U.S. Court of International Trade

Slip Op. 15–47

US MAGNESIUM LLC, Plaintiff, v. UNITED STATES, Defendant, and TIANJIN MAGNESIUM INTERNATIONAL CO., LTD., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 12–00006
PUBLIC VERSION

[The Department of Commerce's Final Results of Redetermination are sustained.]

Dated: May 21, 2015

Jeffery B. Denning, King & Spalding LLP, of Washington, D.C., argued for plaintiff. With him on the brief was *Stephen A. Jones*.

Eric E. Laufgraben, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Melissa M. Brewer*, Attorney-International, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

David A. Riggle, Riggle & Craven, of Chicago, IL, argued for defendant-intervenor. With him on the brief was *David J. Craven*.

OPINION

EATON, Judge:

Before the court are the final results of redetermination pursuant to court remand, dated July 11, 2013, of the administrative review of the antidumping duty order on pure magnesium from the People's Republic of China ("PRC") for the period of review May 1, 2009 through April 30, 2010 ("POR"). *See* Final Results of Redetermination Pursuant to Ct. Remand at 3 (ECF Dkt. No. 86–1) ("Remand Results"); *US Magnesium LLC v. United States*, 37 CIT __, 895 F. Supp. 2d 1319 (2013) (Tsoucalas, J.) ("*USM I*"); *see also* Pure Magnesium From the PRC, 76 Fed. Reg. 76,945 (Dep't of Commerce Dec. 9, 2011) (final results of the 2009–2010 antidumping duty administrative review of the antidumping duty order), and accompanying Issues and Decision Memorandum, PD 28 (Part 2), ECF Dkt. No. 25 ("Issues & Dec. Mem.") (collectively, the "Final Results"); Pure Magnesium From the PRC, the Russian Federation and Ukraine, 60 Fed. Reg. 25,691 (Dep't of Commerce May 12, 1995) (notice of antidumping duty orders). For the reasons set forth below, the Department of Commerce's ("Commerce" or the "Department") Remand Results are sustained.

BACKGROUND

Defendant-intervenor Tianjin Magnesium International Co., Ltd ("Tianjin") is an importer of pure magnesium supplied by its sole producer, Company A.[1] On January 18, 2012, plaintiff US Magnesium LLC ("USM"), a domestic producer of pure magnesium, commenced this action, challenging several determinations made by the Department in the Final Results. Compl. (ECF Dkt. No. 9). The challenged determinations were made in the Final Results as part of the Department's factors of production ("FOP") methodology for calculating normal value. First, Commerce characterized the retorts used in Company A's manufacturing process as an indirect material input and treated expenses associated with the retorts as part of factory overhead. Issues & Dec. Mem. at 8. In making that finding, Commerce rejected, as untimely, information submitted by USM (the "untimely submission") that it claimed provided *prima facie* evidence that Tianjin had submitted fraudulent information regarding whether Company A rented retorts, rather than self-produced them. *See* Mem. from Eve Wang, Case Analyst, to The File at 2, PD 11 (Part 2) (Sept. 20, 2011), ECF Dkt. No. 25 ("Submission Rejection Mem."). Second, Commerce selected the surrogate values used to calculate financial ratios, labor rates, and truck freight based on (1) Hindalco Industry Limited's ("Hindalco")[2] 2009–2010 audited financial statements, (2) data from the 2007–2008 Indian Annual Survey of Industries[3] ("ASI"), and (3) Infobanc[4] data, respectively. Issues & Dec. Mem. at 6, 11, 18.

The *USM I* Court (1) remanded the issue of USM's untimely submission and instructed the Department to consider whether it should be placed on the record, (2) deferred considering the issue of whether the retorts were properly treated as an indirect material input and

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[1] [[ ]] identity is being withheld as business-proprietary information. All references to this company hereinafter will be to "Company A."

[2] Hindalco is a producer of aluminum and copper and part of the Aditya Birla Group. *See* Letter from David A. Riggle, Riggle & Craven, to Gary Locke, Secretary of Commerce at 844, 846, PD 30 (Part 1) (Dec. 7, 2010), ECF Dkt. No. 25.

[3] The Annual Survey of Industries is a public source of industrial statistics in India, set up and conducted pursuant to statute. *See Annual Survey of Industries (ASI)*, MINISTRY OF STATISTICS & PROGRAMME IMPLEMENTATION, GOV'T OF INDIA, http://mospi.nic.in/mospi_new/upload/asi/ASI_main.htm?status=1&menu_id=88 (last visited May 6, 2015).

[4] Infobanc (Infobanc.com) is a business-to-business website (or portal) that provides customer and market research databases, a "network of international buyers," and other services to businesses. *See Frequently Asked Questions*, INFOBANC, http://help.infobanc.com (last visited May 5, 2015).

valued as factory overhead, or whether the Department should have treated the retorts as a direct material input, "in order to allow Commerce to revisit its [characterization]. . . in light of its decision concerning USM's untimely submission," and (3) held that the Department's selection of the surrogate for truck freight was unclear and remanded for the Department to "explain its rationale . . . or select a new surrogate for truck freight rates." *See USM I*, 37 CIT at __, 895 F. Supp. 2d at 1326, 1327, 1330 (citation omitted). The *USM I* Court also granted the Department's request for a voluntary remand regarding the surrogate values for financial ratios and labor rates. *See id*. at __, 895 F. Supp. 2d at 1330, 1331.

On remand, the Department continued to treat retorts as an indirect material input covered by the value of overhead expenses, found no evidence of fraud by Tianjin based on evidence contained in USM's untimely submission, used World Bank[5] data to calculate the surrogate value for truck freight, relied on the 2006–2007 financial statements of aluminum producer Madras Aluminium Limited Company ("MALCO") as the basis for calculating the financial ratios, and made an adjustment to its labor rate calculation. Remand Results at 2, 3, 21, 30, 31. These changes resulted in a 51.26 percent margin for Tianjin.[6] Remand Results at 3.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *Yantai Xinke Steel Structure Co. v. United States*, 38 CIT __, __, Slip Op. 14–38, at 4 (2014) (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, Slip Op. 14–17, at 3 (2014)) (internal quotation marks omitted).

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[5] The World Bank collected the data used to calculate the surrogate value for truck freight "as part of the Doing Business project, which measures and compares regulations relevant to the life cycle of a small-to medium-sized domestic business in 183 economies." *See* Letter from Jeffery B. Denning, King & Spalding LLP, to Hon. Gary Locke, Secretary of Commerce at 300, PD 29 (Part 1) (Dec. 7, 2010), ECF Dkt. No. 25 ("USM's Surrogate Value Submission"). In doing so, World Bank sent its *Trading Across Borders Questionnaire* to companies in India and "[l]ocal freight forwarders, shipping lines, customs brokers, port officials and banks provide[d] information on . . . cost . . . ." *See* USM's Surrogate Value Submission at 304, 355.

[6] In the Final Results, Commerce had calculated a 0.00 percent margin for Tianjin. Pure Magnesium From the PRC, 76 Fed. Reg. at 76,947.

DISCUSSION

I. LEGAL FRAMEWORK

"The United States imposes duties on foreign-produced goods that are sold in the United States at less-than-fair value." *Jacobi Carbons AB v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1360, 1365 (2014) (quoting *Clearon Corp. v. United States*, 37 CIT __, __, Slip Op. 13–22, at 4 (2013)) (internal quotation marks omitted). When making the fair value determination, Commerce is required to make "a fair comparison . . . between the export price[7] or constructed export price[8] and normal value." *See* 19 U.S.C. § 1677b(a).

Ordinarily, in a case such as this where the subject merchandise is exported from a nonmarket economy country,[9] "the normal value of the subject merchandise [is determined based on] the value of the factors of production utilized in producing the merchandise and [an] added . . . amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *See id.*§ 1677b(c)(1). By statute, to find these surrogate values, Commerce is directed to use, "to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country[] and . . . significant producers of comparable merchandise." *Id.*§ 1677b(c)(4). When valuing factors of production, Commerce must use "the best available information regarding the values of such factors in a market economy country or countries considered to be

[7] ["Export price" is defined as the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.
19 U.S.C. § 1677a(a).]

[8] ["Constructed export price" is defined as 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).]

[9] A "nonmarket economy country" 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." 19 U.S.C. § 1677(18)(A). "Because the Department deems the PRC 'to be a nonmarket economy country, Commerce generally considers information on sales in [the PRC] and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise.'" *Jacobi Carbons*, 38 CIT at __ n.11, 992 F. Supp. 2d at 1365 n.11 (alteration in original) (quoting *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004)). "Accordingly, Commerce invokes a different statutory procedure for determining normal value if the subject merchandise is exported from a nonmarket economy country." *Shanghai Foreign Trade Enters.*, 28 CIT at 481, 318 F. Supp. 2d at 1341.

appropriate by the [Department].” *Id.*§ 1677b(c)(1). In selecting the best available information, Commerce’s practice “is to ‘choose surrogate values that represent broad market-average prices, prices specific to the input, prices that are net of taxes and import duties, prices that are contemporaneous with the POR, and publicly available non-aberrational data from a single surrogate market-economy.’” *Jacobi Carbons*, 38 CIT at __, 992 F. Supp. 2d at 1366 (quoting *Clearon*, 37 CIT at __, Slip Op. 13–22, at 7) (citing 19 C.F.R. § 351.408(c)(2)). Thus, to determine normal value of subject merchandise exported from a nonmarket economy country, Commerce first must “assess the ‘price or costs’ of factors of production of [the product at issue] in [a surrogate market economy country] in an attempt to construct a hypothetical market value of that product in [the nonmarket economy country].” *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999).

As to financial ratios, “[i]n non-market economy antidumping cases, such as this, in selecting financial statements to calculate the financial ratios used to determine an exporter’s dumping margin, ‘Commerce looks to specificity, contemporaneity, and quality of the data.’” *Yantai*, 38 CIT at __, Slip Op. 14–38, at 23 (quoting *Dongguan Sunrise Furniture Co. v. United States*, 37 CIT __, __, 904 F. Supp. 2d 1359, 1366 (2013)).

II. LABOR RATE ADJUSTMENT

In the Remand Results, Commerce made two corrections to the surrogate value for labor. *See* Remand Results at 3, 21 (“The Department agrees with USM that it erred when inflating the labor rate with respect to the base period and used the incorrect index to adjust for inflation in the *Final Results*. Accordingly, the Department . . . corrected those two errors for [the] draft results of redetermination.”). First, the Department corrected the base period it had used to adjust for inflation by changing the period from May 1, 2007 through April 30, 2008 to a period contemporaneous with that of the data itself, April 1, 2007 through March 31, 2008. *See* Remand Results at 21. Second, Commerce selected “the consumer price index typically used to adjust for inflation in accordance with the Department’s labor policy bulletin,” rather than the wholesale price index from India that Commerce had used in the Final Results. *See* Remand Results at 21.

Because Commerce was reasonable in choosing a time period more contemporaneous with the data and used the consumer price index in accordance with its past practice, and because neither USM nor Tianjin challenge the adjustment, it is sustained.

III. USM'S ARGUMENTS

A. Characterization of Retorts as Factory Overhead

USM objects to the Department's characterization of the retorts, used in the production of pure magnesium, as an indirect input, valued as part of factory overhead, rather than a direct input.

"Retorts" are steel tubes used during the purification process of magnesium. Tianjin "imports pure magnesium supplied by a sole producer," Company A, which "produces pure magnesium via the 'Pidgeon' process." *USM I*, 37 CIT at __, 895 F. Supp. 2d at 1322 (citation omitted). To produce pure magnesium using this process, Company A "first treats magnesium-bearing dolomite in a kiln to produce calcined dolomite." *Id.* Next, the calcined dolomite is mixed with ferrosilicon and fluorite powder. *Id.* Company A then "presses the mixture into balls or briquettes" and,

> [i]n order to . . . chemically and physically separate [the magnesium] from the other inputs[,] . . . places the pressed mixture into retorts, which are "steel tubes placed under a vacuum in a furnace." The high heat from the furnace vaporizes the magnesium, which travels through the retort and then "condense[s] into a highly purified form."

Id. (alteration in original) (quoting Def.'s Opp'n to Pl.'s Mot. for J. upon the Agency R. 5 (ECF Dkt. No. 41)) (citing Issues & Dec. Mem. at 7 n.39).

The court finds that a review of the steps the Department took, the evidence it considered, and its past practice, demonstrate that the decision to treat the retorts as overhead rather than a direct material was based on substantial evidence and is in accordance with law. Thus, for the following reasons, the Department's characterization of retorts as overhead is sustained.

To begin with, in the Final Results, the Department noted that "[i]ndirect materials are usually: (1) items used in the production process, but not traceable to a particular product; *or* (2) items that are added directly to products, but whose cost is so small that the effort of tracing that cost to individual products would be greater than the benefit of accuracy." Issues & Dec. Mem. at 8 (emphasis added). Here, the Department found that the retorts "are not physically incorporated into the final product and are replaced too infrequently to be a direct material." *See* Issues & Dec. Mem. at 8; Remand Results at 30. In support of these conclusions, the Department noted that there was no record evidence "that the retorts are traceable to specific magnesium products [and USM] conceded that [the] retorts are not physically incorporated into the final product." *See* Issues & Dec. Mem. at 9. Instead, according to Commerce, the record indicated that the "retorts are steel tubes inside furnaces[,] . . . where [precursor materials] react to form magnesium vapors which are then condensed and later re-melted into ingots." *See* Issues & Dec. Mem. at 9. Indeed, there is no real dispute that the retorts are not physically incorporated into the pure magnesium product.

With regard to cost, USM suggests that the cost of retorts supports a finding that they are a direct material input and argues that "Commerce . . . improperly determined that retorts are an indirect material based on a finding that the associated 'cost is so small that the effort of tracing the cost[] to individual products would be greater than the benefit of . . . accuracy.'" US Magnesium's Comments Concerning Commerce's Redetermination Pursuant to Remand 38 (ECF Dkt. No. 94) ("Pl.'s Br.") (quoting Remand Results at 14). USM, however, misconstrues the Department's point. In the Remand Results, Commerce stated that "[u]nder the Department's practice, indirect materials are usually items used in the production process, but are not traceable to a particular product, *or* items that are added directly to products, but whose cost is so small that the effort of tracing that cost to individual products would be greater than the benefit of accuracy." Remand Results at 14 (emphasis added). The Department, however, only made reference to a small cost as being an indication that an input was an indirect material in order to give a complete statement of its rule, not as a finding of fact. Commerce's finding of fact was that the retorts were an indirect material because they were not incorporated into the resulting magnesium, not because their cost was small. USM's argument, thus, is without merit.

Also, in the Final Results, from which Commerce did not depart in the Remand Results, the Department determined that the evidence USM placed on the record during the investigation in an attempt to demonstrate that the retorts were considered a direct material input by the magnesium industry was inconclusive. *See* Issues & Dec. Mem. at 9; Remand Results at 30. In particular, it first found financial reports from a ten-year-defunct company, Southern Magnesium & Chemicals Ltd., to be speculative and unpersuasive. *See* Issues & Dec. Mem. at 9 ("First, [USM] provided non-contemporaneous financial statements for this company covering the fiscal years 1994–1995 through 2000–2001. None of these financial statements, except [those for] 1994–1995[,] . . . list retorts as a direct material.").

Next, "[w]ith regard to [USM's] claim that a Malaysian producer treated retorts as 'raw materials,' the Department [found] that an individual company's treatment [was] insufficient to show that the magnesium industry as a whole treats retorts as [a] direct material when most of the other industry financial statements available on the record . . . did not list retorts as direct material." Issues & Dec. Mem. at 9. Accordingly, it is difficult to quarrel with the Department's conclusion that USM has presented little evidence that retorts are treated as a direct material input by the magnesium industry.

USM next asserts that record evidence demonstrates that Company A treated retorts as a direct input on its financials. *See* Pl.'s Br. 29, 30. The primary evidence relied upon by USM is a subledger, on which the retorts are described as "materials consumption." *See* Pl.'s Br. 29 (quoting Ex. SD-6A to Pl.'s Br. (ECF Dkt. No. 94) ("Subledger")) (internal quotation marks omitted); *see also* Remand Results at 30. The Department, however, notes that the subledger also (1) included "items that would not be considered direct material inputs" as "material[s] consumption"[10] and (2) includes "other line-items that are not material inputs."[11] *See* Remand Results at 30–31 (quoting Mem. from Eve Wang, International Trade Compliance Analyst, to The File at 3, PD 29 (Part 2) (Dec. 5, 2011), ECF Dkt. No. 25) (internal quotation marks omitted). Thus, although, at first blush, the description "materials consumption" might indicate that the listed items were direct inputs, an examination of the nature of the entries shows that they are not. As a result, Commerce determined that, despite Company A having listed retorts as "materials consumption," the subledger does not indicate that Company A treated retorts as a direct material. *See* Remand Results at 30–31.

In addition, because Company A's "December 2009 monthly production cost sheet" does not include retorts under the category of "raw material" along with other direct materials such as dolomite and flux, Commerce concluded that the cost sheet was further evidence that Company A did not treat retorts as a direct material. *See* Remand Results at 31 n.113 ("None of the evidence presented by USM undermines the Department's original determination with respect to retorts. Record evidence demonstrates that [Tianjin's] producer [(Company A)] does not treat retorts as raw material on its books and records. [Company A's] December 2009 monthly production cost sheet, under the category of 'raw material,' *i.e.*, direct materials, lists (1) Fesi; (2) Dolomite; (3) Flux; (4) Fluorite Powder; (5) Sulphur Powder; and (6) Sulfuric Acid, and does not include retorts." (quoting Letter from David A. Riggle, Riggle & Craven, to Secretary of Commerce at 113 (Ex. D-2h), CD 3 (Part 1) (Aug. 27, 2010), ECF Dkt. No.

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[10] The subledger also lists items such as [[ ]] and [[ ]], and [[ ]] is also described as "materials consumption." *See* Subledger.

[11] The subledger also lists non-material inputs such as [[ ]]. *See* Subledger.

25)). The foregoing demonstrates that the Department's conclusion, that Company A did not treat retorts as a direct material, is supported by substantial evidence.

Aside from the evidence itself, USM also makes a claim with respect to Commerce's current practice by arguing "that physical incorporation [is] no longer . . . *required* for a finding that an item is a direct material." Pl.'s Br. 37. According to USM, Commerce is "exclusively following its 1998 decision[12] that rested only on that factor," physical incorporation, which is no longer its practice, and, thus, "Commerce has in effect reverted to its old practice without accurately explaining its reasons for doing so." Pl.'s Br. 37 (citing Remand Results at 8). For USM, "Commerce must consider all record evidence relevant to analysis of this issue" and "[i]t has not done so." Pl.'s Br. 38.

USM asserts that the following statement in a supplemental questionnaire issued to Tianjin indicates that Commerce no longer requires physical incorporation to make a finding that an item is a direct material input:

> [Tianjin] reported retort vessels as part of overhead and did not report per-unit FOP consumption of the material. . . . In addition, the Department has included as direct material inputs that are essential to production and used in significant quantities, *despite*[13] *such inputs not being physically incorporated into the final product*.

See Pl.'s Br. 16 (alteration in original) (quoting Letter from Eugene Degnan, Program Manager, to David A. Riggle, Riggle & Craven at 4, PD 40 (Part 1) (Jan. 18, 2011), ECF Dkt. No. 25).

The Department maintains, though, that physical incorporation is still an important factor that it permissibly considered in making its determination. *See* Remand Results at 31 ("Lastly, as to USM's assertion that the draft remand results failed to acknowledge that the basis for the 1998 [characterization] of retorts, based on physical incorporation, is no longer the Department's policy, we disagree. Although USM points to a supplemental questionnaire to argue that 'physical incorporation is no longer required for finding an item to be

[12] [In the new shipper review to which USM refers, Commerce declined to treat retorts as a direct material because they were not physically incorporated into the final product. *See* Pl.'s Br. 17 n.24 (citing Pure Magnesium From the PRC, 63 Fed. Reg. 3,085, 3,088 (Dep't of Commerce Jan. 21, 1998) (final results of antidumping duty new shipper administrative review)). This new shipper review tends to support the conclusion that the Department has a past practice of finding physical incorporation to be important in a determination of how to characterize an input.]

[13] [The presence of the word "despite," of course, undermines USM's argument.]

an indirect material,' this does not demonstrate that the Department does not consider physical incorporation in its analysis. Indeed, as explained above, the CIT[14] recently upheld the Department's decision in which it considered physical incorporation whether looking at the direct versus indirect material analysis." (citation omitted)). It is apparent that the question, from the Department's supplemental questionnaire, to which USM points was designed to elicit other information that might be relevant to the issue of whether the retorts should be characterized as a direct input, not a signal that it was abandoning its physical incorporation analysis.

Commerce is thus right in its claim that treating the retorts as an indirect material is consistent with its past practice of characterizing materials as overhead when "they are not physically incorporated into the final product and are replaced too infrequently to be a direct material." *See* Issues & Dec. Mem. at 8. In the Issues and Decision Memorandum, Commerce pointed to its prior determinations regarding copper wire incorporated into cans used to preserve mushrooms and two kinds of molds—graphite and steel—used in the production of diamond sawblades. Commerce stated that,

> [u]nlike the copper wire in *Mushrooms/PRC AD Final* (09/14/2005) (where copper wire became part of the can covered by the scope of the order) or graphite molds in *Diamond Sawblades/PRC AD Final* (05/22/2006) (where a portion of the graphite mold[] was absorbed into the finished segment), retorts in this review are not consumed and incorporated into the final product. Furthermore, [in *Diamond Sawblades/PRC AD Final* (05/22/2006),] the Department found that graphite molds were replaced regularly enough to represent a direct material rather than overhead. In *Diamond Sawblades/PRC AD Final* (05/22/2006), the producer used both graphite and steel molds to produce the final product and the Department reached different conclusions as to whether each kind of mold was a direct material. While the Department found graphite molds to be a direct material, it found steel molds to be overhead. In addition to considering the fact that steel molds were not absorbed into the final product, the Department reasoned that steel molds were

[14] [In *Bridgestone Americas v. United States*, the input at issue, HO Oil was "added in [the] milling process, for the purposes of softening rubber and improving its processing technical function." *Bridgestone Americas, Inc. v. United States*, 34 CIT __, __, 710 F. Supp. 2d 1359, 1364 (2010) (alteration in original) (citation omitted) (internal quotation marks omitted). The *Bridgestone Americas* Court held that Commerce's finding, that the oil was a direct input, was supported by substantial evidence and in accordance with law because "[i]n ordinary parlance this description characterizes an input that is physically incorporated into the finished product." *Id.*]

> replaced less frequently than graphite molds. Thus, . . . the Department finds that retorts are more like steel molds and are considered overhead, than graphite molds, because retorts are not consumed into the final product[15] and are replaced too infrequently[16] to be a direct material.

Issues & Dec. Mem. at 8 (footnotes omitted) (citing Certain Preserved Mushrooms From the PRC, 70 Fed. Reg. 54,361 (Dep't of Commerce Sept. 14, 2005) (final results and final rescission, in part, of antidumping duty administrative review), and accompanying Issues and Decision Memorandum at comment 15; Diamond Sawblades and Parts Thereof from the PRC, 71 Fed. Reg. 29,303 (Dep't of Commerce May 22, 2006) (final determination of sales at less than fair value and final partial affirmative determination of critical circumstances), and accompanying Issues and Decision Memorandum at comment 2). In addition, Commerce is correct that this analysis demonstrates both (1) that the Department continues to consider physical incorporation when making a determination as to whether an input is a direct material or not and (2) how this consideration is used in its analysis.

The Department's thorough review of USM's claims demonstrates that they are without merit. Therefore, the Department's determination to treat retorts as an indirect material valued as overhead is sustained as being supported by substantial evidence and in accordance with law.

B. The Untimely Submission

Almost eleven months after the deadline, USM filed a submission of publicly available information regarding retorts, including (1) an August 26, 2011 Chinese magnesium industry bulletin, (2) "the website of an entity that [USM] claims is the producer of the subject magnesium[,] and [(3)] an excerpt from a May 2006 Chinese Magnesium Industry Directory published by the Chinese Magnesium Association."[17] *See* Submission Rejection Mem. at 2; *see also USM I*, 37 CIT at __, 895 F. Supp. 2d at 1323. USM insists that the submission,

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[15] [Because there was no record evidence "that the retorts are traceable to specific magnesium products [and USM] conceded that [the] retorts are not physically incorporated into the final product," it was reasonable for Commerce to conclude that retorts are not physically incorporated into the pure magnesium produced by Company A. Issues & Dec. Mem. at 9.]

[16] [Company A replaces its retorts every [[ ]]. *See* Mem. from Eve Wang, International Trade Compliance Analyst, to The File at 3 n.9, CD 6 (Part 2) (Dec. 5, 2011), ECF Dkt. No. 25.]

[17] USM claimed in its Rule 56.2 brief that the "Chinese industry bulletin conclusively establish[ed] that [Company A] produced the estimated [[ ]] retorts it is estimated to have consumed at one of its two magnesium factories during the POR" and that the

along with other record evidence, shows (1) that Company A is the same entity as (or is very closely aligned with) Company B,[18] another manufacturer of magnesium, (2) that Company B was a producer of retorts, and (3) that Company A therefore produced, rather than rented, the retorts it used to make the subject merchandise that it supplied to Tianjin. *See* Submission Rejection Mem. at 2; Pl.'s Br. 13, 14. According to USM, Tianjin was required to disclose to the Department that Company B, and thus Company A, produced retorts and "[i]ts failure to do so . . . is strong evidence that fraud occurred in the underlying review." *See* Pl.'s Br. 15. Moreover, accordingto USM, this evidence is significant because a finding of fraud on the part of Tianjin would permit the Department to apply adverse facts available[19] ("AFA") to Tianjin's submissions regarding the retorts. *See* Pl.'s Br. 16, 21. The Department rejected the submission as untimely and, thus, did not consider the factual information found in the rejected documents in the Final Results. *See* Submission Rejection Mem. at 2.

The *USM I* Court remanded the issue of USM's untimely submission, instructing the Department to consider whether the untimely submission should be placed on the record. *See USM I*, 37 CIT at __, 895 F. Supp. 2d at 1326.

1. Whether Fraud Existed and the Strength of the Evidence of Fraud

Pursuant to the *USM I* Court's remand order, the Department opened the administrative record and accepted USM's untimely submission so that it could consider whether the documents provided *prima facie* evidence of fraud related to the relationship between Company A and Company B and whether Company A made or rented

website and directory corroborated the information in the bulletin. *See* US Magnesium's Rule 56.2 Br. in Supp. of Mot. for J. on the Agency R. 7, 8 (ECF Dkt. No. 32) ("USM's 56.2 Br.") (citing Submission Rejection Mem. at 2). According to USM, because Tianjin "had failed to report this fact and instead claimed that [Company A] rented retorts," and because this "information was dispositive of a crucial issue" (the characterization of retorts as direct or indirect material inputs), "the [(untimely)] submission demonstrated that [Tianjin] had concealed material facts in an effort to reduce its margins." USM's 56.2 Br. 7–8. Before the court, USM does not appear to make any specific arguments related to the documents in its untimely submission. USM does, however, continue to argue against Commerce's general position that the documents do not pertain to Company A or show that Company A produced the retorts it used to manufacture pure magnesium. *See* Pl.'s Br. 14.

[18] [[ ]] identity is being withheld as business-proprietary information. All references to this company hereinafter will be to "Company B."

[19] Pursuant to 19 U.S.C. § 1677e(b), if Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the [Department]," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

the retorts. *See* Remand Results at 2, 5. In the Remand Results, the Department determined that USM's submission did not demonstrate fraud on the part of Tianjin largely because the documents that made up the submission did not (1) contradict or undermine Tianjin's statement that Company A rented retorts or (2) demonstrate that Company A produced, rather than rented, retorts. *See* Remand Results at 24.

In reaching this determination, the Department found the USM evidence to be unconvincing and chose to rely on what, it believed, was more reliable information on the record. This evidence was the verification report from the 2007–2008 review and the fact of Company A's (rather than Company B's) control of the plants that produced the pure magnesium at issue.

Based on this evidence, the Department determined that Company A and Company B were separate operations, headquartered in the same building.[20] *See* Remand Results at 24, 25, 26 (stating that, "even though both the 2007–2008 and 2008–2009 verifications of the sales and accounting activities of [Company A] took place in [Company B's] headquarters, [Commerce] treated, and continue[s] to treat, them [as] separate[] legal entities," that the 2007–2008 verification report "clearly states that the companies are separate legal entities," and that, in the 2008–2009 and 2009–2010 reviews, "the two plants that produced the subject merchandise . . . continued to be in the sole control of [Company A]"). Therefore, for the reasons given by the Department, it found that the bulletin, website, and directory provided by USM, which show that Company B made retorts, did not demonstrate that Company A made retorts or that Tianjin provided inaccurate information to the Department regarding Company A.

The Department also rejected USM's suggestion that Tianjin's failure to disclose that Company A was affiliated with Company B constituted a failure to cooperate because the questionnaire sent to Tianjin did not require it to disclose that information. *See* Remand Results at 24, 27–28 ("Further, we disagree with USM that [Tianjin] failed its duty to report, or was even on notice of an obligation to report, the fact that its supplier [(Company A)] may have had an affiliate [(Company B)] that produces retorts. . . . [T]he . . . question directs [Tianjin], the respondent in this review, to report its affiliate producers. In response, [Tianjin] responded that [Company A] was its unaffiliated producer. However, the Department did not design this question to seek information regarding affiliates of non-affiliated pro-

[20] The Department also noted that neither the fax number nor address identified in the USM documents for Company B "matche[d] the fax number or address of [Company A] on the record." *See* Remand Results at 13.

ducers [(i.e., whether Company A was affiliated with Company B)]. Whether a non-affiliate producer has other affiliates has no implication on the dumping margin calculation pertaining to the respondent if these affiliates are not involved in the production of the subject merchandise exported by [Tianjin], as in this review. Record evidence also shows that [Tianjin] has no affiliation with its supplier of subject merchandise, [Company A], in this review. Thus, contrary to USM's claim, [Tianjin] would have no duty to report whether its non-affiliate supplier [Company A] had an affiliate that produced retorts." (footnotes omitted)).

The court sustains the Department's determination "that the documents submitted by USM do not demonstrate *prima facie* evidence of fraud by [Tianjin]." *See* Remand Results at 31.

First, Commerce considered the record evidence and reasonably determined that Company A and Company B were not the same company. *See* Remand Results at 24–25 ("The 2007–08 verification report explicitly states that [Company B] and [Company A] are 'separate legal entities,' and 'kept distinct financial records during the [period of review].' During that [period of review], 'beginning in January 2008, [a] pure magnesium plant was transferred to [Company A], at which point [Company A] became the sole producer of subject merchandise for the remainder of the [period of review].' The Department verified the relevant documents recording the ownership transfer from [Company B] to [Company A]. During the subsequent two reviews (*i.e.*, the 08–09 and 09–10 reviews), the two plants that produced the subject merchandise . . . continued to be in the sole control of [Company A], and [Company B] was no longer [Tianjin's] supplier of pure magnesium for those reviews. No evidence on the record of this review contradicts these findings. . . . As explained in the draft remand results, even though both the 2007–2008 and 2008–2009 verifications of the sales and accounting activities of [Company A] took place in [Company B's] headquarters, we treated, and continue to treat, them to be separate[] legal entities." (footnotes omitted)).[21] In other words, the Department did not simply take Tianjin's word for the relationship between Company A and Company B; this relationship was a subject of verifications. Moreover, Tianjin had provided the Department with documentation showing that it rented its retorts and, in the Remand Results, the Department stated that it did "not find that the new record evidence demonstrates that

[21] Moreover, Commerce also found that USM's claim that Company A "[[finds no support on the record. . . . In fact, the second piece of evidence proffered by USM states that [[ ]] specifically refers to [Company B], not [Company A]." Remand Results at 25 (footnote omitted).

[Company A] produced retorts rather than rented them." *See* Remand Results at 26, 29 ("In response to the Department's request for [Company A's] internal documentation prepar[ed] during the normal course of business indicating the retorts are treated as overhead, [Tianjin] provided a rental lease of retorts as well as excerpts of Chinese accounting literature showing that rent is treated as an indirect manufacturing expense in China.").

Second, the Department correctly rejected USM's argument that Commerce should apply AFA as a result of Tianjin's failure to submit information about Company B because the questionnaire sent to Tianjin did not require it to disclose information about unaffiliated companies that did not produce the subject magnesium. Indeed, Question 3.a of the questionnaire directed the respondent, here, Tianjin, to "[p]rovide an organization chart and description of [the] company's [(Tianjin's)] operating structure," to "[d]escribe the general organization of the company and each of its operating units," and "for all *affiliated producers of the merchandise under consideration*, [to] provide information for the following table." *See* Remand Results at 27 (emphasis added) (quoting Letter from Eugene Degnan, Acting Program Manager, to David A. Riggle, Riggle & Craven at A-5–A-6, PD 4 (Part 1) (June 30, 2010), ECF Dkt. No. 25). Although Company B may be affiliated with Company A, there is no indication that Tianjin was affiliated with Company A, let alone, Company B. As such, because Company B is not affiliated with Tianjin and is not itself a producer of the subject merchandise, Tianjin was not required to include information about Company B in its response to the questionnaire. Thus, Tianjin did not fail to disclose information about Company B, or Company A's relationship with Company B, because the questionnaire did not ask for that information.

Because Commerce reasonably determined that the record evidence does not show that the companies are so closely aligned that they should be considered one, and because Tianjin did not fail to disclose the information that Commerce asked for in its questionnaire, Commerce's finding that the documents do not provide evidence of fraud or warrant the application of AFA is supported by substantial evidence.

2. Level of Materiality

In addition to finding that the evidence did not support a finding that Company A made, rather than rented, the retorts, the Department found that, even if the reverse had been true, it would have been immaterial to its determination that the retorts were an indirect input. Pursuant to the *USM I* Court's instructions, Commerce considered the level of materiality of the information in USM's untimely submission, as well as USM's claim that Tianjin failed to disclose Company A's affiliation with Company B, and found "that this information ha[d] no bearing on the [characterization] of retorts as overhead in this case" and was thus not material to its determination. *See* Remand Results at 15, 31. Put another way, the Department found and the court agrees that, even if the information contained in the untimely submission had shown that the relationship between Company A and Company B was so close that Company A could be considered a manufacturer rather than a lessee of retorts, it simply would not have mattered.

Although USM claims that Tianjin's "failure to provide complete disclosure of its supplier's business practices [(i.e., USM's claim that Company A produced, rather than rented, retorts)] with respect to retorts necessarily is material to the margin calculations," this is clearly not the case. *See* Pl.'s Br. 26. As Commerce indicated, whether an input is rented or produced does not affect the Department's analysis in characterizing the input as either a direct material input or an indirect material input valued as overhead. Remand Results at 14–15.

There can be no real question that Commerce was correct in its finding. As has been previously noted, the Department was reasonable in treating the retorts as overhead. Whether Company A rented or produced the retorts it used, however, had no bearing on Commerce's characterization of the retorts or on its resulting margin calculation. Thus, Tianjin's rate would have been the same had it disclosed a close relationship between Company A and Company B or had Commerce found that Company A produced its retorts. Therefore, because the court has already sustained Commerce's characterization of the retorts as overhead, and because the manner in which Company A acquired the retorts had no impact on that characterization (or consequently, on Tianjin's rate), the Department's finding regarding materiality is sustained.

IV. TIANJIN'S ARGUMENTS

Tianjin argues that the Remand Results should be returned to Commerce for the Department to consider the arguments made in its comments on the draft remand results with respect to the surrogate value for truck freight and to give it an opportunity to comment on the selection of the MALCO data as the basis for the financial ratios in the Remand Results.

A. Selection of the World Bank Data to Calculate the Surrogate Value for Truck Freight

In the Final Results, Commerce acknowledged that it was unclear exactly what costs were covered by the Infobanc truck freight rate data, but nonetheless concluded that it was the best available information on the record and selected the data to calculate the surrogate value for truck freight. *See* Issues & Dec. Mem. at 16, 18. The *USM I* Court remanded this finding because it concluded that Commerce had "erred in failing to support its selection of Infobanc rates with substantial evidence and in ignoring contradictory evidence on the record." *USM I*, 37 CIT at __, 895 F. Supp. 2d at 1328.

Thus, on remand, Commerce was directed to "either adequately explain its rationale for selecting Infobanc data with support from substantial evidence in the record or select a new surrogate for truck freight rates." *Id*. at __, 895 F. Supp. 2d at 1330. In the Remand Results, the Department found that the World Bank data was the best available information, and used those rates to value inland truck freight, because it was "contemporaneous with the POR and based on country-wide information," "[t]he World Bank provides information on the source and calculation of the rates it reports," and the World Bank submission included "a detailed discussion support[ing] how the World Bank data were determined." *See* Remand Results at 17. Commerce also found the World Bank publication to be "reliable because it provides detailed information about its local partners with whom it works to collect the necessary information for calculat[ing] its reported rates." Remand Results at 17.

While Tianjin asks for another remand so that Commerce might consider its argument, made in its comments on the draft remand results, that "[t]he World Bank data is aberrational and not representative of India's truck freight prices," it is apparent that the reason the Department did not address this argument is because Tianjin misfiled its comments.[22] *See* Comments of Def.-Int. Tianjin Magnesium International Co., Ltd. on the Department's Remand Determination of July 11, 2013 2 (ECF Dkt. No. 92) ("Tianjin's Br."); Public App. to Tianjin's Br. 2 (ECF Dkt. No. 95); Oral Arg. Tr. 31:24–32:10 (ECF Dkt. No. 115); *see also* Def.'s Reply to Comments Regarding Final Remand Results 22 (ECF Dkt. No. 106) ("Def.'s Br."). Because of this misfiling, Tianjin's comments concerning the calculation of truck freight were never entered on the record of the administrative proceeding and, as a result, the Department was unaware of

[22] Tianjin misfiled its comments to Commerce on the draft remand results by selecting the incorrect period of review so that its comments were not electronically filed in the correct location. *See* Oral Arg. Tr. 31:24–32:10 (ECF Dkt. No. 115).

them. *See* Remand Results at 2 ("[Tianjin] did not submit comments on the draft remand results."); *see also* Def.'s Br. 22–24.

Although it acknowledges that it selected the wrong period of review when electronically filing its comments,[23] Tianjin's counsel nonetheless argues that "[t]o the extent the Department did not even consider [its] comments on the draft remand, such remand must be rejected and returned to the Department for consideration of [Tianjin's] timely filed comments." Tianjin's Br. 2; *see also* Oral Arg. Tr. 31:24–32:10. Notably, Tianjin's counsel gives no reason or explanation as to how their misfiled comments were "timely."

The court will not remand this case again because, first, Tianjin's counsel misfiled its client's comments, thus preventing the Department from considering them and thereby waiving its opportunity to be heard during the administrative process, and, second, in its arguments before the court,[24] Tianjin has not shown that the Department's selection of the World Bank data was somehow wrong.

In its misfiled comments on the Department's draft remand results, which are attached to its brief before this court as an appendix, Tianjin's entire argument is that the World Bank data selected as a surrogate for truck freight is aberrationally high. *See* Public App. to Tianjin's Br. 2–3. Tianjin cites to no record evidence, however, that this is the case.

Moreover, because Commerce demonstrated in the Remand Results that the World Bank data is "contemporaneous with the POR and based on country-wide information," and that "[t]he World Bank provides information on the source and calculation of the rates it reports" and "about its local partners with whom it works to collect the necessary information for calculat[ing] its reported rates," the Department's determination that the World Bank data is the best available information on the record for valuing truck freight is sup-

[23] At oral argument, Tianjin's counsel stated that in filing the comments, "one of the attorneys in [his] office when doing the electronic [indiscernible] selected, incorrectly selected the wrong period for that electronically." *See* Oral Arg. Tr. 32:5–32:7. According to the government's counsel, "when something's filed under the wrong segment, it doesn't necessarily get to the correct Commerce employees." Oral Arg. Tr. 33:11–33:12.

[24] Tianjin's entire argument on this point in its brief before the court is as follows:

> The [R]emand [R]esults presented to the Court are factually inaccurate. In the [R]emand [R]esults by the Department it is stated at page 2 that "[Tianjin] did not submit comments on the draft remand results."
>
> This is untrue. [Tianjin] filed its comments on the [draft] remand results on May 13, 2013 under bar code 3135316. The Department failed to include such comments in the record it sent forward to the Court. To the extent the Department did not even consider [Tianjin's] comments on the draft remand, such remand must be rejected and returned to the Department for consideration of [Tianjin's] timely filed comments.

Tianjin's Br. 2 (citation omitted) (quoting Remand Results at 2). Remarkably, Tianjin's counsel failed to alert the court in its papers that it had misfiled its comments.

ported by substantial evidence. *See* Remand Results at 17–18; *see also Since Hardware (Guangzhou) Co. v. United States*, 37 CIT __, __, 911 F. Supp. 2d 1362, 1375 (2013) ("World Bank data represent a reputable source of information for valuing brokerage and handling because those data are prepared by an independent organization and are based upon a survey derived from a broad number of producers."); *Dongguan Sunrise Furniture Co. v. United* States, 36 CIT __, __, 865 F. Supp. 2d 1216, 1246 (2012) ("Commerce has consistently found the World Bank to be a reliable source for data." (citation omitted)). Thus, this determination is sustained.

B. Selection of the MALCO Data as the Basis for Financial Ratios

Rather than using the financial statements of aluminum producers Sudal Industries Limited ("Sudal"), Bhoruka Aluminium Limited ("Bhoruka"), and Gujarat Foils Limited ("Gujarat") as it had done in the draft remand results, in the final Remand Results, the Department selected MALCO data as the basis for financial ratios. Remand Results at 2–3.

Tianjin, whose misfiled comments apparently supported the Department's use of the Sudal, Bhoruka, and Gujarat financial statements in the draft remand results, argues that it "was given no opportunity to address the Department's reasons for selecting [MALCO]" and that Commerce's selection of the MALCO data "cannot be sustained where a party was deprived of the opportunity to comment on the Department's determination and the facts and logic underlying such determination." Tianjin's Br. 2, 3 (citing Public App. to Tianjin's Br. 1–2). Tianjin alleges that MALCO received subsidies, that the MALCO data did not overlap the POR (i.e., that the MALCO data was non-contemporaneous with the POR), and "that the Department improperly rejected the [financial statements of the] [a]luminum producers used in the draft remand," i.e., those of Sudal, Bhoruka and Gujarat. Tianjin's Br. 2–3.

The Department responds that Tianjin cites no record evidence in support of its subsidies claim, that the contemporaneity issue was adequately addressed by Commerce in the Remand Results, and that, thus, Commerce's selection of the MALCO data is supported by substantial evidence. Def.'s Br. 21–22.

As to its reasons for selecting MALCO, the Department stated in the Remand Results[25] that it chose MALCO's financial statements

[25] Commerce first stated that, "when selecting financial statements for the purpose of calculating surrogate financial ratios, the Department's policy is to use data from market-economy surrogate companies based on the specificity, contemporaneity, and quality of the data." Remand Results at 32. Further, the "surrogate values for manufacturing overhead,

because MALCO produces aluminum, which the Department had "previously determined to be a comparable product to pure magnesium."[26] Remand Results at 33. Commerce also noted that, when selecting a surrogate producer, "the Department examines how similar a proposed surrogate producer's production experience is to the [nonmarket economy] producer's production experience." Remand Results at 33. Like Company A, which produces pure magnesium, "MALCO produces only an unwrought metal product and does not produce downstream products." Remand Results at 33. "Because [Company A] manufactured primary pure magnesium instead of magnesium metal, [Commerce found] that relying on MALCO's financial statements [was] more appropriate in these [R]emand [R]esults than those of the three downstream aluminum producers [(Sudal, Bhoruka, and Gujarat)], even though their production experience is somewhat similar to [Company A's] production." Remand Results at 34.

Commerce recognized in the 2008–2009 review that Sudal and Gujarat's production processes were similar to a "secondary production process" that "involved melting magnesium scrap and alloys in a smelter and then solidifying the mixture in molds to make magnesium metal ingots." Remand Results at 33. Company A, on the other hand, uses "a primary production process," which "begins by calcining dolomite with coal and then mixing calcined dolomite with chemical compounds (*i.e.*, ferrosilicon and fluorite powder) to create metal balls, which [are] placed into a reduction furnace to produce magnesium crown that will be further refined to remove impurities." Remand Results at 33–34. In other words, Company A's "finished product, pure magnesium, is unwrought metal while Sudal, Bhoruka, and Gujarat begin their production with an unwrought metal and finish with a wrought metal product[]." Remand Results at 34. Here, after "find[ing] that Sudal, Bhoruka, and Gujarat's production experience occurs at a different level of production from [Company A]," Commerce stated that, "[i]n comparison, MALCO produced primary alu-

general expenses, and profit . . . will normally be based on publicly available information from companies that are in the surrogate country and that produce merchandise that is identical or comparable to the subject merchandise." Remand Results at 32–33 (citing 19 CFR 351.408(c)(4)). "[I]t is the Department's practice to, where appropriate, apply a three-prong test that considers the: (1) physical characteristics; (2) end uses; and (3) production process" in determining what constitutes "comparable merchandise." Remand Results at 33 (internal quotation marks omitted).

[26] The Department cites its determinations in a new shipper review of pure magnesium from the PRC for this proposition. Remand Results at 33 (citing Pure Magnesium From the PRC, 62 Fed. Reg. 55,215, 55,217 (Dep't of Commerce Oct. 23, 1997) (preliminary results of antidumping duty new shipper administrative review); Pure Magnesium From the PRC, 63 Fed. Reg. 3,085, 3,087 (Dep't of Commerce Jan. 21, 1998) (final results of antidumping duty new shipper administrative review)).

minum, which the Department has previously found to be comparable to pure magnesium." Remand Results at 34.

Regarding contemporaneity, Commerce addressed the lack of overlap between the MALCO financial statements and the POR in the Remand Results. *See* Remand Results at 34 ("Although MALCO's 2006–2007 financial statements [were] an additional year removed from [Tianjin's] POR, [it] nevertheless [found] MALCO's financial statements to be most appropriate in this review because MALCO [was] the only candidate for surrogate financial statements on the record that employs the same production process as the one used by [Company A]."). In other words, although not contemporaneous with the POR, the MALCO data was nonetheless the "best available information" because it was best approximated to Company A's production process.

As to its suggestion that MALCO received subsidies, Tianjin does not explain its reasoning or point to any evidence, let alone record evidence, that this is the case. *See* Tianjin's Br. 2 (arguing that, because "the Department gave no indication in its draft results that it was going to select [MALCO], absent either a time machine or access to the oracle at Delphi, [Tianjin] would have no way of commenting on such methodology and pointing out the many defects including the existence of subsidies for [MALCO]"). Moreover, neither has the court found any evidence on the record suggesting that MALCO received subsidies.

Because the Department chose the MALCO data as the basis for financial ratios after it had reviewed comments on the draft remand results, no party had an opportunity to comment on the selection during the administrative process. Tianjin is thus correct that it should be afforded an opportunity to dispute the choice. Moreover, because the Department changed its selection between the draft remand results and the final Remand Results, Tianjin cannot be faulted for not exhausting its administrative remedies. *See Jacobi Carbons*, 38 CIT at __, 992 F. Supp. 2d at 1367 ("Accordingly, because plaintiffs had no realistic opportunity to present their arguments before the Department, the court finds that plaintiffs did not fail to exhaust their administrative remedies.").

Tianjin is wrong, however, on where its argument should be made. That is, rather than seeking a remand, Tianjin's avenue was to make its arguments before the court in this appeal. *See Tianjin Magnesium Int'l Co. v. United States*, 35 CIT __, __, Slip Op. 11–17, at 8–9 (2011) ("Furthermore, the Court of International Trade provides [Tianjin] a forum in which to challenge its AFA rate, regardless of exhaustion, in the event that Commerce unexpectedly changes its mind between the preliminary and final results." (citing *Qingdao Taifa Grp. Co. v. United States*, 33 CIT 1090, 1093, 637 F. Supp. 2d 1231, 1236 (2009))); *Qingdao*, 33 CIT at 1093, 637 F. Supp. 2d at 1236 ("A party, however, may seek judicial review of an issue that it did not raise in a case brief if Commerce did not address the issue until its final decision, because in such a circumstance the party would not have had a full and fair opportunity to raise the issue at the administrative level." (citing *LTV Steel Co. v. United States*, 21 CIT 838, 868, 985 F. Supp. 95, 120 (1997))).

Tianjin had the opportunity to make a substantive case before the court in its comments following the Remand Results. Tianjin did not make substantive arguments here, however, and, to the extent it made cognizable objections, they are not sufficient to call the Department's determination into question. The record does not appear to contain evidence that MALCO received subsidies and the Department adequately explained, based on record evidence, why it chose the MALCO data even though it is not contemporaneous with the POR. Thus, because the court cannot find that the Department's determination was unsupported by substantial evidence, its selection of the MALCO financial statements is sustained.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the Department of Commerce's Final Results of Redetermination are sustained. Judgment will be entered accordingly.

Dated: May 21, 2015
New York, New York

/S/ RICHARD K. EATON
Richard K. Eaton

Slip Op. 15–56

KWO LEE, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge
Court No. 14–00212

[Negative bonding sufficiency determination sustained.]

Dated: June 12, 2015

Robert T. Hume, Hume & Associates, LLC, of Ojai, CA, for Plaintiff.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Chi S. Choy*, Senior Attorney, Office of Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

OPINION

Pogue, Senior Judge:

In this action, Plaintiff, importer Kwo Lee, Inc., challenges the negative bond sufficiency determination made by U.S. Customs and Border Protection ("Customs" or "CBP") on certain entries of fresh garlic from the People's Republic of China ("PRC").[1] Am. Compl., ECF No. 19, at ¶1. Specifically, Customs has determined that Plaintiff must post a single transaction bond for each such entry so that Plaintiff's total security is equal to Plaintiff's potential antidumping ("AD") duty liability as calculated at the PRC-wide rate (376.67 percent),[2] rather than the substantially lower combination rate (32.78 percent)[3] otherwise applicable to Plaintiff's putative exporter and producer, Qingdao Tiantaixing Foods Co., Ltd. ("QTF"). *Id.* According to Customs, this enhanced bonding is required because Plaintiff's entry documents displayed a pattern of omissions and possible discrepancies that made it impossible to verify the identity of the producer, and therefore impossible to verify Plaintiff's eligibility for QTF's special rate. Def.'s Resp. to Pl.'s Mot. for J. on the Admin. R., ECF No. 56 ("*Def.'s Resp.*"), at 11–12. Plaintiff argues that Customs' determination is invalid because it is not in accordance with law, is arbitrary and capricious, and is the result of inadequate process. Mem. in Supp. of Pl.'s Rule 56.1 Mot. for J. upon the Agency R., ECF No. 55 ("*Pl.'s Br.*"), at 4–6.

As explained below, because Customs' determination was in accordance with law, and neither arbitrary and capricious nor an abuse of discretion, it is sustained.

BACKGROUND

This action has its roots in the 1994 AD duty order on fresh garlic from the PRC (A-570–831). *Garlic AD Duty Order*, 59 Fed. Reg. at 59,209. There, the U.S. Department of Commerce ("Commerce" or "the Department") set the PRC-wide rate at 376.67 percent. *Id.* at

[1] Plaintiff's entries are subject to the 20-year-old antidumping duty order on fresh garlic from the PRC (A-570–831). *Fresh Garlic from the [PRC]*, 59 Fed. Reg. 59,209 (Dep't Commerce Nov.16, 1994) (antidumping duty order) ("*Garlic AD Duty Order*").

[2] *See Garlic AD Duty Order*, 59 Fed. Reg. at 59,210 (setting the PRC-wide rate).

[3] *See Fresh Garlic from the [PRC]*, 73 Fed. Reg. 56,550, 56,552 (Dep't Commerce Sept. 29, 2008) (final results and rescission, in part, of twelfth new shipper reviews) ("*Twelfth NSR*") (assigning QTF a producer/exporter combination rate).

59,210. This rate is still in use today. *See* Undated Port of San Francisco Information Notice, *reproduced in* Apps. to Accompany [Pl.'s Br.] ("Apps. to Pl.'s Br."), ECF No. 55–1 at app. 1 ("*Information Notice*").

In 2006, QTF began shipping fresh garlic to the United States. QTF requested and, following investigation, Commerce granted QTF a new shipper rate ("NSR") of 32.78 percent. *Twelfth NSR*, 73 Fed. Reg. at 56,552. This NSR was a "combination rate," in that it only applies where QTF is both the producer and exporter. *Id*. When QTF is only the exporter, the PRC-wide rate applies. *Id.* at 56,552–53.

Following the *Twelfth NSR*, QTF did not ship garlic to the United States again until 2014,[4] with Plaintiff as importer. Decl. of Steven [Li] (Owner of Kwo Lee, Inc.), *reproduced in* Pl.'s Appl. for a TRO & Mot. for a Prelim. Inj., ECF No. 7–2 at ex. 5, at ¶¶4–5. These entries declared the garlic as subject to the antidumping duty order on fresh garlic from the PRC, A-570–831, with QTF as both the producer and exporter. Decl. of Brian Pilipavicius, Supervisory Imp. Specialist, Area Port of San Francisco, CBP, *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–1 at tab 1 ("*Pilipavicius Decl.*"), at ¶6. This made the entries subject to the QTF NSR rate of 32.78 percent. *Id.* ; *Twelfth NSR*, 73 Fed. Reg. at 56,552. However, because of a pattern of missing and possibly discrepant information, Customs was unable to determine whether QTF was the producer. *Pilipavicius Decl.*, ECF No. 56–1 at tab 1, at ¶¶6–10; Decl. of Frank Djeng, Senior Imp. Specialist, Area Port of San Francisco, CBP, *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–1 at tab 2 ("*Djeng Decl.*"), at ¶¶3–8; Decl. of Richard Edert, Int'l Trade Specialist, Nat'l Targeting & Analysis Grp., Office of Int'l Trade, CBP, *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–1 at tab 3 ("*Edert Decl.*"), at ¶¶8–10. Customs requested further documentation from Plaintiff to verify, by other means, the identity of the producer, and Plaintiff complied. E-mail from Nick

[4] For administrative reviews in which QTF timely certified it had no shipments during the period of review, *see Fresh Garlic from the [PRC]*, Issues & Decision Mem., A-570–831, ARP 07–08 (June 14, 2010) (adopted in 75 Fed. Reg. 34,976, 34,980 (Dep't Commerce June 21, 2010) (final results and partial rescission of the 14th antidumping duty administrative review)) Issue 3 at 11 n. 7 (noting that Customs issued a no-shipment inquiry for QTF, and will only do so when the company has submitted a timely and properly filed no shipment certification); *Fresh Garlic from the [PRC]*, 76 Fed. Reg. 37,321, 37,323 (Dep't Commerce June 27, 2011) (final results and final rescission, in part, of the 2008–2009 antidumping duty administrative review); *Fresh Garlic from the [PRC]*, 77 Fed. Reg. 11,486, 11,489 (Dep't Commerce February 27, 2012) (partial final results and partial final rescission of the 2009–2010 administrative review); *Fresh Garlic from the [PRC]*, 78 Fed. Reg. 36,168, 36,170 (Dep't Commerce June 17, 2013) (final results of antidumping administrative review; 2010–2011); and, *Fresh Garlic from the [PRC]*, 79 Fed. Reg. 36,721,36,724 (Dep't Commerce June 30, 2014) (final results and partial rescission of the 18th antidumping duty administrative review; 2011–2012).

Hong, Customs Broker, to Marc Dolor, Senior Imp. Specialist, Area Port of San Francisco, CBP, and Frank Djeng (Aug. 22, 2014, 02:25PM), *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–1 at tab 5 ("*E-mail from Hong to Dolor & Djeng*"), at AR-000007–08 (e-mail), AR-0000012 (attachment list); E-mail from Nick Hong to Frank Djeng (Aug. 25, 2014, 08:01AM), *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–2 at tab 7, at AR-000170. Review of the responsive documents, however, suggested to Customs that QTF did not have the ability to produce all of the garlic at issue. *Edert Decl.*, ECF No. 56–1 at tab 3, at ¶7.[5]

Unable to ascertain the identity of the producer, Customs applied the AD duty rate for QTF as exporter with another or an unknown producer, that is, the PRC-wide rate. Customs denied entry pending the posting of additional security, in the form of a series of single transaction bonds ("STBs"), equal to this potential AD duty liability. CBP Form 4647, *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–2 at tabs 11 & 14 ("*CBP Form 4647*"), at AR-000187–88, AR-000199–200; Undated Port of San Francisco Information Notice, *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–2 at tabs 11 & 14 ("*Information Notice*"), at AR-000189, AR-000201.[6]

Plaintiff sought to preliminarily enjoin Customs from requiring additional bonding. Pl.'s Appl. for a TRO & Mot. for a Prelim. Inj., ECF No. 7, at 1. Because Plaintiff showed likely irreparable harm and raised serious and substantial questions as to the merits, with the balance of the equities and the public interest in his favor, the court granted Plaintiff's motion. *Kwo Lee, Inc. v. United States*, __ CIT __, 24 F. Supp. 3d 1322 (2014). Instead of the STBs required by Customs, the court required Plaintiff to provide security in the amount of one million dollars ($1,000,000.00) held by the court. *Id.* at 1332.

Plaintiff now moves for judgment on the agency record pursuant to USCIT Rule 56.1. Mot. of Pl. Kwo Lee, Inc. for J. upon the Agency R., ECF No. 55.

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[5] *See also* QTF Production Records, *reproduced in* [Con.] App. to [Def.'s Resp.], ECF Nos. 56–1 & 56–2 at tab 6, at AR-000014–15 (questionnaire completed by Plaintiff), AR-000016–127 (raw garlic purchase invoice and weighing slips), AR-000128–29 (process flow chart for fresh garlic and peeled garlic), AR-000130 (list of machines and equipment used), AR-000131–42 (purchase invoices for machines and equipment used), AR-000143–46 (sample electricity invoices, July 2014), AR-000147–56 (sample invoices for packing material), AR-000157–69 (payroll lists for May, June, and July 2014); Kwo Lee Payroll List July 2014, *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–2 at tab 8, at AR-000173–78; Kwo Lee Payroll List June 2014, *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–2 at tab 9, at AR-000179–82; Kwo Lee Payroll List May 2014, *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–2 at tab 10, at AR-000183–85.

[6] *See also Information Notice*, ECF No. 55–1, at app. 1 (providing the same document as reproduced in the Plaintiff's appendices).

STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (2012) and will therefore uphold Customs' enhanced bonding determination unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[7]

DISCUSSION

I. Customs' Determination Was Within Its Statutory Authority

A. Customs' Statutory Authority to Make Bond Sufficiency Determinations and Require Additional Bonding

Customs has broad statutory authority to protect the revenue of the United States through the imposition of bonding requirements on imports. *See* 19 U.S.C. §§ 66, 1623.[8] Pursuant to this authority, Customs has promulgated extensive regulations, *see Customs Bond Structure; Revision,* 49 Fed. Reg. at 41,152 (amending Customs regulations "to revise the Customs bond structure by consolidating and reducing the number of bond forms in use"), in an effort to specify and structure the bonding application, approval, and execution process. 19 C.F.R. § 113.0 (2014).

The statute specifically provides that even where a "bond or other security is not specifically required by law," Customs may "by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which [Customs] may be authorized to enforce." 19 U.S.C. § 1623(a).[9] Under the corresponding Customs' regulations, port directors are instructed to determine whether a bond "is in proper form and provides adequate security" for

[7] *See* 28 U.S.C. § 2640(e) (Actions brought under § 1581(i) are reviewed "as provided in section 706 of title 5.").

[8] A bond is generally required as part of the entry documentation. The bond ensures "that proper entry summary with payment of estimated duties and taxes when due, will be made for imported merchandise and that any additional duties and taxes subsequently found to be due will be paid." *Customs Bond Structure; Revision*, 49 Fed. Reg. 41,152, 41,152 (Dep't Treasury Oct. 19, 1984).

[9] *See also* 19 U.S.C. § 66 ("[Customs] shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing, and shall give such directions to customs officers and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law.").

the entries at issue. 19 C.F.R. § 113.11.[10] If he or she, or the drawback office, "believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations," he or she may "require additional security." 19 C.F.R. § 113.13(d).

Because "the statute is silent on the specific method," and "expressly delegate[s] broad authority to Customs to prescribe all regulations necessary," these resultant regulations are entitled to "controlling weight," *Chrysler Corp. v. United States*, 592 F. 3d 1330, 1335–36 (Fed. Cir. 2010), and will be sustained so long as they are "reasonably related to the purposes of the enabling legislation." *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (quoting *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 280—81 (1969)) (internal quotation marks omitted).[11]

The statute allows for such bonds as "deem[ed] necessary for the protection of the revenue" of the United States or "to assure compliance with any provision of law." 19 U.S.C. § 1623(a). This is reflected in the language of the regulation, which provides that "if a port director or drawback office believes" that the current level of bonding "would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations," additional bonding may be required. 19 C.F.R. § 113.13(d). Because the regulation is derived from the language of its enabling statute, it is reasonably related to it.[12] Customs' authority to make bond sufficiency determinations and require additional bonding is therefore sustained.[13]

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[10] *See also* 19 C.F.R. § 113.1 ("[T]he Commissioner of Customs . . . may by regulation or specific instruction require, or authorize the port director to require, such bonds or other security considered necessary for the protection of the revenue or to assure compliance with any pertinent law, regulation, or instruction.").

[11] *See also Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F. 3d 1370, 1377 (Fed. Cir. 2013) ("If the statute does not clearly answer the relevant question, then the court must . . .decide whether the agency's interpretation amounts to a reasonable construction of the statute.") (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837,843 (1984)).

[12] *Cf. Yangzhou Bestpak*, 716 F.3d 1370, 1378 (holding that a methodology derived from the relevant statutory language is a reasonable reading of that statute).

[13] *Cf. Carolina Tobacco Co. v. Bureau of Customs & Border Prot.*, 402 F. 3d 1345 (Fed. Cir. 2005) (affirming Custom's decision to require either an increased continuous bond or single transaction bond of comparable amount from plaintiff); *Hera Shipping, Inc. v. Carnes*, 10 CIT 493, 640 F. Supp. 266 (1986) (affirming Custom's decision to require increased bonding from plaintiff).

B. Customs' Ministerial Role in the Administration of Antidumping Duty Laws

Customs' statutory authority to make bond sufficiency determinations and require additional bonding is limited by the agency's purely ministerial role in the enforcement of AD duty laws and determinations. *Reorganization Plan No. 3 of 1979*, 44 Fed. Reg. 69,273, 69,274–75 (Dec. 3, 1979) (announcing transfer from Customs to Commerce of, *inter alia*, all substantive functions under 19 U.S.C. §§ 1671 *et seq.*), *effective under* Exec. Order No. 12,188 of January 2, 1980, 45 Fed. Reg. 989, 993 (Jan. 4, 1980). In application, this means that, while Customs may consider potential AD duty liability in determining whether an entry is sufficiently bonded, it may not usurp Commerce's authority and make a substantive AD duty determination, whether outright or in effect, through a bond sufficiency determination.[14]

Here, contrary to Plaintiff's arguments, Customs' bond sufficiency determination was ministerial, not a substantive AD duty determination. Plaintiff argues that by making a bond sufficiency determination and requiring additional bonding at the PRC-wide rate, Customs effectively "conduct[ed] its own antidumping investigation and [ ] substitute[d] its judgment regarding the antidumping law," – i.e., assigned to QTF, unjustifiably, the PRC-wide rate. Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. for J. upon the Agency R., ECF Nos. 60 (con. ver.) & 61 (pub. ver.) ("*Pl.'s Reply*"), at 5. However, Customs did not purport to assign QTF produced and exported garlic the PRC-wide rate. It made no determination, nor did it need to, regarding Chinese government control or the applicability of the PRC-wide rate to QTF. Customs only determined that it could not, with any certainty, identify the producer of the garlic at issue. *Pilipavicius Decl.*, ECF No. 56–1 at tab 1, at ¶11. While QTF does have an NSR, it is a combination rate and only applies where QTF is both the producer and exporter. *Twelfth NSR*, 73 Fed. Reg. at 56,552; *see also* 19 C.F.R. § 351.107(b)(1). Otherwise, the PRC-wide rate applies. *See Twelfth NSR*, 73 Fed.[15] Customs, in the absence of evidence establishing

[14] *See Mitsubishi Elecs. Am., Inc. v. United States*, 44 F. 3d 973,977 (Fed. Cir. 1994) ("Customs merely follows Commerce's instructions in assessing and collecting duties. Customs does not determine the 'rate and amount' of antidumping duties under 19 U.S.C. § 1514(a)(2). Customs only applies antidumping rates determined by Commerce."); *Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 33 CIT 1137, 1160, 637 F. Supp. 2d 1270, 1291–92 (2009) (holding that Customs is not precluded by statute from securing "potential [AD] duty liability when a determination of bond sufficiency is made" but that such a determination is limited by Customs' ministerial role under the AD laws).

[15] Plaintiff argues that "Customs adopted the PRC-wide rate as the default" when "there is no showing that Commerce ever directed Customs to use this default rate, or under what

producer identity, aplied the QTF/unknown producer rate (the PRC–wide rate).[16] Accordingly, Custom's decision to require bonding equal to Plaintiff's potential antidumping duty liability, as determined by Commerce, was not beyond its authority and was therefore in accordance with law.

II. Customs' Determination Was Not Arbitrary and Capricious.

A bond sufficiency determination, however in accordance with law, cannot be arbitrary and capricious. The agency's decision must be "based on a consideration of the relevant factors," without "a clear error of judgment." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (citations omitted). This requires that Customs explain the available evidence and articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)) (internal quotation marks omitted). While the court "may not supply a reasoned basis for the agency's action that the agency itself has not given," a decision of "less than ideal clarity" may be upheld "if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974). In the context of a bond sufficiency determination, this means that a negative finding must be "based on a reasonable belief as to the existence of the necessary justifying conditions," and the resultant increase in bonding must be reasonable "in relation to the objectives sought to be secured." *Hera Shipping*, 10 CIT at 497, 640 F. Supp. at 269.

circumstances." *Pl.'s Br.*, ECF No. 55, at 18. However, this is contradicted by the plain language of the pertinent antidumping determination, where Commerce instructed that "for subject merchandise exported by QTF . . . but not manufactured by QTF . . . the cash deposit rate will continue to be the PRC-wide rate (i.e., 376.67 percent)." *Twelfth NSR*, 73 Fed. Reg. at 56,552–53.

[16] Plaintiff also argues that because the AFA rate itself is invalid and not in accordance with law, Customs' decision to require enhanced bonding to that amount is not in accordance with law. *Pl.'s Br.*, ECF No. 55, at 9–11, 18–19. This argument is misaddressed. As Plaintiff points out, Customs' role is purely ministerial, such that it has no authority to calculate or recalculate an AD duty rate. It simply applies the rate as determined by Commerce. *See Shinyei Corp. of Am. v. United States*, Slip Op. 11–69, 2011 WL 2421227, *2 (CIT June 15, 2011)("Customs must interpret Commerce's instructions precisely as Customs' role in the process should be ministerial: Customs should do no more than enact the intentions of Commerce.") (citation omitted).

Here, Customs reasonably determined[17] that it could not verify that QTF was the producer because: (1) the phytosanitary certificates[18] that Plaintiff submitted with his entries were all either incomplete or contained seemingly discrepant information, preventing Customs from verifying that QTF was the producer;[19] and (2) the supplemental documentation requested by Customs and provided by Plaintiff, in order to identify the producer, could reasonably be read to further undermined the claim that QTF was the producer.[20] From these factual findings, Customs reasonably concluded that it could not reliably identify the producer, and that, without evidence establishing that QTF was the producer, the QTF NSR did not apply. *Pilipavicius Decl.*, ECF No. 56–1 at tab 1, at ¶¶6, 10–11; *see also* E-mail from Brian Pilipavicius to Ted Hume, Counsel for Plaintiff (Sept. 3, 2014, 09:46AM), *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–2 at tab 15 ("*E-mail from Pilipavicius to Hume*"), at AR-000202. Customs instead applied the appropriate rate for QTF exports with an unknown producer, the PRC-wide rate, and reasonably sought additional bonding in that amount. *Id.*[21]

[17] This rationale was not provided to Plaintiff by Customs in its *CBP Form 4647* or *Information Notice*. But, while these provide insufficient basis for judicial review, *see Kwo Lee*, __ CIT at __, 24 F. Supp. 3d at 1330–31 (finding that the Information Notice alone was insufficient for judicial review), the court may consider affidavits from the agency to obtain "such additional explanation of the reasons for the agency decision as may prove necessary." *Camp v. Pitts*, 411 U.S. 138, 143 (1973).The Defendant has provided such affidavits here. *See also infra* note 24 (discussing the admissibility of Plaintiff's similar affidavit).

[18] According to Customs, phytosanitary certificates are issued by the Chinese government at the production site prior to export. *Pilipavicius Decl.*, ECF No. 56–1 at tab 1, at ¶7. A certificate should "indicate [ ] the originating province, registered production site, name of producer and production date," acting as a "'birth certificate' of sorts" and is "the only way to trace and identify the producer of the garlic, the facility in which it was produced, and when it was produced." *Id.* at ¶8; *see also Djeng Decl.*, ECF No. 56–1 at tab 2, at ¶¶3–6.

[19] The certificates either "contained no [China Inspection and Quarantine ("CIQ")] code, production lot number, and production date, or the CIQ code was discrepant and belonged to a different producer" (each producer is registered with the Chinese government and has its own CIQ code). *Pilipavicius Decl.*, ECF No. 56–1 at tab 1, at ¶¶6, 8; *see also Djeng Decl.*, ECF No. 56–1 at tab 2, at ¶¶6–8.

[20] *See Edert Decl.*, ECF No. 56–1 at tab 3, at ¶7 (noting, *inter alia*, that QTF never previously produced and exported such a large quantity of garlic to the United States, and that, based on documents provided by Plaintiff, it was unlikely that QTF had sufficient employees and facilities to process all the garlic it claimed to have produced).

[21] Customs further supported its decision by contextualizing the instant entries: Customs has had tremendous difficulty collecting duties owed on fresh garlic from the PRC, and the fact pattern here (a small importer with a minimal continuous bond enters a large quantity of garlic) is common and often ends in "uncollectable [duties] because the importers are no longer active and cannot be found." *See Edert Decl.*, ECF No. 56–1 at tab 3, at ¶¶3–5.

Plaintiff has raised questions about the reliability of phytosanitary certificates as a basis for producer identification[22] and has provided alternative explanations from the seeming discrepancies and flaws in its documentation.[23] *See Kwo Lee*, __ CIT at __, 24 F. Supp. 3d at 1328–31. But this is not sufficient to establish that Customs' decision was arbitrary and capricious.[24] Customs considered the relevant factors – the discrepancies and omissions in QTF's documentation and the absence of any other evidence to adequately fill those gaps – and, without a clear error in judgment, concluded that it could not verify

[22] Plaintiff argues that phytosanitary certificates, as issued by the Chinese government, are an unreliable means of establishing producer identity, being routinely imperfect and incomplete, and, when complete, being indicative of storage location and inspection site, not producer. *See Pl.'s Br.*, ECF No. 55, at 14–15 (arguing that phytosanitary certificates are unreliable evidence); Decl. of Zhao Zhenqing, Manager of QTF, *reproduced in* Apps. to Pl.'s Br., ECF No. 55–1 at app. 2 ("*Zhao Decl.*"), at ¶1 (phytosanitary certificates are provided post-inspection to indicate that the produce is pest-free, not to establish producer identity), ¶¶2–4 (phytosanitary certificates indicate storage and inspection site, not producer identity), ¶¶5–6 (phytosanitary certificates are often incomplete); *Pl.'s Reply*, ECF No. 61, at 6–7 (arguing that it is logistically feasible that phytosanitary certificates indicate storage and inspection site rather than producer).

[23] *See Pl.'s Br.*, ECF No. 55, at 15–16 (asserting that Plaintiff's sudden high volume of garlic imports was not indicative of planned antidumping duty fraud, but quick action on a perceived business opportunity after an increase in the antidumping duty rates for other garlic importers made importation of QTF-produced garlic financially reasonable), 16 (arguing that QTF did have the facilities to produce the entered amount of garlic because it was produced during the garlic harvest season and employees work long shifts during this period); *Pl.'s Reply*, ECF No. 61, at 8–9 (asserting that QTF did have the requisite production capacity for the type of garlic at issue).

[24] Plaintiff presents some of its evidence through affidavit. *See Zhou Decl.*, ECF No. 55–1 at app. 2. Defendant argues that the information in the Zhou Declaration "was not presented to CBP at entry, nor did CBP have the opportunity to consider this evidence in reaching its decision," and Plaintiff "should not be permitted to attack CBP's actions on a basis never presented to the agency." *Def.'s Resp.*, ECF No. 56, at 20 (quoting 28 U.S.C.§ 2637(d) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[O]bjections to the proceedings of an administrative agency [must] be made while it has opportunity for correction in order to raise issues reviewable by the courts.")). While it is true that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court," *Camp*, 411 U.S. at 142, the record may be supplemented if to do otherwise would "frustrate effective judicial review," *id*. 142–43; *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381(Fed. Cir. 2009) (internal citation and quotation marks omitted) (The existing record should be supplemented only where it "is insufficient to permit meaningful review consistent with the APA."). Here, without the Zhao Declaration, it would be impossible to determine whether Customs' decision was arbitrary and capricious for having "entirely failed to consider an important aspect of the problem" before it: the reliability of phytosanitary certificates as evidence. *State Farm*, 463 U.S. at 43; *see also* 28 U.S.C. § 2640(e) (actions brought under §1581(i) are reviewed under 5 U.S.C. § 706); 5 U.S.C. § 706(2)(A)(providing for arbitrary and capricious review). Accordingly, consideration of the declaration is appropriate.

that QTF was the producer. *See Overton Park*, 401 U.S. at 416. Under the arbitrary and capricious standard, "[t]he court is not empowered to substitute its judgment for that of the agency." *Id.* Customs has explained the evidence and made a "rational connection between the facts found and the choice made." *Burlington Truck Lines*, 371 U.S. at 168. Accordingly, Custom's decision was not arbitrary and capricious.[25]

III. Plaintiff was Afforded Adequate Process.[26]

Customs is tasked with making bond sufficiency determinations, but in doing so, it cannot "ignore the required procedures of decision making." *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (citation omitted). Because there is no protected interest in importing to the United States, an enhanced bonding determination does not trigger Constitutional due process concerns. *See Bd. of Trustees of Univ. of Illinois v. United* States, 289 U.S. 48, 57 (1933) (holding that there is no

[25] Plaintiff also argues that Customs' decision was arbitrary and capricious because it was discriminatory. *Pl.'s Br.*, ECF No. 55, at 5, 15; *see also SKF USA Inc. v. United States*, 263 F.3d 1369,1382 (Fed. Cir. 2001) ("[A]n agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.") (alteration, quotation marks and citation omitted). Plaintiff claims that other companies have incomplete phytosanitary certificates, *see* TRO Hr'g Tr., ECF No. 40, at 36:4–9; *Zhao Decl.*, ECF No. 55–1 at app. 2, at ¶¶2–5; Attach. 1 to Decl. Zhao Zhenqing, ECF No. 31–1 (providing a sampling of incomplete and imperfect phytosanitary certificates from Zhengzhou Harmoni Spice Co. ("Harmoni") and Hebei GoldenBird Trading Co., Ltd. ("Golden Bird"), but have not been subject to the same bond sufficiency determination as QTF. *Pl.'s Reply*, ECF No. 61, at 10–11 n. 11. However, even if Harmoni and Golden Bird have comparable incomplete phytosanitary certificates, *see Def.'s Resp.*, ECF No. 56, at 23 (noting that the provenance of competitors' phytosanitary certificates offered into evidence is unestablished), this is not enough to show that Customs acted arbitrarily, because the companies are not similarly situated to QTF. Neither Harmoni nor Golden Bird has a producer-specific combination rate. *See Fresh Garlic from the [PRC]*, 71 Fed. Reg. 26,329, 26,332 (Dep't Commerce May 4,2006) (final results and partial rescission of antidumping duty administrative review and final results of new shipper reviews)(setting Harmoni's rate at 0.00 percent irrespective of producer); *Fresh Garlic from the [PRC]*, 79 Fed. Reg. 36,721,36,723 (Dep't Commerce June 30, 2014) (final results and partial rescission of the 18th antidumping duty administrative review; 2011–2012) (setting Golden Bird's rate at the PRC-wide rate, irrespective of producer). Unlike QTF, Customs would not need to determine their producer to know the appropriate cash deposit rate. Errors and omissions in their phytosanitary certificates would not trigger a bond sufficiency determination because the information contained (or not) therein, has no effect on their rate.

[26] Defendant argues that Plaintiff has waived his argument that Customs afforded him inadequate process because he has "dedicate[d] one sentence in [his] brief to challenging the adequacy of the written notice of the STB requirement," without any elaboration to the "factual or legal basis for [his] argument." *Def.'s Resp.*, ECF No. 56, at 26–27 (citing *United States v. Zannino*, 895 F. 2d 1, 17 (1st Cir. 1990)). However, this is incorrect. Defendant cites only to *Pl.'s Br.*, ECF No. 55, at 4–5 (Plaintiff's summary of argument) while ignoring the same filing at 16–17 (Plaintiff's actual argument).

protected property interest in importing to the United States).[27] The statute provides only that Customs may require additional bonding as "deem[ed] necessary." 19 U.S.C. § 1623(a). The regulation is similarly lacking in procedural requirements. *See* 19 C.F.R. § 113.13(d).[28]

Accordingly, further elaboration of the appropriate procedure remains generally within the Customs' discretion. Absent "an erroneous

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[27] *See also Hera Shipping*, 10 CIT at 496, 640 F. Supp. at 269 ("[T]he amount of a bond does not appear to be as significant in the scale of values as the interests for which full due process rights have been found," and "the business person's right to have a bond remain unchanged is not the sort of property right which is of such fundamental importance that it must remain in place, unmolested, until good cause to change it is developed in a hearing.") (citation omitted).

[28] Customs has circulated and published notice of an informal guidance memorandum on bond sufficiency determinations undertaken "when the port has developed a reasonable belief that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy because of Anti-dumping/Countervailing Duty (AD/CVD) concerns." Mem. from Exe. Dir., Trade Policy and Programs Div., Office of Int'l Trade, CBP, to Dirs. of Field Operations and Assistant Dirs. of Trade and Field Operations, Office of Field Operations, CBP, on the Use of Single Transaction Bonds as Additional Security for Antidumping and Countervailing Concerns, Public Distribution of Information on Use of Single Transaction Bonds as Additional Security for Anti-Dumping and Countervailing Duties (June 13, 2012) *reproduced in* App. to Mem. in Supp. of Def.'s Opp'n to Pl.['s] Appl[]. for TRO & Mot[]. for Prelim. Inj., ECF No. 25–1 ("*STB Mem.*"), at A7–8. But there is nothing in this informal guidance that binds the agency to particular procedures. While "[i]t is a familiar rule of administrative law that an agency must abide by its own regulations," *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 654 (1990) (citations omitted),"[t]he general consensus is that an agency statement, not issued as a formal regulation, binds the agency only if the agency intended the statement to be binding." *Farrell v. Dep't of Interior*, 314 F. 3d 584, 590 (Fed. Cir. 2002) (citations omitted). "The primary consideration in determining the agency's intent is whether the text of the agency statement indicates that it was designed to be binding on the agency." *Id.* at 591. Custom's public notice contains nothing to suggest that the memorandum was considered binding; rather it was meant to provide "guidance" to ensure "the appropriate use of the port's authority to require additional bonding in a uniform manner." *STB Mem.*, ECF No. 25–1, at A7.

Further, the record indicates that Customs abided by this guidance in making Kwo Lee's bond sufficiency determination. The notice states, *inter alia*, that: (1) "[e]ach transaction will be judged on its own merits," and "[o]nly on a case-by-case basis will the STB be required"; (2) "[i]mporters/brokers will be provided [with] written notice of the STB requirement," and "[t]he notice will include[] [t]he amount of the STB [and] the general reason why the STB is being required"; and (3) the amount of the STB "in general, will be based on the value of the merchandise times the AD/CVD rate that would apply if the goods were subject to [the given] AD/CVD rate." *Id.* Here, (1) the determination made was specific to Kwo Lee, *see Pilipavicius Decl.*, ECF No. 56–1 at tab 1, at ¶¶6–11; *Djeng Decl.*, ECF No. 56–1 at tab 2, at ¶¶3, 7–10; *Edert Decl.*, ECF No. 56–1 at tab 3, at ¶7; (2) Kwo Lee's broker was provided with written notice of the amount of the required additional bonding, *see CBP Form 4647*, ECF No. 56–2 at tabs 11 & 14, at AR-000187–88, AR-000199–200, and a statement of the general reasons why STBs were required for the entries, *Information Notice*, ECF No. 56–2 at tabs 11 & 14, at AR-000189, AR-000201; and (3) the amount of additional bonding was calculated to increase the total bonding to equal the potential antidumping duty liability for the QTF exporter/unknown producer rate, *Pilipavicius Decl.*, ECF No. 56–1 at tab 1, at ¶11.

interpretation of the law" or "clearly erroneous factual underpinnings," a discretionary decision can be set aside only if it "represents an unreasonable judgment in weighing relevant factors," *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1039 (Fed. Cir. 1992) (citations omitted), or if Customs fails to provide "sufficient information as to the basis for the change [in bonding requirement] to allow it to be challenged in court," *Hera Shipping*, 10 CIT at 496, 640 F. Supp. at 269.[29] Outside this, the court will defer to the agency "regarding the development of the agency record." *Dongtai Peak Honey Indus. Co. v. United States*, 777 F. 3d 1343, 1351 (Fed. Cir. 2015) (internal quotation marks and citation omitted).[30]

It is true that here the written notice Customs provided Plaintiff was a generalized statement, the same as that provided to the industry as a whole several months earlier.[31] It indicated only that heightened bonding was required "[d]ue to discrepancies found with entry documents, concerns with bond sufficiency and the financial risk associated with the entry of fresh garlic from the PRC." *Information Notice*, ECF No. 56–2 at tabs 11 & 14, at AR-000189, AR-000201; *Information Notice*, ECF No. 55–1 at app. 1 (same). It did not indicate, as Customs had decided, that because Plaintiff failed to produce documentation to establish the identity of its producer, Customs, in accordance with Commerce's instructions, required bonding equal to the rate assigned to entries from QTF as exporter with an unknown producer – the PRC-wide rate. *See Twelfth NSR*, 73 Fed. Reg. at 56,552–53. In this respect it was deficient. However, concurrent and subsequent communications between Plaintiff and Customs[32] as well as affidavits, documentation, and briefing provided in the course of

[29] *See also Nat'l Fisheries*, 33 CIT at 1151–52, 637 F. Supp. 2d at 1284–85.

[30] Indeed, "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978)(quotation marks and citation omitted); *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) ("Beyond the APA's minimum requirements, courts lack authority 'to impose upon [an] agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.' To do otherwise would violate 'the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'") (quoting *Vermont Yankee*, 435 U.S. at 549, 544) (alteration in original).

[31] *Compare* Port of San Francisco Information Notice (June 9,2014), *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–2 at tab 23, at AR-001060, *with Information Notice*, ECF No. 55–1 at app. 1.

[32] *See, e.g.*, *E-mail from Pilipavicius to Hume*, ECF No. 56–2 at tab 15, at AR-000202–03 (explaining that Customs was requiring additional bonding pursuant to 19 C.F.R. § 113.13(d) because all of Plaintiff's phytosanitary certificates were "incomplete or discrepant," leaving the producer of the garlic in question); E-mail from Frank Djeng to Ted Hume

this action,[33] have served to cure the deficiency. *See Hera Shipping*, 10 CIT at 497, 640 F. Supp. at 269; *cf. Jennings v. Mahoney*, 404 U.S. 25, 26 (1971). Plaintiff was made aware of Customs' decision and reasoning and has been given opportunity to challenge it, before both before Customs and this Court. Plaintiff was, therefore, accorded adequate process.

CONCLUSION

Customs' bond sufficiency determination, and the resultant additional bonding requirement imposed on Plaintiff, is sustained as in accordance with law, not arbitrary and capricious, and not an abuse of discretion.

Entry of judgment is stayed pending the final determination in the Twentieth Administrative Review of the Antidumping Duty Order on Fresh Garlic from the PRC,[34] which will decisively establish Plaintiff's antidumping duty liability.

/S/ DONALD C. POGUE
Donald C. Pogue, Senior Judge

Dated: June 12, 2015
New York, NY

Slip Op. 15–57

SAMSUNG ELECTRONICS CO., LTD., AND SAMSUNG ELECTRONICS AMERICA, INC., Plaintiffs, v. UNITED STATES, Defendant.

PUBLIC

Before: Leo M. Gordon, Judge
Consol. Court No. 13–00098

(Sept. 4, 2014, 01:58 PM), *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–2 at tab 18, at AR-000208 (confirming teleconference, as requested by Plaintiff, to discuss the use and meaning of the phytosanitary certificates); *see also E-mail from Hong to Dolor & Djeng*, ECF No. 56–1 at tab 5, at AR-000007–11 (requesting further documentation to "verify the manufacturer/shipper of the instant shipment"); E-mail from Frank Djeng to Nick Hong (Aug. 28, 2014, 02:56 PM), *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–2 at tab 11, at AR-000186 (providing Plaintiff with CBP Form 4647 and Information Notice); E-mail from Frank Djeng to Richard Edert and others (Aug. 28, 2014, 06:42PM), *reproduced in* [Con.] App. to [Def.'s Resp.], ECF No. 56–2 at tab 12, at AR-000190 (summarizing conversation with Plaintiff's counsel, stating that they were waiting for "more information to prove that he does represent the importer[]" and that the Customs officers "did not reveal anything except giving him a history of the garlic duty evasion to support why we're asking for STB (revenue risk, bond saturation, [number] of shipments)").

[33] *Pilipivicius Decl.*, ECF No. 56–1 at tab 1; *Djeng Decl.*, ECFNo. 56–1 at tab 2; *Edert Decl.*, ECF No. 56–1 at tab 3; *Def.'s Resp.*, ECF No. 56; App. to [Def.'s Resp.], ECF Nos. 56–1 & 56–2.

[34] *See* Petitioner's Request for Admin. Rev., A-570–831, ARP 13–14 (Dec. 1, 2014), *reproduced in* Apps. to Pl.'s Br., ECF No. 55–1 at app. 4.

[Motion for judgment on agency record denied; final determination of sales at less than fair value sustained in part.]

Dated: Dated: June 12, 2015

Warren E. Connelly, *J. David Park*, *Jarrod M. Goldfeder*, and *Phyllis L. Derrick*, Akin Gump Strauss Hauer & Feld LLP of Washington D.C. for Plaintiffs Samsung Electronics Co., Ltd and Samsung Electronics America, Inc.

Daniel L. Porter, *James P. Durling*, *Christopher A. Dunn*, *Ross E. Bidlingmaier*, and *Claudia D. Hartleben*, Curtis, Mallet-Prevost, Colt & Mosle of Washington, D.C. for Consolidated Plaintiffs LG Electronics, Inc. and LG Electronics USA, Inc.

Jack A. Levy, *Myles S. Getlan*, *James R. Cannon, Jr.*, *John D. Greenwald*, *Matthew Frumin*, and *Thomas M. Beline*, Cassidy Levy Kent (USA) LLP of Washington, D.C. for Plaintiff and Defendant-Intervenor Whirlpool Corporation.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant United States. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Joanna V. Theiss*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance for the United States Department of Commerce.

OPINION

Gordon, Judge:

This consolidated action involves a U.S. Department of Commerce ("Defendant" or "Commerce") final determination in the less than fair value investigation of large residential washers from the Republic of Korea. *Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,988 (Dep't of Commerce Dec. 26, 2012) (final determ. LTFV investigation) ("*Final Results*"); *see also* Issues and Decision Memorandum for the Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea, A-580–868 (Dep't of Commerce Dec. 26, 2012), *available at* http://enforcement.trade.gov/frn/summary/korea-south/2012–31104–1.pdf (last visited this date) ("*Decision Memorandum*"). Before the court are the motions for judgment on the agency record of Plaintiffs Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively, "Samsung"), Consolidated Plaintiffs LG Electronics Inc. and LG Electronics USA, Inc. (collectively, "LG"), and Consolidated Plaintiff Whirlpool Corporation ("Whirlpool"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[1] and 28 U.S.C. § 1581(c) (2012).

This opinion addresses Whirlpool's challenge to the *Final Results*. *See* Consol. Pl. Whirlpool's Mot. for J. on the Agency R. 1–50 (Sept. 27, 2013), ECF No. 46 ("Whirlpool Br."); Def.'s Consol. Resp. to Pls.' Mots.

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

for J. on the Agency R. 51–81 (Feb. 14, 2014), ECF No. 62 ("Def. Resp."); Consol. Def.-Intervenors LG Elecs., Inc.'s and LG Elecs. USA, Inc.'s Resp. to Whirlpool Corp.'s Br. in Supp. of its Mot. for J. on the Agency R. 2–15 (Mar. 7, 2014), ECF No. 66 ("LG Resp."); Resp. Br. of Samsung Elecs. Co., Ltd. and Samsung Elecs. Am., Inc., in Opp'n to Whirlpool Corp.'s Rule 56.2 Mot. for J. upon the Agency R. 1–21 (Mar. 10, 2014), ECF No. 70 ("Samsung Resp."); Reply Br. of Whirlpool Corp. 1–37 (Apr. 21, 2014), ECF No. 83 ("Whirlpool Reply").

Specifically, Whirlpool challenges (1) Commerce's finding that LG was not affiliated to its suppliers; (2) Commerce's finding that LG properly reported all its costs; (3) Commerce's refusal to apply adverse facts available to LG due to LG's rebate reporting; (4) Commerce's sales-below-cost test; (5) Commerce's refusal to apply adverse facts available to Samsung due to an affiliated retailer's failure to cooperate; (6) Commerce's selection of the shipment date rather than the invoice date as the date of sale for certain Samsung transactions; and (7) Commerce's treatment of Samsung's costs related to an unforeseen event as direct warranty expenses rather than a different kind of direct expenses. For the reasons set forth below, the court denies Whirlpool's motion for judgment on the agency record and sustains the *Final Results* for each of the issues challenged by Whirlpool.

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). 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. 2014). 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. 2015).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."). The court first considers whether Congressional intent on the issue is clear. Dupont, 407 F.3d at 1215. When a "court determines Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Under *Chevron*'s second prong, the court must defer to Commerce's reasonable construction of the statute. *See, e.g.*, *Eurodif*, 555 U.S. at 316; *Union Steel v. United States*, 713 F.3d 1101, 1106–10 (Fed.Cir.2013).

II. Discussion

Whirlpool makes seven multipart arguments in opposition to the *Final Results*.

A. Exhaustion

As a preliminary matter, Defendant and Samsung both respond that Whirlpool failed to exhaust certain arguments: (1) that Commerce improperly rejected a factual submission and (2) that Samsung was able to compel its affiliate to act on a prior occasion. Whirlpool Br. at 32–36. Defendant and Samsung explain that Whirlpool failed to raise either issue in its administrative case brief. Def. Resp. at 73, 75; Samsung Resp. at 11–14. Defendant also contends that Whirlpool did not raise any of the exceptions to the exhaustion requirement in its opening brief "despite a manifest exhaustion problem." Def. Resp. at 73.

Whirlpool replies that it preserved its rejected submission argument. Whirlpool Reply at 23–26. Whirlpool explains that it twice attempted to submit the relevant arguments and exhibits, and that Commerce twice issued rejection memoranda outlining the agency's reasoning. *Id.* at 24. Whirlpool cites to *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140 (Fed. Cir. 2013), a case that, according to Whirlpool, considered and rejected "almost identical" exhaustion arguments to those Defendant and Samsung raise here. Whirlpool Reply at 25. Whirlpool also argues that "the issue of whether Samsung could compel [its affiliated retailer] was squarely before Commerce" because Whirlpool in its administrative case brief contended that Samsung did not exert "maximum efforts" to compel cooperation. *Id.* at 22 (quoting Whirlpool Case Brief, 32–42 (Dep't of Commerce Oct. 31, 2012), CD 312[2] ("Whirlpool Admin. Br.")).

The court agrees with Defendant and Samsung that exhaustion is appropriate in these circumstances. When reviewing Commerce's antidumping determinations, the U.S. Court of International Trade is mandated by statute to require exhaustion of administrative remedies "where appropriate." 28 U.S.C. § 2637(d). "This form of non-jurisdictional exhaustion is generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review-advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F.Supp.2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 88–90 (2006)). The court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

An important corollary to the exhaustion of administrative remedies is Commerce's own regulatory requirement that parties raise all issues within their administrative case briefs. 19 C.F.R. § 351.309(c)(2) (2014) ("The case brief must present all arguments that continue in the submitter's view to be relevant to the final determination."); *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008) (parties are "procedurally required to raise the[ir] issue before Commerce at the time Commerce [is] addressing the issue"); *see also* 19 U.S.C. § 1677f(i)(3)(A) ("the administering authority shall include . . . an explanation of the basis for its determination that addresses relevant arguments, made by interested parties"). This requirement works in tandem with the exhaustion requirement and promotes the same twin purposes of protecting administrative agency authority and promoting judicial efficiency.

Whirlpool had the opportunity during this proceeding to address the rejected submission and the affiliate's past cooperation, but chose not to do so. By declining to argue or develop either issue in its

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

administrative case brief, Whirlpool signaled that both issues no longer merited attention from Commerce. Whirlpool thereby undermined Commerce's ability to analyze both issues in the *Decision Memorandum* and in turn deprived the court of a fully developed record on the contested issues. Furthermore, Commerce's regulatory requirement that parties raise all issues within their administrative case briefs carries the force of law, and the court cannot simply ignore it. Exhaustion is therefore appropriate here because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.

The court also notes that *Itochu* does not apply here. The U.S. Court of Appeals for the Federal Circuit in *Itochu* explained that 19 C.F.R. § 351.309(c)(2) did not apply to the voluntary submission made during a changed-circumstances review at issue in that appeal. *Itochu*, 733 F.3d at 1145 n.1. This action does not involve a changed-circumstances review, but rather a less than fair value investigation to which the regulation requiring a party to raise all issues in an administrative case brief applies. 19 C.F.R. 351.309(c)(2); *Itochu*, 733 F.3d at 1145 n.1.

Lastly, Samsung contends that Whirlpool makes an argument in its confidential opening brief about Samsung's invoicing that did not appear in Whirlpool's administrative case brief. Samsung maintains that Whirlpool has therefore failed to exhaust its administrative remedies on this issue. Samsung Resp. at 17–18. Whirlpool does not respond to this argument in its reply brief. Whirlpool Reply at 29–32. Because Whirlpool failed to raise this argument below, the court agrees with Samsung that requiring exhaustion is appropriate in these circumstances as well.

B. Affiliation Between LG and its Suppliers

Whirlpool challenges Commerce's finding that LG was not affiliated with certain input suppliers. Whirlpool Br. at 11–19; *see also Decision Memorandum* at 48–51. The statute defines "affiliated persons" as persons that have at least one of a number of relationships, including "[a]ny person who controls any other person and such other person." 19 U.S.C. § 1677(33)(G). The statute further provides that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33). In making the determination of whether "control" exists, Commerce's regulations provide that it will consider *inter alia* "[c]orporate or family groupings; franchise or joint venture agreements; debt financing;" and critically for this case, "close supplier relationships." 19 C.F.R. § 351.102(b)(3); *see also* Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1 at 838 (1994) (control sufficient to establish affiliation may be demonstrated "for example, through . . . close supplier relationships") ("SAA"). Not all close supplier relationships are control relationships, however. A close supplier relationship is a control relationship under the statute when "the supplier or buyer becomes *reliant* upon the other." SAA at 838 (emphasis added).

Despite a comprehensive discussion by Commerce in the *Decision Memorandum* addressing the issue of affiliation against a well-developed factual record, *see Decision Memorandum* at 48–51, Whirlpool challenges the issue of affiliation through an elaborate, multipart argument that the administrative record mandates that LG is affiliated with certain suppliers.

Whirlpool begins with a "legal" challenge. Whirlpool argues that "Commerce plainly adopted a standard of exclusivity as a prerequisite to finding affiliation" that "is not found in the statute or Commerce's regulations and does not reflect a reasonable interpretation of either." Whirlpool Br. at 16, 19. Whirlpool, however, does not apply the *Chevron* framework to the applicable statutory language. *See id.* at 16–19. Whirlpool also does not mention or apply the standard of review applicable to Commerce's interpretation of its own regulations. *See id.* ; *see also Am. Signature, Inc. v. United States*, 598 F.3d 816, 827 (Fed. Cir. 2010) (citing *Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009)) (explaining standard of review for agency interpretations of its own regulations).

Whirlpool's insistence that Commerce "plainly adopted a standard of exclusivity" is a mischaracterization of the *Decision Memorandum* and Commerce's collapsing analysis. Rather than "adopt a standard of exclusivity," Commerce simply applied its standard collapsing analysis, crediting as important the specific fact that LG's suppliers did not exclusively supply LG. This is therefore not a "legal" issue, but instead a more straightforward substantial evidence issue involving the relative weight Commerce accorded "exclusivity" in determining whether LG's suppliers were reliant on LG. *See* Whirlpool Br. at 15–17 ("Commerce's decision to find that LG and certain input suppliers were not affiliated through a close supplier relationship rested almost entirely on its finding that the suppliers did not exclusively supply LG.").

When framed properly as a substantial evidence issue, Whirlpool's arguments are unavailing. Whirlpool contends that Commerce weighed the duration and terms of the supply agreements and the suppliers' profitability too heavily in its analysis. Whirlpool explains that LG maintained loan agreements with its suppliers that extended over longer terms than the supply agreements, and that the suppliers were profitable because of the loans and other help provided by LG. Whirlpool also argues that "Commerce misunderstood the relevance of LG supplying raw materials for less than market value to its suppliers," insisting that this arrangement "tied the suppliers to LG" suggesting a potential for control. *Id.* at 18. Whirlpool argues that the record instead supports a finding that LG had the potential to control its suppliers. Specifically, according to Whirlpool, LG: (1) purchased an overwhelming majority of certain suppliers' production; (2) transferred raw materials to suppliers at less than market price; (3) provided no-interest loans to four suppliers and specified how those loans were to be used; (4) provided technical assistance to increase suppliers' productivity; (5) replaced suppliers' old facilities; (6) "partnered" with suppliers "to venture into foreign markets;" and (7) collaborated with suppliers and met customers together; and engaged in other business proprietary activity with suppliers indicative of an affiliation. *Id.* at 13–17.

These arguments are ultimately not responsive to the substantial evidence standard of review because they fail to address the whole administrative record. Whirlpool does not account for the record information that detracts from Whirlpool's preferred affiliation outcome. An administrative record for an antidumping investigation may support two or more reasonable, though inconsistent, determinations on a given issue. Whirlpool's argument just emphasizes that portion of the administrative record that supports its preferred outcome. For Whirlpool to prevail on judicial review on fact-intensive issues like control and affiliation, the administrative record must support one and only one determination. In other words, Commerce's conclusion that LG's suppliers were not affiliated with LG would have to have been unreasonable because the overwhelming weight of information and argument on the administrative record demonstrates that they were affiliated with LG.

Here, that was not the case. The issue of affiliation was arguable. Despite the "high level of cooperation and convenience that LG and its suppliers employ in their commercial relationships," Commerce found that "record evidence regarding the suppliers' sales establishes that LG's input suppliers could, and did, look to other unaffiliated buyers of their goods," and reasonably concluded that arrangement "belies the existence of a relationship in which the suppliers have become 'reliant' on LG." *Decision Memorandum* at 49. Commerce explained that it also considered "(i) the terms and provisions of supply agreements; (ii) the relative percentage that sales to LG represented of each of the suppliers' total sales; (iii) the terms of any financing agreements with the suppliers; and (iv) the overall profitability of the suppliers." *Id.* Commerce found that the supply agreements were short-term in nature, were renewable at either party's option, and did not prohibit sellers from selling to other buyers. Commerce also found that no supplier sold exclusively to LG, and that the suppliers were all profitable. *Id.* at 49–50. Commerce noted that LG does not assume any risk in extending credit to its suppliers because the agreements require the suppliers to post collateral in the form of credit guarantees from commercial banks. *Id.* at 50. Commerce concluded that LG's suppliers are not reliant on LG, and that therefore, LG's relationship with its suppliers is not a control relationship under the statute.

The information and argument on the administrative record was not so one-sided to require Commerce to find that LG's suppliers were reliant upon LG. The court therefore cannot, on this administrative record, direct Commerce by affirmative injunction to find that LG is affiliated with its suppliers.

On the same issue of affiliation, Whirlpool argues that Commerce erroneously deviated from a past administrative precedent in which it found affiliation. Whirlpool Br. at 15 (citing *Certain Welded Stainless Steel Pipe from Taiwan*, 62 Fed. Reg. 37,543 (Dep't of Commerce July 14, 1997) (final results admin. review) ("*Steel Pipe*")). There is a general principle of administrative law that "an agency must either follow its own precedents or explain why it departs from them." *See generally*, 2 Richard J. Pierce, *Administrative Law Treatise* § 11.5, at 1037 (5th ed. 2010). Here, rather than arbitrarily deviating from a prior precedent, Commerce reasonably explained that the relationship at issue in *Steel Pipe* featured many indicia of control that were not present in this instance. The respondent in *Steel Pipe* "had full-time access to its supplier's computer system, as well as physical custody of the supplier's signature stamp," and "the supplier pledged its entire inventory and accounts receivable directly to the respondent's bank without any consideration, or even a written agreement." *Decision Memorandum* at 5051 (citing *Steel Pipe*, 62 Fed. Reg. at 37,549–50); *see also Steel Pipe*, 62 Fed. Reg. at 37,550 (finding control through a close supplier relationship in part because the respondent was the exclusive stainless steel supplier to the alleged affiliate and because there was no evidence the alleged affiliate ever looked elsewhere for stainless steel products). Whirlpool does not address these distinguishing facts. *See* Whirlpool Br. at 15.

As a final note, Whirlpool raises for the first time a brand new argument on this issue in its reply brief. Whirlpool's opening brief argues that Commerce "ignored" two facts. This argument lacks any basis because Commerce addressed those facts in its *Decision Memorandum*. *Compare* Whirlpool Br. at 17 ("Commerce ignored the fact that each supplier's sales to LG accounted for a very substantial proportion of its total sales," and "Commerce ignored that the zero interest loan provided by LG to the suppliers bound [the suppliers] to LG for terms of [numerous] years.") *with Decision Memorandum* at 49 ("Another factor we considered in our analysis was the relative percentage that sales to LG represented of each of the supplier's total sales," and "we also examined the terms of any financing agreements with the suppliers."). Nevertheless, in its reply brief Whirlpool identifies *five* additional facts that Commerce supposedly "ignored." Whirlpool Reply at 8-11. Whirlpool may not introduce these new arguments for the first time in its reply. *See SmithKline*, 439 F.3d at 1320; *see also* Scheduling Order at 4 (June 13, 2013), ECF No. 22 ("The reply brief may not introduce new arguments.").

The court therefore sustains Commerce's conclusion that LG is not affiliated to its suppliers through a close supplier relationship.

C. Unaccounted Costs of Production for LG

Whirlpool argues that Commerce failed to address its argument that LG's cost of production may not reflect certain "costs related to specific sub-assemblies for washers supplied by certain suppliers." Whirlpool Br. at 19. Whirlpool cites record evidence showing that LG provided loans to its suppliers and that LG shared engineers, know-how, and equipment with its suppliers. According to Whirlpool, Commerce "dispatched this important contention with one blithe comment," and that remand is therefore necessary "for further investigation." *Id.* at 20–21 (citing *Decision Memorandum* at 51).

Commerce responded to Whirlpool's contention that LG's cost of production did not include certain expenditures by explaining that it "verified that LG had accounted for all appropriate manufacturing, G & A, and financing expenses in its reported costs." *Decision Memorandum* at 51. "Verification is a spot check and is not intended to be an exhaustive examination of a respondent's business." *Monsanto Co. v. United States*, 12 CIT 937, 944, 698 F. Supp. 275, 281 (1988); *see also Micron Tech v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997); *U.S. Steel Group v. United States*, 22 CIT 104, 107, 998 F. Supp. 1151, 1154 (1998); *PMC Specialties Group Inc. v. United States*, 20 CIT 1130, 1134 (1996). Commerce is "*not* required . . . [to] trace through every number of the response–a representative sample is sufficient." *Micron*, 117 F.3d at 1396. Commerce inferred that LG properly reported its financing and technical support costs because Commerce was able to reconcile a representative sample of LG's costs during verification. Although brief, Commerce's explanation provides a reasonably discernable path that addresses Whirlpool's contention. *Decision Memorandum* at 51; *see NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1321–22 (Fed. Cir. 2009) (The court must sustain a determination "'of less than ideal clarity'" where Commerce's decisional path is reasonably discernable. (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 281, 286 (1974))).

Whirlpool would have preferred if Commerce had identified direct evidence indicating that LG reported its financing and technical support costs. *See* Whirlpool Br. at 19–21; Whirlpool Reply at 12–13. Whirlpool does not, however, demonstrate why Commerce's inference that LG did report financing and technical support costs is unreasonable. For example, Whirlpool does not show that the sample Commerce verified was not statistically valid, and Whirlpool does not analyze the adequacy of Commerce's verification procedures. Whirlpool also does not explain why LG should have separately itemized its financing and technical support costs in its responses. *See* Whirlpool Br. at 19–21; Whirlpool Reply at 12–13. All Whirlpool offers is its own negative inference about the absence of direct evidence. That alone is insufficient to undermine the reasonableness of Commerce's inference from the available record evidence. *Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Technical, Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) ("The question is whether the record adequately supports the decision of [Commerce], not whether some other inference could reasonably have been drawn."). The court therefore sustains this aspect of the *Final Results*.

D. Departure from Past Practice in not Applying AFA to LG

Whirlpool argues that Commerce unreasonably departed from its past practice in not applying partial adverse facts available ("AFA") to LG for LG's reporting of three rebate programs: REBATE1U, REBATE5H, and REBATE4U. Whirlpool Br. at 21–27. Once again, the court is not persuaded.

Commerce uses facts otherwise available under 19 U.S.C. § 1677e when "necessary information is not available on the record" or when "an interested party . . . withholds information that has been requested by [Commerce], . . . fails to provide such information by the deadlines for submission of the information or in the form and manner requested[,] . . . significantly impedes a proceeding[,] . . . or . . .

provides such information but the information cannot be verified." 19 U.S.C. § 1677e(a). Commerce "may use an inference that is adverse . . . in selecting from among the facts otherwise available" when an interested party "fails to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* § 1677e(b).

In *Bottom Mount Combination Refrigerator-Freezers from Korea*, 77 Fed. Reg. 17,413 (Dep't of Commerce Mar. 26, 2012) ("*Refrigerators*"), Commerce applied partial AFA to LG because LG failed to disclose its rebate allocation methodology to Commerce's satisfaction and because LG's rebate allocation methodology produced distortions. Issues and Decision Memorandum for the Antidumping Duty Investigation of Bottom Mount Refrigerator Freezers from the Republic of Korea, A-580–865, at 40–49, 59–69 (Dep't of Commerce Mar. 16, 2012), *available at* http://enforcement.trade.gov/ frn/summary/korea-south/2012–7237–1.pdf (last visited this date) ("*Refrigerators Memorandum*"). Whirlpool insists that LG's rebate reporting in this investigation is similarly flawed. Commerce discovered at verification that a time lag between the dates of sales eligible for rebates under the REBATE1U program and the dates LG paid those rebates caused underreporting of rebate amounts and revealed the possibility that LG's two-year rebate reporting window was not sufficiently large to capture all rebates applicable to POI sales. Whirlpool Br. at 23–24. Commerce also discovered that LG's records permitted allocation of all rebates under the REBATE5H and REBATE4U programs by time period even though "LG claimed it had 'insufficient information'" to do so. *Id.* at 24 (quoting LG U.S. Verification Report at 24 (Dep't of Commerce Oct. 16, 2012), PD 446). Whirlpool argues that these deficiencies show that LG knew its methodology would not capture all rebate amounts and would cause distortions, and that LG possessed but did not report information that permitted a more specific rebate allocation. According to Whirlpool, these same problems led Commerce to apply partial AFA to LG in *Refrigerators*. *Id.* at 23–26.

In *Refrigerators*, Commerce found that LG did not act to the best of its ability in reporting its home market "sell-out" rebates" because:

> 1) LG's methodology resulted in rebate amounts which were excessive and not consistent with its commercial activity; 2) LG attempted to mask the unreasonable results of its chosen methodology by capping its reported amounts at 50 percent of gross unit price (rather than requesting guidance from the Department as to an acceptable methodology); and 3) LG failed to disclose its capping methodology in its initial questionnaire re-

> sponse, and when it finally disclosed the cap, it only did so as a note in an exhibit attached to a supplemental response, rather than in the narrative itself.

Refrigerators Memorandum at 40–41. Commerce in *Refrigerators* then detailed LG's many attempts to hide the true nature of its rebate programs and highlighted the distortions that LG's rebate reporting produced. *Id.* 41–49. Commerce made similar findings about other LG rebate programs in *Refrigerators*:

> After analyzing the facts on the record, we find that LG's methodology for calculating [LG's U.S. lump sum and sell-out rebates] was distortive because: 1) LG's methodology (before adjustment) resulted in rebates ranging from negative amounts to rates significantly exceeding gross unit price; and 2) LG's modification to this methodology via an arbitrary cap and floor did not make the results more reasonable (but instead only masked the distortion). Moreover, we find that LG did not act to the best of its ability because it: 1) did not respond fully to the Department's supplemental questions; 2) stated inaccurate information in its questionnaire responses; 3) did not disclose its methodology until verification; and 4) failed to request guidance from the Department as to an acceptable methodology (but rather tried to mask what the company itself recognized as unreasonable results by spreading what it considered to be excess amounts over other, unrelated sales).

Id. at 59; *see id.* at 59–69.

By contrast, Commerce below recognized LG's "substantial effort" at cooperating and resolving issues that emerged during verification:

> As an initial matter, we recognize that LG has put forth substantial effort and resources to address the rebate reporting deficiencies identified in *Refrigerators* in order to provide a more accurate methodology for reporting rebates in this investigation. As LG outlines in its case brief, LG has provided substantial information for the record to describe and document its rebate reporting methodology. Among other things, LG solicited a meeting with Department officials on this topic early in the investigation to seek guidance as to how it should reports its rebates. LG submitted extensive questionnaire and supplemental questionnaire responses addressing rebate reporting, and engaged in a thorough examination of rebate reporting during the two sales verifications. Although the petitioner contends that LG's overall methodology is flawed, it only provided three sets of rebate

examples where it identifies specific issues with LG's rebate reporting. As discussed further below, only with respect to one of these sets of rebates do we find cause to adjust LG's reporting. Otherwise, we accept LG's rebate reporting as reasonable and non-distortive.

a) REBATE1U

As the petitioner states, during the CEP sales verification, we identified two issues concerning the reporting of LG's sell-in rebates. We disagree with the petitioner that these issues demonstrate the overall inaccuracy and distortiveness of LG's rebate reporting. Rather, they represent the only significant issues which arose from a thorough examination of LG's methodology. LG fully disclosed its methodology in reporting these rebates in its questionnaire responses, and we obtained the necessary information at verification to revise the reported amounts in a manner we believe is more representative of these rebates. Consequently, we find no basis to conclude that LG's REBATE1U reporting is distortive, nor that LG did not act to the best of its ability in reporting REBATE1U. Thus, there is no basis to apply AFA in adjusting REBATE1U.

. . . .

With respect to the two-year window LG used to reconcile accrual amounts with actual rebate payments, we observed at verification that this methodology may not fully account for volume-based rebates because the window ended at December 31, 2011, and rebate claims for the year 2011 may have continued through 2012. At our request, LG performed an additional analysis at verification and showed that expanding the window for an additional six months captured additional rebate amounts. This revision of LG's methodology, we believe, provides a reasonable means of matching rebates paid after the POI with the sales made during the POI. Accordingly, we have adjusted the reported REBATE1U amounts using the information derived from the additional six-month period, as provided at verification. . . .

b) REBATE5H and REBATE4U

. . . .

The petitioner points to results derived from a detailed examination of specific sales selected at verification, where the Department obtained information that indicated it may have been

> possible to allocate certain rebates reported in these categories on a more specific basis. As we noted in our verification reports, LG was able to obtain additional detailed rebate information beyond its electronic records for the relatively small number of sales examined at verification, however, "it did not perform this manual exercise for the thousands of rebate programs applicable to the sales of hundreds of thousands of washing machine units during the POI." Moreover, our examination of other rebate programs reported under these variables supported LG's explanation that a more specific allocation was not possible. Given the extremely large number of sales and rebate programs involved in this investigation, and the time and resource restraints LG faced in meeting the questionnaire response deadlines, along with the fact that LG reported most rebates on a more specific basis, we find LG's REBATE5H and REBATE4U reporting methodology reasonable and, thus, we do not agree with the petitioner that we should find that LG failed to cooperate by not acting to the best of its ability and to apply AFA for these rebates.

Decision Memorandum at 39–41 (footnotes and citations omitted).

As Defendant and LG describe in their responses, *see* Def. Resp. at 66–70; LG Resp. at 10–15, LG's level of cooperation in *Refrigerators* differed from its level of cooperation in this investigation. In *Refrigerators* LG submitted misleading and inaccurate questionnaire responses, hid the full nature of its rebate programs, and refused to seek guidance from the agency in preparing its questionnaire responses. Commerce also found that LG's rebate reporting was distortive. *Refrigerators Memorandum* at 40–49, 59–69. Here, LG sought guidance from Commerce early in the investigation on how to report rebates. Additionally, LG submitted over 1,000 pages of questionnaire and supplemental responses concerning its rebate reporting, and engaged in a thorough examination of its rebate reporting during both sales verifications. Commerce found that LG "provide[d] a reasonable means" of solving issues with its REBATE1U program at verification by expanding the number of rebates it reported. *Decision Memorandum* at 40. Commerce explained that "there is no basis to apply AFA in adjusting REBATE1U" because of LG's cooperation, and accepted LG's REBATE5H and REBATE4U reporting as "reasonable and non-distortive." *Id.* at 39. Most important, Commerce distinguished the present case from *Refrigerators* by explaining that LG "put forth substantial effort and resources to address the rebate reporting deficiencies identified in *Refrigerators*." *Id.* In the court's view, Commerce provided a reasonable explanation for treating this situation differently than *Refrigerators* and therefore did not act arbitrarily in refusing to apply partial AFA to LG.

E. Commerce's Sales Below Cost Test

Whirlpool argues that Commerce's sales-below-cost test violates clear statutory language because it does not account for level of trade. Whirlpool Br. at 5–11. The court is not persuaded. Under 19 U.S.C. § 1677b(b), Commerce may exclude home market sales made at less than the cost of production from its determination of normal value if such sales "have been made within an extended period of time and in substantial quantities." 19 U.S.C. § 1677b(b)(1). Commerce explained below that it "has, over time, developed a consistent, predictable and reasonable practice in this regard to perform the sales-below-cost test and the 'substantial quantities' test on a model specific basis." *Decision Memorandum* at 43. Under this methodology, if below-cost sales represent 20 percent or more of the volume of sales of a specific model of subject merchandise, Commerce may exclude those below-cost sales. "[A]ll sales of a given model, regardless of [levels of trade], are aggregated for purposes of determining the percentage that were below cost." *Decision Memorandum* at 41. This approach has been sustained as a reasonable interpretation of 19 U.S.C. § 1677(b). *See Mitsubishi Heavy Indus., Ltd. v. United States*, 22 CIT 541, 563–65, 15 F. Supp. 2d 807, 826–28 (1998) (sustaining Commerce's sales-below-cost test as reasonable under *Chevron* step two), *after remand*, 23 CIT 326, 54 F. Supp. 2d 1183 (1999), *after remand*, 24 CIT 275, 97 F. Supp. 2d 1204 (2000), *aff'd*, 275 F.3d 1056 (Fed. Cir. 2001) (same); *NSK Ltd. v. United States*, 28 CIT 1535, 1549–53, 346 F. Supp. 2d 1312, 1326–29 (2004), *aff'd*, 481 F.3d 1355 (Fed. Cir. 2007) (same).

Whirlpool nevertheless challenges this longstanding, court-approved methodology, arguing that the statute requires Commerce to disaggregate home market sales by level of trade before determining whether below-cost sales represent 20 percent or more of the volume of sales of a specific model. Whirlpool Br. at 5–9. By way of example, Whirlpool explains that sales below cost represent more than 20% of LG's sales made at particular levels of trade when considering groups of sales at each level of trade in isolation. *Id.* at 7–8. Section 1677b(b), though, only requires Commerce to consider whether a respondent made home market sales at less than cost of production "within an extended period of time and in substantial quantities." 19 U.S.C. § 1677b(b)(1). The statute provides *no* explicit instructions on whether to aggregate sales or not before considering whether they meet those criteria. *Id.* Moreover, the phrase "level of trade" does not appear alongside "extended period of time and in substantial quantities" or anywhere else in § 1677b(b). *Id.* The SAA also explains that "the cost test generally will be performed on no wider than a model-specific basis" without any mention of "level of trade." SAA at 832; *see also* H.R. Rep. No. 571, 93rd Cong., 1st Sess. 71 (1973) (discussing sales below cost without reference to "level of trade"); S. Rep. No. 1298, 93rd Cong., 2d Sess. 173 (1974) (same). Similarly, the level of trade provision in § 1677b(a) describes how Commerce *adjusts* normal value "[i]n order to achieve a fair comparison with the export price or constructed export price," without instructing Commerce to alter the set of sales used to calculate normal value. 19 U.S.C. § 1677b(a)(7) (describing requirements for comparing foreign like product sales to U.S. sales by similar levels of trade, but not referencing foreign like product sales made below cost); *see also* 19 C.F.R. § 351.412(a) (same).

Section 1677b(b)'s references to "sales of foreign like product under consideration for the calculation of normal value" are not clear instructions to group sales by level of trade as Whirlpool claims. 19 U.S.C. § 1677b(b). Rather, as Defendant and LG explain, the statute is silent as to the overlap between level of trade and sales below cost, meaning Congressional intent on this issue is not clear. In the absence of clear Congressional intent on how to resolve the specific issue, Commerce's interpretation governs so long as it is reasonable. *See Eurodif*, 555 U.S. at 316. Commerce's long-standing sales-below-cost test addresses the statute's explicit "extended period of time and in substantial quantities" criteria as well as the SAA's specification that Commerce conduct the test on no wider than a model-specific basis. Whirlpool identifies a different approach based on level of trade that, in its view, has certain advantages and would have led to a different determination below. Whirlpool, however, fails to demonstrate that its preferred approach is the only correct interpretation of the statute. Whirlpool Br. at 5–9. The court therefore agrees with Defendant and LG that Commerce's established sales-below-cost test, which does not account for level of trade, must be sustained as a reasonable interpretation of an otherwise silent statutory provision.

Whirlpool argues in the alternative that Commerce's sales-below-cost test is unlawful because it "lacks the power to persuade" under the four factors outlined in *Skidmore v. Swift & Co.*, 323 U.S. 576 (1944), which Whirlpool insists applies here because Commerce describes its sales-below-cost test in an agency manual. *Id.* at 9–11 (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). The court, though, reviews Commerce's statutory interpretations articulated in antidumping proceedings under *Chevron*. *Pesquera Mares Australes Ltda.*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). Commerce has explained its sales-below-cost test in many antidumping proceedings over the years. *See, e.g.*, *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom*, 67 Fed. Reg. 55,780 (Dep't of Commerce Aug. 30, 2002) (final results admin. reviews); *see also Mitsubishi Heavy Indus.*, 22 CIT at 564, 15 F. Supp. 2d at 827 (sustaining Commerce's sales-below-cost test as reasonable under *Chevron*). It did so again here. *See Decision Memorandum* at 41–43. *Chevron* is therefore the appropriate standard of review, not *Skidmore*.

F. Samsung's Uncooperative Retailer and AFA

Whirlpool seeks a remand directing Commerce to apply adverse facts available to Samsung. *See* Whirlpool Br. at 27–31, 35–39. Whirlpool contended during the investigation that Samsung had submitted falsified cost and home market sales data, which to Whirlpool demonstrated "that Samsung had engaged in fraudulent manipulation of its accounting system to systematically falsify its entire accounting system." *Decision Memorandum* at 61, 67. Commerce sought information from one of Samsung's affiliated retailers to address Whirlpool's fraud allegation, but the retailer refused to cooperate. Further Discussion of Comments 16–19 in the Issues and Decision Memorandum, 1 (Dep't of Commerce Dec. 18, 2012), CD 324 ("*Supplemental Decision Memorandum*"). Commerce ultimately "found no evidence of falsified data or fraudulent conduct," and declined to apply total AFA to Samsung despite the affiliated retailer's noncooperation. *Decision Memorandum* at 67–68, 73.

In essence, Whirlpool argues that Samsung could have compelled its affiliated customer to participate but did not, meaning that Samsung did not cooperate to the best of its ability. Whirlpool contends that the shared family ownership between Samsung and its affiliated retailer positioned Samsung to compel its affiliate to cooperate. Whirlpool Reply at 20; Whirlpool Br. at 35–36. Whirlpool also challenges Commerce's treatment of other facts that weighed on its conclusion. In particular, Whirlpool highlights the affiliate's cooperation during the *Refrigerators* investigation, and points out that Samsung only used management-level employees to communicate with the affiliate rather than higher-level officers or directors. In Whirlpool's view, Samsung's effort at obtaining its affiliated retailer's cooperation was "half-hearted." Whirlpool Br. at 38.

Whirlpool's argument is unpersuasive on this administrative record. Commerce reasonably found that Samsung demonstrated it could not compel its affiliated retailer to cooperate, and more broadly that Samsung acted to the best of its ability. *See Decision Memorandum* at 67–72; *Supplemental Decision Memorandum* at 6–10. Commerce explained that it took numerous special steps in response to Whirlpool's fraud allegation, including: (1) issuing a supplemental questionnaire on the allegation to Samsung,(2) reviewing Samsung's response and other relevant data, (3) postponing verification of Samsung to ensure Commerce had adequate time to prepare, (4) meeting with Whirlpool's counsel and accounting expert to help Commerce prepare for verification, (5) staffing Commerce's verification with two sales analysts and two consultants, (6) requesting data from the home market customer (who ultimately refused to cooperate), (7) conducting a "surprise" visit to another Samsung home market customer (who did cooperate), (8) using several "surprise" testing methods that Whirlpool's accounting consultant recommended and that Commerce did not disclose to Samsung in advance, and (9) conducting extensive testing of Samsung's accounting system, including the data Whirlpool flagged as indicative of fraud. *Decision Memorandum* at 67–70. Commerce detailed steps Samsung took to accommodate each of these requests. *See id.* Further, Commerce described Samsung's "significant efforts" in trying to obtain cooperation from the affiliated retailer. Commerce noted that Samsung contacted its affiliate within one day of Commerce's notification of the need to verify the affiliate's purchase data, and that Samsung communicated with the affiliate about cooperating with the investigation several times. *Supplemental Decision Memorandum* at 8.

Whirlpool stresses the shared family grouping in arguing that Samsung could compel its affiliate to cooperate. Commerce, though, reasonably found that other evidence on the record softened the relative impact of the shared family grouping. As Commerce explained below, none of the enumerated factors besides "family groupings" applies to Samsung and its affiliated retailer. Samsung and its directors did not have any significant stock ownership in the affiliated retailer. Samsung and the affiliated retailer shared no corporate board members or managers. Commerce could not find any evidence of intertwined operations between the two companies. *Id.* at 8. Importantly, Samsung provided documentation of events affecting its relationship with its affiliate[3] undermining Whirlpool's insistence that Samsung could

[3] "Samsung provided documentation demonstrating that it was involved in [[ ]]" with its affiliated retailer. *Supplemental Decision Memorandum* at 10.

compel its affiliate to act by virtue of the shared family grouping. *Id.* at 10. Commerce also explained that there was "no evidence that Samsung secured [its affiliate's] cooperation in [*Refrigerators*] through compulsion" and that "the timing of these events indicates that [the retailer] and Samsung may have been on better terms during [*Refrigerators*] while their relationship deteriorated to the point that [the retailer] was no longer willing to advance Samsung's interests through its cooperation with [Commerce's] requests." *Id.* In sum, Commerce found little evidence indicating that Samsung might actually be legally or operationally in a position to exercise restraint or direction over its affiliate. Coupled with the steps Samsung took at Commerce's behest to obtain the retailer's cooperation, Commerce reasonably found that Samsung could not compel its retailer to cooperate.

G. Date of Sale

During the proceeding Commerce selected shipment date as the date of sale for Samsung's transactions because Commerce determined that the material terms of sale were set by that date. *Supplementary Decision Memorandum* at 23. Pursuant to regulation Commerce normally uses the date of invoice as the date of sale, but "may use a date other than the date of invoice if [Commerce] is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." 19 C.F.R. § 351.401(i); *see generally Yieh Phui Enter. Co. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1319, 1322–24 (2011) (describing in detail Commerce's date of sale regulation). Whirlpool argues that Commerce erred in selecting shipment date rather than invoice date as the date of sale for a particular subset of Samsung's transactions that according to Whirlpool involved changes to material terms *after* shipment date. Whirlpool Br. at 39–44.

Commerce, though, did not agree with Whirlpool that the underlying *agreements* between Samsung and its customers materially changed. *Supplemental Decision Memorandum* at 23–24. Instead, as Commerce reasonably explained, an event occurred[4] during shipment that triggered a conditional item within Samsung's customer agreements, which provided that Samsung would compensate its customers for that particular event. *Id.* at 23. Commerce explained that Samsung and its customers contemplated the event, and provided for Samsung to make payments to its customers for such an event. To Commerce the changes Whirlpool identifies were therefore not mate-

[4] [[ ]].

rial changes to the underlying sales agreements, but rather the unremarkable result of conditional terms within the sales agreements applying to these particular transactions. *Id.* at 23–24. There is evidentiary support within the record for a reasonable mind to so conclude. The court therefore sustains Commerce's selection of shipment date as the date of sale.

H. Warranty Expenses

Commerce treated certain Samsung expenses[5] as direct warranty expenses, and as a consequence reduced Samsung's constructed export price. *Supplemental Decision Memorandum* at 18 (citing 19 U.S.C. § 1677a(d)(1)(B)). In keeping with its past practice, however, Commerce did not reduce Samsung's constructed export price by the full amount of the event expenses. Commerce relies "on a company's three-year average of warranty expenses . . . in place of the [period of investigation] warranty expenses if there is evidence that the [period of investigation] expenses are not representative of a respondent's historical experience, thereby mitigating the impact of warranty claims that may by nature occur at irregular intervals." Issues and Decision Memorandum for the Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People's Republic of China, A-570–979, at 80 (Dep't of Commerce Oct. 9, 2012), *available at* http://enforcement.trade.gov/frn/summary/ prc/2012–25580–1.pdf (last visited this date) (citing *Wooden Bedroom Furniture from the People's Republic of China*, 76 Fed. Reg. 49,729 (Dep't of Commerce Aug. 11, 2011) (final results admin. review); *Chlorinated Isocyanurates from Spain*, 74 Fed. Reg. 50,774 (Dep't of Commerce Oct. 1, 2009) (final results admin. review)). Whirlpool agrees with Commerce's decision to reduce Samsung's constructed export price to account for the event expenses. Whirlpool, though, disputes Commerce's treatment of those expenses as warranty expenses and seeks a remand directing Commerce to reduce Samsung's constructed export price by the full amount.

Whirlpool alleges that "Commerce acted contrary to law by recategorizing these expenses as warranty expenses," believing that Commerce must categorize expenses in accordance with a respondent's accounting system when that system complies with generally accepted accounting principles. *See* Whirlpool Br. at 47. Whirlpool, however, again does not identify a clear statutory provision that

[5] [[ ]], affecting "a significant number of washers." *Supplemental Decision Memorandum* at 10.

prohibits Commerce from treating the event expenses as warranty expenses or evaluate the reasonableness of Commerce's interpretation under *Chevron* step two. *See id.* at 44–50; Whirlpool Reply at 33–37. The court therefore cannot identify a "legal" issue here.

The main thrust of Whirlpool's argument is instead that Commerce unreasonably treated these expenses as warranty expenses (a substantial evidence argument). Whirlpool argues that Samsung maintained a monthly warranty reserve that it used to cover "actual warranty expenses," such as the cost of parts for repair, service fees, and scrapping defective units. Whirlpool Br. at 47–50. Whirlpool further argues that Samsung did not cover the expenses using this warranty reserve, and did not otherwise treat those expenses as warranty expenses in its own accounting system. *Id.* Whirlpool also argues that certain specific expenses[6] Samsung incurred are more analogous to direct expenses that are not direct warranty expenses. Whirlpool contends that these expenses are a direct and unavoidable consequence of specific sales and incident to bringing the subject merchandise from Korea to the place of delivery. *Id.* at 47. Lastly, although Whirlpool concedes that Commerce has previously treated certain kinds of expenses[7] as warranty expenses in *Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People's Republic of China*, 77 Fed. Reg. 63,791 (Dep't of Commerce Oct. 17, 2012) (final LTFV determ.) ("*Solar Cells*"), Whirlpool nevertheless argues that the particular expenses here are distinguishable, and that Samsung did not experience these expenses in "irregular intervals . . . over a three year period." *Id.*

The court does not agree with Whirlpool. Commerce below explained that it consistently treats expenses like those in *Solar Cells* as warranty expenses, and reasonably found that Samsung's expenses are similar to those in *Solar Cells*. *Supplemental Decision Memorandum*, at 19.[8] Commerce also noted that a typical warranty claim might include expenses similar to those Samsung incurred here.[9] The court is not convinced that the purported differences Whirlpool details in its brief undermine Commerce's reasonable conclusion that Samsung's expenses were similar to warranty expenses. *See id.* Furthermore, Samsung experienced the event only once during the period of investigation, which reasonably led Commerce to find that the associated expenses were not representative of Sam-

[6] [[ ]] expenses.

[7] [[ ]] expenses.

[8] Specifically, Commerce explained that "[[ ]]." *Supplemental Decision Memorandum* at 19.

[9] Specifically, expenses associated with [[ ]].

sung's historical warranty expenses. In the court's view Commerce reasonably calculated a three-year average warranty expenses for Samsung in harmony with past practice. *Id.* (citing *Honey from Argentina*, 71 Fed. Reg. 26,333 (Dep't of Commerce May 4, 2006)).

Samsung's treatment of the expenses in its own accounting system may support an alternative calculation of constructed export price, but the court does not agree with Whirlpool that Commerce's treatment is unreasonable merely because of this possibility. Whirlpool's arguments amount to the identification of a potential reasonable alternative finding Commerce could have made on the same facts. In any event, Commerce's treatment of Samsung's expenses was reasonable. The court therefore will sustain this issue.

III. Conclusion

For the foregoing reasons, the court sustains the *Final Results* for each of the issues Whirlpool has raised in its motion for judgment on the agency record. Judgment will be entered accordingly.

Dated: Dated: June 12, 2015
New York, New York

/S/ LEO M. GORDON
Judge Leo M. Gordon

Slip Op. 15–58

SAMSUNG ELECTRONICS CO., LTD., AND SAMSUNG ELECTRONICS AMERICA, INC., Plaintiffs, v. UNITED STATES, Defendant

Before: Leo M. Gordon, Judge
Consol. Court No. 13–00098

[Motions for judgment on agency record denied; final determination of sales at less than fair value sustained in part.]

Dated: Dated: June 12, 2015

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Jack A. Levy, *Myles S. Getlan*, *James R. Cannon, Jr. John D. Greenwald*, *Matthew Frumin*, and *Thomas M. Beline*, Cassidy Levy Kent (USA) LLP of Washington, D.C. for Plaintiff and Defendant-Intervenor Whirlpool Corporation.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant United States. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. David-*

son, Director, *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Joanna V. Theiss*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance for the United States Department of Commerce.

OPINION

Gordon, Judge:

This consolidated action involves a U.S. Department of Commerce ("Defendant" or "Commerce") final determination in the less than fair value investigation of large residential washers from the Republic of Korea. *Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,988 (Dep't of Commerce Dec. 26, 2012) (final determ. LTFV investigation) ("*Final Results*"); *see also* Issues and Decision Memorandum for the Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea, A-580–868 (Dep't of Commerce Dec. 26, 2012), *available at* http://enforcement.trade.gov/frn/summary/korea-south/2012–31104–1.pdf (last visited thi date) ("*Decision Memorandum*"). Before the court are the motions for judgment on the agency record of Plaintiffs Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively, "Samsung"), Consolidated Plaintiffs LG Electronics Inc. and LG Electronics USA, Inc. (collectively, "LG"), and Consolidated Plaintiff Whirlpool Corporation ("Whirlpool"). This opinion addresses Samsung and LG's challenges to the *Final Results*. *See* Br. of Respondent Pls. LG Elecs. & LG Elecs. USA in Supp. of their Mot. for J. on the Agency R. (Sept. 27, 2013), ECF No. 43 ("LG Br."); Mem. of Pls. Samsung Elecs. Co., Ltd. & Samsung Elecs. Am., Inc. in Supp. of their Rule 56.2 Mot. for J. upon the Agency R. (Sept. 27, 2013), ECF No. 45 ("Samsung Br."); Def.'s Consol. Resp. to Pls.' Mots. for J. on the Agency R. 1–50 (Feb. 14, 2014), ECF No. 62 ("Def. Resp."); Resp. Br. of Whirlpool Corp. 1–24 (Mar. 7, 2014), ECF No. 68; Reply Br. of Pls. Samsung Elecs. Co., Ltd., & Samsung Elecs. Am., Inc. (Apr. 21, 2014), ECF No. 81 ("Samsung Reply"); Consol. Pls. LG Elecs., Inc.'s & LG Elecs. USA, Inc.'s Reply Br. (Apr. 21, 2014), ECF No. 82. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[1] and 28 U.S.C. § 1581(c) (2012).

Specifically, Samsung argues that Commerce's targeted dumping analysis violates the statute because (1) Commerce's established targeted dumping test uses weighted average prices instead of individual transaction prices and (2) Commerce thereafter applied the average-to-transaction price comparison to all of Samsung's sales rather than a subset of those sales. LG raises similar arguments,

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

albeit with emphasis on different points, and adds that Commerce unlawfully excluded certain home market sales from its model-matching analysis.

For the reasons set forth below, the court denies both motions and sustains the *Final Results* for each of the issues raised.

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). 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. 2015). 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. 2015).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

II. Discussion

A. Targeted Dumping

Commerce calculates a respondent's dumping margin by determining the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). The statute provides three methods for comparing normal value to export price or constructed export price to make this calculation: (1) average-to-average ("A-to-A"), (2) transaction-to-transaction ("T-to-T"),[2] and (3) average-to-transaction ("A-to-T"). *Id.* § 1677f-1(d)(1). Under the A-to-A methodology, Commerce compares weighted-average normal values to weighted-average export prices or constructed export prices, whereas under the A-to-T methodology, Commerce compares weighted average normal values to export prices or constructed export prices of individual transactions. 19 C.F.R. § 351.414(b)(1)-(2).

The statute allows for the A-to-T methodology as an exception to the other methodologies. 19 U.S.C. § 1677f-1(d)(1)(A). Specifically, Commerce may apply the A-to-T methodology "if (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time, and (ii) the administering authority explains why such differences cannot be taken into account using" the A-to-A or T-to-T methodologies. *Id.* § 1677f-1(d)(1)(B). Pricing that meets both conditions is known as "targeted dumping."

Commerce in *Certain Steel Nails from the United Arab Emirates*, 73 Fed. Reg. 33,985 (Dep't of Commerce June 16, 2008) and *Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 33,977 (Dep't of Commerce June 16, 2008) (collectively, "*Nails*") adopted a practice for evaluating whether a respondent has engaged in targeted dumping. This so-called "*Nails* test" begins with two statistical analyses: the "standard deviation test" and the "price gap test." If these two tests reveal a pattern of export prices or constructed export prices that differ significantly among purchasers, regions, or period of time, Commerce next considers whether the A-to-A methodology could take into account the observed price differences. Commerce does so by determining whether there is a "meaningful difference" between the results of the A-to-A methodology and the A-to-T methodology. Commerce explained its application of these procedures below:

[2] Commerce "will use the [T-to-T] method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." 19 C.F.R. § 351.414(c)(2).

In the first stage of the test, the "standard-deviation test," we determined the volume of the allegedly targeted group's sales of subject merchandise that are at prices more than one standard deviation below the weighted-average price of all sales during the POI, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (i.e., by CONNUM) using the POI-wide weighted-average sales prices for the allegedly targeted groups and the groups not alleged to have been targeted. If that volume did not exceed 33 percent of the total volume of a respondent's sales of subject merchandise for the allegedly targeted group, then we did not conduct the second stage of the *Nails* test. If that volume exceeded 33 percent of the total volume of a respondent's sales of subject merchandise for the allegedly targeted group, on the other hand, then we proceeded to the second stage of the *Nails* test.

In the second stage, we examined all sales of identical merchandise (i.e., by CONNUM) sold to the allegedly targeted group which passed the standard-deviat[i]on test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales to the allegedly targeted group and the next higher weighted-average price of sales for a non-targeted group exceeds the average price gap (weighted by sales volume) between the non-targeted groups. We weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted sales were not included in the non-targeted group; the allegedly targeted group's weighted-average sales price was compared only to the weighted-average sales prices to the non-targeted groups. If the volume of the sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly targeted group, then we determined that targeting occurred.

If we determined that a sufficient volume of U.S. sales were found to have passed the *Nails* test, then the Department considered whether the average-to-average method could take into account the observed price differences. To do this, the Department evaluated the difference between the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using the average-to-transaction method. Where there was a meaningful difference between the results of the average-to-

> average method and the average-to-transaction method, the average-to-average method would not be able to take into account such price differences, and the average-to-transaction method would be used to calculate the weighted-average margin of dumping for the respondent in question. Where there was not a meaningful difference in the results, the average-to-average method would be able to take into account such price differences, and the average-to-average method would be used to calculate the weighted-average dumping margin for the respondent in question.

Decision Memorandum at 19–20 (footnote omitted). For a comprehensive explanation of the *Nails* test *see* Judge Restani's discussion in *Mid Continent Nail Corp. v. United States*, 34 CIT ___, ___, 712 F. Supp. 2d 1370, 1373–79 (2010).

Applying this test, Commerce below concluded that LG and Samsung exhibited a pattern of export prices or constructed export prices that differ significantly over certain purchasers, regions, and time periods, and that those differences could not be taken into account using the A-to-A methodology.[3] Commerce then applied the A-to-T methodology to all of LG and Samsung's sales. *Id.* at 20.

1. Consistency of the *Nails* test with the law

The U.S. Court of International Trade ("CIT") has sustained the *Nails* test as consistent with 19 U.S.C. § 1677f-1(d)(1)(B) on several prior occasions. *See, e.g.*, *JBF RAK LLC v. United States*, 38 CIT ___, ___, 991 F. Supp. 2d 1343, 1353–55 (2014); *Timken Co. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1279, 1290–93 (2014); *Mid Continent Nail*, 34 CIT at ___, 712 F. Supp. 2d at 1377–79. LG and Samsung maintain, however, that the *Nails* test violated the statute, primarily because Commerce failed to use individual transaction prices rather than average prices in analyzing export prices. LG Br. at 16–33; Samsung Br. at 2–32.

Section 1677f-1(d)(1)(B) conditions application of the A-to-T methodology on "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." 19 U.S.C. § 1677f1(d)(1)(B)(i). Con-

[3] Commerce in a subsequent proceeding adopted a new targeted dumping methodology that is not at issue in this action. *See* Issues and Decision Memorandum for the Antidumping Duty Investigation of Xantham Gum from the People's Republic of China, A570–985, at 23–29 (Dep't of Commerce May 28, 2013), *available at* http://enforcement.trade.gov/frn/summary/prc/2013–13220–1.pdf (describing the new "differential pricing" analysis) (last visited this date).

gress did not modify the phrase "pattern of export prices (or constructed export prices)" with either "weighted average" or "individual transactions." *Id.* Congress could have used either modifier, but chose not to. This omission is critical because *both* appear in the immediately preceding segment of the statute. Specifically, Congress defined the A-to-T methodology as "comparing the *weighted average* of the normal values to the export prices (or constructed export prices) *of individual transactions* for comparable merchandise." *Id.* § 1677f-1(d)(1)(B) (emphasis added); *see also* Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1 at 843 (1994) (providing for "comparison of average normal values to individual export prices or constructed export prices in situations where an [A-to-A] or [T-to-T] methodology cannot account for a pattern of prices that differ significantly" without specifying "pattern of prices"). This construction shows that Congress remained silent on whether "a pattern of export prices" means more specifically "a pattern of *weighted average* export prices" or "a pattern of export prices *of individual transactions*."

Commerce's decision to use weighted average prices therefore controls here so long as it is reasonable. And Commerce below provided a reasonable justification for using weighted averages instead of individual transaction prices:

> [I]n exercising our discretion, we interpret "export prices" (as well as "constructed export prices") in [19 U.S.C. § 1677f-1(d)(1)(B)(i)] to mean a weighted average of the individual sales prices. In the context of testing to *see* whether purchasers, time periods, or regions have been targeted, the relevant price variance, in the Department's view, is the variance in price across purchasers, time periods, and regions, not across transactions. For this reason, the Department approaches the problem by analyzing the variance of the weighted-average sales prices paid by each group.

Decision Memorandum at 20–21 (emphasis in original) (citations omitted). The court must therefore sustain Commerce's use of average prices instead of individual transaction prices. *See Gold E. Paper (Jiangsu) Co. v. United States*, 37 CIT ___, ___, 918 F. Supp. 2d 1317, 1328 (2013) (sustaining as reasonable under *Chevron* Commerce's use of average prices instead of transaction prices).

LG and Samsung nevertheless contend that the use of average prices violates the plain language of the statute. LG Br. at 16–33; Samsung Br. at 17–20. The court does not agree. As described above, Congress did not modify "export prices (or constructed export prices)" in § 1677f-1(d)(1)(B)(i) with *either* "weighted averages" or "individual transactions" when defining targeted dumping, even though Congress used both phrases in defining the A-to-T methodology in § 1677f-1(d)(1)(B). Although LG and Samsung provide numerous textual justifications to support their own interpretation, their view is not the one and only one possible. Congress' silence leaves Commerce with a measure of discretion to craft a targeted dumping analysis that considers average prices instead of transaction prices.

LG and Samsung also argue that Commerce's interpretation is unreasonable. LG and Samsung insist that average prices are inherently distortive and both provide many examples using hypothetical and record data to illustrate the problems they perceive with using average prices instead of transaction prices. To LG and Samsung, averaging prices masks the true nature of the underlying data because it hides variability from one transaction to another. LG Br. at 16–29; Samsung Br. at 9–16, 21–27. LG adds that using average prices could exaggerate the volume of targeted sales, since each averaged group could include higher-priced sales. LG Br. at 25–29. The court again does not agree. The question before the court is whether Commerce's interpretation of 19 U.S.C. § 1677f1(d)(1)(B)(i) is reasonable, not whether some other approach might produce a different (or even a better) result. Commerce below explained that "[t]he focus of the statute is not . . . on the variation of transaction-specific sales *per se*, or even on a difference between individual transactions to a particular group." *Decision Memorandum* at 21. Instead, "the statute is explicitly concerned with export prices that 'differ significantly *among* purchasers, regions, or periods of time,'" or in other words, differences among the groups of purchasers, regions, or periods of time themselves. *Id.* 21 (quoting 19 U.S.C. § 1677f1(d)(1)(B)(i)) (emphasis in original). *Id.* Commerce applied the *Nails* test to groups of sales averaged by individual purchasers, regions, and time periods to measure the degree to which export prices differed among purchasers, among regions, and among periods of time. This approach enabled Commerce "to disregard meaningless variations" between individual transactions "and focus instead on uncovering a pattern of prices among groups." *Id.* (emphasis omitted).

LG further challenges step two of the *Nails* test as inconsistent with the statute because, in LG's view, it "ignores" relevant data. LG Br. at 29–33. The court disagrees. The statute requires Commerce to identify a pattern of prices that "differ significantly." The statute does so *without* describing the thing from which those prices must differ or how great that difference must be. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(i). Commerce addresses the significant difference requirement in step two of the *Nails* test by "looking up" from each targeted group's average price to the next-highest non-targeted group and measuring the gap. Commerce reasonably uses these gaps to quantify, in objective mathematical terms, the significance of the price gap associated with the targeted group as compared to the price gaps of non-targeted groups. Commerce in other words does not consider the distance between targeted groups because step two of the *Nails* test measures the relative significance of the distances between targeted groups and non-targeted groups. *See Decision Memorandum* at 19–20; *see also* Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Steel Nails from the United Arab Emirates, A-520–804, at 12–13 (Dep't of Commerce Mar. 19, 2012) ("*Nails Decision Memorandum*") (detailing mathematical rationale behind step two of the *Nails* test). LG claims that Commerce's gap test "ignores" prices below the targeted group's average price, but just as Commerce observed below, *see Decision Memorandum* at 21, LG does not show why the significant-difference requirement can *only* be met by measuring the distance between targeted groups as it prefers.

Finally, LG and Samsung argue that Commerce failed to explain why the A-to-A methodology could not account for the observed price differences in violation of 19 U.S.C. § 1677f-1(d)(1)(B)(ii). LG Br. at 37–39; Samsung Br. at 36–37. Defendant, though, agrees with LG and Samsung that 19 U.S.C. § 1677f-1(d)(1)(B)(ii) requires an explanation, and identifies where Commerce made that explanation in the *Decision Memorandum*. Def. Br. at 22 (citing *Decision Memorandum* at 20). This argument is therefore not a *Chevron* challenge on the question of whether the statute requires an explanation (it does), but instead a challenge to the reasonableness of the explanation provided by Commerce. Commerce below explained that "the A-to-A method does not take into account such price differences because there is a *meaningful difference* in the weighted average dumping margins when calculated using the A-to-A method and the A-to-T method for both respondents." *Decision Memorandum* at 20 (emphasis added). Specifically, Samsung's margin increased from *de minimis* to 9.29% using A-to-T, and LG's margin increased from a proprietary margin to 13.02% using A-to-T. *See* LG Electronics Final Determination Margin Calculation Memorandum, Att. 2 at 127 (Dep't of Commerce Dec. 18, 2012), CD 320[4]; Samsung Final Determination Margin Calculation Memorandum, Att. 2 at 125 (Dep't of Commerce Dec. 18, 2012), CD 319. Commerce's explanation is reasonable. *Cf. Apex Frozen Foods Private Ltd. v. United States*, 38 CIT ___, ___, 37 F. Supp. 3d 1286, 1294–300 (2014) (sustaining similar explanation as reasonable in the

[4] "CD" refers to a document contained in the confidential administrative record.

context of arbitrariness review, and commenting in dicta that a similar explanation would survive substantial evidence review).

In sum, LG and Samsung's arguments amount to a request that the court order Commerce to redefine targeted dumping as something other than that defined by Commerce. LG and Samsung would prefer that a finding of targeted dumping depend upon the level of variance between low-priced individual export or constructed export prices, and both offer good arguments for why their preferred definition may comport with the statute's language. LG and Samsung's preferred definition is not the only possible way to construe the statute, however. Commerce's *Nails* test also represents a reasonable interpretation of a silent statutory provision and must therefore be sustained.

2. Samsung's subjective considerations

Samsung argues that Commerce "refused to consider any of the numerous factual considerations" behind its pricing strategies, such as rebates and holiday discounts, that led Commerce to find targeted dumping. Samsung Br. at 7–9, 27–32. According to Samsung, "on any given day and in any given locality, Samsung is likely to be charging a wide variety of prices for the same [large residential washer] model. That is simply how the entire consumer electronics industry works." *Id.* at 9.

Samsung effectively reads an "intent" requirement into the statute, urging the court to remand because it had legitimate commercial justifications for differential pricing that Commerce refused to consider. Section 1677f–1(d)(1)(B), however, only instructs Commerce to consider export price (or constructed export price) patterns in its targeted dumping analysis. It does not require Commerce to investigate the subjective reasons a respondent may have for pricing its merchandise. Samsung's argument therefore fails under *Chevron*. *See Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 38 CIT ___, ___, 990 F. Supp. 2d 1384, 1387–89 (2014); *JBF RAK*, 38 CIT at ___, 991 F. Supp. 2d at 1353–55.

Similarly, Samsung argues that the *Nails* test makes it "[i]mpossible" for a respondent to avoid a finding of targeted dumping because it is complex and unpredictable. Samsung Br. at 21–24. Samsung's argument is not persuasive. "The absence of certainty regarding the dumping margins and final assessment of antidumping duties is a characteristic of the retrospective system of administrative reviews designed by Congress." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1381 (Fed. Cir. 2008); *see* 19 C.F.R. § 351.212(a) ("Unlike the systems of some other countries, the United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported."). The statute does not specify the methodology Commerce must employ to determine whether a respondent's sales exhibit a pattern of export or constructed export prices that differ significantly among purchasers, regions, or periods of time. Commerce filled that silence with the *Nails* test, which it had applied several times before commencing this investigation. Samsung's discomfort with a lack of certainty does not undermine the validity of Commerce's *Nails* test.

The court therefore declines Samsung's invitation for the court to order Commerce to consider factual matter not required or suggested by the statute. *See JBF RAK*, 38 CIT at ___, 991 F. Supp. 2d at 1355 (Explaining that an "intent" requirement here "would create a tremendous burden on Commerce that is not required or suggested by the statute" (quoting *Viraj Group v. United States*, 476 F.3d 1349, 1357–58 (Fed. Cir. 2007)).

3. Application of the A-to-T methodology to all of LG and Samsung's sales

LG and Samsung both argue that Commerce violated an improperly-withdrawn regulation and the statute when it applied the A-to-T methodology to all of LG and Samsung's sales rather than just those that passed the *Nails* test. LG Br. at 4–16; Samsung Br. at 32–40.

a. Withdrawn regulation and exhaustion

Samsung and LG introduce a new argument before the court that was not raised during the investigation. Specifically, Samsung and LG argue that, in 2008, Commerce improperly withdrew 19 C.F.R. § 351.414(f)(2) (2007), which stated that Commerce "normally will limit the application of the [A-to-T] method to those sales that constitute the targeted dumping." Samsung Br. at 32–34; LG Br. at 4–5; *see also Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930, 74,930–31 (Dep't of Commerce Dec. 10, 2008) ("*Withdrawal Notice*"). When it withdrew the regulation, Commerce explained that it "had never performed a targeted dumping analysis" and that it therefore promulgated the regulation "without the benefit of any departmental experience on the issue of targeted dumping." *Withdrawal Notice* at 74,930. Commerce also explained that "[t]his situation has caused the [agency] to question whether, in the absence of any practical experience, it established an appropriate balance of interests in the provisions." *Id.* By withdrawing the regulation, Commerce sought "an opportunity to analyze extensively the concept of targeted dumping and develop a meaningful practice in this area as it gains experience in evaluating such allegations." *Id.* at 73,930–31.

Samsung and LG argue that Commerce violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 553 (2012), when it withdrew the regulation without notice and comment. Samsung Br. at 32–34; LG Br. at 4–16. LG also argues that the good cause exception to the notice and comment requirement, which Commerce relied upon in the *Withdrawal Notice*, does not apply here. LG Br. at 5–12. Samsung and LG argue further that Commerce erred in not applying the now-withdrawn regulation, which provided that the agency "will normally limit the application of the [A-to-T] method to those sales that constitute targeted dumping." Samsung Br. at 32–34; LG Br. at 4–16. Finally, Samsung and LG argue that Commerce was required "to limit its application of the" A-to-T method to "only those transactions found to be targeted," and to "determine the amount of dumping, if any, in all other transactions using the" A-to-A method, "unless the [agency] provides an adequate explanation why the situation is not a 'normal' one." Samsung Br. at 34; *see also* LG Br. at 36, 38. Samsung and LG, however, failed to exhaust any of these arguments.

Samsung and LG admit that they did not raise their arguments regarding the now-withdrawn regulation in their case briefs before Commerce or at any other point during the investigation below. Samsung Br. at 34 n.25; LG Br. at 12–16. Nonetheless, Samsung and LG ask the court to excuse their failure to exhaust these arguments based upon alleged futility and an assertion that the argument is a pure question of law. Samsung Br. at 34 n.25; LG Br. at 12–16.

The exhaustion requirement applicable to trade cases is rooted in two sources of law that are implicated here: (1) a statute, 28 U.S.C. § 2637(d), which applies to all antidumping and countervailing duty proceedings; and (2) a regulation, 19 C.F.R. § 351.309(c)(2), which applies to case briefs in antidumping and countervailing duty investigations, certain types of reviews, and in other proceedings if Commerce requests written argument. *See* 19 C.F.R. § 351.309(b).

The statute provides that the court "shall, where appropriate, require the exhaustion of administrative remedies" in civil actions arising from Commerce's antidumping and countervailing duty determinations. 28 U.S.C. § 2637(d). The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has recognized limited exceptions where exhaustion would have been "futile" or the matter is a "pure question of law," *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1146 (Fed. Cir. 2013), because, in the parlance of the statute, "require[ing] the exhaustion of administrative remedies" in these circumstances would not be "appropriate." 28 U.S.C. § 2637(d). Notwithstanding these limited exceptions, the CIT "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies before . . . Commerce in trade cases." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

The regulation requires that a "case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results." 19 C.F.R. § 351.309(c)(2). The Federal Circuit has held that "Commerce's regulations specifically address the exhaustion requirement, as applied to challenges to antidumping determinations, and require a challenger to submit a case brief to Commerce that contains all of the arguments that the submitter deems relevant, 'including any arguments presented before the date of publication of the preliminary determination or preliminary results.'" *Corus Staal*, 502 F.3d at 1379 (quoting 19 C.F.R. § 351.309(c)(2)); *accord Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) ("Commerce regulations require the presentation of all issues and arguments in a party's administrative case brief."). In short, "parties are 'procedurally required to raise the[ir] issue before Commerce at the time Commerce [is] addressing the issue.'" *Dorbest*, 604 F.3d at 1375 (quoting *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008)) (alteration in original). The Federal Circuit has explained further that the regulatory exhaustion requirement is "not simply a creature of court decision, as is sometimes the case, but is a requirement explicitly imposed by the agency as a prerequisite to judicial review." *Corus Staal*, 502 F.3d at 1379; *see also Fuwei Films (Shandong) Co. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1381, 1385 (2011) (Commerce's regulation "carries the force of law and the court cannot simply ignore it."). A violation of Commerce's regulation, therefore, supplies an independent ground for determining that an argument has not been exhausted. *See Dorbest*, 604 F.3d at 1375 (holding "that Dorbest's failure to raise its issue in its administrative case brief constituted a failure to exhaust administrative remedies" in violation of regulatory exhaustion requirement).

Samsung and LG concede that they filed case briefs before Commerce that failed to raise any arguments regarding Commerce's now-withdrawn regulation. Samsung Br. at 34 n.25; LG Br. at 12–16. Interested parties in other cases, however, raised these arguments at the administrative level. *See, e.g.*, *Nails Decision Memorandum* at 15–18; Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Coated Paper Suitable for High Quality Print Graphics Using Sheet-Fed Process from the People's Republic of China, A-570–958, at 21–25 (Dep't of Commerce Sept. 20, 2010), *available at* http://enforcement.trade.gov/frn/summary/prc/2010–24159–1.pdf (last visited this date). Samsung and LG could have done the same thing, but apparently chose not to do so. Requiring exhaustion here is "appropriate."

LG and Samsung argue that the "pure question of law" and "futility" exceptions should apply here. Neither do. "In order to qualify for the [pure question of law] exception, plaintiff must (a) raise a new argument; (b) this argument must be of purely legal nature; (c) the inquiry shall require neither further agency involvement nor additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce party time and resources." *Corus Stall BV v. United States*, 30 CIT 1040, 1050 n.11 (2006) (citing *Consol. Bearings Co. v. United States*, 25 CIT 546, 55354, 166 F. Supp. 2d 580, 587 (2001), *rev'd on other grounds*, 348 F.3d 997, 1003–04 (Fed. Cir. 2003), *aff'd on other grounds*, 502 F.3d at 1378 n.4. The withdrawn regulation arguments advanced by LG and Samsung are not purely legal; they have two factual components that would require further agency involvement, additional fact finding, and potentially could necessitate a re-opening of the administrative record.

First, the APA expressly provides for waivers of the notice and comment requirement "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). In the *Withdrawal Notice*, Commerce made a good cause finding that the notice and comment "requirement is impracticable and contrary to the public interest." *Withdrawal Notice* at 74,931. Although Commerce included the required "brief statement of reasons" for its good cause finding in the *Withdrawal Notice*, *see* 5 U.S.C. § 553(b)(B), if LG and Samsung had raised their APA arguments in their administrative case briefs in compliance with 19 C.F.R. § 351.309(c)(2), Commerce would have had an opportunity to explain why, as a matter of fact, good cause existed. By failing to exhaust their administrative remedies, LG and Samsung deprived Commerce of this opportunity.

Second, even if LG and Samsung were to prevail in their APA arguments, the now-withdrawn regulation would not mandate that LG and Samsung receive a different result before Commerce. The now-withdrawn regulation provided that Commerce "will *normally* limit the application of the [A-to-T] method to those sales that constitute targeted dumping," but the agency retained discretion to deviate from this normal practice in appropriate circumstances. 19

C.F.R. § 351.414(f)(2) (2007) (emphasis added). Thus, in applying the regulation, Commerce still would have to conduct a factual inquiry and exercise its discretion as to whether, under the circumstances of this particular investigation, limiting the application of the A-to-T method to targeted dumped sales would be appropriate. By failing to exhaust their administrative remedies, LG and Samsung deprived Commerce of the opportunity to: (1) conduct this factual inquiry (which, on remand, could require a re-opening of the administrative record); and (2) exercise agency discretion prior to judicial review. For these reasons, the pure question of law exception to the exhaustion requirement is not applicable here.

The futility exception does not apply either. LG and Samsung argue that Commerce was not likely to agree with their arguments regarding the now-withdrawn regulation because the agency rejected the same arguments in four other proceedings. LG Br. at 13–15; Samsung Br. at 34 n.25. But even "if it is likely that Commerce would have rejected" the arguments regarding the now-withdrawn regulation, "it still would have been preferable, for purposes of administrative regularity and judicial efficiency, for" LG and Samsung "to make [their] arguments in [their] case brief[s] and for Commerce to give its full and final administrative response in the final" determination. *See Corus Staal*, 502 F.3d at 1380. *Compare Fuwei Films*, 35 CIT at ___, 791 F. Supp. 2d at 1385 (rejecting plaintiff's assertion of futility defense to exhaustion because plaintiff "could have raised its arguments about potential unreasonable inconsistencies in Commerce's zeroing practice in its administrative case brief"), *with Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1368–74 (Fed. Cir. 2011) (reaching merits of plaintiff's challenge to zeroing and noting that plaintiff raised the issue at the administrative level).

Finally, LG and Samsung's reliance on *Itochu* is unavailing. LG Br. at 12, 15. *Itochu* involved a changed circumstances review, where the respondent "was under no specific requirement to file a case brief" and the provisions of 19 C.F.R. § 351.309(c)(2) did "not apply." *Itochu*, 733 F.3d at 1145 n.1. In *Itochu*, the respondent provided comments to the agency once prior to the preliminary results, and, in the absence of a regulatory exhaustion requirement, the Federal Circuit held that it would have been futile for the respondent to "resubmit" those comments for a second time after the preliminary results when "Commerce was defending [its position] in court at the time" on the grounds that "it had no discretion in the matter because it was constrained by statute to reject [the respondent's] position." *Itochu*, 733 F.3d at 1146–48. Unlike *Itochu*, in this case, LG and Samsung had a regulatory obligation to file case briefs containing all of their arguments, they filed case briefs without making any arguments regarding the now-withdrawn regulation, and there is no statute that would have required Commerce to reject the position advanced by LG and Samsung. *See Aluminum Extrusions Fair Trade Comm. v. United States*, 37 CIT ___, ___, 938 F. Supp. 2d 1337, 1341–42 (2013) (distinguishing *Itochu* as case that applied futility exception where the statute required Commerce to reject the respondent's argument); *Mid Continent Nail Corp. v. United States*, 37 CIT ___, ___, 949 F. Supp. 2d 1247, 1260–61 n.10 (2013) (holding that, notwithstanding the "rare circumstances" in *Itochu*, "[i]ssues that are not addressed in an administrative case brief filed with the agency are generally deemed abandoned").

For these reasons, LG and Samsung failed to exhaust their arguments regarding Commerce's now-withdrawn regulation.

b. Consistency with the statute

Commerce did not violate the statute when it applied the A-to-T methodology to all of LG and Samsung's sales. Section 1677f-1(d)(1)(B) permits Commerce to apply the Ato-T methodology when "(i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (ii) the administering authority explains why such differences cannot be taken into account using" the A-to-A or T-to-T methodologies. 19 U.S.C. § 1677f-1(d)(1)(B). In Commerce's view, this statutory language permitted application of the A-to-T methodology to all of LG and Samsung's sales:

> With respect to the application of the [A-to-T] method to the non-targeted sales, the Department has previously determined that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a uniform application of [A-to-T] comparisons for all transactions when satisfaction of the statutory criteria suggests that application of the [A-to-T] method is appropriate. The only limitations the statute places on the application of the [A-to-T] method are the satisfaction of the two criteria set forth in the statute. When the criteria for application of the [A-to-T] method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the [A-to-T] method to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average NVs to the EPs (or CEPs) of individual transactions. While the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the [A-to-T] method to all sales, it does find that this interpretation is a

reasonable one and is more consistent with the Department's approach to the selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally.

The respondents' argument that the [A-to-T] method should only be applied to the U.S. sales which are found to be targeted would undermine the determination that a pattern of significant price differences exists under section 777A(d)(1)(B)(i) of the Act. This pattern is initially identified by the petitioner in its targeted dumping allegation when it identifies purchasers, regions or time periods which may be the basis of such a pattern. The Department then employs the Nails test to confirm whether the alleged purchasers, regions or time periods have been targeted based on the weighted-average sales prices to purchasers, regions, or time periods, allegedly targeted or not. Then, under section 777A(d)(1)(B)(ii) of the Act, the Department must explain whether the significant price differences can be taken into account by the [A-to-A] or [T-to-T] methods, and if not, then the Department may apply the [A-to-T] method. If the Department were to apply the [A-to-T] method only to those U.S. sales which pass the Nails test, as argued by the respondents, then this approach would include only part of the U.S. sales which constitute the identified pattern. In other words, the U.S. sales which pass the Nails test represent only part of the pricing behavior of the respondent, which, in and of themselves, do not constitute the identified pattern which is based on significant price differences between all groups, whether allegedly targeted or not. The identified pattern is defined by all of the respondent's U.S. sales. To consider whether the [Ato-A] or [T-to-T] method can account for only part of the identified significant price differences, and if so, then to apply the [A-to-T] method to only part of the identified significant price differences, would be an incomplete application of the statute.

If Congress had intended for the Department to apply the [A-to-T] method only to a subset of transactions and use a different comparison method for the remaining sales of the same respondent, Congress could have explicitly said so, but it did not. Instead, Congress expressed its intent with the language of section 777A(d)(1)(B), which imposes a general preclusion from using [A-to-T] comparisons and withdraws that preclusion entirely if the two criteria are satisfied. In the absence of a pre-

> clusion, the Department is free to apply the [A-to-T] method to all transactions. The Department may choose any method that is appropriate.

Decision Memorandum at 33–34 (citation omitted).

The court agrees. *See Apex Frozen Foods*, 38 CIT at ___, 37 F. Supp. 3d at 1301 03 (sustaining Commerce's application of the A-to-T methodology to all sales under *Chevron.*). The statute permits Commerce to "determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values of the normal values to the export prices (or constructed export) prices of individual transactions" when the conditions in § 1677f1(d)(1)(B)(i) and (ii) are met, without specifying *which* individual export prices (or constructed export prices). Rather, the statute outlines preconditions that, when met, allow Commerce to apply the A-to-T methodology. The statute's clear language does not prohibit application of the A-to-T methodology to all sales, meaning Commerce's interpretation governs so long as it is reasonable. Commerce expressed concern that it would not be able to account for a "pattern" if it isolated the A-to-T methodology to only targeted sales. As Commerce explains, a "pattern" of targeted sales may only emerge when observed against a backdrop of non-targeted sales. Commerce also observed that applying the A-to-T methodology to all sales is just like applying the A-to-A and T-to-T methodologies to all sales, its usual practice under the statute. Because Commerce has supplied a reasonable interpretation of a silent statutory provision, the court must sustain under *Chevron*.

LG and Samsung nevertheless challenge Commerce's refusal to limit application of the A-to-T methodology to targeted sales. LG and Samsung contend that the required explanation of "such differences" in § 1677f-1(d)(1)(B)(ii) refers *only* to the differences "among purchasers, regions, or periods of time" in § 1677f-1(d)(1)(B)(i). LG Br. at 35–39; Samsung Br. at 36, 38. As a consequence, LG and Samsung argue, "[t]he phrase 'such differences' does not apply to those other transactions that do not have such differences," meaning Commerce may not apply the A-to-T methodology to all sales. LG Br. at 35–37 (emphasis omitted); *see* Samsung Br. at 36–38. The court disagrees. The preconditions set forth in 19 U.S.C. § 1677f-1(d)(1)(B)(i) and (ii) are just that—preconditions that must exist before Commerce may apply the A-to-T methodology. One of those preconditions requires Commerce to supply an explanation with specified content, as LG and Samsung point out. 19 U.S.C. § 1677f-1(d)(1)(B)(i) and (ii) do not, however, instruct Commerce on how to apply the A-to-T methodology after making its explanation. That language is instead in 19 U.S.C. § 1677f-1(d)(1)(B), which permits Commerce to compare "the weighted average of the normal values to the export prices (or constructed export) prices of individual transactions" without specifying whether those export prices or constructed export prices must be drawn only from targeted sales. *Id.* § 1677f-1(d)(1)(B).

LG and Samsung also argue that the statute "creates a strong presumption" for using the A-to-A or T-to-T methodologies because the A-to-T methodology is a "limited exception." *See* LG Br. at 35; Samsung Br. at 37. As Defendant correctly argues, however, the statute does not specify *how often* Commerce may use the alternative A-to-T methodology. The statute merely sets forth preconditions that, when satisfied, permit Commerce to use the A-to-T methodology. 19 U.S.C. § 1677f-1(d)(1)(B). The court does not agree with LG and Samsung that the statute's description of the A-to-T methodology as an "exception" limits Commerce's application of the A-to-T methodology once those two conditions are satisfied.

LG quotes statements Commerce made when promulgating the limiting rule regulation in support of its *Chevron* argument. LG Br. at 36–37; *see also* Samsung Br. at 27–32. The court must defer to an agency's reasonable interpretation of an unclear statute, however, even if that interpretation reflects a change in policy. *Eurodif*, 555 U.S. at 316 (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous . . . even after a change in regulatory treatment, which 'is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.'" (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005))). An agency "need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009) (emphasis in original). Here, Commerce changed its position on the limiting rule in 2008, explaining that it "promulgated [the limiting rule regulation] without the benefit of any departmental experience on the issue of targeted dumping" because it "had never [before] performed a targeted dumping analysis." *Withdrawal Notice*, 73 Fed. Reg. at 74,930–31. Commerce returned "to a case-by-case adjudication" to allow it "to gain a greater understanding of the issue," *id.* at

74,931, an effort that led to the *Nails* test. Commerce in this investigation drew from actual experience with targeted dumping and reasonably explained why applying the A-to-T methodology to all sales served to remedy masked dumping. *Decision Memorandum* at 33–35 (explaining that applying the A-to-T methodology to all sales "eliminates . . . masked dumping by exposing (1) any implicit masking within the weighted-average U.S. sales price by basing the comparison on the transaction-specific U.S. sales price, and (2) any explicit masking between averaging groups by not providing offsets for negative comparison results"). Commerce's prior interpretation of the statute does not, in the court's view, render its current interpretation unreasonable.

The court understands LG and Samsung's arguments for why it might make sense to limit application of the A-to-T methodology to only those sales constituting the targeted dumping. Where Commerce finds that the conditions in § 1677f-1(d)(1)(B)(i) and (ii) are satisfied, though, Commerce may apply the A-to-T methodology. 19 U.S.C. § 1677f1(d)(1)(B). In the end, LG and Samsung identify neither clear statutory language prohibiting Commerce from applying the A-to-T methodology to all sales nor any unreasonableness in Commerce's decision. The court therefore must sustain Commerce's application of the targeted dumping remedy below.

B. Commerce's exclusion of small top-loading washers from its model-matching analysis of LG's sales

The statute directs Commerce to set normal value at "the price at which the foreign like product is first sold . . . for consumption in the exporting country." 19 U.S.C. § 1677b(a)(1)(B)(i). The statute defines "foreign like product" as "merchandise in the first of the following categories in respect of which a determination . . . can be satisfactorily made":

> **(A)** The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> **(B)** Merchandise –
>
> > **(i)** produced in the same country and by the same person as the subject merchandise,
> > **(ii)** like that merchandise in component material or materials and in the purposes for which used, and
> > **(iii)** approximately equal in commercial value to that merchandise
>
> **(C)** Merchandise –

> **(i)** produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
> **(ii)** like that merchandise in the purposes for which used, and
> **(iii)** which [Commerce] determines may reasonably be compared with that merchandise

Id. § 1677(16). Merchandise falling within these three categories is known as identical merchandise, similar merchandise, and reasonably comparable merchandise, respectively. This statutory hierarchy requires Commerce first to consider identical merchandise. Where a given export sale lacks a corresponding identical home-market sale, however, Commerce must look next to similar merchandise. Where an export sale lacks a corresponding identical or similar home market sale, Commerce then turns to reasonably comparable merchandise. *See id.* Commerce has developed a "model–matching" methodology for identifying similar and reasonably comparable merchandise. *SKF*, 537 F.3d at 1375.

Typically, the home market sales data available for model-matching is limited to in-scope merchandise because Commerce only requests that data. This, as LG and Defendant agree, is not the typical case. After LG and Samsung submitted their complete questionnaire responses but before Commerce issued its preliminary determination, Whirlpool asked Commerce to narrow the scope of the investigation. Commerce obliged and amended the scope to exclude washers with vertical rotational axis and a capacity of less than 3.70 cubic feet ("small top-load washers"). This sequence of events left Commerce in the unusual position of having record data of home market sales for both in-scope and non-scope merchandise, since LG had already reported its small top-load washer sales. Commerce ultimately declined to consider LG's small top-load washer data as similar merchandise in its model-matching analysis. *Decision Memorandum* at 8.

LG argues that Commerce's exclusion of non-scope small top-load washer sales from its model-matching analysis violates clear statutory language under *Chevron* step one. LG frames the issue as a matter of whether Commerce erroneously added a requirement to the statute that similar merchandise must also meet the scope's physical description. LG Br. at 41–43. Commerce below, though, agreed that the statute is not so limited. *Decision Memorandum* at 8 ("LG maintains that [§ 1677(16)(B)] provides the Department with the discretion to use sales which have been excluded from the scope of the investigations as foreign like product for model-matching purposes. We do not disagree with this assertion."). The critical legal question is instead whether the statute requires Commerce to examine all merchandise "like" the subject merchandise in materials and use. LG believes it does. According to LG, the statute "explicitly distinguishes" in-scope merchandise from similar merchandise by using the phrase "subject merchandise" in § 1677(16)(B)(i) and the phrase "like that merchandise" in § 1677(16)(B)(ii). To LG, this distinction "can only mean" that similar merchandise "is something other than subject merchandise." LG Br. at 42 (emphasis omitted). LG also points out that Congress explicitly committed the definition of reasonably comparable merchandise to Commerce's discretion. *See* 19 U.S.C. § 1677(16)(C) (defining reasonably comparable merchandise as that "which [Commerce] determines may reasonably be compared with [the subject] merchandise"). To LG, the lack of any similar phrasing in § 1677(16)(B) means that Congress did not intend to give Commerce the discretion to restrict the universe of sales under consideration for similar merchandise. LG Br. at 43.

LG's reading of the statute may make sense, but it is not the only interpretation possible. "[T]his statute 'is silent with respect to the methodology that Commerce *must* use to match a U.S. product with a suitable home-market product.'" *SKF*, 537 F.3d at 1379 (quoting *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995)) (emphasis added); *see also Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382–84 (Fed. Cir. 2001). Here, the statute defines similar merchandise simply as "[m]erchandise" that meets the requirements contained in § 1677(16)(B)(i)-(iii). Congress did not clarify whether "[m]erchandise" *must* include in-scope merchandise, or both in-scope and non-scope merchandise. *See* 19 U.S.C. § 1677(16)(B). Likewise, none of the requirements outlined in § 1677(16)(B)(i)-(iii) say or imply that similar merchandise *must* include non-scope merchandise. One easy inference to draw from this omission is that "[m]erchandise" includes home market sales of in-scope and non-scope merchandise as LG argues. Unfortunately for LG, however, because Congress in its silence did not foreclose Commerce from interpreting the term "merchandise" differently, the court proceeds with its analysis under *Chevron* step two.

Commerce explained that including non-scope merchandise in its model-matching analysis would "deviate from its standard practice" and "would have a significant effect on all future investigations and administrative reviews." *Decision Memorandum* at 8–9. Commerce explained that doing so would also encourage respondents "to strategically select sales of products, even those outside of the scope, that they believe [Commerce] should use for model-matching purposes, in an effort to increase or decrease [dumping] margins." *Id.* at 9. In any event, Commerce found "no overarching reason to use smaller top-load washers which do not meet the physical descriptions of the merchandise covered by the scope for model-matching purposes" because "LG has reported home market sales of merchandise covered under the scope of the investigations, which can be accurately compared with sales of subject merchandise, and adjusted for any physical differences affecting price." *Id.*

LG's straightforward alternative interpretation of the statute has merit, as Commerce itself acknowledged below. Under *Chevron* step two, however, "an agency's construction need not be the only interpretation or the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Koyo*, 66 F.3d at 1210. Commerce chose one possible interpretation over LG's preferred interpretation after considering the impact both interpretations would have on future administrative proceedings. LG has not provided a reason for the court to second guess that judgment call. The court must therefore defer to Commerce's reasonable interpretation of the statute.

As a final note, LG insists that Commerce's decision to restrict its model-matching analysis to in-scope merchandise is not a long-standing practice that requires special deference. LG Br. at 25–27. LG, though, asked the court to assess whether Commerce's approach constitutes a permissible construction of the statute, not whether Commerce's approach is consistent with past practice. *See id.* at 39. Under *Chevron*, the court must defer to Commerce's reasonable interpretation of a silent statutory provision. Commerce's discussion of its past practice informs the court's assessment of whether Commerce reasonably interpreted the statute, but no more than called for under the *Chevron* standard. The court in sustaining Commerce's interpretation of a silent statutory provision here does so with the deference due under the second step of *Chevron*.

III. Conclusion

For the foregoing reasons, the court sustains the *Final Results* for each of the issues LG and Samsung have challenged in their motions for judgment on the agency record. Judgment will be entered accordingly.

Dated: June 12, 2015
New York, New York

/s/ Leo M. Gordon
Judge Leo M. Gordon

Slip Op. 15–59

MAVERICK TUBE CORPORATION, Plaintiff, and UNITED STATES STEEL CORPORATION, BOOMERANG TUBE LLC, ENERGEX TUBE (A DIVISION OF JMC STEEL GROUP), TEJAS TUBULAR PRODUCTS, TMK IPSCO, VALLOUREC STAR, L.P., AND WELDED TUBE USA INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and TOSCELIK PROFIL VE SAC ENDUSTRISI A.S., CAYIROVA BORU SANAYI VE TICARET A.S., BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., AND BORUSAN ISTIKBAL TICARET, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 14–00229

[On USCIT Rule 56.2 motions, countervailing duty investigation of hot-rolled steel from Turkey remanded to International Trade Administration, U.S. Department of Commerce.]

Dated: Dated: June 15, 2015

Alan H. Price and *Robert E. DeFrancesco, III*, Wiley Rein, LLP, of Washington DC, for the plaintiff Maverick Tube Corporation.

Robert E. Lighthizer, *Jeffrey D. Gerrish*, and *Nathaniel B. Bolin*, Skadden Arps Slate Meagher & Flom, LLP, of Washington DC, for the plaintiff-intervenor United States Steel Corporation.[1]

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of Counsel on the brief was *Scott D. McBride*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

David L. Simon, Law Office of David L. Simon, of Washington DC, for the defendant-intervenors Toscelik Profil ve Sac Endustrisi A.S. and Cayirova Boru Sanayi ve Ticaret A.S.

Donald B. Cameron, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, and *Sarah S. Sprinkle*, Morris Manning & Martin, LLP , of Washington DC, for the defendant-intervenors Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Borusan Istikbal Ticaret.

OPINION AND ORDER

Musgrave, Senior Judge:

This consolidated matter encompasses three of the four lawsuits initiated by domestic industry petitioners and Turkish respondents all separately challenging aspects of *Certain Oil Country Tubular Goods From the Republic of Turkey*, 79 Fed. Reg. 41964 (July 18, 2014), PDoc 369, and accompanying issues and decision memoran-

[1] The other captioned plaintiff-intervenors did not participate in litigation.

dum (July 10, 2014) ("*IDM*"), PDoc 363, (collectively "*Final Determination*"), a final affirmative countervailing duty ("CVD") investigation conducted by the International Trade Administration, U.S. Department of Commerce ("Commerce") covering the investigatory period January 1, 2012, through December 31, 2012 ("POI"). The focus of the proceeding at bar, in which Maverick Tube Corporation ("Maverick") and United States Steel Corporation ("U.S. Steel"), U.S. domestic industry petitioners, are nominally captioned as plaintiff and plaintiff-intervenor respectively, is the alleged Turkish state provision of hot-rolled steel ("HRS") for less than adequate remuneration ("LTAR") in the production of oil country tubular goods ("OCTG"). *See* 19 U.S.C. §1677(5).

The fourth suit, unconsolidated, was filed against the United States by Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Borusan Istikbal Ticaret (together "Borusan"). Intervening in this action after it was consolidated, Borusan sides with the other Turkish respondents Toscelik Profil ve Sac Endustrisi A.S. and Cayirova Boru Sanayi ve Ticaret A.S. (together, "Toscelik"), all nominally captioned as defendant-intervenors, in support of Toscelik's motion for judgment. Borusan's own case is already before Commerce on remand,[2] with results of redetermination due July 17, 2015. Familiarity with that case is here presumed, as it sets forth the procedural and certain substantive background pertinent to this matter. Jurisdiction is also here invoked pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. §1516a(a)(2)(B)(i), and 28 U.S.C. §1581(c). And substantive briefing on the parties' separate motions for judgment pursuant to USCIT Rule 56.2 has proceeded according to schedule.[3]

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[2] *See generally* Court No. 14–00214; *see also Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, Slip Op. 15–36 (Apr. 22, 2015) ("*Borusan*"). Borusan pressed ahead in that proceeding with a "motion to expedite briefing and consideration." Court No. 14–00214, ECF No. 7. Filing of a joint proposed scheduling order, to which the defendant had consented, mooted acting on the motion to expedite briefing. *Id.*, ECF No. 11. Motions to intervene in that action were filed thereafter. The motions were duly acted upon in the order received, *see id.*, ECF Nos. 30–33, except that issuance of slip opinion 15–36 in due course obviated acting upon the motion for expedited consideration (and its proposed order's peculiarity, *i.e.*, having the court order itself to consider the case on an expedited basis). Emphasized here is that the *Borusan* court has only acted pursuant to a consented-to motion for scheduling and not affirmatively acted upon a motion to expedite.

[3] For which the parties are all to be commended. After response briefs to those motions were filed, the defendant renewed a motion to consolidate *Borusan* with this matter, arguing that further consolidation would conserve resources and avoid duplication. In *Borusan*, the defendant has likewise procedurally moved, for the same reasons, and it also moved to stay further proceedings on that case. The motion to stay was denied, Court No. 14–00214, ECF No. 81, but the motions to consolidate have been held in abeyance.

I. Maverick's and U.S. Steel's Motions for Judgment

Maverick's Rule 56.2 motion challenges the exclusion of certain "tier-two" benchmark data provided by it for the record, and also the exclusion of import duties from certain prices used for that benchmark. U.S. Steel's briefing on its Rule 56.2 motion adopts Maverick's arguments as briefed.

A. Exclusion of Certain Benchmark Data

Commerce's regulations set forth a hierarchy, or "tiers", governing how it will determine whether adequate remuneration was paid for a good or service in question. *See* 19 C.F.R. §351.511. Tier one compares the "government price" paid by a respondent "to a market-determined price for the good or service resulting from actual transactions in the country in question." *Id.*, §351.511(a)(2)(I). If Commerce concludes that there is no useable market-determined price with which to make such comparisons, it resorts to tier two, a comparison of "the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." *Id.*, §351.511(a)(2)(ii). The *status quo* of this matter is rejection of tier-one pricing and reliance upon a tier-two benchmark. *See IDM* at 38–39.

During the investigation, Maverick placed world market HRS benchmark prices on the record, including monthly export prices of HRS from countries around the globe derived from the Global Trade Atlas ("GTA"), transaction price indices from MEPS (International) Ltd., prices from a source named "CRU," and a price series from Steel Business Briefing (SSB). *See IDM* at 25; *see also* PDoc 166 at 9–12. Maverick contests Commerce's rejection of these data and argues Commerce should have used instead a simple average of all available data except for imports to and exports from Turkey. Maverick Br. at 7. *See IDM* at 46–48.

Complaining that Commerce did not average all of the prices made available to it, Maverick argues three general points: (1) Commerce has stated in several previous cases that its goal is to "derive the most robust HRS benchmark possible" and thus it has used the largest number of data points as possible; (2) the data sources supplied by Maverick have been used by Commerce in other administrative proceedings and there was "no evidence of, for example, export barriers, import barriers, or other government distortions in the countries in question that might support a conclusion that export prices would differ from any domestic prices represented by the data"; and (3) the relevant regulation states that "where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable.” *See* 19 C.F.R. §351.511(a)(2)(ii).

Commerce will calculate a simple average “when the datasets on the record [are] not reported in a uniform manner.” *See*, *e.g.*, *Utility Scale Wind Towers from the People’s Republic of China*, 77 Fed. Reg. 75978 (Dec. 26, 2012) (final affirmative CVD deter.) and accompanying issues and decision memorandum at cmt. 15. Commerce determined that the GTA data did not present such a circumstance, *see IDM* at 48, and Maverick does not contest the determination that the GTA data are reported on a uniform basis. Maverick’s contention for simple averaging, thus, depends upon the validity of the administrative disregard of its proffered MEPS, CRU and SBB data.

Commerce agreed with Maverick that it has interpreted 19 C.F.R §351.511(a)(2)(ii) “within the context of our goal to derive the most robust benchmarks possible; thus we have sought to include as many data points as possible.” *IDM* at 42. However, Commerce also recognized that the regulation states that a tier-two world market benchmark price can only be used if it is “reasonable to conclude that such price[s] would be available to purchasers in the country in question”. *Cf. id. with* 19 C.F.R §351.511(a)(2)(ii). Similar to Commerce’s rejection of the SBB data that were considered in *Borusan*, Commerce explained in the *Final Determination* that it would not use these “prices because record information indicated that these were domestic prices (not export prices) in specific countries”, noting further that petitioners “did not contend that the MEPS, CRU or SBB prices represent export prices.” *IDM* at 47. Commerce explained that “[r]egardless of the Department’s inclusion of these price series in past investigations, the information about the MEPS, CRU and SBB price series for HRS on the record of this investigation indicates that these are domestic prices in countries other than Turkey” and that this determination was consistent with its determination in *Certain Kitchen Appliance Shelving and Racks from the People’s Republic of China*, 77 Fed. Reg. 21744 (Apr. 11, 2012) (final CVD determ.) (in accompanying issues and decision memorandum at cmt. 5), in which it had excluded domestic prices from the input benchmark for wire rod because the petitioners had provided no evidence that the prices were representative of prices that would be available to purchasers in the PRC. *See id*. at 48.

Commerce here states that regardless of the quality of the data or the existence or nonexistence of trade barriers, domestic prices in countries other than Turkey are “not prices of [hot rolled steel] that would be available to purchasers in Turkey.” Def’s Resp. at 37, quoting *IDM* at 25 (Def's bracketing). Consistent with *Borusan*, the court remains unpersuaded by Maverick's arguments that Commerce's rejection of MEPS, CRU and SBB data was not supported by substantial evidence or not in accordance with law; Maverick is essentially asking the court to displace Commerce's "fairly conflicting views" on domestic price availability, which would be inappropriate. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("*Universal Camera*").

B. Non-Inclusion of Certain Import Duties

In its preliminary determination, Commerce included import duties in the benchmark price based on the GTA export prices from certain countries. *See* PDoc 327 at 10 n.80; PDoc 328 at 9 n.71. For the *Final Determination*, Commerce concluded the record showed that imports of HRS into Turkey from certain countries are subject to a zero duty rate; therefore Commerce excluded import duties from the benchmark price for export prices from these countries. *IDM* at 46. The record evidence Commerce relied upon included: (1) the Turkish government's response that hot rolled steel coils were imported into Turkey under Harmonized Tariff Schedule ("HTS") number 7208; (2) Borusan's response that import duties do not apply to imports from European Union countries because they are subject to a zero duty rate; and (3) sections of the Turkish HTS for number 7208 showing a zero duty rate for imports of hot rolled steel into Turkey from European Union countries and certain other countries. *See* PDoc 179 at 4–5; PDoc 75 at 13; PDoc 73 at Ex. 10. Maverick argues the record evidence was inconsistent and incomplete, and therefore Commerce should not have excluded import duties from the export prices from those countries when it determined the benchmark for HRS. Maverick Br. at 10–12.

Commerce responds that Maverick is now arguing for the first time that the evidence on the record is unreliable, faulting Commerce for relying on a tariff schedule that is partially untranslated and claiming Commerce must have made a "typographical error" when it cited to pages four and five of the Turkish government's questionnaire response because "the portion of the Government of Turkey's questionnaire response that Commerce cited does not address hot-rolled steel import duties at all." Maverick Br. at 11. Commerce contends Maverick failed to exhaust administrative remedies on this issue both because Maverick could have placed rebuttal information on the record after obtaining Borusan's original questionnaire response and because it also had the opportunity to respond to the exact arguments on this point raised by both Toscelik and Borusan in its administrative rebuttal brief but did not do so.

The court tends to take a strict approach to the doctrine of administrative exhaustion in accordance with its statutory mandate. *See*, *e.g.*, *SeAH Steel Corp. v. United States*, 35 CIT ___, 764 F. Supp. 2d 1322, 1325 (2011), referencing *Jiaxing Brother Fastener Co., Ltd. v. United States*, 34 CIT 1455, 1465–67, 751 F. Supp. 2d 1345, 1355–57 (2010); *see also* 28 U.S.C. § 2637(d) (in trade cases the court "shall, where appropriate, require the exhaustion of administrative remedies"). There appears no reason to relax that requirement here. Pages 36 to 39 of Maverick's administrative rebuttal brief before Commerce are devoted almost entirely to arguing against adjusting the HRS benchmark to account for VAT and Borusan's "individual firm experience" in ocean and inland freight shipment. The inclusion of import duties, as consistent with Commerce's regulations and practice, is adverted to only perfunctorily on page 39 of that brief. By contrast, Maverick would here set forth in greater detail its reasoning on why the duties in this instance should not have been excluded. The court is not persuaded that Maverick could not "seek administrative remedy" by fleshing out its argument of the issue in its rebuttal brief before Commerce rather than here, and therefore finds that the issue has not been administratively exhausted.[4]

II. *Toscelik's Motion for Judgment*

In the *Final Determination* Commerce determined a subsidy rate of 1.67 percent for Toscelik. Toscelik's 56.2 motion contests Commerce's determination that the Turkish HRS market is distorted by the presence of Eregli Demir ve Celik Fabrikalari T.A.S. ("Erdemir") and its subsidiary Iskenderun Iron & Steel Works Co. ("Isdemir") (collectively, "Erdemir"), its determination to reject as a tier-one benchmark Toscelik's HRS purchases from private foreign suppliers, its tier-two benchmark, its determination that Erdemir is a government author-

[4] Moreover, Maverick's substantive arguments on the issue again appear to move for substituting a fairly conflicting view of the evidence, which the court cannot do. *See Universal Camera,* 340 U.S. at 488. Commerce cited specifically to the Turkish government's declaration that HRS is imported under HTS 7208. *IDM* at 46, n.283. Commerce here explains that all of the key sections of the Turkish HTS are translated into English, Borusan identified which countries in English were covered by which sections, and the various sub-classifications under HTS 7208 are clearly discernible. Def's Resp. at 43, referencing PDoc 73 at Ex. 10. Maverick claims that because heading 7225 is also circled on the Turkish HTS on the record and because Borusan supplied only selected tariff line sections in its submission, the court must conclude that the evidence is inconsistent and incomplete, Maverick Br. at 12, but as Commerce argues there is no record evidence that calls into question the validity of the Turkish HTS supplied by Borusan and the validity of the Turkish government's response on this issue, and Maverick cites to none. *See* Def's Resp. 43–44.

ity, and the determination that the industries receiving the alleged HRS subsidy were "limited" in number.

Slip opinion 15–36 was issued after initial briefs were filed in this matter. Because the above claims are essentially the same as those addressed in that opinion, albeit as administratively determined with respect to Toscelik, Toscelik's reply brief states that they will defer to the court's prior decision on those issues. This opinion, therefore and hereby, adopts and adheres to the reasoning of slip opinion 15–36 with respect to Toscelik's HRS-for-LTAR claims for purposes of remand, with one difference that was pressed more extensively in Toscelik's 56.2 brief than in Borusan's case: As it considers on remand the issue of whether the Turkish HRS market was distorted during the POI, Commerce is hereby specifically requested to address more fully and directly the incongruity of Toscelik's evidence that it argues shows the prices it paid to Erdemir were higher than the prices it paid for imported coils and higher than its own cost of production, as summarized in Table 1 of Toscelik's confidential brief on its Rule 56.2 motion (referencing Toscelik's Questionnaire Response at Exhibit 22, CDoc 83), and explain how Erdemir's less-than-majority share of the HRS market gives it the power to dictate below-market import prices to major steel mills in Europe, Russia, and Ukraine.

With respect to the inclusion of import duties, VAT, and inland and ocean freight in the tier-two benchmark, slip opinion 15–36 concluded that Commerce's treatment of the import duties and VAT was lawful, in accordance with *Essar Steel Ltd. v. United States*, 678 F.3d 1268 (Fed. Cir. 2012), but remanded on the inland and ocean freight issues. With respect to all such items, however, Toscelik makes the point that the benchmark of the *Final Determination* is a monthly price nearly twice that of Toscelik's own cost of production, of purchase prices from international suppliers, and of domestic U.S. *ex* -works prices, Toscelik Br. at 27 & 41, and that "[i]t is simply not reasonable or lawful for Commerce to construct a benchmark for a commodity product that is so inconsistent with commercial reality" as it does not comply with Commerce's legal obligation to calculate margins as accurately as possible in accordance with cases such as *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). *Id*. at 27. *See* also Slip Op. 15–36 at 44. The court agrees and hereby requests Commerce, in reconsidering this matter on remand consistent with *Borusan*, to demonstrate the reasonableness of any tier two benchmark redetermination in relation to an approximation of commercial reality.

Toscelik also challenges Commerce's valuation for benchmarking purposes of a land parcel that Toscelik was granted in 2008 for LTAR from the Osmaniye Organized Industrial Zone Authority, a state agency. In the *Final Determination*, Commerce explained its approach to this valuation as follows

> We are relying on the land benchmark data used in *CWP Turkey 2011* AR [*i.e.*, administrative review] and *CWP Turkey 2010* AR.[5] Specifically, we used as our benchmark publicly available information concerning industrial land prices in Turkey for purposes of calculating a comparable commercial benchmark price for land available in Turkey.

IDM at 58.

The administrative valuation of this parcel was the subject of Toscelik's separate lawsuit in Court No. 13–00371. Relying upon the principle and purpose of amortization itself, that litigation concluded that the average useful life ("AUL") schedule, once established, may not be altered in mid-stream, and upon remand Commerce, *inter alia*, restored the benchmark for the year 2008 parcel as originally calculated in *CWP Turkey 2010*. *See Toscelik Profil ve Sac Endustrisi A.S. v. United States*, 38 CIT ___, Slip Op. 14–126 (Oct. 29, 2014), *remand results sustained*, 39 CIT ___, Slip Op. 15–28 (Apr. 1, 2015). Toscelik would apply that same principle here.

Commerce argues that because the matter at bar involves a different program investigation (*inter alia*, HRS-for-LTAR in production of OCTG), the concerns expressed in Toscelik's earlier litigation are not inherent here, that there is no statutory or regulatory authority requiring that it use the same benchmark "forevermore, in all future proceedings in which that subsidy is analyzed", that it is reasonable to reconsider the valuation of the same parcel of land in different proceedings, and that the results of *CWP Turkey 2010* and *CWP Turkey 2011* are not binding on Commerce in the present proceeding. Def's Resp. at 51. However, as Toscelik points out in reply,

> [i]n the present *Final Determination*, Commerce explicitly relied on the 2010 and 2011 CWP reviews for its land valuation; Commerce did not recalculate anything, but brought into the present record the 2010 and 2011 final results (the 2011 remand results

[5] *CWP Turkey 2011* and *CWP Turkey 2010* are the results of the 2011 and 2010 administrative reviews of the CVD order on steel pipe from Turkey, published respectively as *Circular Welded Carbon Steel Pipes and Tubes From Turkey*, 78 Fed. Reg. 64916 (Oct. 30, 2013) (final CVD admin. rev.) and accompanying issues and decision memorandum, and *Circular Welded Carbon Steel Pipes and Tubes from Turkey*, 77 Fed. Reg. 46713 (Aug. 6, 2012) (final CVD admin. rev.) and accompanying issues and decision memorandum.

> were not available at the time Commerce made the final determination herein). Thus, Commerce explicitly pinned the present case to the records and determinations on the 2010 and 2011 CWP reviews.

Toscelik Reply at 3. The difficulty of whether Commerce could recalculate the benchmarks *ab initio* in the present case is an issue that need not be reached, for Commerce has merely adopted the results of *CWP Turkey 2010 and 2011*, and thus when *CWP 2011* turned out to be unlawful and was corrected on remand, the *status quo* of the posture of that result applies directly to the present case. For that reason, this issue must be remanded for correction.

Conclusion

Aspects of this matter must be remanded consistent with *Borusan* and the foregoing. The court will issue a separate remand order after further consultations with the parties. As to the substantive matters covered by this opinion:

It is so ordered.

Dated: June 15, 2015
New York, New York

/S/ R. KENTON MUSGRAVE
R. Kenton Musgrave, Senior Judge

Slip Op. 15–60

JIANGSU JIASHENG PHOTOVOLTAIC TECHNOLOGY CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge
Consol. Court No. 13–00012[1]

[denying motion to intervene out of time]

Dated: June 16, 2015

Gregory S. Menegaz, *J. Kevin Horgan*, and *John J. Kenkel*, deKieffer & Horgan, PLLC, of Washington, DC, for the movant.

L. Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, Jeanne E. Davidson, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Rebecca Cantu*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

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[1] This action is consolidated with *SolarWorld Americas, Inc v. United States*, Ct. No. 13–00006. Order June 12, 2013, ECF No. 18.

OPINION AND ORDER

Pogue, Senior Judge:

This consolidated action arises from the United States Department of Commerce's ("Commerce") antidumping ("AD") investigation of crystalline silicon photovoltaic cells ("CSPC" or "subject merchandise") from the People's Republic of China ("PRC" or "China").[2] Before the court is a motion by Sumec Hardware & Tools Company, Limited ("Sumec") — an exporter of subject merchandise that participated in the investigation — to intervene in this action, notwithstanding the passage of more than two years since the litigation began.[3]

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[4] and 28 U.S.C. § 1581(c) (2012).

As explained below, because Sumec has not shown good cause for filing its motion more than two years past the 30-day time limit for intervention, Sumec's motion to intervene out of time in this action is therefore denied.

BACKGROUND

Because Commerce considers the PRC to be a non-market economy ("NME"),[5] when investigating merchandise from China, the agency presumes that the export operations of all Chinese producers and exporters are controlled by the PRC government, unless respondents

[2] *See [CSPC], Whether or Not Assembled into Modules, from the [PRC]*, 77 Fed. Reg. 63,791 (Dep't Commerce Oct. 17, 2012) (final determination of sales at less than fair value, and affirmative final determination of critical circumstances, in part) ("*Final Results*") and accompanying Issues & Decision Mem., A-570–979, AD Investigation (Oct. 9, 2012).

[3] *See* Mot. for Intervention Pursuant to Rule 24(a)(3), ECF No. 101 ("Sumec's Mot.") (filed on May 14, 2015); Compl., Ct. No. 13–00006 (consolidated with this action, *see supra* note 1), ECF No. 8 (filed on February 1, 2013, challenging, *inter alia*, the AD cash deposit rate established for Sumec in this investigation; certifying service of the complaint on Sumec's counsel). Pursuant to USCIT R. 24(a)(3), "[i]n an action described in 28 U.S.C. § 1581(c), a timely motion [to intervene] must be made no later than 30 days after the date of service of the complaint . . ., unless for good cause shown at such later time for the following reasons: (i) mistake, inadvertence, surprise or excusable neglect; or (ii) under circumstances in which by due diligence a motion to intervene under this subsection could not have been made within the 30-day period."

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

[5] *See [CSPC], Whether or Not Assembled into Modules, from the [PRC]*, 76 Fed. Reg. 70,960, 70,962 (Dep't Commerce Nov. 16, 2011) (initiation of antidumping duty investigation) ("The presumption of NME status for the PRC has not been revoked by [Commerce] and, therefore, in accordance with [19 U.S.C. 1677(18)(C)(i)], remains in effect for purposes of the initiation of this investigation.").

show otherwise.[6] As a result, Commerce's practice is to assign to all exporters from the PRC a single "countrywide" antidumping duty rate unless they affirmatively establish eligibility for a "separate rate" by demonstrating both *de jure* (in law) and *de facto* (in fact) autonomy during the period of investigation.[7] Here, Commerce initially determined that Sumec had adequately established its eligibility for a separate rate.[8] On February 1, 2013, however, SolarWorld Americas Inc. (formerly SolarWorld Industries America, Inc.[9]) "SolarWorld") — a U.S. manufacturer of the domestic like product and a petitioner in the underlying investigation[10] — filed (and served on Sumec) a complaint challenging this determination (among other challenges to the final results of this investigation).[11] Although a number of the producers/exporters whose separate rate status was challenged in SolarWorld's complaint timely moved to intervene in this action, Sumec was not among them.[12]

After the close of briefing, on June 4, 2014, the court docketed a list of questions for the parties to address at the oral argument to be held on June 18, 2014.[13] Among the court's questions were a number of inquiries regarding SolarWorld's challenge to Commerce's grant of separate rate status to certain of respondents in this investigation, including Sumec.[14] Upon review of these questions, Commerce de-

[6] *See [CSPC], Whether or Not Assembled into Modules, from the [PRC]*, 77 Fed. Reg. 31,309, 31,315 (Dep't Commerce May 25, 2012) (preliminary determination of sales at less than fair value, postponement of final determination and affirmative preliminary determination of critical circumstances) ("*Prelim. Results*") ("In proceedings involving NME countries, [Commerce] has a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single AD rate.") (citation omitted) (unchanged in the *Final Results*, 77 Fed. Reg. at 63,794).

[7] *Prelim. Results*, 77 Fed. Reg. at 31,315 (unchanged in the *Final Results*, 77 Fed. Reg. at 63,794).

[8] *See Final Results*, 77 Fed. Reg. at 63,796.

[9] *See* Order Nov. 5, 2014, ECF No. 88 (granting SolarWorld's motion to amend the caption of this proceeding "to reflect the change in name of SolarWorld Industries America, Inc. to SolarWorld Americas Inc.").

[10] Compl., Ct. No. 13–00006 (consolidated with this action, *see supra* note 1), ECF No. 8, at ¶ 3.

[11] *Id.* at ¶¶ 12–14, Certificate of Service.

[12] *See* Order Feb. 22, 2013, Ct. No. 13–00006, ECF No. 15; Order Mar. 5, 2013, Ct. No. 13–00006, ECF No. 27; Order Mar. 13,2013, Ct. No. 13–00006, ECF No. 33 (each order granting timely motions to intervene); *cf. Siam Food Prods. Pub. Co. v. United States*, 22 CIT 826, 829, 24 F. Supp. 2d 276, 280 (1998) ("Parties with identified interests in the results of a review have the option to protect those interests by intervening in the proceedings.") (citing USCIT R. 24).

[13] *See* Letter from Ct. Re Oral Arg., ECF No. 80.

[14] *See id.* at 9–15.

cided to "reconsider and reevaluate its determination to grant a separate rate to four respondents,"[15] including Sumec,[16] and accordingly moved for a voluntary remand "to reevaluate the evidence and reconsider the separate rate eligibility of [, *inter alia*, Sumec]."[17] This motion was unopposed.[18] Finding the motion to have been based on a substantial and legitimate concern, the court granted Commerce's request for a voluntary remand to reconsider the separate rate eligibility of, *inter alia*, Sumec.[19] At no point during this process did Sumec seek to intervene to protect its interests in retaining its separate rate.

On remand, Commerce determined that Sumec failed to affirmatively establish its *de facto* independence from government control, and hence concluded that Sumec was not eligible for a rate separate from the China-wide entity.[20] Finding itself aggrieved by this determination, Sumec then moved to intervene in this action, outside of the 30-day window afforded for intervention as a matter of right,[21] arguing that Commerce's determination on remand was a "surprise" within the meaning of USCIT Rule 24(a)(3)(i).[22]

DISCUSSION

USCIT Rule 24(a)(3), which governs intervention in actions challenging Commerce's antidumping determinations,[23] provides that in-

[15] Def.'s Mot. for Voluntary Remand, ECF No. 81 ("Def.'s Mot. for Remand") at 1.

[16] *Id.* at 2.

[17] *Id.* at 3.

[18] *See* ECF Nos. 81–89; *see also* Oral Arg. Tr., ECF No. 83, at 20 (SolarWorld's counsel "welcom[ing] the United States' motion for a voluntary remand").

[19] *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*,__ CIT __, 28 F. Supp. 3d 1317, 1340–41 (2014). *See id*. at 1340 n.113 (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022,1029 (Fed. Cir. 2001) ("[E]ven if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position.. . . [I]f the agency's concern is substantial and legitimate, a remand is usually appropriate."), and noting that Commerce's stated concern was "consistency of agency action with other pending cases where a similar issue is presented" (quotation marks and citation omitted)).

[20] Final Results of Redetermination Pursuant to Ct. Order, ECF Nos. 97–1 (conf. version) & 98–1 (pub. version) ("*Remand Results*") at 8, 10–11, 23–25.

[21] Sumec's Mot., ECF No. 101.

[22] *Id.* at 4; *see* USCIT R. 24(a)(3)(i) (defining "good cause" for tardy intervention in actions challenging Commerce's antidumping determinations as including, *inter alia*, "surprise").

[23] USCIT R. 24(a)(3) (covering "action[s] described in 28 U.S.C.§ 1581(c)"); 28 U.S.C. § 1581(c) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under [19 U.S.C. § 1516a]."); 19 U.S.C. § 1516a (providing causes of action for judicial review of countervailing duty and antidumping duty proceedings); 19 U.S.C.§ 1516a(a)(2)(B)(i) (providing cause of action for review of Commerce's determinations in antidumping investigations such as the one at issue here); 28 U.S.C. § 2631(j)(1)(B) ("Any person who would be adversely affected or aggrieved by a decision in a civil action

terested parties may intervene as a matter of right within 30 days after the date of service of the complaint, and "expresses a clear mandatory standard that the court may waive the 30-day limit only if good cause is shown."[24] "Good cause" is defined as either (1) "mistake, inadvertence, surprise or excusable neglect," or (2) "circumstances in which by due diligence a motion to intervene under this subsection could not have been made within the 30–day period."[25]

Here, Sumec argues that good cause exists for its tardy intervention because, notwithstanding Sumec's actual knowledge of SolarWorld's pending legal challenge to Sumec's separate rate status in the investigation, Sumec believed that the challenge was meritless, and hence saw no need to intervene until the "surprise" of Commerce's decision on remand.[26] But adopting this interpretation of "surprise" as good cause for tardy intervention within the meaning of Rule 24(a)(3) would essentially render that provision's 30-day time limit meaningless. For under this interpretation, all would-be Defendant-Intervenors could claim good faith (subjective) belief in the legality of Commerce's favorable determination, and thus unpredictably delay their intervention until the outcome of the litigation begins to appear unfavorable. Such an interpretation "would render the actual time limit [for intervention] superfluous."[27]

That Sumec was subjectively surprised by the turn of events in the course of this litigation does not negate its awareness, at the time that SolarWorld served its complaint, that Sumec's interests in the

pending in the Court of International Trade may, by leave of court, intervene in such action, except that . . . in a civil action under [19 U.S.C. § 1516a], only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right[.]").

[24] *Siam Food Prods.*, 22 CIT at 827, 24 F. Supp. 2d at 278 (citing USCIT R. 24(a)).

[25] USCIT R. 24(a)(3). Sumec does not argue that it could not have, by due diligence, filed its motion to intervene within the 30-day period. *See* Sumec's Mot., ECF No. 101.

[26] *See* Sumec's Mot., ECF No. 101, at 1–2 (explaining that Sumec "did not appeal or intervene" within the 30-day period because it "was not [yet] adversely affected" by Commerce's decision); *id.* at 3 ("Sumec Hardware was not aggrieved in the original final results [of the underlying AD investigation] and could not have reasonabl[y] predicted that the litigation would result in the denial of its separate rate."); *id.* at 4 ("[Sumec] had no reason to seek appeal [or intervene] [but] has now been significantly aggrieved by a decision it could not predict. The decision was a 'surprise.'") (quoting USCIT R. 24(a)(3)(i)).

[27] *See Siam Food Prods.*, 22 CIT at 830, 24 F. Supp. 2d at 281; *see also id.* ("Under such a scenario [where tardy strategic intervention is permitted so long as the movant files early enough to continue the action without too much prejudice to the opposing parties], existing parties and the court might not know when to expect intervention, the proceedings on the merits could be interrupted and/or delayed by motions to intervene, and extra adjudication could be routinely required for parties who choose to file late. The court assumes the 30-day limit added [to USCIT Rule 24(a)(3)] in 1993 was intended to avoid this result. The time limit cannot be so easily avoided, even if some prejudice to the late filer results from denial of the motion.").

outcome of this AD investigation may be adversely affected by this litigation. Thus this is not a case of surprise, but rather an example of a failed litigation strategy. Sumec knew its interests were at stake, and yet made a conscious decision to risk letting the litigation play out without Sumec's intervention. Sumec not only did not intervene within the 30-day time limit, but Sumec also did not seek to intervene at any point during the briefing of SolarWorld's challenge to Sumec's separate rate, nor even once it became apparent that Commerce itself was seeking an unopposed voluntary remand to reconsider the evidence on this issue. That this strategy turned out to be unwise is neither surprising nor excusable.[28] It does not constitute "good cause" within the meaning of USCIT Rule 24(a)(3).

Nor is this a case of excusable neglect.[29] Here the reason for Sumec's tardiness was not neglect, but rather Sumec's conscious decision not to intervene until the outcome of the litigation began to appear unfavorable.[30] As in *GPX*, Sumec "had notice of the substantive issues raised by the appeal[] and could have moved to intervene."[31] Instead, "it delayed its decision on its involvement,"[32] awaiting the outcome of the remand determination. As in *GPX* and *Siam Products*, this does not constitute "excusable neglect," but rather "a conscious decision not to intervene timely."[33] As in *Siam Products*,[34] this was not a case of neglect at all, but rather a deliberate decision that turned out to have been imprudent.

CONCLUSION

For all of the foregoing reasons, having shown no good cause for delaying its intervention until after completion of Commerce's voluntary remand, Sumec has not established a basis for exception from

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[28] *See* USCIT Rule 24(a)(3)(i); *cf. GPX Int'l Tire Corp. v. United States,* 33 CIT 114, 116–17 (2009) (not reported in the Federal Supplement) (declining to find good cause for tardy intervention where the movant was aware of the litigation affecting its interests but made a conscious decision to delay intervention and assume the risk that the litigation may adversely affect its interests).

[29] *See* Sumec's Mot., ECF No. 101, at 3 (suggesting that the court apply the Supreme Court's interpretation of "excusable neglect" to Sumec's tardy intervention (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. LP*, 507 U.S. 380, 395 (1993) (discussing "excusable neglect" in the context of Federal Rule of Civil Procedure 60(b)(1) (permitting courts to reopen judgments for reasons of "mistake, inadvertence, surprise, or excusable neglect"))).

[30] *See supra* note 27 (quoting and citing Sumec's motion).

[31] *GPX* , 33 CIT at 117.

[32] *See id.*

[33] *Id.* (quoting *Siam Food Prods.*, 22 CIT at 830, 24 F. Supp. 2dat 280) (internal quotation marks omitted).

[34] *See Siam Food Prods.*, 22 CIT at 830, 24 F. Supp. 2d at 280 ("There is simply no 'neglect.' There was a conscious decision not to intervene . . . .").

Rule 24(a)(3)'s general requirement that interventions must be made within 30 days of the service of the complaint. Sumec's untimely motion to intervene — now that the matter has been fully briefed, argued, opined upon, and reconsidered on remand — therefore must be, and hereby is, denied.

It is SO ORDERED.

Dated: June 16, 2015
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

Slip Op. 15–61

PEER BEARING COMPANY-CHANGSHAN, Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 09–00052

JUDGMENT

Before the court is a decision issued by the United States Court of Appeals for the Federal Circuit ("Court of Appeals") vacating and remanding the court's decision in *Peer Bearing Co.-Changshan v. United States*, 37 CIT __, 853 F. Supp. 2d 1365 (2013). The Court of Appeals instructed the court to reinstate the "application of adverse facts available and [the] calculation of [plaintiff's] margin" by the U.S. Department of Commerce, International Trade Administration in the first redetermination issued on remand ("First Remand Redetermination"). *Peer Bearing Co.-Changshan v. United States*, 766 F.3d 1396 (Fed. Cir. 2014); CAFC Mandate in Appeal # 14–1001 (Oct. 21, 2014), ECF No. 142; Final Results of Redetermination Pursuant to Remand (July 1, 2011), ECF No. 98 ("*First Remand Redetermination*"). Therefore, upon consideration of the decision of the Court of Appeals and all other filings and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the First Remand Redetermination be, and hereby is, reinstated; and it is further

ORDERED that entries of merchandise that are affected by the First Remand Redetermination shall be liquidated in accordance with the final judicial decision in this action.

Dated: June 16, 2015
New York, New York

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

Slip Op. 15–62

G.G. MARCK & ASSOCIATES, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 08–00306

[In this classification case, defendant's motion for summary judgment is granted, in part, and plaintiff's cross-motion for summary judgment is granted, in part.]

Dated: June 17, 2015

Edmund Maciorowski, Edmund Maciorowski P.C., of Bloomfield Hills, MI, argued for plaintiff.

Jason M. Kenner, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of New York, NY, argued for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Amy M. Rubin*, Acting Assistant Director, and *Barbara S. Williams*, Attorney in Charge. Of counsel on the brief was *Beth Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection.

OPINION

EATON, Judge:

Before the court are the cross-motions for summary judgment of plaintiff G.G. Marck & Associates, Inc. ("plaintiff" or "Marck") and defendant United States ("defendant") on behalf of the United States Customs and Border Protection Agency ("Customs"). Def.'s Mot. for Summ. J. (ECF Dkt. No. 57); Pl.'s Am. Mot. for Summ. J. (ECF Dkt. No. 70). The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). At issue is the proper classification of ninety-one cups and mugs imported by plaintiff between August 3, 2006 and September 18, 2006. *See* Summons at 1, 3 (ECF Dkt. No. 1).

Plaintiff commenced this lawsuit after its timely-filed protest was denied by Customs and the assessed duties were paid. *See* Compl. ¶¶ 2, 3 (ECF Dkt. No. 9); Answer ¶¶ 2, 3 (ECF Dkt. No. 10). Plaintiff initially pursued the issues presented here in court number 06–00094 as a test case, but moved for voluntary dismissal on May 18, 2010 following the filing of motions for summary judgment. *See* Stipulation of Dismissal, *Marck & Assocs., Inc. v. United States*, Ct. No. 06–00094 (May 18, 2010), ECF Dkt. No. 97; Pl.'s Mot. for Summ. J., *Marck & Assocs., Inc. v. United States*, Ct. No. 06–00094 (Dec. 15, 2009), ECF Dkt. No. 83; Def.'s Mot. for Summ. J., *Marck & Assocs., Inc. v. United States*, Ct. No. 06–00094 (Dec. 10, 2009), ECF Dkt. No. 80. On September 7, 2010, the court designated this matter a test case pursuant to USCIT Rule 84 and suspended related court actions filed by plaintiff between March 31, 2006 and July 26, 2010.[1] Order (ECF Dkt. No. 16). Seven additional lawsuits, filed subsequently by plaintiff, have since been suspended pending the disposition of this test case.[2]

For the reasons set forth below, defendant's motion for summary judgment is granted, in part, and plaintiff's motion for summary judgment is granted, in part, and the court finds that (1) five articles are properly classified under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 6912.00.39, as "Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china" that are "Available in specified sets,"[3] (2) fifty-eight articles are properly classified under HTSUS subheading 6912.00.44, "Mugs and other steins,"[4] and (3) twenty-eight articles are properly classified under HTSUS subheading 6912.00.48, "Other."[5]

BACKGROUND

The facts described below have been taken from the parties' stipulated facts, admitted portions of plaintiff's USCIT Rule 56(h) statement,[6] and findings based on record evidence on which no reasonable fact-finder could come to an opposite conclusion. *See Chrysler Corp. v. United States*, 24 CIT 75, 91, 87 F. Supp. 2d 1339, 1354 (2000). Marck, a distributer of ceramic tableware, is the importer of record of the contested merchandise, stoneware cups and mugs, from Chinese manufacturer Shandong Zibo Niceton-Marck Huaguang Ceramics

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[1] Twenty-three actions filed between March 31, 2006 and July 26, 2010 were suspended (court numbers listed chronologically by the date they were filed): 06–00107, 0600264, 06–00303, 06–00346, 07–00146, 07–00405, 08–00075, 08–00104, 08–00105, 08–00295, 0800300, 08–00327, 08–00365, 08–00423, 09–00035, 09–00105, 09–00190, 09–00263, 09–00371, 0900542, 10–00022, 10–00154, and 10–00216. *See* Order (ECF Dkt. No. 16).

[2] The seven additional lawsuits filed, that have since been suspended pending the disposition of this test case, are (court numbers listed chronologically by the date they were filed) 10–00342, 11–00032, 11–00186, 11–00531, 12–00128, 12–00399, and 13–00221.

[3] HTSUS subheading 6912.00.39 reads as follows: "Available in specified sets: . . . In any pattern for which the aggregate value of the articles listed in additional U.S. note 6(b) of this chapter is over $38." Subheading 6912.00.39 of Chapter 69, HTSUS (2006).

[4] HTSUS subheading 6912.00.44 covers "Mugs and other steins." Subheading 6912.00.44 of Chapter 69, HTSUS (2006).

[5] HTSUS subheading 6912.00.48 covers "Other." Subheading 6912.00.48 of Chapter 69, HTSUS (2006).

[6] Because the United States Court of International Trade amendment to USCIT Rule 56(h) eliminated the requirement that parties must submit a statement of material facts not in dispute, defendant did not submit a USCIT Rule 56(h) statement of its own. *See* Def.'s Resp. to Pl.'s Separate Statement of Undisputed Material Facts 1 (ECF Dkt. No. 81). Nonetheless, plaintiff submitted a statement of material facts, and defendant filed a reply. *See* Pl.'s Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried (ECF Dkt. No. 70); Def.'s Resp. to Pl.'s Separate Statement of Undisputed Material Facts 1 n.1.

Ltd. (“Huaguang” or the “manufacturer”). *See* Pl.’s Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried ¶¶ 111, 112 (ECF Dkt. No. 70) (“Pl.’s Rule 56(h) Statement”). The items are imported separately and not as sets. *See* Mem. in Supp. of Def.’s Mot. for Summ. J. (ECF Dkt. No. 57) (“Def.’s Br.”), Ex. 1 at 26.

At liquidation, Customs classified all of the merchandise under Heading 6912 of the HTSUS (“Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china”). *See* Summons at 2. Customs, however, classified merchandise it found to be “mugs” under subheading 6912.00.44 as “Mugs and other steins” at 10 percent *ad valorem*, and those items it found to be “cups” under subheading 6912.00.48 as “Other” at 9.8 percent *ad valorem*. *See* Summons at 2; App. 4 to Pl.’s Br. in Supp. of Mot. for Summ. J., Aff. of Raymond Guan (“Guan Aff.”), Ex. 1 (“Niceton Invoices”).

Marck timely protested Customs’ classifications of the merchandise and urged that its merchandise[7] should have been classified under subheading 6912.00.39 at 4.5 percent *ad valorem*:

6912.00	Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china:
	Tableware and kitchenware:
	. . .
	Other:
	. . .
	Other:
	Available in specified sets:
	. . .
6912.00.39	*In any pattern for which the aggregate value of the articles listed in additional U.S. note 6(b) of this chapter is over $38*

See Subheading 6912.00.39 of Chapter 69, HTSUS (2006) (emphasis added); Compl. ¶ 2; Answer ¶ 2; Niceton Invoices.

The phrase “[a]vailable in specified sets” is the subject of the Additional U.S. Notes (“U.S. Notes”), which form a part of the HTSUS.[8]

[7] The twenty-two style numbers of the ninety-one contested mugs and cups at issue are 1015, 7168, 286, 39, 3476, 414, 481, 67, 803, 4110, 1209, 1776, 212, 3414, 1376, 1950, 209, 7101, 1276, 81015, 617, and 5176. Pl.’s Rule 56(h) Statement ¶ 19.

[8] While the Explanatory Notes are non-binding and apply to the interpretation of the Harmonized Tariff Schedule and the HTSUS, the U.S. Notes, which are statutory provisions, relate only to the interpretation of the HTSUS in the United States. *See Del Monte Corp. v. United States*, 730 F.3d 1352, 1355 (Fed. Cir. 2013); *Kahrs Int’l, Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013).

See Additional U.S. Note 6(b), HTSUS ("U.S. Note 6"); *Del Monte Corp. v. United States*, 730 F.3d 1352, 1355 (Fed. Cir. 2013) ("Included among the specified 'notes' are Additional U.S. Notes, which Customs describes as 'legal notes that provide definitions or information on the scope of the pertinent provisions or set additional requirements for classification purposes' and which are 'considered to be statutory provisions of law for all purposes.'" (citation omitted) (quoting U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: TARIFF CLASSIFICATION 32 (2004))). As shall be explained in more detail hereinafter, in accordance with U.S. Note 6(b), the inclusion under the phrase "available in specified sets" requires that specific articles of particular sizes (e.g., plates, tea cups, soups, fruits, a platter or chop dish, an open vegetable dish or bowl, a sugar, and a creamer) be "sold or offered for sale in the same pattern." *See* U.S. Note 6(a), (b).

As is relevant here, Marck offers a number of different lines of dinnerware merchandise, one of which it describes as falling under the trademark "Cancun™ Vitrified" ("Cancun"). *See* Def.'s Br., Ex. 5 at 48 ("Marck Catalog"). In Marck's catalog, "Cancun" trademarked items are offered in nine basic solid colors: Stanford red, black, cobalt, ocean blue, California orange, lemon, hunter green, white, and natural.[9] *See* Marck Catalog at Marck & Associates Color Codes, 49. Dinnerware items identified by Marck as being covered by the "Can-

[9] Marck's 2006 catalog features a "Color Codes" page, which designates a unique code used to identify the color of each item throughout the catalog. Marck Catalog at Marck & Associates Color Codes ("Marck Color Codes"). Under "Vitrified Colors," color code "296" is labeled "Stanford red" and followed in a parenthesis by the letter "R," color code "04" is labeled "cobalt" and followed in a parenthesis by the letters "CB," color code "210" is labeled "California orange" and followed in a parenthesis by the letter "O," color code "242" is labeled "lemon" and followed in a parenthesis by the letter "Y," and color code "67" is labeled "hunter green" and followed in a parenthesis by the letter "G." *See* Marck Color Codes. The 2009–2010 catalog of International Tableware Incorporated ("ITI"), an associate of Marck, however, labels color code "2194" as "red," "04" as "cobalt blue, "210" as "orange," "242" as "yellow," and "67" as "green." The parties agree, and so does the court, that these four corresponding colors in each catalog reference the same color, and the court finds, based on a review of the invoices, catalogs, and photographs of the contested merchandise that no reasonable fact-finder could conclude otherwise. Thus, the court adopts the color descriptions as used in ITI's catalog when referencing these particular colors hereinafter: "296" and "2194" will refer to articles that are colored "red," "04" will refer to articles colored "cobalt blue," "210" will refer to articles colored "orange," "242" will refer to articles colored "yellow," and "67" will refer to articles that are colored "green."

Moreover, Marck labels color code "06" in its catalog as "ocean blue," which is followed in a parenthesis by the letters "LB." *See* Marck Color Codes. Accordingly, in creating a chart of the contested articles, defendant described the color of article 7168–06 as "ocean blue." *See* Def.'s Br., Ex. 4 at 8.

ITI's 2009–2010 catalog, however, labels color code "06" as "light blue," and lists "light blue" as one of the "Cancun" trademarked colors. Def.'s Br. 4, Ex. 6, at 26, 27. Based on the color description in ITI's catalog, defendant determined that "light blue" is a color of cun" trademark include the following items: 10 ¼ inch plates, 6 ⅝ inch plates, 7 ounce tall cups, 6 inch saucers, 7 inch bowls, 4 ¾ inch 4 ounce fruit bowls, 13 ¼ inch platters, 10 inch bowls, sugar bowls with lids, and 14 ounce creamers. *See* Pl.'s Rule 56(h) Statement ¶ 115. Although it does not identify them as part of the "Cancun" line (or any other line), Huaguang, the manufacturer, sells the 10 ¼ inch plates, 6 ⅝ inch plates, 7 ounce tall cups, 6 inch saucers, 7 inch bowls, and 4 ¾ inch 4 ounce fruit bowls in packages of twelve, and the 13 ¼ inch platters, 10 inch bowls, sugar bowls with lids, and 14 ounce creamers in packages of one. *See* Guan Aff. ¶ 22, Ex. 5; App. 5 to Pl.'s Br. in Supp. of Mot. for Summ. J., Aff. of Christopher Miller ¶ 37, Ex. 5 ("Miller Aff."). The total price of any combination of the seventy-seven articles constituting a complete set under the "Cancun" trademark, at the time of importation, exceeded $38.00. Pl.'s Rule 56(h) Statement ¶ 126.

STANDARD OF REVIEW

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(c) (2015); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). In the context of a customs classification case, summary judgment is appropriate when "there is no factual dispute regarding what the merchandise is." *Sony Elecs., Inc. v. United States*, 37 CIT __, __, Slip Op. 13–153, at 5 (2013) (citing *Faus Grp., Inc. v. United States*, 581 F.3d 1369, 1372 (Fed. Cir. 2009)). "When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000) (citing *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999)). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (footnote omitted) (citations omitted). That is, "the nonmoving party must come forward with 'specific facts show-

"Cancun" merchandise, and therefore that item 7168–06 is not part of the "Cancun" collection because it exhibits "ocean blue," which is not a color of "Cancun" trademarked merchandise.

Following a review of the invoices, catalogs, and photographs of contested articles, the court finds that a reasonable fact-finder could only conclude that the color descriptions of "light blue" and "ocean blue" reference the same color, identified consistently under color code "06," and are employed interchangeably by Marck and ITI. Thus, item 7168–06 is, in fact, offered in one of the colors of "Cancun" trademarked merchandise. The court adopts ITI's description of "light blue" when referencing this particular color (i.e., 06) hereinafter.

ing that there is a *genuine issue for trial*.'" *Id.* at 587 (citation omitted) (quoting FED.R.CIV. P. 56(e)).

DISCUSSION

I. LEGAL FRAMEWORK

Classification of imported merchandise involves a two-step inquiry: "first, construe the relevant classification headings; and second, determine under which of the properly construed tariff terms the merchandise at issue falls." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)). The first step is a question of law and the second step is a question of fact. *See id.* (citing *Universal Elecs.*, 112 F.3d at 491). Nonetheless, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Id.* (citations omitted). The plaintiff "has the burden of establishing that the government's classification is wrong," but the court determines "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

"The HTSUS General Rules of Interpretation [('GRI')] and the Additional U.S. Rules of Interpretation . . . govern the proper classification of all merchandise and are applied in numerical order." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Baxter Healthcare Corp. of Puerto Rico v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999)). GRI 1 provides, in relevant part, that "the terms of the headings and any relative section or chapter notes" control classification. "The first step in properly construing a tariff classification term is to determine whether Congress clearly defined that term in either the HTSUS or its legislative history." *Airflow Tech., Inc. v. United States*, 524 F.3d 1287, 1290–91 (Fed. Cir. 2008) (quoting *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001)) (internal quotation marks omitted). "Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same. A court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss*, 195 F.3d at 1379 (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989); *Baxter*, 182 F.3d at 1337).

Although there is no dispute regarding what the merchandise is in this case (i.e., stoneware tableware), the court must determine (1) under which properly construed HTSUS subheading each item should be classified and (2) which, if any, of the contested articles "are sold or offered for sale in the same pattern" and "available in specified sets." *See* U.S. Note 6(a). In doing so, the court must address Marck's primary argument, which is that the ninety-one cups and mugs, including those not in the seven colors of "Cancun" trademarked merchandise, are part of the "Cancun" trademark pattern.

II. THE CONSTRUCTION OF HTSUS SUBHEADINGS 6912.00.44 AND 6912.00.48

Chapter 69 of the HTSUS encompasses "Ceramic Products," and HTSUS Heading 6912 covers "Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china." The court finds, and the parties agree, that the contested stoneware mugs and cups should be classified under HTSUS Heading 6912 because they are ceramic tableware and neither porcelain nor china.[10] *See* App. 1 to Pl.'s Br. in Supp. of Mot. for Summ. J., Aff. of Dr. William M. Carty ¶ 5 ("Carty Aff."). The parties disagree, however, under which subheading these mugs and cups are properly classified, i.e., "under which of the properly construed tariff terms the merchandise at issue falls." *See Bausch & Lomb*, 148 F.3d at 1365 (citing *Universal Elecs.*, 112 F.3d at 491).

HTSUS subheading 6912.00.44 covers "Mugs and other steins," and subheading 6912.00.48 applies to "Other." The court finds that subheading 6912.00.44, "Mugs and other steins," is an *eo nomine* provision because it describes the merchandise by name. *See Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995) ("[A]n *eo nomine* provision . . . describes a commodity by a specific name, usually one common in commerce. Absent limiting language or indicia of contrary legislative intent, such a provision covers all forms of the article." (citing *Nat'l Advanced Sys. v. United States*, 26 F.3d 1107, 1111 (Fed. Cir. 1994))).

Precisely what constitutes a mug or stein, however, is not made clear by the HTSUS. Where, as here, the provisions of the HTSUS are unclear and undefined, and the statutory language remains un-

[10] The parties agree that each of the contested cups and mugs are "stoneware," as described in the invoices for each entry of the subject merchandise. *See* Guan Aff., Ex. 1.

The HTSUS distinguishes "stoneware" from other types of ceramic products, such as porcelain, china, chinaware, bone chinaware, and earthenware, and describes "stoneware" as "ceramic ware which contains clay as an essential ingredient, is not commonly white, will absorb not more than 3 percent of its weight of water, and is naturally opaque (except in very thin pieces) even when absorption is less than 0.1 percent." *See* U.S. Note 5(a).

changed in the transition from the Tariff Schedules of the United States ("TSUS")[11] to the HTSUS, prior constructions of the TSUS are "instructive in interpreting the HTS[US]." *See Pima Western, Inc. v. United States*, 20 CIT 110, 116, 915 F. Supp. 399, 404 (1996) (quoting H.R. CONF.REP.NO. 100–576, at 550 (1988), *reprinted in* 1988 U.S-.C.C.A.N. 1547, 1583) (internal quotation marks omitted). The Federal Circuit's predecessor, the United States Court of Customs and Patent Appeals, in construing the predecessor provisions of subheadings 533.71 and 533.75 in the TSUS, observed that, although "the definition and general concept of a mug may be fluid and indefinite," there are certain "general characteristics which seem to distinguish a mug from a cup and which do not appear to have varied extensively over the years." *United States v. Nat'l Silver Co.*, 59 CCPA 64, 65, 66, 455 F.2d 593, 594, 595 (1972).[12] In keeping with this observation, the *National Silver* Court found that, under the TSUS, a "mug" was "either straight-sided or barrel-shaped, measuring about the same across the top as across the bottom, having a flat bottom, heavier than a cup, and not used with a saucer." *Id.* at 66, 455 F.2d at 595 (citing *Ross Prods., Inc. v. United States*, 46 Cust. Ct. 158, 163, C.D. 1976 (1958)). In comparison, a "cup," the Court held, "designat[es] a bowl-shaped drinking vessel commonly set on a saucer and used for the service of hot liquids." *Id.* at 67, 455 F.2d at 595 (citing *Ross Prods., Inc. v. United States*, 46 Cust. Ct. 8, 12, C.D. 2226 (1961)). The *National Silver* Court relied on Webster's Third New International Dictionary (1963) to support its construction of the terms. For instance, the dictionary provided that a "mug" is "a drinking cup usu-[ally] of metal or earthenware and usu[ally] cylindrical with no lip but with a handle." *Id.* at 66, 455 F.2d at 595 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1483 (1963)) (internal quotation marks omitted).

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[11] The HTSUS became effective, replacing the TSUS, on January 1, 1989. *See Marubeni Am. Corp. v. United States*, 35 F.3d 530, 532 (Fed. Cir. 1994).

[12] In *National Silver*, the U.S. Court of Customs and Patent Appeals construed the following TSUS provisions:

> Articles chiefly used for preparing, serving, or storing food or beverages, or food or beverage ingredients:
>
> . . .
>
> Of nonbone chinaware of subporcelain:
>
> . . .
>
> Household ware not covered by item 533.65, 533.66, 533.68, or 533.69:
>
> 533.71 *Steins*, *mugs*, candy boxes, decanters, punch bowls, pretzel dishes, tidbit dishes, tiered servers, and bonbon dishes. Other articles:
>
> . . .
>
> 533.75 *Cups* valued over $1.35 but not over $4 per dozen.

Nat'l Silver, 59 CCPA at 65, 455 F.2d at 594; 533.75, TSUS (emphasis added); 533.71, TSUS (emphasis added).

Contemporary dictionaries provide substantially similar definitions for a "mug." *See, e.g.*, OXFORD ENGLISH DICTIONARY ONLINE (Oxford University Press Mar. 2015), *available at* http://www.oed.com/view/Entry/123325?rskey=mlAiKE&result=1#eid ("A drinking vessel, freq. cylindrical (and now usually with a handle), generally used without a saucer."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1483 (2002) ("[A] drinking cup usu[ally] of metal or earthenware and usu[ally] cylindrical with no lip but with a handle."); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1153 (4th ed. 2000) ("A heavy cylindrical drinking cup usually having a handle.").

Webster's Third New International Dictionary (1963), the dictionary upon which the U.S. Court of Customs and Patent Appeals relied in *National Silver*, defined a "cup" to mean "a usu[ally] open bowl-shaped drinking vessel often having a handle and a stem and a base and sometimes a lid. . . . [A] handled vessel of china or glass that is set on a saucer and used for hot liquids (as coffee, tea, or soup)." *Nat'l Silver*, 59 CCPA at 66, 455 F.2d at 595 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 554 (1963)) (internal quotation marks omitted); *see also Imports, Inc. v. United States*, 55 Cust. Ct. 506, 507, Abs. 69681 (1965) ("Standing alone, 'cup' has been held to designate 'a bowl-shaped drinking vessel commonly set on a saucer and used for the service of hot liquids, such as tea, coffee, or soup.'" (quoting *Ross Prods.*, 46 Cust. Ct. at 12, C.D. 2226)).

As with mugs, contemporary dictionary definitions provide similar definitions for what constitutes a "cup." *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 554 (2002) ("[A] usu[ally] open bowl-shaped drinking vessel often having a handle and a stem and base and sometimes a lid. . . . [A] handled vessel of china or glass that is set on a saucer and used for hot liquids (as coffee, tea, or soup)."); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 444 (4th ed. 2000) ("A small open container, usually with a flat bottom and a handle, used for drinking."); OXFORD ENGLISH DICTIONARY ONLINE (Oxford University Press Mar. 2015), *available at* http://www.oed.com/view/Entry/1233 25?result=1&rskey=mlAiKE& ("A small open vessel for liquids, usually of hemispherical or hemispheroidal shape, with or without a handle; a drinking-vessel. The common form of a cup (*e.g.* a tea-cup or coffee-cup) has no stem; but the larger and more ornamental forms (*e.g.* a wine-cup or chalice) may have a stem and foot, as also a lid or cover; in such case *cup* is sometimes applied specifically to the concave part that receives the liquid.”).

“[I]n all cases involving statutory construction,” a court’s “starting point must be the language employed by Congress,” and the court “assume[s] ‘that the legislative purpose is expressed by the ordinary meaning of the words used.’” *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979); *Richards v. United States*, 369 U.S. 1, 9 (1962)) (internal quotation marks omitted). Based on its review of the U.S. Court of Customs and Patent Appeals’ holding, relevant dictionary definitions, and its own understanding of the common meaning of the words, the court adopts the construction of the terms “mug” and “cup” as used in *National Silver*. Thus, for classification purposes under the HTSUS, unless properly classified elsewhere, articles found to be “either straight-sided or barrel-shaped, measuring about the same across the top as across the bottom, having a flat bottom, heavier than a cup, and not used with a saucer,” are properly classified as “Mugs and other steins” under subheading 6912.00.44, and articles found to be “bowl-shaped drinking vessel[s] commonly set on a saucer and used for the service of hot liquids,” are not mugs and are thus properly classified under subheading 6912.00.48, “Other,” given the absence of a more specific subheading for this type of merchandise.

III. THE CONSTRUCTION OF HTSUS SUBHEADING 6912.00.39

Plaintiff insists that, while if sold separately, its mugs and cups would properly be classified under HTSUS 6912.00.44 (“Mugs and other steins”) and 6912.00.48 (“Other”) respectively, because they are offered for sale and sold with other ceramic items in the same pattern and thus as sets, they are properly classified under HTSUS subheading 6912.00.39. As has been noted, this subheading covers “Other: Available in specified sets: In any pattern for which the aggregate value of the articles listed in additional U.S. note 6(b) of this chapter is over $38.”

> The statutory language in U.S. Note 6(a) explains that “available in specified sets”
>
> embraces plates, cups, saucers and other articles principally used for preparing, serving or storing food or beverages . . . which are sold or offered for sale *in the same pattern*, but no article is classifiable as being ‘available in specified sets’ unless it is of a pattern in which at least *the articles listed below in (b)* of this note are sold or offered for sale.

U.S. Note 6(a) (emphasis added).

Importantly, U.S. Note 6(b) specifies that, where

> each of the following articles is sold or offered for sale in the same pattern, the classification hereunder in subheading[] . . . 6912.00.39, of all articles of such pattern shall be governed by the aggregate value of the following articles in the quantities indicated . . . whether or not such articles are imported in the same shipment:
>
> 12 plates of the size nearest to 26.7 cm [(10.5 inches)] in maximum dimension, sold or offered for sale,
>
> 12 plates of the size nearest to 15.3 cm [(6.0 inches)] in maximum dimension, sold or offered for sale,
>
> 12 tea cups and their saucers, sold or offered for sale,
>
> 12 soups of the size nearest to 17.8 cm [(7.0 inches)] in maximum dimension, sold or offered for sale,
>
> 12 fruits of the size nearest to 12.7 cm [(5.0 inches)] in maximum dimension, sold or offered for sale,
>
> 1 platter or chop dish of the size nearest to 38.1 cm [(15.0 inches)] in maximum dimension, sold or offered for sale,
>
> 1 open vegetable dish or bowl of the size nearest to 25.4 cm [(10.0 inches)] in maximum dimension, sold or offered for sale,
>
> 1 sugar of largest capacity, sold or offered for sale,
>
> 1 creamer of largest capacity, sold or offered for sale.
>
> If either soups or fruits are not sold or offered for sale, 12 cereals of the size nearest to 15.3 cm in maximum dimension, sold or offered for sale, shall be substituted therefor.

U.S. Note 6(b). Thus, in order for merchandise to be classified under subheading 6912.00.39, it must be of a single pattern and each of the specified pieces must be sold or offered for sale in that pattern.

It is undisputed that articles advertised in Marck's catalog under the "Cancun" trademark constitute a "specified set" as enumerated under U.S. Note 6(b) in two of the colors (i.e., cobalt blue and light blue), because each of the required dinnerware pieces satisfy the specifications set forth in U.S. Note 6(b) (i.e., are sold or offered for sale in the same pattern), are ceramic tableware other than porcelain or china, and the set has an aggregate value over $38.00. In other words, the parties agree, and so does the court, that (1) the articles sold in the cobalt blue color, identified by Marck under the "Cancun" trademark, are in the same pattern and (2) each of the items necessary to constitute a set under U.S. Note 6(b) are offered for sale in the same cobalt blue color. It is equally undisputed that those articles sold in the light blue color constitute another set.[13]

With respect to the remaining items, the primary issue hinges on the proper construction of the language "in the same pattern" in U.S. Note 6(a). That is, because the required creamer and sugar are only manufactured in the two solid blue colors (i.e., cobalt blue and light blue), the court must decide whether the creamer and sugar are "in the same pattern" as Marck's merchandise offered for sale in other colors, in more than one color, or with surface designs.

In the absence of a statutory definition for a term, or an Explanatory Note to clarify a term's meaning, legislative history may be considered in resolving a classification dispute. *See Airflow Tech.*, 524 F.3d at 1290–91; *NEC Elecs., Inc. v. United States*, 144 F.3d 788, 791 (Fed. Cir. 1998). The term "pattern" and the phrase "in the same pattern" are not defined in the HTSUS. As noted, where, as here, the provisions of the HTSUS are ambiguous, and the statutory language remains unchanged in the transition from the TSUS to the HTSUS, prior constructions of the TSUS are "instructive in interpreting the HTS[US]." *See Pima Western*, 20 CIT at 116, 915 F. Supp. at 404 (quoting H.R. CONF.REP.NO. 100–576, at 550, *reprinted in* 1988 U.S.C.C.A.N. at 1583) (internal quotation marks omitted). The Tariff Classification Study ("TCS") is "part of the legislative history of the TSUS," and may be used "to aid the interpretation of [the] HTSUS." *Libbey Glass, Div. of Owens-Illinois, Inc. v. United States*, 921 F.2d 1263, 1265 (Fed. Cir. 1990); *Pima Western*, 20 CIT at 117, 915 F. Supp. at 405 (citing *Beloit Corp. v. United States*, 18 CIT 67, 74, 843 F. Supp. 1489, 1495 (1994)).

The phrase "in the same pattern" is undefined by the HTSUS, by the Explanatory Notes, by this Court or its predecessor, or by the Federal Circuit or its predecessor's case law. Because the language of HTSUS subheading 6912.00.39 remained unchanged in the transition from the TSUS to the HTSUS, however, the TCS, Seventh Supplemental Report's (Aug. 14, 1963) definition is instructive for interpreting the language of the tariff subheading. That is, the TCS,

[13] Defendant concedes that those items sold in "light blue" constitute a complete set and satisfy U.S. Note 6(b). As noted previously, however, Marck labels those items offered for sale by International Tableware Incorporated in the color "light blue," as in an "ocean blue" color. Thus, although both companies employ a different term by which to describe the color of these items, it is clear, and no reasonable fact-finder could find otherwise, that the color descriptions of "light blue" and "ocean blue" reference the same color and thus the same merchandise.

in this instance, provides insight into Congress's intended construction for the predecessor TSUS subheading and hence the unchanged language found in HTSUS subheading 6912.00.39. The TCS defined "in the same pattern" to mean "articles in coordinated shapes, colors, or decorations, including plain white articles, designed to be used together as sets." TARIFF CLASSIFICATION STUDY, SEVENTH SUPPLEMENTAL REPORT 100 (Aug. 14, 1963) ("TCS REPORT").

Not only is the definition useful for discerning Congress's intent, it also confirms that Congress did not wish to depart from the common understanding of the phrase "in the same pattern" and the term "pattern." *See, e.g.*, MACMILLAN DICTIONARY, http://www.macmillandictionary.com/us/dictionary/american/pattern_1 (last visited June 1, 2015) ("[A] set of lines, shapes, or colors that are repeated regularly.").

Based on this definition and the common understanding of the words, the court finds that Congress intended that subheading 6912.00.39 cover only those items that (1) coordinate in shape, color, and[14] decoration, and (2) were designed to be used as a set.[15] *See* TCS REPORT 100 (explaining that articles must be "designed to be used together as sets" to be "in the same pattern"). In assessing whether articles coordinate in shape, color, and decoration, a court may rely on record evidence tending to demonstrate that articles are indeed in the

[14] While the TCS uses "or" rather than "and" with respect to shape, color, and decoration, it is apparent to the court that a mechanistic approach was not the purpose of the drafters. Thus, in large measure, a pattern, like pornography, is something that you know when you *see* it. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I *see* it, and the motion picture involved in this case is not that.").

[15] Plaintiff relies on prior Customs ruling letters to further support its claim that the contested articles are properly classified under subheading 6912.00.39 ("Available in specified sets: In any pattern for which the aggregate value of the articles listed in additional U.S. note 6(b) of this chapter is over $38."). In Ruling Letter D80779 and Ruling Letter H80584 (collectively, "Ruling Letters"), Customs provided that the provisions of U.S. Note 6(b) were satisfied by an affidavit from the manufacturer attesting to the sizes and values of the individual items available in the same pattern as the subject merchandise. *See* N.Y. Ruling Letter D80779 (Aug. 11, 1998); N.Y. Ruling Letter H80584 (May 17, 2001). In other words, for plaintiff, because it submitted affidavits from the Vice-President and Chief Financial Officer of Marck, which stated that (1) all of the items in the specified set were offered for sale by the manufacturer at all times and sold to other companies such as Marck, and (2) the "Cancun" dinnerware line identified the relevant pattern for the specified set, it has fulfilled the requirements set forth in the Ruling Letters and thus, satisfied the provisions of U.S. Note 6(b). *See* Pl.'s Br. in Supp. of Mot. for Summ. J. 13 (ECF Dkt. No. 70); Guan Aff. ¶ 24; Miller Aff. ¶ 37. The court finds these Ruling Letters unhelpful, however, because they do not address the proper meaning of "in the same pattern." Accordingly, these Ruling Letters are not relevant to the construction of subheading 6912.00.39 and will not be considered in this action.

same pattern. *See* USCIT R. 56(c)(1)(A); *United States v. Adaptive MicroSystems, LLC*, 37 CIT __, __, 914 F. Supp. 2d 1331, 1337 (2013). Further, the court may supplement its inquiry by conducting its own examination of the merchandise, and depictions of the merchandise, to determine whether articles are in the same pattern. *See Mattel, Inc. v. United States*, 926 F.2d 1116, 1120 (Fed. Cir. 1991); *Simod*, 872 F.2d at 1578.

In order to determine whether an article was designed to be used as part of a set, the court's task is to ascertain the manufacturer's or seller's intent. *See* TCS REPORT 100. In addition to witness testimony, sources such as a company's sales literature, advertisements, and other promotional materials may be probative to the question. *See Streetsurfing LLC v. United States*, 38 CIT __, __, 11 F. Supp. 3d 1287, 1292, 1301–02 (2014) ("Plaintiff markets its waveboards as 'a new sport that combines the natural fluidity of surfing with the smooth maneuverability of snowboarding and skating into one new action sport known as Street Surfing.' . . . As demonstrated by Streetsurfing's sales literature and instructional DVD packaged with the merchandise, users with greater skill are able to ride the waveboards with greater speed and a higher degree of precision, on more uncertain terrain (e.g., hills and sidewalks), and may even become proficient enough to perform 'tricks' and 'stunts' similar to those performed using a skateboard. Skill is required for a rider to take full advantage of the articles covered by HTSUS Heading 9506, and the presence of this element further favors classification of plaintiff's waveboards under this heading, as sporting goods or articles for general physical exercise or athletics." (citations omitted)).

IV. WHETHER THE CONTESTED ARTICLES ARE "IN THE SAME PATTERN" AND THUS COVERED UNDER SUBHEADING 6912.00.39

A. Coordinating Design Characteristics

While the parties agree that the contested articles are stoneware ceramic mugs and cups, they disagree on whether the articles exhibit the same shape, color, and decoration. For defendant, articles found under the "Cancun" trademark in Marck's catalog are characterized exclusively by "tableware and fourteen mugs offered in 'seven vibrant solid colors,' namely crimson red, black, cobalt blue, light blue, orange, yellow[,] and green in a vitrified finish." Def.'s Br. 8 (citing Def.'s Br., Ex. 6 at 2, 25–28 ("ITI Catalog")). Further, according to defendant, only those items that are of the same color designed to be used with "Cancun" trademarked merchandise are in the same pattern.

See Def.'s Br. 12 ("In order to be considered in the same 'Cancun pattern,' the mugs must not only exhibit a matching solid color and vitrified finish, but also be designed to be used in conjunction with a 'Cancun' specified set." (citation omitted)). Sixteen of the contested items satisfy this criteria and therefore, it is undisputable that they are in the same pattern as other items, of the same color, that are "Cancun" trademarked. Defendant, however, argues that seventy-seven of the contested mugs are not offered for sale in the same pattern as any of those identified by Marck as part of the "Cancun" trademarked line because they are not available in one of the seven solid "Cancun" trademark colors and in a vitrified finish. Rather, these contested mugs, it claims, appear in (1) non-"Cancun" trademark solid colors such as teal, green, plum, salmon, pink, purple, burgundy, white, charcoal, lavender, and gray, (2) two-tone color patterns, and (3) special finishes such as matte, a marble style, and a speckled style. *See* Def.'s Br. 9; *see also infra* App. B.

Because plaintiff argues that there is such a thing as a "Cancun" collection that is defined by "bright bold colors and round rim shapes," it maintains that all of the contested articles exhibit a design that "coordinates" with that of the "Cancun" trademarked dinnerware line. *See* Pl.'s Br. 18; *see also infra* App. B. To support its position, plaintiff provided affidavits from Dr. John Conrad ("Dr. Conrad") and Curtis E. Fahnert ("Mr. Fahnert"), each of whom independently evaluated the contested mugs and cups at issue in this case.[16] Based

[16] Defendant does not object to the proffered experts' qualifications.

Dr. Conrad is a ceramics researcher who worked as a ceramics professor for thirty years. App. 3 to Pl.'s Br. in Supp. of Mot. for Summ. J., Aff. of Dr. John Conrad 1 ("Conrad Aff."). His education consists of a Bachelor of Science in Art from Indiana's Teachers College in 1958, a Masters of Fine Arts (majoring in ceramics) from Carnegie Institute of Technology, now Carnegie Mellon University, in 1963, and a Doctorate of Education with a focus on "glass to clay fusion" from the University of Pittsburgh in 1970. Conrad Aff. 1, 2. Dr. Conrad worked as an Adjunct Instructor at Carnegie Mellon from 1961 to 1964 and then later became a Professor of Fine Arts at Mesa College, where he developed a ceramic program and served as Chairman of the Art Department from 1980 to 1982 and 1985 to 1988. *See* Conrad Aff. 1, 2. From 2001 to 2003, he served as an Adjunct Emeritus Ceramic Professor. Conrad Aff. 2. Additionally, he was granted "Infinite status" as a Guest Professor at Luxun Academy of Fine Arts in Shenyang, China, and consulted for several companies, including American Cement Corporation in Riverside, California, KD Corporation in Dallas, Texas and Seattle, Washington, and Baby Keepsakes in Thousand Oaks, California. Conrad Aff. 2, 3. Dr. Conrad's publications include "the first books on ceramics techniques and formulas that are still used as a reference in the industry," and "nine books on ceramic techniques and formulas." Conrad Aff. 3–4.

Mr. Fahnert is an industrial ceramic designer with a Bachelor's degree obtained from the New York State School of Ceramics at Alfred University in 1951. App. 2 to Pl.'s Br. in Supp. of Mot. for Summ. J., Aff. of Curtis E. Fahnert 1 ("Fahnert Aff."). During the early years of his career, he designed the shape of a product at the American Ceramic Products in Santa Monica, helped build "the Santa Clara Pottery Plant from concept to full production," served as the Liaison between different departments at Homer Laughlin China Company, on their evaluations, both experts affirmed in their affidavits that the contested articles coordinated in shape and color with those articles that are part of the "Cancun" dinnerware line.[17]

Because this is a classification case, the other record evidence includes the physical samples of certain contested articles and each tableware piece offered in the cobalt blue color, which were provided by plaintiff to the court. *See* Pl's Demonstrative Exs.; *infra* App. A; *Mattel*, 926 F.2d at 1120; *Lerner N.Y., Inc. v. United States*, 37 CIT __, __, 908 F. Supp. 2d 1313, 1318 (2013); *Springs Creative Prods. Grp. v. United States*, 37 CIT __, __, Slip Op. 13–107, at 19 (2013) ("[S]amples are potent witnesses and have great probative effect respecting the purpose for which they are designed." (citing *Janex Corp. v. United States*, 80 Cust. Ct. 146, 148, C.D. 4748 (1978))).

In addition, before the court are (1) the sales catalogs of the manufacturer, Huaguang, and the two sellers, Marck and its affiliate International Tableware Incorporated ("ITI"), and (2) enlarged images of each individual contested mug and cup. *See* Def.'s Br., Ex. 10 ("Huaguang Catalog"); Marck Catalog; ITI Catalog; Supplemental Aff. of Christopher Miller ("Miller Supplemental Aff."), Ex. 1; *infra* App. B.

The court has conducted its own examination of this evidence with respect to the uncontested and contested articles claimed by plaintiff's experts to each coordinate and complement one another in de-

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and supervised work at Canonsburg Pottery. *See* Fahnert Aff. 1–2. Thereafter, Mr. Fahnert spent the following twenty-three years working as the Assistant to the Art Director for Royal China Co. Fahnert Aff. 2. He is now retired. Fahnert Aff. 1.

[17] As part of Dr. Conrad's assessment, he concludes that there are twenty-two mugs and cups with shapes consistent with the "Cancun" trademarked items and that each of those shapes are available in colors that coordinate with at least one of the seven solid "Cancun" colors. *See* App. 3 to Pl.'s Br. in Supp. of Mot. for Summ. J., Aff. of Dr. John Conrad 6–17 ("Conrad Aff."); Supplemental Aff. of Dr. John W. Conrad ¶ 3 ("Conrad Supplemental Aff."). Both Dr. Conrad and Mr. Fahnert found that each of the twenty-two styles have a round rim shape consistent with that of the "Cancun" collection. Conrad Aff. ¶ E; App. 2 to Pl.'s Br. in Supp. of Mot. for Summ. J., Aff. of Curtis E. Fahnert ¶ E ("Fahnert Aff."). With respect to color, Dr. Conrad and Mr. Fahnert assert that the "Cancun" collection is characterized by "bright, bold colors" and that each of the contested mugs exhibits this unified color scheme. Conrad Aff. ¶ E; Fahnert Aff. ¶ E. Dr. Conrad further identifies the "Cancun" color or colors with which each of the ninety-one contested mugs and cups coordinates. Conrad Supplemental Aff. ¶ 3 ("Because of the careful selection of colors applied to the particular shapes defining the cancun pattern, it is readily apparent to me and it is my professional opinion that each of the mugs or cups identified in Exhibit 1 and its appendix, color coordinates with and complements the specific color offerings of the cancun dinnerware set as identified in column 8 [of the Catalog Corresponding Dinnerware Pattern Color Codes]."). For example, the "Heartland Bistro" mug in burgundy with an almond trim, identified as 5176–43–07C, coordinates with the "Cancun" trademarked articles in red and yellow, and the "El Grande" mug in green camouflage, identified as 81015–901, coordinates with the "Cancun" trademarked items in black and green. *See* Conrad Supplemental Aff., Ex. 1 at 3, 9; *see also infra* App. B, column 3, row 3, *and* column 1, row 1.

sign characteristics (i.e., shape, color, and decoration), and finds that seventy-five of the contested cups and mugs do not coordinate in shape, color, and decoration with those items advertised under the "Cancun" trademark and thus are not "in the same pattern." *See infra* App. B; TCS REPORT 100.

With respect to the proffered testimony of plaintiff's witnesses, Dr. Conrad and Mr. Fahnert, it is important to keep in mind the role of experts in court cases. To accept expert testimony as admissible under Rule 702 of the Federal Rules of Evidence, the court must find that (1) "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;" (2) "the testimony is based on sufficient facts or data;" (3) "the testimony is the product of reliable principles and methods; and" (4) "the expert has reliably applied the principles and methods to the facts of the case." FED.R.EVID. 702. That is, in order for an expert witness's testimony to be admissible, it must be reliable, relevant, and helpful to the trier of fact. While expert testimony can be useful for "explaining to [the trier of fact] what they otherwise could not understand," it is not needed or useful where the question at issue is one that a person of usual discernment could decide and where the subject of expert testimony "can and does speak for itself." *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 & n.6 (1973) (quoting *United States v. Wild*, 422 F.2d 34, 36 (2d Cir. 1969)) (internal quotation marks omitted) ("This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. . . . The films, obviously, are the best evidence of what they represent."); *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1354 (Fed. Cir. 2007) ("The district court found her testimony unhelpful to the jury, and not an appropriate subject for expert evidence . . . . The district court did not abuse its discretion in concluding that the jury was fully capable of understanding those materials without expert assistance and that Dr. Hendrix's testimony should have been excluded." (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997))); *Warner-Lambert Co. v. United States*, 28 CIT 939, 947 n.7, 341 F. Supp. 2d 1272, 1278 n.7 (2004), *aff'd*, 425 F.3d 1381 (Fed. Cir. 2005).

Thus, although Dr. Conrad and Mr. Fahnert may well be experts in ceramic technique and design, their testimony is nonetheless not helpful to the court and thus inadmissible. As a result, their testimony will not be considered by the court. This is primarily because Mr. Fahnert's and Dr. Conrad's testimony, that all of "the mugs and cups clearly have the same design characteristics including bright, bold colors and a round rim shape," could apply to countless items that surely do not coordinate with the merchandise at issue.[18] *See* App. 2 to Pl.'s Br. in Supp. of Mot. for Summ. J., Aff. of Curtis E. Fahnert ¶ E ("Fahnert Aff."); App. 3 to Pl.'s Br. in Supp. of Mot. for Summ. J., Aff. of Dr. John Conrad ¶ E ("Conrad Aff."). Moreover, a person of usual discernment does not need the assistance of an expert to make a decision of whether dinnerware items are in the same pattern. Were this not the case, an expert would be needed to accompany each shopper that enters a housewares store.

Also, the court finds that these experts have not reliably applied any principles and methods to the facts of this case. That is, the testimony of both Mr. Fahnert and Dr. Conrad is simply incredible. Both witnesses assert, for instance, that the "Cancun" trademarked cup in a cobalt blue color, identified as 39–04, and the "green" colored speckled mug, identified as 803474/4715, "color coordinate[] with and complement[] the specific color offerings" of each other. *See* Supplemental Aff. of Dr. John W. Conrad ¶ 3, Ex. 1 at 2, line 12; Fahnert Aff. ¶ 9; Conrad Aff. ¶ 9; Miller Supplemental Aff., Ex. 1, at 2, line 12. The briefest examination of these two items demonstrates that this is not the case and that no reasonable fact-finder could conclude otherwise.[19] *Compare infra* App. A & n.29, *with infra* App. B, column 1, row 2.

Thus, because the affidavits of Dr. Conrad and Mr. Fahnert will not be considered by the court, the only probative evidence on the record as to whether the contested cups and mugs are in the same pattern as "Cancun" trademarked items are (1) the sales catalogs of Huaguang, Marck, and ITI, (2) the images of each individual contested cup and mug, and (3) the physical samples of certain contested items and each tableware piece offered in the cobalt blue color. *See* Huaguang Catalog; Marck Catalog; ITI Catalog; Miller Supplemental Aff., Ex. 1; Pl.'s Demonstrative Exs.; *infra* App. B.

The purpose of U.S. Note 6 is to limit tariff treatment by giving a preferential rate to only certain tableware. This limitation is made by drawing a distinction between (1) tableware that is sold individually, and (2) tableware in the same pattern that is designed to be used

[18] Remarkably, each expert chose exactly the same words to express his opinion. *See* App. 2 to Pl.'s Br. in Supp. of Mot. for Summ. J., Aff. of Curtis E. Fahnert ¶ E ("Fahnert Aff."); App. 3 to Pl.'s Br. in Supp. of Mot. for Summ. J., Aff. of Dr. John Conrad ¶ E ("Conrad Aff."). No doubt, a human example of Vulcan mind meld. *See Star Trek: Dagger of the Mind* (NBC television broadcast Nov. 3, 1966).

[19] This is a point fairly made by the Marx Brothers in *Duck Soup*: "Well, who you gonna believe? Me or your own eyes?" *See* DUCK SOUP (Paramount Pictures 1933).

together as sets. The legislative history to subheading 6912.00.39 indicates that Congress intended that items in the same pattern coordinate with respect to color, design, and decoration. *See* TCS REPORT 100. An examination of the merchandise at issue makes it clear, however, that, here, color is not only an important characteristic, but is largely determinative of whether two items coordinate together. Defendant makes this point in its papers. *See* Def.'s Br. 8–9 ("As such, to prevail on its preferred classification[,] Marck . . . would have to prove that each of the contested mugs is designed to be used with a matching 'Cancun' set containing all pieces required by Additional [U.S.] Note 6. The evidence adduced during discovery, however, establishes otherwise. . . . Thus, 'Cancun' refers to seven distinct dinnerware sets each consisting of pieces tied together by their own unique matching color and finish offered together. For example, the cobalt patterned 'Cancun' set is comprised of table and drinkware pieces including mugs, plates, bowls, platters, a sugar, and a creamer tied together by a matching solid cobalt color and vitrified finish. . . . The 'Cancun' dinnerware line consists of seven specific solid colors and a specific vitrified finish. Seventy-seven (77) of the contested mugs do not fit within the 'Cancun' parameters as they are either not in one of the seven specific 'Cancun' colors or the specific vitrified finish.").

While it need not always be the case that items of tableware be of the same color to be in the same pattern, in this case, the various colors are so strikingly different that they cannot be said to coordinate with one another. *See infra* App. B. Therefore, even though Marck has trademarked all of the colors under the "Cancun" name, this act has not transformed items of various strong colors into a single pattern.

Also, an item of tableware cannot be a member of several patterns. It can be a member of just one. Marck characterizes each of the ninety-one contested articles as being part of the same pattern as those advertised under the "Cancun" copyright by arguing that each cup and mug shares complementary or harmonious colors. It is apparent, however, that U.S. Note 6 is not so broad as to encompass this kind of mixing and matching, and that, with respect to the merchandise at issue, only those items that are (1) of the *same* color, (2) share similar design characteristics (i.e., shape and decoration), and (3) were "designed to be used together as sets" are "in the same pattern." *See* TCS REPORT 100. Put another way, even though an item may share a similar shape with "Cancun" trademarked items, a cup or mug cannot be said to be "in the same pattern" as "Cancun" trademarked merchandise for purposes of classification under HTSUS subheading 6912.00.39 unless it also shares the same color as those items advertised under the "Cancun" trademark.

B. Sixteen of the Mugs and Cups Are Designed to Be Used with a Set

While finding whether an article is part of a pattern is the first step in determining whether it is classified under HTSUS subheading 6912.00.39, even items in the same pattern are not properly classifiable under the subheading unless they are also "available in specified sets." *See* U.S. Note 6(a). As noted, determining whether articles were designed to be used together as a set requires the court to determine the manufacturer's intent. *See* TCS REPORT 100 ("The phrase 'in the same pattern' in the headnotes to this subpart refers to articles in coordinated shapes, colors, or decorations, including plain white articles, *designed to be used together as sets*." (emphasis added)). While witness testimony and affidavits may aid in determining the intent of the designers, other evidence, such as advertising and marketing materials, and web pages may also instruct the court's assessment of how the merchandise was designed to be used. Based on the sales literature of the manufacturer and sellers, the court finds that only sixteen of the ninety-one articles were designed to be used together: 8286–02, 839–02, 87168–02, 867–02, 81015–02, 81950–02,[20] 8286–04, 839–04, 87168–04, 81015–04, 8286–05, 839–05, 87168–05, 81015–05, 81376–05, and 87168–06.

1. Affidavits

Affidavits and other probative evidence submitted by the parties may inform a court's determination of whether articles were designed to be used together as a set when the documents specifically address the manufacturer's intent. To support its claim that all ninety-one contested articles were designed for use together with items under the "Cancun" trademark, plaintiff relies on the following testimony

[20] Although the specific series and color code 81950–02, i.e., the "Cleveland Mocha Mug" in a white color, does not appear under the "Cancun" trademark in Marck's catalog, it is clear that the white "Cleveland Mocha Mug" is, in fact, featured and offered for sale as part of the "Cancun" collection in its catalog. *See* Marck Catalog at 53. A close examination of its catalog reveals that it offers for sale both a white-colored "Cleveland Mocha Mug" and a natural-colored "Cleveland Mocha Mug" as part of the "Cancun" collection, but labels the two different colored items with the code "81950–01," i.e., that they are both offered for sale in the color natural. *See* Marck Catalog at 53. Following a visual comparison with other similarly colored "Cancun" trademarked articles in the Marck catalog that are assigned the color code "01," it is apparent that the white-colored "Mocha Mug" displayed on page 53 of Marck's catalog was inadvertently labeled with the color "01," and that it is, in fact, the white colored "Cleveland Mocha Mug" 81950–02. Indeed, plaintiff agrees that the contested article 81950–02 is featured by Marck on page 53 of its catalog as part of the "Cancun" trademarked collection. *See* Def.'s Br., Ex. 4 at 10.

from an affidavit of Marck's Vice-President and Chief Financial Officer, Christopher Miller ("Mr. Miller"):

> [T]he Cancun pattern is an offering of bright bold colors and shapes coordinated together in a unified design. These trademarked items [(i.e., trademarked as "Cancun")] were, to my personal knowledge, designed by myself and other Marck personnel, with the assistance of the supplier, [Huaguang], using complementary and coordinated shapes and colors on the basis of well recognized artistic principles to create a unified theme for the identification of these products as a unified set, pleasing to the eye.

See Miller Supplemental Aff. ¶ 3; Pl.'s Resp. to Def.'s Mot. for Summ. J. 10 (ECF Dkt. No. 83) ("Pl.'s Resp. Br."). Even though this affidavit does not specifically address the intent behind the design of the ninety-one contested items, plaintiff insists that it supports its claim that the items at issue were designed to be used as part of "Cancun" trademarked sets. *See* Pl.'s Resp. Br. 10.

The court finds that the affidavit is not probative with respect to the issue of intent. That Marck influenced the design of the "Cancun" trademarked articles found in its catalog (including the sixteen mugs and cups that are concededly part of the "Cancun" line) does not lead to the conclusion that Marck designed the articles in the "Cancun" line to be used together as a set with each of the remaining seventy-five contested mugs and cups (i.e., the non-"Cancun"-trademarked items). That is, Mr. Miller's affidavit speaks only to the process of how the particular "Cancun" line of merchandise was designed. He does not, however, identify which, if any, of the seventy-five cups and mugs that were not advertised by Marck as being part of the "Cancun" collection were designed to coordinate with the "Cancun" trademarked line. Although Mr. Miller's testimony is that the "Cancun" trademark items were designed by himself and others in such a way that each piece was complemented and coordinated, he fails to identify, in either of his affidavits, any of the seventy-five remaining contested items as actually being under the "Cancun" trademark. *See* Miller Supplemental Aff. ¶ 3; Miller Aff. ¶¶ 15–36. Thus, Mr. Miller's affidavits do not provide relevant evidence because they do not raise or settle a question of fact with respect to whether Marck designed each of the contested mugs and cups to be used together as part of the "Cancun" collection.

2. Sales Literature

Packaging, advertisements, and catalogs are among the forms of sales literature that may also help inform the court's decision as to whether articles were intended to be used together as sets and are thus properly classified under HTSUS subheading 6912.00.39. *See Streetsurfing*, 38 CIT at __, 11 F. Supp. 3d at 1292, 1301–02. Therefore, it can be assumed that items intended to be used together as a set will be offered for sale in a way that reveals that intention. Furthermore, the grouping of articles, either by trademark,[21] name, or item number may also be demonstrative of the manufacturer's design purpose. *See, e.g.*, *Household Mfg. Co. v. United States*, 62 Cust. Ct. 198, 204–05, 296 F. Supp. 323, 328 (1969); *Imports, Inc. v. United States*, 55 Cust. Ct. 506, 507, Abs. 69681 (1965). Further, it is worth noting that the facts relating to the sales literature are not in dispute.

The relevant sales literature here includes the catalogs of Huaguang, ITI, and Marck. Huaguang (the manufacturer) does not feature the "Cancun" trademark line anywhere in its catalog of merchandise. *See* Huaguang Catalog. Although there are ninety-one contested mugs and cups, the contested items are of twenty-two different mug and cup styles. Huaguang features only ten (the ten style numbers are 1015, 7168, 286, 39, 481, 67, 1209, 3414, 7101, and 81015) of the twenty-two mug and cup styles in the "Coffee Mug Series" of its catalog and none of these ten styles appear in the "Dinner Set Series" displayed in its catalog. *See* Def.'s Br., Ex. 11 at 3–4; Huaguang Catalog at 4, 8, 16, 18, 21.

ITI's 2009–2010 catalog, however, includes a "Cancun" trademark section in seven solid colors (crimson red, black, cobalt blue, light blue, orange, yellow, and green) with a vitrified finish. *See* ITI Catalog at 1, 2, 25–28 (listing "Cancun" next to the description "Seven Vibrant Solid Colors" in the catalog's Table of Contents). The catalog includes the phrases "solid colors"[22] and "rolled edge and narrow rim" under the "Cancun" heading. ITI Catalog at 26. Although it depicts all of the tableware pieces under the "Cancun" trademark, the sugar and creamer articles are available only in the light blue and cobalt blue colors. *See* ITI Catalog at 26–28 (stating that the sugar bowl and creamer are "available in Cobalt Blue and Light Blue only"). Further, the ITI catalog features only ten of the ninety-one contested mugs and

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[21] While the act of assigning the same trademark to various items cannot serve to make them in the same pattern for purposes of classification, it can reveal a seller's intention.

[22] It is worth noting that several of the items that plaintiff and its experts insist coordinate with the "Cancun" trademarked line are not of solid colors. *See infra* App. B.

cups within the “Cancun” dinnerware line. *See* ITI Catalog at 26–28. These ten articles featured under the “Cancun” trademark within the ITI catalog include four cobalt blue articles (81015–04, 8286–04, 839–04, and 87168–04), five black articles (81376–05, 81015–05, 8286–05, 839–05, and 87168–05), and one light blue article (87168–06). As to the remaining eighty-one contested cups and mugs, ITI displays only six others (8286–02, 839–02, 87168–02, 867–02, 81015–02, and 81950–02), all white articles, elsewhere in its catalog, under a different trademark name. *See* ITI Catalog at 28 (displaying the six white articles in a section of its catalog titled “European White Mugs & Saucers”). Thus, the remaining seventy-five articles, most of which are either multicolored with different colored interiors and exteriors, characterized by a special matte, marble, or speckle finish, or decorated with a camouflage pattern are not featured anywhere in ITI’s catalog.

For its part, Marck’s 2006 catalog has photographs that exhibit each of the contested articles, as well as the “Cancun” trademarked cups and mugs. *See* Marck Catalog. Unlike ITI’s catalog, it displays the “Cancun” collection in nine solid colors, rather than seven: the seven colors exhibited in ITI’s catalog, plus white and natural. *See* Marck Catalog at 49. Marck’s catalog does not, however, offer certain “Cancun” trademark tableware pieces (i.e., 10 ¼ inch plates, 6 ⅝ inch plates, 7 inch bowls, 4 ¾ inch 4 ounce fruit bowls, 13 ¼ inch platters, 10 inch bowls, sugar bowls with lids, and 14 ounce creamers) for sale together with any of the contested articles that are not featured as part of the “Cancun” collection. *See* Marck Catalog. Marck’s catalog does, though, display sixteen of the ninety-one contested cups and mugs within the “Cancun” section: six white articles (8286–02, 839–02, 87168–02, 867–02, 81015–02, and 8195002), four cobalt blue articles (8286–04, 839–04, 87168–04, and 81015–04), five black articles (8286–05, 839–05, 87168–05, 81015–05, and 81376–05), and one light blue article (87168–06). *See* Marck Catalog at 49–53. In other words, although Marck’s catalog features each of the ninety-one contested cups and mugs, it does not offer for sale the “Cancun” trademarked tableware pieces as displayed by ITI in its catalog of merchandise, and it depicts only sixteen of the contested cups and mugs under the “Cancun” trademark.

The court finds that catalogs provide an indication of whether the articles were designed to be used with a specified set. It further finds the undisputed facts establish that the “Cancun” collection does not appear anywhere in the manufacturer Huaguang’s catalog and that only ten of the twenty-two mug and cup styles of the ninety-one contested articles are displayed in the catalog, none of which are featured in its "Dinnerware Set Series" section. *See* Huaguang Catalog at 4–21, 37–51. Further, just ten of the contested mugs and cups are displayed in the same section as the "Cancun" trademarked tableware pieces (i.e., the plates, bowls, cups, platters, sugar bowls, and creamers) in ITI's catalog, and only sixteen are featured in a similar manner by Marck in its own catalog. *See* ITI Catalog at 26–28; Marck Catalog at 49–58. It is therefore significant that none of the contested mugs and cups in Huaguang's catalog, eighty-one of the contested mugs and cups in ITI's catalog, and seventy-five of the contested mugs and cups in Marck's catalog, are neither (1) categorized anywhere under the same trademark as the "Cancun" collection, nor (2) displayed within the same section as the "Cancun" dinnerware line.

Next, the court finds that matching style code numbers assigned to articles is informative as to whether items were "designed to be used together as sets." *See* TCS REPORT 100. For example, in Marck's catalog, the number "8" is added to the front of each of the sixteen articles' style code numbers when they are displayed within the "Cancun" collection. *See* Marck Catalog at 49–53. In other words, these sixteen articles, when featured under other trademarked collections in Marck's catalog, are designated different style codes (i.e., the same style code but with the number "8" removed as the first digit) than when they are displayed within the "Cancun" trademark section of its catalog (i.e., the same style code but with the number "8" added as the first digit). Thus, Marck's deliberate use of matching style codes for certain articles, when featured in the "Cancun" trademark section of its catalog, suggests that these items were intended to be part of the "Cancun" line.

Accordingly, because the undisputed facts demonstrate that Huaguang's sales literature does not feature the "Cancun" trademark dinnerware line, and the catalogs of ITI and Marck fail to display seventy-five of the ninety-one contested mugs and cups under the "Cancun" trademark within the same section as the "Cancun" dinnerware line, it appears that these articles were not intended to be used as part of the "Cancun" set. This conclusion is further bolstered by the fact that Marck assigns articles depicted in the "Cancun" section of its catalog a unique style code (i.e., by adding the number "8" to the front of each item's style code) to denote that they are "Cancun" trademarked items. Therefore, the court finds that the undisputed evidence establishes that, because only sixteen of the contested mugs and cups appear under the "Cancun" trademark within the "Cancun" section of Marck's catalog with the similar unique identifying style code, the remaining seventy-five mugs and cups were not designed to be used together with those articles under the "Cancun" trademark.

3. Conclusion

In light of the undisputed evidence provided by the sales literature and lack of any probative evidence to the contrary, the court finds that the question, of whether the ninety-one contested articles were designed to be used together as sets with "Cancun" trademarked merchandise, is ripe for summary judgment. This is because the sales literature, which is the only probative record evidence on the question, compels a conclusion to which no reasonable mind could differ. That is, based on the evidence provided by the sales literature, there is no genuine dispute as to any material fact leading to the conclusions regarding which contested cups and mugs were designed to be used together as sets with the "Cancun" trademarked collection. Therefore, the court finds that seventy-five of the contested articles were not designed to be used together as sets with the "Cancun" trademarked merchandise found in Marck's catalog, and that sixteen of the contested mugs and cups, those that are advertised in the "Cancun" section of Marck's catalog and assigned matching style codes (i.e., by adding the number "8" to the front of each item's style code), were indeed designed to be used together as sets with "Cancun" trademarked merchandise in the same pattern. Of these sixteen cups and mugs, six of them are colored white (8286–02, 839–02, 87168–02, 867–02, 81015–02, and 81950–02), four are colored cobalt blue (8286–04, 839–04, 87168–04, and 81015–04), five are colored black (8286–05, 83905, 87168–05, 81015–05, and 81376–05), and one is colored light blue (87168–06). In other words, there is undisputed evidence that these sixteen articles exhibit coordinated colors, shapes, and decorations with those articles featured as part of the "Cancun" trademark, and based on their placement in the sales literature, were designed to be used together with the "Cancun" trademarked merchandise. Thus, the court finds that, to the extent that they are offered in the same color as other "Cancun" trademarked merchandise and are thus in the same pattern, these sixteen items were offered for sale as a set. Accordingly, these sixteen articles have satisfied the first factor needed for them to be found to be properly classified under subheading 6912.00.39 as "available in specified sets."

V. THE PROPER CLASSIFICATION OF THE MERCHANDISE

A. Five Mugs and Cups Are Properly Classified Under HTSUS Subheading 6912.00.39

With respect to the sixteen mugs and cups found to be "in the same pattern," only five of them (8286–04, 839–04, 87168–04, 81015–04,and 87168–06) are properly classifiable under HTSUS subheading 6912.00.39 as "available in specified sets" pursuant to GRI 1 because subheading 6912.00.39 fully describes these articles. That is, because these five articles are *prima facie* classifiable as "available in specified sets," no analysis beyond GRI 1 is necessary. As noted, subheading 6912.00.39 requires that articles classified thereunder be (1) "tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china," (2) ceramic, and (3) "in the same pattern," and it also requires that (4) the specified set contain each of the articles listed in U.S. Note 6(b), which (5) must have an aggregate value greater than $38.00. *See* U.S. Note 6(a), (b). The record establishes, however, that the "Cancun" trademark dinnerware items imported by plaintiff that are made of ceramic and satisfy the specifications of U.S. Note 6(b), and as a whole, are valued at over $38.00, only constitute a "set" under the statute in two colors: cobalt blue and light blue.

Cobalt blue and light blue are two of the seven basic "Cancun" colors and each of the required dinnerware items are offered in cobalt blue and light blue. As previously noted, defendant concedes that the "Cancun" articles in cobalt blue and light blue satisfy the specifications set forth in U.S. Note 6(b), and it does not dispute that the merchandise at issue is ceramic tableware. Although the other eleven articles, each of which were either in a black or white color, were found to be in the same pattern as other articles of the same color claimed by Marck to be included under the "Cancun" trademark, they lack certain matching enumerated dinnerware items (i.e., a sugar and creamer) of the same color (i.e., in the same pattern). *See* ITI Catalog at 26 (stating that the sugar bowl and creamer are "available in Cobalt Blue and Light Blue only"). That is, because, here, only items of the same color are in the same pattern, and because the sugar and creamer dinnerware items are offered for sale in only two colors (i.e., cobalt blue and light blue), it is only those colors that constitute a "set" for purposes of U.S. Note 6(b).

As explained previously, matching color is determinative (although, alone, not dispositive) in resolving the question of whether tableware items are "in the same pattern." Thus, even though contested articles may coordinate with other articles of the same color, they are available in a specified set only if each of the enumerated dinnerware articles in U.S. Note 6(b) are also offered for sale in the same color. Because all of the articles required by U.S. Note 6(b) to qualify for special treatment under the HTSUS—and be classified as "available in specified sets" under subheading 6912.00.39—are offered for sale in only two colors, cobalt blue and light blue, only those contested articles found to be under the "Cancun" trademark that are colored cobalt blue and light blue are properly classified under subheading 6912.00.39 as "available in specified sets."

Thus, these five mugs and cups (four of which are colored cobalt blue, and the other, which is colored light blue[23]) that are "in the same pattern" satisfy the provisions for classification under subheading 6912.00.39, "available in specified sets," and are classified therein. As noted, these mugs and cups are identified by the following item numbers (when advertised in the "Cancun" section of Marck's catalog): 8286–04, 839–04, 87168–04, 81015–04, and 87168–06.

B. Eighty-six Mugs and Cups Are Properly Classified Under Subheadings 6912.00.44 and 6912.00.48

Customs classified sixty-one of the ninety-one contested articles under HTSUS subheading 6912.00.44, "Mugs and other steins," and thirty of the ninety-one contested articles under subheading 6912.00.48, "Other." *See* Niceton Invoices. The court, by this opinion, has found that five of the ninety-one mugs are properly classified under HTSUS subheading 6012.00.39, "available in specified sets." With respect to the eighty-six remaining articles, because each item is *prima facie* classifiable under one of the following two subheadings, the court finds that Customs' classification under HTSUS subheadings 6912.00.44 and 6912.00.48 is proper.

Although plaintiff does not contest Customs' method of distinguishing cups from mugs, the court is not relieved of its obligation to independently determine whether Customs' classification of the contested mugs and cups in HTSUS subheadings 6912.00.44 and 6912.00.48 is indeed correct. *See Jarvis Clark*, 733 F.2d at 878.

The court has conducted an independent examination of the sample articles and contested mugs, inspected the photographs and descriptions of the articles in the sellers' catalogs, and has considered the definitions of the words "cups" and "mugs" as set forth earlier in this

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[23] As previously explained, the "light blue" color described in ITI's catalog and the "ocean blue" color listed in Marck's catalog reference the same color. Thus, article 87168–06, which appears under the "Cancun" trademark section of Marck's catalog in the color ocean blue, is offered for sale in the same color as each of the enumerated dinnerware articles listed by U.S. Note 6(b).

opinion. *See Mattel*, 926 F.2d at 1120; *Simod*, 872 F.2d at 1578. As a result, the court finds, pursuant to GRI 1, that Customs correctly identified fifty-eight of the eighty-six remaining articles as mugs, and therefore properly classified them as "Mugs and other steins" under the subheading 6912.00.44, which is an *eo nomine* provision. The court also finds that Customs correctly identified twenty-eight of the articles as cups, and therefore, applying GRI 1, holds that Customs properly classified them under subheading 6912.00.48, which fully describes the remaining articles.

Thus, the court concludes that fifty-eight of the eighty-six articles are mugs,[24] and therefore properly classified under subheading 6912.00.44, and twenty-eight of the eighty-six articles are cups,[25] and properly classified under subheading 6912.00.48 as "Other."

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is granted, in part, and plaintiff's motion for summary judgment is granted, in part. Judgment will enter accordingly.

Dated: June 17, 2015
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

[24] Specifically, the fifty-eight articles that are mugs fall under eleven style codes: 414 (Milwaukee Barrel Mug), 803 (Spokane Barrel Mug), 4110 (Denver Light-Weight Mug), 1209 (Santa Fe Campfire Mug), 212 (NY Barrel Mug), 3414 (Heartland C-Handle), 7101 (Titan Mug), 7168 (3 Finger "C" Handle), 1015 (El Grande), 81015 (Cancun El Grande), and 617 (Boston Irish Mug).

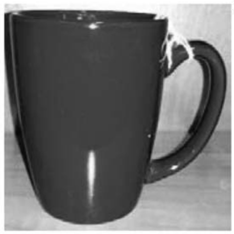
The fifty-eight mugs are individually identified under the following style and color code combinations: 414–11, 414–43, 414–02, 803-RH6/H7, 803–474/4715, 803–4, 803–02/309, 803–5, 803–621/623, 4110–2, 1209–11, 1209–02/04, 1209–02/82, 1209–02, 212–02, 212–07, 341402/11C, 3414–02/04C02, 3414–02/47MF, 3414–02/96C, 7101–11, 7101–02, 7101–43, 7168–25, 7168–02/04, 7168–64, 7168–23, 7168–26, 7168–30, 7168–04M, 7168–43, 7168–05M, 7168–84, 7168–02/11, 7168–36, 7168–11, 7168–23M, 7168–04/02, 7168–72, 7168–02, 7168–05, 101505/02–05, 1015–67/02–67, 1015–11, 1015–02–11C, 1015–02/04, 1015–02/05, 1015–04/02, 101567/02–67, 1015–07, 1015–04/02–96, 81015–901, 1015–02–96, 1015–04/04MF, 1015–05/02, 101502, 1015–05, and 617–04.

[25] Specifically, the twenty-eight articles that are cups fall under eleven different style codes: 3476 (Heartland Bistro Cup), 481 (Canaveral Endeavor Cup), 1776 (Heartland Bistro Cup), 209 (Savannah Endeavor Cup), 1276 (Santa Fe Bistro Mug), 5176 (Heartland Bistro Cup), 286 (Houston Endeavor Cup), 39 (Tulsa Funnel Cup), 67 (Funnel Cup), 1376 (St. Paul Bistro Mug), and 1950 (Cleveland Mocha Mug).

The twenty-eight cups are individually identified under the following style and color code combinations: 3476–07–05C, 3476–07–11C, 3476–07–43C, 481–02, 481–04, 481–02/232–02C, 481–02/233–02C, 1776–02/05C, 1776–02/04C, 209-RH6/H7, 1276–25, 5176–43–07C, 286–11, 286–02, 286–326/02–326C, 286–02/02MF, 286–237/02–237C, 286–43, 286–05, 39–02, 39–05, 3902/11MF, 67–11, 67–43, 67–02/02MF, 67–02, 1376–05, and 1950–02.

APPENDIX A[26]
Cobalt Blue

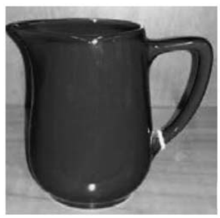

[27]

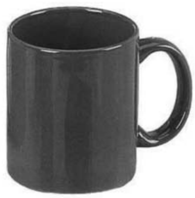

[28]


[29]

Sugar Bowl [30]

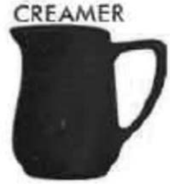
Creamer [31]




[32]

SUGAR BOWL [33]

CREAMER [34]



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[26] Not depicted here is style 87168–04. The physical sample was broken during Dr. William M. Carty's examination of the merchandise. *See* Carty Aff., Images and Figures at 2, 8.

[27] Style 81015–04. *See* Pl.'s Representative Sample Marked T.

[28] Style 8286–04. *See* Pl.'s Representative Sample Marked C.

[29] Style 839–04. *See* Pl.'s Representative Sample Marked D.

[30] *See* Pl.'s Ex. GG.

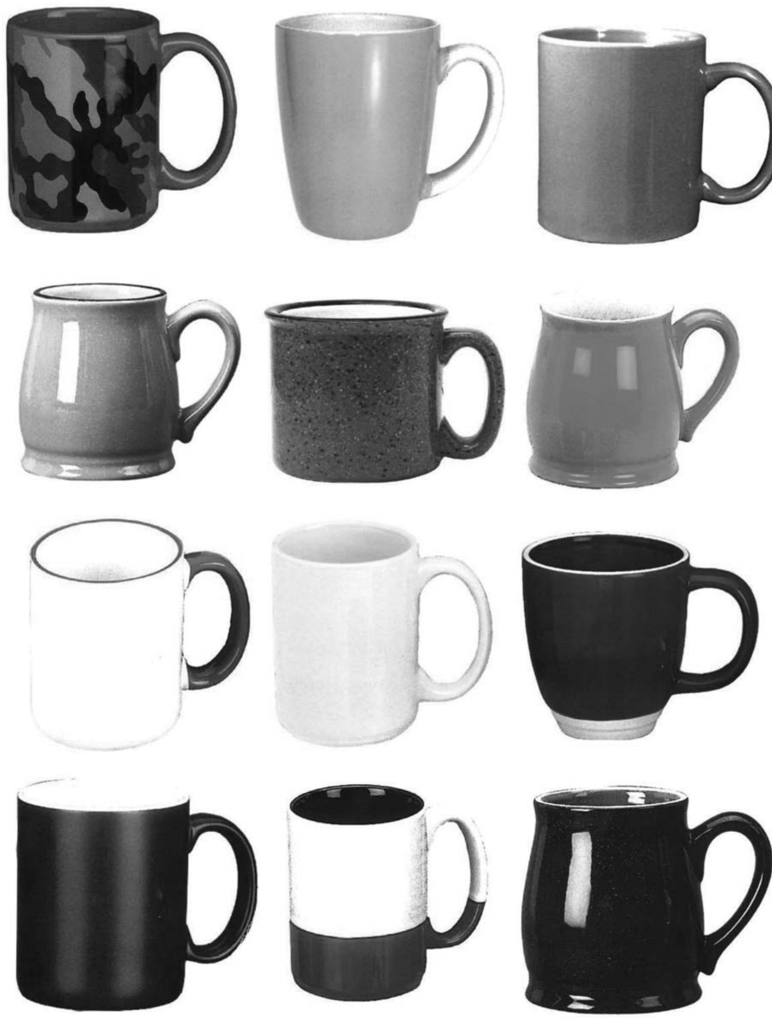
[31] *See* Pl's Demonstrative Ex. X.

[32] Style 87168–06. *See* ITI Catalog at 28.

[33] *See* ITI Catalog at 26.

[34] *See* ITI Catalog at 26.

APPENDIX B[35]
Examples of the Ninety-one Contested Cups and Mugs at Issue



[35] *See* Miller Aff., Ex. 1.