U.S. Court of International Trade

Slip Op. 17–138

ABB, Inc., Plaintiff, v. United States, Defendant, and Hyundai Heavy Industries Co., Ltd., Hyundai Corporation USA, and Hyosung Corporation. Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 16–00054
PUBLIC VERSION

[Defendant's request for a remand is granted with respect to Commerce's treatment of respondents' commissions and its revenue capping practice; Commerce's decision to cap Hyosung's reported freight revenue by Hyosung's reported domestic inland freight expense is sustained.]

Dated: October 10, 2017

R. Alan Luberda, Kelley Drye & Warren LLP, of Washington, DC, argued for plaintiff. With him on the brief were *David C. Smith, Jr.*, and *Melissa Marie Brewer*.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *James H. Ahrens, II*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, DC.

David Edward Bond, White & Case, LLP, of Washington, DC, argued for defendant-intervenors Hyundai Heavy Industries, Co., Ltd., and Hyundai Corporation USA. With him on the brief were *Walter Joseph Spak, William Joseph Moran*, and *Ron Kendler*.

Jaehong David Park, Arnold & Porter Kaye Scholer LLP, of Washington, DC, argued for consolidated plaintiff and defendant-intervenor Hyosung Corporation. With him on the brief were *Henry David Almond, Andrew Mercer Treaster, Daniel Robert Wilson* and *Sylvia Yun Chu Chen*.

OPINION AND ORDER

Barnett, Judge:

ABB, Inc. ("Plaintiff" or "ABB") and Hyosung Corporation ("Hyosung") each challenge certain aspects of the final results of the U.S. Department of Commerce's ("Commerce") second administrative review of the antidumping duty order on large power transformers from the Republic of Korea for the period of review ("POR") August 1, 2013,

to July 31, 2014 ("POR 2").[1] *Large Power Transformers from the Republic of Korea*, 81 Fed. Reg. 14,087 (Dep't Commerce March 16, 2016) (final results of antidumping duty admin. review; 2013–2014) ("*Final Results*"), CJA 1; PJA 1; PR 205; ECF No. 73–1; and accompanying Issues and Decision Mem., A-580–867 (Mar. 8, 2016) ("I&D Mem."), CJA 2; PJA 2; PR 198; ECF No. 73–1.

ABB argues that "Commerce failed to deduct U.S. commission expenses from constructed export price ('CEP') and instead added the U.S. commission expense to normal value," and that it "improperly granted both respondents a commission offset to normal value" for commissions on U.S. sales incurred in the United States. Confidential Pl.'s Mem. of Law in Supp. of Mot. for J. on the Agency R. ("ABB's MJAR") at 2, ECF No. 41–2. ABB also argues that "Commerce failed to cap the revenues [Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation USA (collectively, "Hyundai")] included in its gross unit prices for subject merchandise for sales-related services that were separately purchased by the customer by the amount of the related expenses incurred by Hyundai on those services" and, as a result, Hyundai's constructed export price is "overstated" and its dumping margin is "understated." *Id.* at 4. Defendant has requested remand on the issues raised by ABB. Def.'s Resp. to Pl.'s Rule 56.2 Mots. for J. Upon the Agency R. ("Def.'s Resp.") at 11–12, ECF No. 50; *see also* Def.'s Suppl. Mem. Addressing Standard for Voluntary Remand ("Def.'s Suppl. Br."), ECF No. 79.

Hyosung argues that "Commerce's decision to use Hyosung's reported Korean domestic inland freight expenses as the [] cap for [its] reported inland freight revenue, when that revenue was made up primarily of U.S. inland freight revenue" is unsupported by substantial evidence and not in accordance with law. Confidential Mem. in Supp. of Consol. Pl. Hyosung's Rule 56.2 Mot. for J. Upon the Agency R. ("Hyosung's MJAR") at 10, ECF No. 40–2. Defendant argues that Commerce's decision to cap Hyosung's inland freight revenue by its domestic inland freight expenses is supported by substantial evidence and otherwise in accordance with law. Def.'s Resp. at 12–16.

The motions are fully briefed and the court heard oral argument on August 1, 2017. *See* Docket Entry, ECF No. 83. For the reasons discussed below, the court grants Defendant's request to remand the

[1] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 27–3, and a Confidential Administrative Record ("CR"), ECF No. 27–4. Parties further submitted joint appendices containing record documents cited in their briefs. *See* Public Joint Appendix ("PJA"), ECF No. 74; Confidential Joint Appendix ("CJA"), ECF No. 73. Citations are to the confidential joint appendix unless stated otherwise. Additionally, the court requested complete versions of certain record documents for which parties had only submitted selected pages in the joint appendices. These are cited separately as they appear in this opinion

issues raised by ABB, and sustains Commerce's determination with respect to Hyosung's inland freight revenue cap.

JURISDICTION AND STANDARD OF REVIEW

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

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It "requires more than a mere scintilla," but "less than the weight of the evidence." *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). In determining whether substantial evidence supports Commerce's determination, the court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). However, that a plaintiff can point to evidence that detracts from the agency's conclusion or that there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)). The court may not "reweigh the evidence or . . . reconsider questions of fact anew." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)); *see also Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (citation omitted) (the court "may not reweigh the evidence or substitute its own judgment for that of the agency.").

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), guides judicial review of Commerce's interpretation of the antidump-

[2] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition, and all references to the United States Code are to the 2012 edition, unless otherwise stated.

ing and countervailing duty statutes. *See Nucor Corp. v. United States*, 414 F. 3d 1331, 1336 (Fed. Cir. 2005).

DISCUSSION

I. Defendant's Remand Request

Defendant requests that the court remand Commerce's determination with respect to two issues: (1) Commerce's treatment of Hyundai's and Hyosung's (collectively "respondents") U.S. commissions, and (2) Commerce's treatment of Hyundai's sales related revenue. Def.'s Resp. at 11–12; Def.'s Suppl. Br. at 2–3. ABB supports Defendant's request, *see generally* Confidential Pl.'s Reply Br. ("ABB's Reply"), ECF No. 71, but both respondents oppose the remand request.[3]

When an agency determination is challenged in the courts, the agency may "request a remand (without confessing error) in order to reconsider its previous position" and "the reviewing court has discretion over whether to remand." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (citations omitted). Remand is appropriate "if the agency's concern is substantial and legitimate," but "may be refused if the agency's request is frivolous or in bad faith." *Id*.

Commerce's concerns are substantial and legitimate. In its motion for judgment on the agency record, ABB argues that Commerce improperly added U.S. commission expenses to normal value when it should have deducted them from the CEP, and improperly granted to both respondents commission offsets to normal value for commissions on U.S. sales incurred in the United States. ABB's MJAR at 2. Referencing Commerce's remand redetermination in the first administrative review of the antidumping duty order on LPT's from Korea,[4] Defendant acknowledges that Commerce recently has reconsidered its practice on U.S. commissions and explains that it seeks remand to "reconsider whether it is acting consistently with respect to U.S. commission expenses in this case." Def.'s Suppl. Br. at 2–3. Commerce has a substantial and legitimate interest in ensuring that its determinations reflect its practice regarding U.S. commission expenses. *See SKF USA Inc.*, 254 F. 3d at 1029. Therefore, even though each administrative review is a separate proceeding, and the records may

[3] Respondents did not have an opportunity to brief their response to Defendant's request. However, at oral argument Hyundai spoke for both Parties in opposition to the remand request.

[4] This remand redetermination is the subject of separate litigation before this court. *See generally ABB v. United States*, Court No. 15–00108.

differ between the two administrative reviews, remand is appropriate.[5] *See id*.

Separately, ABB argues that Commerce erred when it "failed to cap revenues included by Hyundai in gross unit price for [certain] sales-related services . . . by the expenses associated with those services," and that this is contrary to Commerce's established practice of capping service-related revenues at the amount of the corresponding expense. ABB's MJAR at 31–35. ABB maintains that "the record demonstrates that Hyundai improperly included revenues in excess of related expenses in gross unit price," such that Commerce's decision is not supported by substantial evidence. *Id.* at 35–45 (capitalization omitted). Defendant requests remand on this issue so that Commerce may evaluate its revenue capping practice and ensure that its application of this practice is consistent with respect to both respondents. Def's Response at 12.[6] The court agrees that in articulating a desire for consistent treatment with respect to both respondents, Defendant has identified a concern that is substantial and legitimate. It is within the court's discretion to grant remand when appropriate, as it is here. *See SKF USA Inc.*, 254 F. 3d at 1029.

II. The Cap on Hyosung's Inland Freight Revenue

Hyosung challenges Commerce's decision to cap Hyosung's reported inland freight revenue by Hyosung's reported domestic (i.e., within Korea) inland freight expense. *See generally* Hyosung's MJAR.

Hyosung reported inland freight revenue in a field it labelled "REV_INLFT" and described that data field as freight revenue "plant to port." *Id.* at 4; *see also* Def.'s Resp. at 13 (citing Hyosung's June 8, 2015 Supp. Questionnaire Resp. at Ex. S-18, CJA 16; CR 185–186;

[5] At oral argument and in briefing before the court, Hyundai expressed concern that remand will complicate the legal issues before the court because the court has yet to rule on Commerce's treatment of U.S. commissions issue in the first administrative review remand redetermination, and because it would only allow Commerce to apply factors that are incorrect and issue a determination that is contrary to law. *See* Def.Intervenor's Mot. to Stay Proceedings Pending Resolution of the Commission Offset Issue at 5, ECF No. 61. In a separate opinion issued concurrently with this opinion, the court is affirming Commerce's treatment of U.S. commission expenses in the first administrative review. *ABB Inc. v. United States*, 41 CIT ___, Slip Op. 17–137 (Oct. 10, 2017). Moreover, Commerce has articulated a substantial and legitimate interest in making its remand request and, as such, remand is appropriate.

[6] Hyundai again registered its concerns at oral argument, namely that Commerce may be requesting a remand so that it may apply an allegedly new practice relating to the identification of service-related revenue that it developed for the first time in the third administrative review, currently on appeal before this court. *See Hyundai Heavy Industries Co., Ltd. v. United States*, Court No. 17–00054. Here, however, Commerce has requested remand in order to ensure that its revenue capping practice is consistent with respect to both respondents; anything beyond that is conjecture. As with the earlier issue, Commerce's interest in providing consistent treatment to both respondents is substantial and legitimate and, as such, remand is appropriate.

PJA 16; PR 137; ECF No. 73–2; Hyosung Aug. 3, 2015 Third Supp. Sales Questionnaire Resp. at Ex. S-10, CJA 17; CR 227; PJA 17; PR 157; ECF No. 73–2 (identifying the REV_INLFT field as "Freight Revenue – Plant to Port")). In the preliminary results, Commerce made deductions "[i]n accordance with section 772(c)(2) of the Act[,19 U.S.C. § 1677a(c)(2)], and where appropriate, [] from the starting price for certain movement expenses, including [domestic (i.e., Korean)] inland freight . . . [and] U.S. inland freight." Analysis of Data Submitted by Hyosung Corp. in the Prelim. Results of the 2013–2014 Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea (Dep't Commerce Aug. 31, 2015) ("Prelim. Mem. - Hyosung") at 11, CJA 24; CR 239; PJA 24; PR 169; ECF No. 73–3 (proprietary prelim. mem. for Hyosung). Commerce capped Hyosung's reported inland freight revenue by its domestic inland freight expenses. *Id.* at 4 ("Consistent with [Commerce's] normal practice, we have capped sales-related revenues to offset directly associated sales expenses (i.e., with respect to fields . . . DINLFTPU/REV_INLFT."). Thus, Commerce used the data reported by Hyosung in the field DINLFTPU (i.e., domestic inland freight expense to port in Korea) to cap the freight revenue reported in REV_INLFT. *See* Case Br. of Hyosung Corp. ("Hyosung Case Br.") at 4–5, CJA 31; CR 259; PJA 31; PR 184; ECF No. 73–3.

In its administrative case brief, Hyosung first argued that Commerce should not cap its expense revenue amounts, but that if it continued to do so, it should "revise its programming language so that the inland freight expenses incurred in the United States are also included in the pool of expenses included in the cap." *Id.* at 5. Hyosung sought to persuade Commerce that it should include U.S. inland freight expenses with domestic inland freight expenses in the cap, explaining that Hyosung and its customers negotiate both the domestic inland freight and the terms for delivery to the U.S. location. *Id*. at 5.[7] Hyosung argued that the record demonstrated that its reported inland freight revenue amounts were tied to its U.S. inland freight expenses. *Id.* at 5–6. To this assertion, Hyosung appended a footnote in which it suggested that Commerce's decision to use domestic inland freight expense alone as the cap "may have been the result of

[7] Hyosung references a transaction identified as SEQU 21. Hyosung Case Br. at 6 n.6 (citing Hyosung's May 11, 2015 Supp. Questionnaire Resp. ("Hyosung's May 11 SQR") at Ex. SA-7-D, CJA 12; CR 109–112; PJA 12; PR 101; ECF No. 73–2). Hyosung argued that the "invoice to the customer for this sale includes a single line for freight, and the customer's purchase order specifies a delivery point in [[ ]] . . . [as well as] [[ ]]," and it "stipulates that [[ ]]." *Id.* at 6. Hyosung contended this meant that "freight charges at issue relate primarily to the freight incurred in the United States, and not only to the minimal inland freight expenses incurred in Korea." *Id*.

confusion caused by the variable labels listed in Hyosung's database summaries."[8] *Id*. at 6 n.5.

In the *Final Results*, Commerce continued to cap Hyosung's inland freight revenue by its domestic inland freight expenses, noting that the record demonstrated a direct relationship between Hyosung's reported freight revenue and its domestic inland freight expenses, and that Hyosung itself "linked the inland freight revenue directly to the underlying expense, which is *domestic inland freight from Hyosung's plant to port of exportation*." I&D Mem. at 24 nn.108–109. Commerce determined that the record did not link Hyosung's U.S. inland freight expense to its reported inland freight revenue and that it would not "permit respondents to expand the expense fields to include revenue offsets for expenses that did not generate the revenue." *Id.*

Following the *Final Results*, Hyosung made ministerial error allegations, claiming it had "confirmed to [Commerce] that any identification of the freight revenue amounts being associated with freight from the factory to the port was an inadvertent labeling error in preparing the database summary sheets and databases in its submissions." Large Power Transformers from the Republic of Korea: Ministerial Error Allegations ("Hyosung Ministerial Error") at 4–5, CJA 41; CR 279; PJA 41; PR 206; ECF No. 73–4 (citing Hyosung Case Br. at 6 n.5). It also alleged that Commerce ignored record evidence that the inland freight revenue field included U.S. inland freight revenue. *Id.* at 5–8. Hyosung argued that Commerce based the *Final Results* on this single labeling error that was contradicted by the record. *Id.* at 7. Hyosung also pointed to the documents provided regarding two sample sales in support of its position.[9] *Id.* at 5–7.

In the Amended Final Results, Commerce referred to the I&D Memo, noting that the record did not link U.S. inland freight expense to Hyosung's reported inland freight revenue and that Hyosung had itself linked the inland freight revenue to the underlying expense; therefore, the adjustment was methodological in nature and there was no ministerial error. Ministerial Error Mem. for the Am. Final

[8] The footnote read: "Hyosung believes [Commerce's] preliminary decision to treat DINLFTPU alone as the revenue cap may have been the result of confusion caused by the variable labels listed in Hyosung's database summaries. Specifically, Hyosung's SAS database print out and file description materials included the label 'Freight Revenue plant to Port.' Although this variable label nominally identifies the revenue as associated with plant to port shipments, this label was for informational purposes and merely identified one component of the freight revenue. As discussed above, the record makes clear that the inland freight revenue refers to transportation to the customer's site and is not limited to transport to the Korean port from the factory." Hyosung Case Br. at 6 n.5 (internal citation omitted).

[9] Specifically, transactions referenced as SEQUs 4 and 21. Hyosung Ministerial Error at 5–7.

Results of the 2013/2014 Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea ("Am. Final Results") at 5, CJA 44; CR 283; PJA 44; PR 219; ECF No. 73–4 (citing I&D Mem. at Comment 3).

Before this court, Hyosung argues that Commerce ignored record evidence that Hyosung's inland freight revenue field related to U.S. inland freight expenses (or was at least inclusive of the same). *See* Hyosung's MJAR at 5–8, 11–21. Specifically, Hyosung argues, Commerce ignored the "the huge disparity between the minimal domestic Korean inland freight expenses (related to the short trip from Hyosung's factory in Korea to the port in Korea) and the U.S. inland freight expenses and revenues (for shipping the [large power transformer] units from U.S. ports to their final destination within the United States)," as well as documentation for sample sales transactions, *id.* at 7–8, and instead "relied solely on informational data descriptors and labels related to the expense [sic] fields in Hyosung's reported U.S. sales databases." *Id.* at 10. Thus, Hyosung argues that Commerce's failure to weigh all the evidence before it renders its determination unsupported by substantial evidence in the record. *Id.* at 11. Defendant responds that Hyosung's arguments are speculative and that Commerce's determination was based on the record created by Hyosung during the administrative review. Def.'s Resp. at 12–16. ABB also argues in support of Commerce's determination. Confidential Pl. and Def.-Int.'s Resp. in Opp'n to Consol. Pl. Hyosung's Mot. for J. on the Agency Record at 12–27, ECF No. 51.

The court will sustain Commerce's decision to use Hyosung's reported domestic inland freight expenses as the applicable cap if it is supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Section 1677a(c)(2) directs Commerce to reduce the price used to establish CEP by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses . . . which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." 19 U.S.C. § 1677a(c)(2). Commerce offsets respondents' freight expenses with related freight revenues, capping those revenues at the level of the associated expenses. This court previously has deemed Commerce's approach reasonable. *Donnguan Sunrise Furniture Co., Ltd. v. United States*, 36 CIT ___,___, 865 F. Supp. 2d 1216, 1248 (2012) ("Commerce's approach is reasonable under the statute" when it "deducts respondent's freight expenses from [the price used to establish CEP] . . . [and] then offsets respondent's freight expenses with related freight revenues, resulting in a net freight expense.").

The inclusion of multiple expense fields in the cap on Hyosung's domestic inland freight revenue would allow the revenue to offset more expenses and, therefore, be a favorable adjustment for the respondent. It is well established that a respondent bears the burden of establishing its entitlement to any favorable adjustment. *See e.g., Allied Tube and Conduit Corp. v. United States*, 25 CIT 23, 29, 132 F. Supp. 2d 1087, 1093 (2001) ("Commerce has reasonably placed the burden to establish entitlement to adjustments on [respondent], the party seeking the adjustment and the party with access to the necessary information.") (quoting *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1040 (Fed. Cir. 1996)); *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 24, 704 F. Supp. 1114, 1124, (1989), *aff'd*, 901 F.2d 1089 (Fed. Cir. 1990) ("[I]f these investigations are to be successful, parties must submit data promptly, and be very clear as to what the data indicates . . . [Commerce] did not abuse its discretion in refusing to recalculate the margin when the error made by [Commerce] is attributable to plaintiffs' late submission of ambiguous information.").

Hyosung argues that Commerce's decision to cap its reported inland freight revenue by its domestic inland freight expense is not supported by substantial evidence because Commerce "pointed only to database labels and summary descriptors to support its conclusion that Hyosung's reported inland freight revenues pertained solely to domestic inland freight." Hyosung's MJAR at 11. However, it was Hyosung's burden to establish its entitlement to the more favorable adjustment based on both domestic and U.S. inland freight expense. *See Fujitsu Gen. Ltd.*, 88 F.3d at 1040. Hyosung twice provided supplemental questionnaire responses in which it labelled the relevant data field "Freight Revenue --Plant to Port," thus linking this "inland freight revenue directly to the underlying expense, which is domestic inland freight from Hyosung's plant to the port of exportation." I&D Mem. at 24. Hyosung did not seek to revise its database labels or otherwise definitively explain the contents of its inland freight revenue field, even when it had, by its own admission, identified a point of confusion. *See* Hyosung – Case Br. at 6 n.5. Instead of clearly indicating that it had made an error, Hyosung made various methodological arguments that Commerce should (a) include U.S. freight expenses in the cap because that reflected how Hyosung negotiated freight with its customers, (b) change its programming language to include U.S. inland freight expenses in the cap, or (c) substitute U.S. inland freight expenses as the cap. Hyosung Case Br. at 4–6.

Hyosung asserts that its business proprietary table comparing domestic and U.S. inland freight expenses and its reported inland freight revenues establishes that the U.S. inland freight expenses bear a closer relation to the freight revenue than domestic inland freight expenses. Hyosung's MJAR at 12–13. Whether true or not, this is not an explanation of exactly what data Hyosung included in its inland freight revenue. Moreover, even if Hyosung's assertion about the *aggregate* revenue and expense fields being sufficiently correlated is accepted, Commerce performs its analysis on a *transaction-specific* basis and this table does not clearly suggest any correlation between the revenue and expense fields at the transaction level. *See id.* at 13.

Hyosung relies on two sample sales to bolster its argument that "record documentation confirms that Hyosung's reported inland freight revenue amounts relate to U.S. inland freight" because Hyosung and its customers focus on delivery and installation in the United States.[10] *See* Hyosung's MJAR at 15–18. With regard to Hyosung's assertion that its sample documentation casts doubt on Commerce's determination, Hyosung is asking the court to infer something about an entire data set of sales based on what it contends is evident from a few select sales. Not only is this requested inference not self-evident from the documentation to which it points,[11] Hyosung is not clear whether it is arguing that U.S. inland freight expense is *also* linked to the revenue such that it should be included in the cap or is the only expense linked to the revenue such that it should serve as an alternate cap.[12]

Hyosung bore the burden to properly document its entitlement to the favorable adjustment. *Fujitsu Gen. Ltd.* 88 F.3d at 1040. Instead, it provided information to Commerce that it subsequently characterized as confusing and, later, erroneous. Hyosung Case Br. at 6 n.5; Hyosung Ministerial Error at 4. However, Hyosung failed to adequately correct the information or otherwise document the error. In

[10] The particular sales in question are referenced as SEQUs 4 and 21. Hyosung's MJAR at 15–17. Regarding SEQU 4, for example, Hyosung avers that "there is nothing in the extensive sales documentation for this sale to indicate that the customer negotiated, let alone contemplated, charges related to inland freight in Korea." *Id*. at 15.

[11] For example, regarding SEQU 4, what Hyosung claims is the basis for the inland freight revenue appears to the court to be revenue associated with [[ ]]. Hyosung's May 11 SQR at Ex. SA-7-C.

[12] *Compare* Hyosung's MJAR at 1–2 ("Specifically, Hyosung's reported inland freight revenue was not only inclusive of (but made up primarily of) U.S. inland freight revenue (*i.e.,* revenue from inland freight *incurred in the United States*), but Commerce capped this revenue based solely on Hyosung's reported expenses for *Korean domestic inland freight*.")(original italics) *with id*., at 18 ("the agency's decision should be remanded so that it can recalculate Hyosung's margin using the reported U.S. inland freight expenses as the applicable cap to its reported freight revenue amounts.").

failing to act in a manner that would correct its error, Hyosung failed to carry its burden to prove its entitlement to the adjustment it seeks. *See Asociacion Colombiana de Exportadores de Flores*, 13 CIT at 24, 704 F. Supp. at 1124 ("[P]arties must submit data promptly, and be very clear as to what the data indicates").

Considering the record as a whole and Commerce's explanations of its determination in the preliminary results and *Final Results*, Hyosung's identification of certain sample sales from which Commerce *should have inferred* that its inland freight revenue field was mislabeled is not enough to call into question the conclusions Commerce reached after reviewing all the data that Hyosung provided. *Matsushita Elec.*, 750 F.2d at 933 (evidence that detracts from the agency's conclusion or the possibility of two inconsistent conclusions does not preclude the agency's finding from being supported by substantial evidence). Hyosung asks the court to reweigh the evidence reviewed by the agency. This it cannot do. *Downhole Pipe*, 776 F.3d at 1377.

Commerce's decision is based on substantial evidence in the record because Hyosung failed to identify and support its entitlement to a more favorable adjustment. When it presumably became aware that it had committed an error in reporting, instead of seeking to correct the error, Hyosung obfuscated it by referring to the database label as "informational" and one that "merely identified one component of freight revenue" – referring to the overall result as "confusion."[13] Hyosung Case Br. at 6 n.5. This court sustains Commerce determinations when they are based on substantial evidence in the record; here, Hyosung fails to provide the court with a sufficient basis to disturb Commerce's finding.

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[13] According to Hyosung, Commerce "confirm[ed] that the documentation on the record supports the conclusion that Hyosung's reported inland freight revenue related to U.S. inland freight." Hyosung's MJAR at 17. Hyosung is referring, in part, to Commerce's statement that "[f]or SEQUs 4 and 21 Hyosung also received freight revenue (for U.S. inland freight)." Analysis of Data Submitted by Hyosung Corp. in the Final Results of the Antidumping Duty Admin. Review of Large Power Transformers from the Republic of Korea; 2013–2014 at 7, CJA 36; CR 264; PJA 36; PR 200; ECF No. 73–3. In its response, Defendant refers to this statement as a "clerical error" and points the court to Commerce's determination in the *Final Results* that record evidence did not link U.S. inland freight to Hyosung's reported inland freight revenue. Def.'s Resp. at 15 (citing I&D Mem. at 24). Regardless of whether Commerce's statement was a clerical error, documentation regarding SEQUs 4 and 21 does not, by itself, call into question the entire set of sales reported to Commerce during the administrative proceeding. For purposes of this court's review, because Commerce relied on two separate questionnaire responses, in which "Hyosung itself linked the inland freight revenue directly to the underlying expense, which is domestic inland freight from Hyosung's plant to the port of exportation," I&D Mem. at 24 (emphasis omitted), and because the record evidence does not establish that all the reported inland freight revenue data was mislabeled, substantial evidence supports Commerce's decision to cap the revenue based on domestic inland freight expense.

III. Whether Commerce was Required to Correct the Error Alleged by Hyosung

Subsequent to the *Final Results*, Hyosung raised a ministerial error allegation, asking Commerce to correct its "inadvertent labeling error." Hyosung Ministerial Error at 4. Commerce declined Hyosung's request, noting that its decision to use Hyosung's reported domestic inland freight expense as the cap "d[id] not constitute a ministerial error . . . because our adjustment is methodological in nature and . . . was consistent with our stated intention in the Final Results." Ministerial Error Mem. for the Am. Final Results of the 2013/2014 Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea at 5, CJA 44; CR 219; PJA 44; CR 283; ECF No. 73–4. Hyosung now argues that, pursuant to *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208–09 (Fed. Cir. 1995), Commerce should have allowed Hyosung to correct its error.

Commerce may correct errors, even those made by a respondent, that are timely raised. *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006) ("Commerce is free to correct any type of importer error-clerical, methodolog[ical], substantive, or one in judgment-in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections."). Hyosung's reliance on *NTN Bearing* to support its argument that Commerce should have allowed it to correct its error is misplaced. In *NTN Bearing*, the Court of Appeals for the Federal Circuit ("Federal Circuit") ruled that Commerce had abused its discretion when it declined to correct a clerical error *purely on the basis of timeliness*, when the respondent had sought to correct the error after the publication of the preliminary results and had provided Commerce with supporting documentation to establish the clerical nature of the error. *NTN Bearing*, 74 F.3d at 1208–09. Here, Hyosung has not established that it sought to correct the error during the administrative proceeding. Instead, in its administrative case brief, in a footnote, it referred to a point of confusion, but otherwise made arguments to Commerce to include or substitute U.S. inland freight expenses in the cap. *See supra* Section II.

Hyosung did not identify the database label as a "clerical error" until it filed its ministerial error allegations after Commerce issued the *Final Results*. *See* Hyosung Ministerial Error at 4 (phrasing it as an "inadvertent labeling error). Hyosung never sought to submit a new dataset with corrected labels and did not provide supporting documentation that clearly established the clerical nature of its error.

The Federal Circuit has found that "Commerce is not required to correct a final determination reflecting an error made by a private party when that error is not apparent from Commerce's final calculations released pursuant to 19 C.F.R. § 351.224(b), or from the final determination itself." *Alloy Piping Prods., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284, 1292 (Fed. Cir. 2003). Only "when an error is apparent (or should have been apparent) from the face of the calculation or from the final determination itself and goes uncorrected, that error, in effect, becomes a government error and, hence, a 'ministerial' error, and the government is required to correct it." *Id.* (citing *Koyo Seiko Co. v. United States*, 746 F. Supp. 1108, 1111 & n.4 (1990) (a respondent's error was sufficiently obvious to require correction when it resulted in negative and positive dumping margins in excess of 16,000 percent)).

As the court discussed, Hyosung did not adequately establish that there was an error or that any such error was apparent from the record. Instead, Hyosung asked Commerce to make inferences based on a comparison of the relative expenses for domestic versus U.S. freight, and then only provided substantiating documentation for a small subset of its sales. That documentation failed to clarify the situation. Thus, Hyosung fails to show that its error was apparent from the record and Hyosung's ministerial error allegation is untimely.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Final Results are remanded to Commerce so that it may reconsider its treatment of respondents' commissions as discussed in Section I; and it is further

ORDERED that Commerce's Final Results are remanded to Commerce so that it may evaluate its revenue capping practice and ensure that its application of this practice is consistent with respect to both respondents, as discussed in Section I; and it is further

ORDERED that Commerce shall file its remand results on or before January 8, 2018; and it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 5,000 words; and it is further

ORDERED that Commerce's determination to cap Hyosung's reported freight revenue by Hyosung's reported domestic inland freight expense is sustained.

Dated: October 10, 2017
New York, New York

Mark A. Barnett
MARK A. BARNETT, JUDGE

Slip Op. 17–142

ÖZDEMIR BORU SAN. VE TIC. LTD. STI., Plaintiff, v. UNITED STATES, DEFENDANT, AND ATLAS TUBE AND INDEPENDENCE TUBE CORPORATION, DEFENDANT-INTERVENORS.

Before: Gary S. Katzmann, Judge
Court No. 16–00206

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

Dated: October 16, 2017

David L. Simon, Law Office of David L. Simon, of Washington, DC, argued for plaintiff. With him on the brief was *Mark B. Lehnardt* of Washington, DC.

Kelly Ann Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With her on the brief were *Chad A.* Readler, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, and *Tara K. Hogan*, as Senior Trial Counsel. Of counsel on the brief was *Emily R. Beline*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC. With them on the supplemental brief was *Robert E. Kirschman, Jr.*, Director. Of counsel on the supplemental brief was *Brandon J. Custard*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Cynthia C. Galvez, Attorney, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor Independence Tube Corp. With her on the brief were *Timothy C. Brightbill* and *Alan H. Price*.

John W. Bohn, Attorney, Schagrin Associates, of Washington, DC, argued for defendant-intervenor Atlas Tube. With him on the brief was *Roger B. Schagrin*.

OPINION

Katzmann, Judge:

The Trade Preferences Extension Act of 2015 ("TPEA"), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015), which was signed into law on June 29, 2015, made numerous amendments to the antidumping and countervailing duty laws found under Title 19 of the United States Code. Specifically, 19 U.S.C. § 1677e(b) and (c) were amended, and (d) was added.[1] In what appears to be a matter of first impression, the countervailable subsidy case now before the court provides an occasion to consider these TPEA amendments as they concern the application, by the United States Department of Commerce ("Commerce"), of facts available and adverse inferences to a respondent company.

[1] These TPEA amendments affect all antidumping and countervailing duty determinations made on or after August 6, 2015. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793 (Dep't Commerce Aug 6, 2015).

Plaintiff, Özdemir Boru San. ve Tic. Ltd. Sti ("Özdemir"), a Turkish producer and exporter to the United States of heavy walled rectangular welded carbon steel pipes and tubes ("HWR pipes and tubes"), brought this action against Defendant, the United States ("the Government"), on October 9, 2016, challenging elements of Commerce's final determination in *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 81 Fed. Reg. 47,349 (Dep't Commerce July 21, 2016) (final results of investigation), and the subsequent *Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 81 Fed. Reg. 62,874 (Dep't Commerce Sept. 13, 2016) ("*Final Determination*"), as well as the corresponding *Issues and Decision Memorandum for the Final Determination*, July 14, 2016, P.R. 241 ("*IDM*"). Summons, ECF No. 1; Complaint ¶ 1, ECF No. 5 ("Compl."). Specifically, Özdemir argues that Commerce's application of adverse facts available ("AFA") to Özdemir regarding the Turkish Exemption from Property Tax ("EFPT") program, and Commerce's inclusion of two particular land parcels in the Land for Less-than-Adequate-Remuneration ("LTAR") benchmark, are actions unsupported by record evidence and contrary to law. Compl. ¶¶ 21–24. Özdemir thus asks this court to hold unlawful the *Final Determination* on these grounds, and to remand it to the agency for a redetermination consistent with the court's judgment. Compl. at 6. The Government, and defendant-intervenors Independence Tube Corporation ("Independence") and Atlas Tube Corporation ("Atlas") Özdemir's motion.

For the reasons set forth hereafter, the court finds that the *Final Determination* is supported by substantial evidence[2] and in accordance with law with respect to the AFA issue, but not with respect to the Land for LTAR issue, and thus remands it to Commerce.

BACKGROUND

A. *Statutory and Regulatory Framework*

1. *Countervailable Subsidies: Basic Principles*

If Commerce determines that the government of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold, or likely to be sold for import, into the United States, and the International Trade Commission determines that an industry in the United States is materially injured or threatened with

[2] Regarding the substantial evidence standard of review, *see infra* p.19.

material injury thereby, then Commerce shall impose a countervailing duty ("CVD") upon such merchandise equal to the amount of the net countervailable subsidy. *See* Section 701 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671(a) (2012).[3] Generally, a subsidy is countervailable if it consists of a foreign government's financial contribution to a recipient, which is specific, and also confers a benefit upon the recipient, as defined under 19 U.S.C. § 1677(5). A benefit is conferred when, in the case where goods or services are provided, such goods or services are provided for less than adequate remuneration. 19 U.S.C. § 1677(E)(iv). Furthermore, the statute states that:

> [T]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

Id. The regulation on "adequate remuneration" states that:

> [Commerce] will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, [Commerce] will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.

19 C.F.R. § 351.511(a)(2)(i) (2015).

The subsidy must also be "specific" as defined under 19 U.S.C. § 1677(5A). In the case of domestic subsidies like those alleged in this case, a specific subsidy can be one that is "limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy." 19 U.S.C. § 1677(5A)(D)(iv). An investigation of countervailable subsidies shall commence whenever an interested party files a petition with Com-

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1677e, however, are not to the U.S. Code 2012 edition, but to the unofficial U.S. Code Annotated 2017 edition. The current U.S.C.A. reflects the amendments made to 19 U.S.C. § 1677e (2012) by the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015), which are integral to this case.

merce, on behalf of an industry,[4] which alleges the elements necessary for the imposition of the duty, and which is accompanied by information reasonably available to the petitioner supporting those allegations. 19 U.S.C. § 1671a(b)(1), (c)(2).

2. *Legal Standard for Application of Facts Available and Adverse Inferences*

During the course of its countervailing duty proceeding, Commerce requires information from both the producer respondent and the foreign government alleged to have provided the subsidy. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369–70 (Fed. Cir. 2014). Information submitted to Commerce during an investigation is subject to verification. 19 U.S.C. § 1677m(i)(1).

When a respondent: (1) withholds information that has been requested by Commerce, (2) fails to provide such information by Commerce's deadlines for submission of the information or in the form and manner requested, (3) significantly impedes an antidumping proceeding, or (4) provides information that cannot be verified, then Commerce shall "use the facts otherwise available [FA] in reaching the applicable determination." 19 U.S.C. § 1677e(a)(2).[5] Unaltered by the TPEA, this FA subsection thus asks whether necessary or requested information is missing from the administrative record, and provides Commerce with a methodology to fill the resultant informational gaps. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003).

Under certain circumstances, in an investigation, Commerce may determine to assign an AFA rate to an investigated respondent as to a given subsidy program, instead of the countervailable subsidy rate that the respondent might receive for that program under normal circumstances. Typically, an AFA rate is higher than the normally calculable subsidy rate for an investigated program, and thus ulti-

[4] "The term 'industry' means the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A).

[5] 19 U.S.C. § 1677e(a) provides:

> If--
>
> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person--
>
> (A) withholds information that has been requested by [Commerce] . . .
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . .
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified . . .
>
> [Commerce] . . . shall . . . use the facts otherwise available in reaching the applicable determination under this subtitle.

mately results in a higher CVD rate. *See* 19 U.S.C. § 1677e (addressing both FA and AFA).

Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available," AFA, if it "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[.]" *Id.* § 1677e(b)(1)(A).[6] A respondent's failure to cooperate to "the best of its ability" is "determined by assessing whether [it] has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries." *Nippon Steel*, 337 F.3d at 1382.

When applying an adverse inference, Commerce may rely on information from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record. 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c)(1)-(2) (2015). Relevantly, section 502 of the TPEA amended 19 U.S.C. § 1677e(b) to provide that Commerce "is not required to determine, or make any adjustments to, a countervailable subsidy rate . . . based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information." 19 U.S.C. § 1677e(b)(1)(B).

Pursuant to subsection (c), if the information relied upon is secondary -- as opposed to primary information, which is obtained in the course of the investigation -- then Commerce "shall, *to the extent practicable*, corroborate that information *from independent sources that are reasonably at [its] disposal*." 19 U.S.C. § 1677e(c)(1) (emphasis added). As regards the issues in this case, the TPEA did not substantially amend the corroboration requirement.[7]

If Commerce uses an adverse inference, then in selecting among the facts otherwise available, and ultimately choosing an AFA rate, the

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[6] 19 U.S.C. § 1677e(b)(1) provides:

> In general
>
> 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 [Commerce].* . . [Commerce] . . . in reaching the applicable determination under this subtitle—
>
> (A) *may* use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available; and
>
> (B) is not required to determine, or make any adjustments to, a countervailable subsidy rate . . . based on any assumptions *about information the interested party would have provided if the interested party had complied with the request for information*.

(emphasis added).

[7] The TPEA added to 19 U.S.C. § 1677e(c) an exception to the corroboration requirement, specifically that "[Commerce] . . . shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding." 19 U.S.C. § 1677e(c)(2). This added subsection is not relevant to the instant proceeding.

agency utilizes the statutory authorization found in subsection (d), which was added to the statute by the TPEA. Per subsection (d)(1), Commerce

> *[m]ay*. . . (i) use a countervailable subsidy rate applied for *the same or similar program* in a countervailing duty proceeding involving the same country; or (ii) *if there is no same or similar program*, use a countervailable subsidy rate for a subsidy program from a proceeding that [Commerce] considers reasonable to use[.]

19 U.S.C. § 1677e(d)(1)(A)(i)–(ii) (emphasis added). In carrying out this AFA rate selection procedure, Commerce may select "the highest such rate" made available. 19 U.S.C. § 1677e(d)(2). In doing so, Commerce "is not required . . . to estimate what the countervailable subsidy rate . . . would have been if the interested party found to have failed to cooperate . . . had cooperated," or to demonstrate that the countervailable subsidy rate used as an AFA rate "reflects an alleged commercial reality of the interested party." 19 U.S.C. § 1677e(d)(3).

Prior to the enactment of the TPEA, Commerce articulated a policy that it employs when selecting AFA rates. Commerce still follows this policy, and employed it in the underlying proceeding:

> In selecting AFA rates for programs on which a company has failed to fully cooperate, it is [Commerce's] practice to use the highest calculated program-specific rates determined for a cooperating respondent in the same investigation, or, if not available, *rates calculated in prior CVD cases involving the same country*. Specifically, [Commerce] applies the highest calculated rate for the identical program in the investigation if a responding company used the identical program, and the rate is not zero.
>
> If there is no identical program match within the investigation, or if the rate is zero, [Commerce] uses the highest non-de minimis rate calculated for the identical program in another CVD proceeding involving the same country.
>
> *If no such rate is available, [Commerce] will use the highest non-de minimis rate for a similar program (based on treatment of the benefit) in another CVD proceeding involving the same country*.
>
> Absent an above-de minimis subsidy rate calculated for a similar program, [Commerce] applies the highest calculated subsidy

> rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies.

IDM at 4 (citations omitted) (emphasis added).

Commerce has explained the rationale behind its AFA policy:

> [Commerce's] practice when selecting an adverse rate from among the possible sources of information is to ensure that the result is sufficiently adverse "as to effectuate the statutory purposes of the AFA rule to induce respondents to provide the Department with complete and accurate information in a timely manner."

Id. (citations omitted). Importantly, Commerce maintains that its practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Id.* (quoting Statement of Administrative Action, accompanying the Uruguay Round Agreements Act, H.R. No. 103–316, vol. 1, at 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 4199 ("SAA"));[8] *compare* 19 U.S.C. § 1677e(d)(3).

B. *Prior Proceedings*

On July 21, 2015, Atlas, Independence, and additional petitioners,[9] filed with Commerce a CVD petition concerning imports of HWR pipes and tubes from the Republic of Turkey ("Turkey"). *See* Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as Amended July 21, 2015 Volume V – Information Relating to the Republic of Turkey – Countervailing Duties, P.R. 9 ("Petition"); CVD Investigation Initiation Checklist (Aug. 10, 2015), P.R. 31, C.R. 22 ("Initiation Checklist").

Commerce initiated its investigation on August 17, 2015. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Initiation of Countervailing Duty Investigation,* 80 Fed. Reg. 49,207 (Dep't Commerce Aug. 17, 2015). The period of investigation ("POI") was January 1, 2014 through December 31,

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

[9] Bull Moose Tube Company, EXLTUBE, Hannibal Industries, Inc., Maruichi American Corporation, Searing Industries, Southland Tube, and Vest, Inc. *See IDM* at 1.

2014. *Id.* Commerce selected Özdemir as one of two mandatory respondents in the investigation,[10] pursuant to section 19 U.S.C. § 1677f-1(e)(2)[11] and 19 C.F.R. § 351.204(c)(2) (2015).[12] *IDM* at 2.

On September 9, 2015, Commerce issued a CVD Questionnaire to respondents and the Government of Turkey ("GOT"). Countervailing Duty Questionnaire Countervailing Duty (CVD) Investigation Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republica of Turkey C-489–823, P.R. 37 ("Questionnaire"). The GOT filed its response to the Questionnaire on October 28, 2015, along with a number of supportive exhibits. P.R. 63, C.R. 27 ("GOT QR"); Law Concerning Incentives on Investments and Employment and on the Amendment of Certain Laws (Law No. 5084), P.R. 67, C.R.92 ("GOT QR Ex. 9); The provinces under the Article 2 of Law Concerning Incentives on Investments and Employment and on the Amendment of Certain Law (Law No. 5084), P.R. 125, C.R. 93 ("GOT QR Ex. 10"); Article 4 of Law No. 3365, P.R. 134 ("GOT QR Ex. 19"). By its counsel, Özdemir filed the following relevant substantive submissions: on October 30, 2015, its questionnaire response ("QR"), P.R. 134, C.R. 104, and on November 30, 2015, its response to Commerce's supplemental questionnaire ("SQR"), P.R. 186, C.R. 147.

On December 28, 2015, Commerce published its preliminary determination. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Preliminary Affirmative Counter-*

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[10] The other company was MMZ Onur Boru Profil uretim San Ve Tic. A.S. *IDM* at 2. MMZ is not otherwise relevant to the instant proceeding.

[11] 19 U.S.C. § 1677f-1(e)(2) provides:

> If [Commerce] determines that it is not practicable to determine individual countervailable subsidy rates . . . because of the large number of exporters or producers involved in the investigation or review, [Commerce] may--
>
> (A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to--
>
> (i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; . . .

[12] 19 C.F.R. § 351.204(c)(2) provides:

> Exporters and producers examined--
>
> (1) In general. In an investigation, [Commerce] will attempt to determine an . . . individual countervailable subsidy rate for each known exporter or producer of the subject merchandise. . . . (2) Limited investigation. Notwithstanding paragraph (c)(1) of this section, [Commerce] may limit the investigation by using a method described in . . . [19 U.S.C. § 1677f-1(e)].
>
> (2) Limited investigation. Notwithstanding paragraph (c)(1) of this section, [Commerce] may limit the investigation by using a method described in . . . [19 U.S.C. § 1677f-1(e)].

*vailing Duty Determination and Alignment of Final Determination With Final Antidumping Determination,*80 Fed. Reg. 80,749 (Dep't Commerce Dec. 28, 2015) ("*Preliminary Determination*"). It was accompanied by Commerce's memorandum, *Countervailing Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Decision Memorandum for the Preliminary Determination,*dated December 18, 2015, P.R. 199 ("*Preliminary Decision Memo*"). The foregoing two documents were accompanied by a third, company specific memorandum entitled *Preliminary Determination Calculation Memorandum for Özdemir Boru Profil San. ve Tic. Sti.,*dated December 18, 2015, P.R. 202, C.R. 161 ("*Preliminary Calculation Memo*"). Özdemir was assigned a preliminary CVD rate of 1.35 percent.[13] *Preliminary Determination* at 80,750. Also on December 28, 2015, Özdemir filed a request for correction of ministerial error. Compl. ¶ 12.

In the *Preliminary Decision Memo*, Commerce preliminarily determined under the Provision of Land for LTAR program that the Zonguldak organized industrial zone ("OIZ") land sold to Özdemir in 2008 constituted a financial contribution within the meaning of 19 U.S.C. § 1677(5)(E)(iv),[14] and that it was specific under § 1677(5A)(D)(iv).[15] Commerce further preliminarily determined that the program conferred a benefit upon Özdemir to the extent that the land in question was sold to Özdemir for LTAR as described under 19 U.S.C. § 1677(5)(E)(iv). In making an LTAR determination, Commerce compares the price actually paid to a benchmark value, pursuant to 19 C.F.R. § 351.511(a). As a benchmark, Commerce used land values that it had previously used in its investigation of line pipe from Turkey, *Welded Line Pipe from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 80 Fed. Reg. 61,371 (Dep't Commerce Oct. 13, 2015). *See Preliminary Decision Memo* at 11–12.

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[13] MMZ Onur Boru Profil uretim San Ve Tic. A.S. received a subsidy rate of 7.69 percent. *Preliminary Determination* at 80,750. Companies not individually-investigated were assigned an "all-others" rate of 4.39 percent, calculated by weighing the subsidy rates of the individual companies selected as respondents by those companies' exports of the subject merchandise to the United States. *Id.*

[14] 19 U.S.C. § 1677(5)(E)(iv) provides:

> A benefit shall normally be treated as conferred where there is a benefit to the recipient, including -- . . .
>
> (iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.

[15] 19 U.S.C. § 1677(5A)(D)(iv) provides:

> Where a subsidy is limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy, the subsidy is specific.

Commerce preliminarily determined Özdemir's net subsidy rate under this program to be 0.55 percent ad valorem. *Id.* at 12.

As to the EFPT program at issue in this case, Commerce preliminarily concluded that Özdemir had not used it, based on Özdemir"s responses to Commerce's questionnaires. *Preliminary Decision Memo* at 16. Specifically, in response to Commerce's questions regarding that program, Özdemir stated that:

> [It] did not receive any benefits under this program. Eligibility for this program is limited to enterprise located within certain designated regions. Since none of the Özdemir' plants are klocated in those regions, Özdemir was not eligible to use this program.

QR at 33.

Commerce subsequently conducted verifications of Özdemir's QR. Verification of the Questionnaire Responses of Özdemir Boru Profil San ve Tic. Ltd Sti. (Mar. 10, 2016), P.R. 227, C.R. 235 ("Verification Report"); Verification Exhibit 2, C.R. 173–75; Verification Exhibit 10, C.R. 173, 191–92; Verification Exhibit 15, C.R. 203. During verification, Commerce discovered that Özdemir was eligible for, and did receive, an EFPT subsidy during the five years prior to the period of investigation, because it possessed buildings in the Zonguldak OIZ in Turkey. Verification Report at 2, 9. Commerce determined that Özdemir was unable to demonstrate at verification that it had not received this subsidy during the POI as well. Ministerial Error Allegations in the Final Determination (Aug. 19, 2016), P.R. 252 at 5 ("Min. Error Dec. Memo"). On March 24, 2106, Özdemir files its case brief. P.R. 233, C.R. 237. The GOT filed its case brief the same day. P.R. 232.

On July 21, 2016, Commerce published its original final determination, wherein the agency continued to find that Özdemir was subsidized by reason of its purchase of certain real property from the government at LTAR, and assigned Özdemir a subsidy rate of 0.54 percent ad valorem for that program. *IDM* at 15. Regarding the EFPT program, Commerce determined that "Özdemir withheld information requested by" the agency and thus had failed to cooperate to the best of its ability in reporting benefits under this program. *Id.* at 5; *see* 19 U.S.C. § 1677e(a)(2)(A). Commerce consequently assigned Özdemir an AFA rate for the EFPT program, and, being unable to locate an above-de minimis application of that same program in a Turkish proceeding, resorted to the third tier of its hierarchy. *IDM* at 6–7; *see* 19 U.S.C. § 1677e(b). Under that tier, Commerce uses the highest non-de minimis rate for a similar program, based on treatment of the

benefit, in another CVD proceeding involving the same country. *IDM* at 6. Commerce selected an AFA CVD rate of 14.01 percent, derived from *Final Affirmative Countervailing Duty Determinations; Certain Welded Carbon Steel Pipe and Tube Products From Turkey*, 51 Fed. Reg. 1268, 1270 (Jan. 10, 1986) ("CWP&T 1986"). *IDM* at 7 n.29. In that determination, 14.01 percent was the program-specific rate applied for the Export Tax Rebate and Supplemental Tax Rebate program. In applying that programmatic rate, Commerce found that the CWP&T 1986 program and the EFPT program were "[a] match, based on program type and treatment of benefit." *Id.* at 7.

Commerce next addressed corroboration of the selected CWP&T 1986 rate per 19 U.S.C. § 1677e(c). *IDM* at 8. Commerce noted that in determining the reliability of the selected rate, "there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs." *Id.* However, Commerce determined that "no information has been presented which calls into question the reliability of these previously calculated subsidy rates that we are applying as AFA." *Id.* As to relevance, Commerce found that, "[f]or those programs which the [agency] found a program-type match, . . . because these are the same or similar programs, they are relevant to the programs under investigation in this case." *Id.*"Due to the lack of certain record information concerning the programs under investigation," Commerce "corroborated the rates it selected to the extent practicable." *Id.*; *see* 19 U.S.C. § 1677e(c)(1).

As to the Provision of Land for LTAR program, Commerce determined Özdemir's net subsidy rate to be 0.54 percent ad valorem. *IDM* at 15.

Özdemir subsequently alleged that Commerce made a ministerial error with respect to its application of AFA to the EFPT program. Min. Error Dec. Memo. Commerce acknowledged that it inadvertently characterized its application of an adverse inference to the EFPT program as resulting from Özdemir's failure to follow questionnaire instructions to report all "other subsidies" received from the GOT, but concluded that an adverse inference was nonetheless appropriate because Özdemir failed to respond accurately to specific questions about that program in its initial questionnaire response. Min. Error Dec. Memo at 4–5, 5 n.21. Accordingly, Commerce published the amended *Final Determination*, in which it did not change the subsidy rate for Özdemir, on September 13, 2016.

On October 9, 2016, within thirty days after the publication of the CVD order, Özdemir timely filed its summons. Sum.; *see* 19 U.S.C. § 1516a(a)(2)(A); USCIT Rule 3(a)(2). Özdemir filed its complaint the same day. Compl. Atlas moved to intervene as defendant-intervenor

on October 28, and the court granted the motion the same day. ECF Nos. 7, 11. Independence filed a motion to intervene as defendant-intervenor on November 8, and the court granted it the next day. ECF Nos. 12, 15. Pursuant to USCIT Rule 56.2, Özdemir filed its motion for judgment on the agency record on February 21, 2017. ECF Nos. 26, 27 ("Pl. 's Br."). The Government filed its responsive brief in opposition on May 28. ECF No. 33 ("Def.'s Br."). Independence and Atlas filed their respective responsive briefs in opposition on May 30. ECF Nos. 34, 35 ("Independence Br." and "Atlas Br."). Özdemir filed its reply on June 26. ECF Nos. 36, 37 ("Pl.'s Reply"). Oral argument was held before the court on September 12, 2017. ECF No. 52.

Özdemir argues before this court that the *Final Determination* was unsupported by substantial evidence, and was contrary to law, in regards to the application of AFA to Özdemir regarding the EFPT program, and in the inclusion of certain land parcels in the benchmark for the Land for LT AR program.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c), and 19 U.S.C. § l 516a(a)(2)(A)(i)(II), and will sustain Commerce's countervailable subsidy determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(l)(B)(i); *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1374 (Fed. Cir. 2012).

DISCUSSION

I. *The Application of AFA to Özdemir is Supported by Substantial Evidence and in Accordance with Law.*

A. *Commerce's Use of Facts Otherwise Available is Supported by Substantial Evidence.*

1. *Parties' Arguments*

Özdemir argues that it correctly reported its "non-use" of the EFPT program, and placed all necessary documentation on the record. Pl.'s Br. at 21–24. Özdemir explains that Commerce asked in the Questionnaire, under the heading of "Program-Specific Questions," that it report only on subsidies received *during the POI*, calendar year 2014:

> For each program, if your company (including cross-owned affiliate required to respond, as well as all trading companies) did

> not apply for, use, or benefit from that program during the POI, you must clearly state so. Otherwise, please answer the questions listed.

Questionnaire at Sec. III p.7. Özdemir argues that it followed this instruction, answering that "Özdemir did not receive any benefits under [the EFPT] program." QR at 33; Pl.'s Br. at 23. The Property Tax Law creating this subsidy program provides a 0.2 percent property tax exemption on buildings built in an OIZ for the first five years following completion of construction. GOT QR at 84. Özdemir thus submits that because it completed its building on the OIZ property in 2008, SQR at 5, the company was exempted from paying property tax on it specifically from 2009 through 2013. GOT QR at 76–84; GOT QR Ex. 19; Pl.'s Br. at 22. As Commerce confirmed: "Özdemir did not make any tax payments for buildings located at its facility in the Zonguldak OIZ for the first five years following completion of the buildings' construction (*i.e.*, December 24, 2008)." Verification Report at 9; *see* Verification Exhibit 10 at 534 (acknowledging that Özdemir had "completed construction of factory and begun production" as of December 25, 2008); Pl.' s Br. at 22.

Özdemir asserts in conjunction that because the exemption is a tax program, Petition at 24,[16] Initiation Checklist at 25, Questionnaire at 14, and thus a recurring subsidy, the benefit is expensed in the year received. 19 C.F.R. § 35 l.524(a) (2015) ("[Commerce] will allocate (expense) a recurring benefit to the year in which the benefit is received."); Pl.'s Br. at 23. Therefore the benefit was used at the latest in 2013, prior to the POI. Pl.'s Br. at 23. Özdemir points to the QR and the GOT QR, and argues that the record "contains every element necessary for an exact calculation of any putative benefit attributable" to the EFPT program.[17] *Id*. Further, per Özdemir, the amount of any subsidy so calculated would be well below the level of countervailability. Pl. 's Br. at 24.

Independence argues that Özdemir now attempts to artificially reduce its incorrect QR statement to the point that it did not receive benefits under the EFPT program during the POI, ignoring the portion of that statement where it stated that it was altogether ineligible for the program for geographic reasons. Independence Br. at 10. Independence also refers to Commerce's specific instructions that "[it is] investigating alleged subsidies received over a time period corre-

[16] "The benefit equaled the difference between the amount that would have been paid in taxes without the program and the amount actually paid." Petition at 24.

[17] Özdemir also contends that it cannot be said to have impeded the investigation, *see* 19 U.S.C. § 1677e(a)(2)(C), because it provided an accurate QR response regarding EFPT benefits during the POI. Pl. 's Br. at 25.

sponding to the AUL," meaning for the POI and the preceding 14 years. Questionnaire at Sec. II, p. 11–2; Independence Br. at l 0. Atlas argues that Özdemir's incorrect QR statement could not be verified, and thus triggered 19 U.S.C. § 1677e(a)(2)(D).[18] Atlas Br. at 12–14. Further, because Özdemir did not attempt correction until verification, after the responsive deadline had passed, Verification Report at 2, 9, Atlas argues that 19 U.S.C. § 1677e(a)(2)(B) was also triggered. Atlas Br. at 13 .[19] Atlas also argues that 19 U.S.C. § 1677e(a)(2)(C) was implicated, since even if Özdemir's incorrect QR response regarding the receipt of EFPT benefits were verifiable, Özdemir regardless "significantly impede[d]" the CVD investigation. Atlas Br. at 21. This is because Commerce's verification team, upon its arrival in Turkey, would have required an entirely different set of information in order to verify that Özdemir had not received an EFPT program benefit during the POI.[20] Atlas Br. at 22.

The Government argues that Commerce's conclusion that Özdemir withheld information and failed to cooperate to the best of its ability in providing the requested information about use of the EFPT program is supported by substantial evidence on the record. *IDM* at 5–6; Def.'s Br. at 10–11. The Government also argues that Commerce should not have been required to calculate the allegedly de minimis subsidy rate based on record evidence, as Özdemir contends it could

[18] Atlas notes that "Commerce is given wide latitude to determine its verification procedures," meaning that the agency possesses significant discretion in administering that element of the investigative process. Atlas Br. at 16 (quoting *Max Fortune Indus. Co. v. United States*, Slip Op. 13–52, 2013 WL 1811907 at *3 (Apr. 15, 2013)). The court owes Commerce's verification decisions "considerable deference." Atlas Br. at 16 n.37 (quoting *Daewoo Elecs. Co. v. Int'l Union of Elec. Elec., Tech., Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1516 (Fed. Cir. 1993)).

[19] Both defendant-intervenors argue that the record does not, in fact, show that Özdemir did not receive a benefit from the EFPT program during the POI. Independence asserts that "it is fair to assume that Özdemir did receive a benefit under the [EFPT] program during the POI" because the record does not demonstrate that the company paid property taxes specifically on its factory location in the OIZ. Independence Br. at 11 (citing Min. Error Dec. Memo. at 4–5).

Atlas submits the record does not definitively demonstrate that the EFPT program applies only during the *first* five years following construction, as it would have had to in this case to precede the POI. Atlas Br. at 17–19. Atlas adds that "Commerce did not verify that Özdemir's 2013 property taxes were *due* in 2013, rather than in 2014," nor did it verify the value that Özdemir purports its building carries. Atlas Br. at 20–21.

Because this possibility does not implicate the triggering of Commerce's resort to facts otherwise available under 19 U.S.C. § 1677e(a), the court does not reflect in depth on defendant-intervenors suggestions regarding EFPT benefits received during the POI.

[20] In response to Özdemir's argument that the portions of its QR incorrectly linking the EFPT program to geographic location are not relevant to the question of whether a benefit was received during the POI, Atlas argues that the statute expressly contemplates that the conditions for application of facts otherwise available under § 1677e(a)(2) apply even where (a)(l) does not, meaning AFA may apply even where Commerce cannot find that "necessary information is not available on the record." Atlas Br. at 15.

and should have, because Commerce's resort to facts otherwise available was statutorily authorized and reasonable in light of Özdemir's QR misstatement. Def. 's Br. at 11.

2. *Analysis*

The court concludes that Commerce's application of AFA is supported by substantial evidence on the record. Substantial evidence is "more than a mere scintilla," but "less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004). "A finding is supported by substantial evidence if a reasonable mind might accept the evidence as sufficient to support the finding." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citing *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016). This includes "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474,487 (1951)). However, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)).

Commerce "shall ... use the facts otherwise available" if one of the criteria spelled out in 19 U.S.C. § 1677e(a)(l) or (2) are met. All parties agree that Özdemir provided an incorrect QR response regarding the EFPT program. QR at 32–33. The statute is triggered "[if] ... an interested party ... withholds information that has been requested by [Commerce]." Regarding the EFPT program, Commerce specifically requested that Özdemir answer questions found in the Questionnaire Standard Questions Appendix. QR at 33; Questionnaire at Sec. III pp.18–19. The questions therein do not request simple answers, but rather pose several questions requiring detailed answers about a firm's history with the program in question, benefits received thereunder, and records kept demonstrating those benefits. Questionnaire at Sec. III p.19. For the purposes of triggering facts otherwise available, it is of no moment that some part of Özdemir's incorrect QR statement supports the proposition that Özdemir did not receive EFPT benefits during the POI. In fact, Özdemir's argument that the Questionnaire instructions demand responses only regarding the POI, Pl.' s Br. at 21, is undermined by Commerce's specific instruction

that "[it is] investigating alleged subsidies received over a time period corresponding to the [15-year] AUL," meaning for the POI and the preceding 14 years. Questionnaire at Sec. II p.11–2. The contrast between Özdemir's brief, incorrect QR statement, and the detailed information that Commerce requested, as well as the explicitly noted AUL informational timeframe, constitute substantial evidence on the record that Özdemir "with[e]ld[] information that has been requested by [Commerce]" pursuant to 19 U.S.C. § 1677e(a)(2)(A).

The court is not persuaded by Özdemir's argument that Commerce could have referred to the record to calculate the precise countervailable subsidy received under the EFPT program, rather than rely on facts otherwise available. The possibility that the record does contain the information necessary to calculate a putative countervailable subsidy is irrelevant to the statutory triggers found in § 1677e(a), specifically whether "an interested party" such as Özdemir has "with[e]ld[] information that has been requested by [Commerce]." 19 U.S.C. § 1677e(a)(2)(A). Özdemir has provided no authority stating otherwise.[21] More to the point, because that possibility does not implicate the statutory standard, it does not detract from the substantiality of the evidence supporting the conclusion that Özdemir' s incorrect QR response did trigger § 1677 e(a)(2)(A). *See CS Wind*, 832 F.3d at 1373.

B. *Commerce's Application of AFA is Supported by Substantial Evidence and m Accordance with Law.*

1. *Commerce's Decision to Apply an Adverse Inference is Supported by Substantial Evidence.*

Özdemir argues that it fully cooperated in the investigation, and thus Commerce had no factual basis in the record to apply AFA under 19 U.S.C. § 1677e(b)(l). Pl.'s Br. at 24; *see supra* n.5. Özdemir acknowledges that its QR statement regarding EFPT benefits was in error, but submits that Commerce knew throughout the investigation that EFPT program qualification was based on location in an OIZ, and not on the province in which the property was located. Initiation Checklist at 25; Pl.' s Br. at 25. Özdemir again argues that the operative fact is that it did not receive an EFPT benefit during the POI, and notes that Commerce verified that any property tax exemption applicable to Özdemir would have ended before the POI began.

[21] Indeed,§ 1677e(a)(l), which triggers facts otherwise available where "necessary information is not available on the record," is read not in tandem with, but alternately to, (a)(2), as discernible by their separation with the conjunctive "or." *See supra* n.5. That necessary information is present in the record before Commerce, thus obviating § 1677e(a)(l), does not necessarily prevent the triggering of a subsection of (a)(2) as well.

Verification Report at 9; Pl.'s Br. at 26. Özdemir generally asserts also that it "did not hide any information from Commerce," having spent four pages in its QR explaining that one of its plants "is located in the Zonguldak OIZ," and that it provided all the payment and title information related to that property, including information establishing that construction of that building was completed in December 2008 -- thus cutting off the applicable property tax benefit before the POI began in 2014. Pl.'s Br. at 26; QR at 13–16, Exs. 8–10; SQR at 5.

Özdemir argues in its Reply that Commerce impermissibly applied a per se rule in determining that Özdemir "failed to act to the best of its ability" and therefore warranted an adverse inference. 19 U.S.C. § 1677e(b)(l); Pl.'s Reply at 16–17. Özdemir argues that, instead, the "best of its ability standard" calls for an assessment of materiality. Pl.' s Reply at 17.

The court is persuaded by the Government's argument that substantial evidence supports Commerce's decision to apply AFA. "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 [Commerce], [then 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)(l)(A); *see* 19 C.F.R. § 351.308; *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (discussing burdens of proof in administrative proceedings before Commerce). Commerce "may employ [such] inferences ... to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Viet I-Mei Frozen Foods Co. v. United States*, 839 F.3d 1099, 1109 (Fed. Cir. 2016) (quoting SAA at 870). "Because Commerce lacks subpoena power, Commerce's ability to apply adverse facts is an important one." *Maverick Tube*, 857 F.3d at 1360 (quoting *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012)). Thus, "[t]he purpose of the adverse facts statute is 'to provide respondents with an incentive to cooperate' with Commerce's investigation." *Id*. (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). "Compliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum efforts to provide Commerce with full and complete answers to all inquiries in an investigation." *Maverick Tube*, 857 F. 3d at 1360 (quoting *Nippon Steel*, 337 F.3d at 1382).

Substantial evidence supports both Commerce's finding that Özdemir did not act to the best of its ability to comply with Commerce's request for information, and its decision to apply an adverse inference

in consequence. As explained *supra*, the Questionnaire asks for a detailed series of answers regarding the respondent's history with the EFPT program. Questionnaire at 18–19. Özdemir stated in its QR that it "did not receive any benefits under [the EFPT] program. Eligibility for this program is limited to enterprises located within certain designated regions. Since none of the Özdemir's plants are located in those regions, Özdemir was not eligible to use this program." QR at 33. At verification, Commerce discovered that this response was not accurate, as Özdemir had taken advantage of the EFPT program, and did have facilities in the designated region.[22] Verification Report at 2, 9. Commerce's resulting conclusion that Özdemir had withheld requested information, pursuant to 19 U.S.C. § 1677e(a)(2)(A), by failing to report use of the EFPT program was reasonable and supported by substantial evidence. *IDM* at 5. Accordingly, resort to facts otherwise available was warranted. *Id*. So too was Commerce's decision to apply an adverse inference reasonable. *Id*. at 6. The record shows that Özdemir did not "provide Commerce with full and complete answers to all inquiries in [the] investigation," as regards the EFPT program. *Maverick Tube*, 857 F.3d at 1360. While "[t]he best-of-one's-ability standard 'does not require perfection and recognizes that mistakes sometimes occur,' it "does not condone inattentiveness, carelessness, or inadequate record keeping." *Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373, 1379 (Fed. Cir. 2016) (quoting *Nippon Steel*, 337 F.3d at 1382). In summary, "Commerce requested information from [Özdemir], which [Özdemir] did not provide, and never claimed that it was unable to provide."[23] *Maverick Tube*, 857 F.3d at 1360; *IDM* at 6; Verification Report at 2, 9. Commerce's decision to apply an AFA rate was therefore supported by substantial evidence on the record.

Özdemir's assertion that it inadvertently provided the incorrect QR statement regarding EFPT benefits does not advance its argument here. "While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element." *Nippon Steel*, 337 F.3d at 1383, *cited in Essar Steel*, 678 F.3d at 1276. Rather, "the statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of

[22] Commerce also determined that Özdemir was unable to provide information showing that it actually paid property taxes on the factory located in the Zonguldak OIZ during the POI. Min. Error Decision Memo at 5.

[23] The court notes that Özdemir could reasonably have provided corrected information regarding lts use of the EFPT program in its SQR. *See* SQR at 5. However, Özdemir did not do so. *Id.; see, e.g., Fresh Garlic Producers Ass'n v. United States*, 39 CIT_, _, 121 F. Supp. 3d 1313, 1325 (2015).

motivation or intent." *Id*. The court also finds unpersuasive Özdemir's arguments that its incorrect QR statement was not material, and thus could not justify an adverse inference. Pl.'s Reply at 14–16. Neither the statute nor binding precedent impose that standard on Commerce; the animating inquiry of the adverse inferences provision is whether "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]." 19 U.S.C. § 1677e(b)(1); *see Maverick Tube*, 857 F.3d at 1360–61. Contrary to Özdemir's materiality articulation, the "best of its ability" standard "expects respondents to '(a) take reasonable steps to keep and maintain full and complete records . . . ; (b) have familiarity with all of the records it maintains in its possession, custody, or control; and (c) conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question.'" *Papierfabrik*, 843 F.3d at 1379 (quoting *Nippon Steel*, 337 F.3d at 1382). Özdemir's emphasis on EFPT benefits received during the POI is besides the point. Rather, the relevant point is that Özdemir did not put forth its best efforts to provide "full and complete" answers to Commerce's inquiries in its QR. *Nippon Steel*, 337 F.3d at 1382; *see Essar Steel*, 678 F.3d at 1276 ("Without the ability to enforce full compliance with its questions, Commerce runs the risk of gamesmanship and lack of finality in its investigations.").

The court is likewise unpersuaded by Özdemir's argument that Commerce could have used additional tax information provided at verification to ascertain its participation in the EFPT program during the POI and beforehand. The purpose of verification is not to "continue the information-gathering stage of [Commerce's] investigation." *Borusan Mannesmann Boru Sanyive Ticaret A.S. v. United States*, 39 CIT _, _, 61 F. Supp. 3d 1306, 1349 (2015) (quoting agency position), *aff'd, Maverick Tube*, 857 F.3d 1353. "Verification is intended to test the accuracy of data already submitted, rather than to provide a respondent with an opportunity to submit a new response." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT 1635, 1644, 353 F. Supp. 2d 1294, 1304 (2004), aff'd, 146 F. App' x 493 (Fed. Cir. 2005). "Commerce . . . is under no obligation to request or accept substantial new factual information from a respondent after discovering that a response cannot be corroborated during verification." *Id.; see* 19 C.F.R. § 351.307(d) (2015). Nor is it for this court to mold Commerce's verification procedures more strictly than the statute provides. Indeed, the statute gives Commerce wide latitude in its verification procedures, *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396

(Fed. Cir. 1997) (citing *American Alloys, Inc. v. United States*, 39 F.3d 1469, 1475 (Fed. Cir. 1994)), and further "Congress has implicitly delegated to Commerce the latitude to derive verification procedures ad hoc." *Id*. More generally, the Federal Circuit "ha[s] recognized Commerce's authority to apply adverse facts, even when a party provides relevant factual information if a party has not acted to the best of its ability to provide the information." *Essar Steel*, 678 F.3d at 1278; *see Nippon Steel*, 337 F.3d at 1378–83.

The operative point is that Özdemir possessed information that Commerce requested in its Questionnaire, and upon being asked to provide that information with supportive details and explanations, Özdemir did not provide it. QR at 33. "Such behavior cannot be considered 'maximum effort to provide Commerce with full and complete answers.'" *Maverick Tube*, 857 F.3d at 1361 (quoting *Nippon Steel*, 337 F.3d at 1382). Commerce's decision to apply an adverse inference, and an AFA rate, was thus supported by substantial evidence on the record.

2. *Commerce Selection of the AFA Rate was in Accordance with Law.*

Commerce used the third level of its methodology in applying the CWP&T 1986 rate[24] to Özdemir in this proceeding. *IDM* at 6–7 ("If no such rate is available, the Department will use the highest non-de minimis rate for a *similar program* (*based on treatment of the benefit*) in another CVD proceeding involving the same country.") (emphasis added). In a two-pronged argument, Özdemir contends that even if it did not act to the best of its ability in responding to Commerce's Questionnaire, Commerce nonetheless violated its AFA selection criteria in assigning the 14.01 percent program-specific rate to Özdemir. Pl.'s Br. at 27.

First, Özdemir argues that "Commerce should have stopped at its second preference," rather than reach the third, "because a rate had been calculated for an identical program in a prior CVD proceeding involving the same country." Pl.'s Br. at 28. That rate, per Özdemir, is a 0.01 percent subsidy rate applied to respondent Toscelik for the EFPT program in the investigation of oil country tubular goods ("OCTG"). Pl.'s Br. at 28 (citing *Certain Oil Country Tubular Goods From the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 79 Fed. Reg. 41,964 (Dep't Commerce July 18, 2014) and

[24] *See supra* p. 14, regarding CWP&T 1986 (the 1986 *Final Affirmative Countervailing Duty Determinations; Certain Welded Carbon Steel Pipe and Tube Products From Turkey*, 51 Fed. Reg. 1268).

accompanying ID M). Özdemir asserts that a rate of 0.01 percent is not de minimis, and disputes the validity of Commerce's 0.5 percent de minimis threshold by asserting that "Commerce's practice is to treat programs with ad valorem subsidy rates below 0.005 [percent] as de minimis." Pl.'s Br. at 29–30 (citing *Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Countervailing Duty Administrative Review*, 77 Fed. Reg. 46,713 (Dep't Commerce Aug. 6, 2012)). Özdemir contends that, though Commerce cited a previous usage of the 0.5 percent de minimis AFA threshold, it provided no reasoning in either the *Final Determination* or the cited decision explaining why that threshold should apply. Pl.'s Br. at 30 (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998); *U.H.F.C. Co. v. United States*, 916 F.2d 689, 700 (Fed. Cir. 1990)).

Second, Özdemir argues that even if Commerce's selection of the CWP&T 1986 14.01 percent rate as AFA was justified, it was nonetheless inconsistent with Commerce's regulatory criteria. Pl.' s Br. at 30–31. Özdemir contends that the 1986 program was not a "match, based on program type and treatment of the benefit." *IDM* at 7. According to Özdemir, the "treatment" of a benefit refers to its attribution, which is fundamentally different between an export subsidy and a domestic subsidy. Pl.'s Reply at 8. Specifically, the 1986 Export Tax Rebate program was an export subsidy, rather than a domestic subsidy, attributed only to export sales rather than total sales. Pl.'s Br. at 31. Per Özdemir, "[t]he benefit from an export subsidy is attributed to a company's *export* sales only, while the benefit from a domestic subsidy is attributed to a company's *total* sales." Pl.'s Reply at 8 (citing 19 C.F.R. § 351.525(b)(2)-(3) (2015)).[25]

The court construes Özdemir's argument as an assertion that Commerce acted m an arbitrary and capricious fashion, and thus, not in accordance with law. When determining whether Commerce's interpretation and application ofthe statute is in accordance with law, this Court must consider "whether Congress has directly spoken to the precise question at issue," and, if not, whether the agency's interpretation of the statute is reasonable. *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1344 (Fed. Cir. 2017) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842–43 (1984)). If the Court determines that the statute is silent or ambiguous with respect to the specific issue, then the traditional second prong of the Chevron analysis asks what level of deference is owed

[25] Furthermore, Özdemir argues that, under the fourth alternative, respondents could not "conceivably" use that program, as it was terminated nearly 30 years ago; if the rate could not "conceivably" be used under the fourth alternative, it could certainly not be "similar" under the third alternative. Pl.'s Br. at 31; Pl.'s Reply at 2.

Commerce's interpretation. *Chevron*, 467 U.S. at 842–43; *see United States v. Mead Corp*., 533 U.S. 218,228 (2001). "Chevron requires us to defer to the agency's interpretation of its own statute as long as that interpretation is reasonable." *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994); *see Kyocera Solar, Inc. v. United States Int'l Trade Comm'n*, 844 F.3d 1334 (Fed. Cir. 2016).

The court notes that under the plain text of 19 U.S.C. § 1677e(d), added to the statute by the TPEA, Commerce has broad discretion to "use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country," and to "apply any of the countervailable subsidy rates or dumping margins specified under that paragraph, including the highest such rate or margin." No party has contended that this language is ambiguous. In the context of Commerce's execution of its statutory mandates, "reviewing courts must accord deference to the agency in its selection and development of proper methodologies."[26] *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999) (citing *Daewoo Elecs. Co. v. Int'l Union of Elec. Elec., Tech., Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1516 (Fed. Cir. 1993)). To the extent that the statutory language poses some ambiguity ripe for interpretation, "[o]ur review centers on whether the agency's interpretations of statutes and regulations it administers are reasonable." *Thai Pineapple*, 187 F.3d at 1365 (citing *Chevron*, 467 U.S. at 844; *Daewoo*, 6 F.3d at 1516).

Özdemir presents no binding authority to support the proposition that Commerce is bound to a practice of treating programs with ad valorem subsidy rates below 0.005 percent, but not above, as de minimis, for the purpose of selecting AFA rates. Nor does Özdemir offer determinations by Commerce evidencing that practice. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently."), *aff'd*, 332 F.3d 1370 (Fed. Cir. 2003). Commerce, however, cited to a previous determination explicitly stating, twice, the agency's practice of treating programmatic rates of 0.5 percent or less ad valorem as de minimis. *IDM* at 7 n.26 (citing *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 Fed. Reg. 28,557 (Dep't Commerce May 10, 2010) and accompanying IDM at " 1. Grant Under the Tertiary Technological Renovation Grants for Discounts Program," "2. Grant Under the

[26] The parties do not dispute the validity of Commerce's established AFA rate selection hierarchy, Pl.'s Br. at 27–28, Def.'s Br. at 15–16, but only whether Commerce adhered to it in the underlying proceeding. *See Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1373–74 (Fed. Cir. 2014).

Elimination of Backward Production Capacity Award Fund." ("[A]ll previously calculated rates for grant programs from prior China CVD investigations have been de minimis (e.g., less than 0.5 percent ad valorem).")). Thus Commerce's application of the 0.5 percent threshold was not inconsistent with prior agency practice, and was not arbitrary and capricious, or discordant with law, on those grounds.

The court also finds unavailing Özdemir's subsidiary argument that Commerce did not sufficiently justify the usage of a 0.5 percent de minimis threshold. Commerce did provide a justification of applying that threshold in the same paragraph to which it appended a footnote characterizing the threshold as its normal practice. *IDM* at 6–7 n.26. Specifically, the purpose of skipping over de minimis rates, and therefore in applying the 0.5 percent de minimis threshold in the contest of AFA rate selection, is "to ensure that the result is sufficiently adverse 'as to effectuate the statutory purposes of the AFA rule to induce respondents to provide [Commerce] with complete and accurate information in a timely manner.'" *IDM* at 6 (quoting *Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 Fed. Reg. 8909, 8932 (Dep't Commerce Feb. 23, 1998)). Commerce intends that this practice will ensure "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *IDM* at 6 (quoting SAA at 870). "Commerce has wide, though not unbounded, discretion 'to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin.'" *Papierfabrik*, 843 F.3d at 1380 (quoting *De Cecco*, 216 F.3d at 1032). Indeed, Commerce's methodology here, consistent with the TPEA at 19 U.S.C. § 1677e(d)(l)-(2), has been sustained by the Federal Circuit as permissible, under the previous iteration of the statute. *Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1373–74 (Fed. Cir. 2014). Even under the previous iteration of the statute, where AFA rates were to "be a reasonably accurate estimate of the respondent's actual rate," there was too expected "some built-in increase intended as a deterrent to noncompliance." *Id*. at 1373 (quoting *De Cecco*, 216 F.3d at 1032). Under that framework, Commerce's decision to disregard Özdemir's desired AFA rate of 0.01 percent ad valorem, derived from the Final OCTG determination, 79 Fed. Reg. 41,964, was reasonable, and in accordance with law.[27]

The court turns to Özdemir's argument that Commerce is invalidly applying a new standard in selecting a "similar" program for AFA

[27] To the extent that Commerce's application of 0.5 percent as the AFA threshold, or its selection of the highest available rate over that threshold, in the context of the proceedings at issue, also raises a question of factual support, the court finds that these decisions were supported by substantial evidence on the record.

purposes, Pl.' s Br. at 31, and finds it unpersuasive. Özdemir contends that Commerce's practice of determining similarity on the basis of relevant subsections of 19 C.F.R. §§ 351.504–20, as represented in *SolarWorld Americas, Inc. v. United States*, 41 CIT _, _, 229 F. Supp. 3d 1362, 1368 (2017), conflicts with the agency's similarity determination in this case. Most significantly, *SolarWorld* does not interpret the relevant statutory provision, 19 U.S.C. § 1677e(d), which was added by the TPEA. Section 1677e(d)(l)(A)(i) permits Commerce to "use a countervailable subsidy rate applied for the same or similar program in a [CVD] proceeding involving the same country." The "similar" qualifier is undefined, and it is within Commerce's purview to effectuate it and give it meaning. The court asks "whether the agency's interpretations of statutes and regulations it administers are reasonable." *Thai Pineapple*, 187 F.3d at 1365 (citing *Chevron*, 467 U.S. at 844; *Daewoo*, 6 F.3d at 1516). From the statute's structure, it is patent that Commerce is entitled to interpret "similar," as the following subsection, (ii), provides that "if there is no same or similar program, [Commerce may] use a countervailable subsidy rate for a subsidy program from a proceeding that [Commerce] considers reasonable to use." 19 U.S.C. § 1677e(d)(l)(A). This language indicates a Congressional judgment that Commerce will determine whether a subsidy program is similar, and even if none is found, the agency will have discretion to apply a "reasonable" rate from another program. Özdemir presents no binding precedent that would compel this court to remand Commerce's determination for insufficient explanation of similarity, let alone precedent directing this court to read § 1677 (d) less deferentially to Commerce's discretion than the provision's text provides. "[U]nder *Chevron*, an agency can only reject a prior interpretation of an ambiguous statute if it explains why it is doing so." *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1382 (Fed. Cir. 2017). Özdemir has presented no prior interpretation by Commerce of the word "similar" in the context § 1677e(d) against which the court could construe the agency's current interpretation.[28]

[28] Because the court holds that Commerce's selection of an AFA rate in accordance with the third tier of methodology was reasonable and in accordance with law, the court does not address Özdemir's contention that Commerce impermissibly applied a rate that could not have "conceivably" been used because it was terminated well prior to the underlying proceeding. Pl.'s Br. at 31. This argument implicates the fourth tier of Commerce's AFA rate selection methodology, where "[a]bsent an above-de minimis subsidy rate calculated for a similar program, [Commerce] applies the highest calculated subsidy rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies." *IDM* at 6 (citing 75 Fed. Reg. 28,557; *Lightweight Thermal Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 Fed. Reg. 57,323 (Dep't Commerce Oct. 2, 2008), and accompanying IDM at "Selection of the Adverse Facts Available Rate.").

Further, *SolarWorld* does not necessarily stand for the proposition that a subsidy which is or could be classified under a given subsection of§ 351 cannot be "similar," for the purposes of AFA rate selection, to a subsidy which is or could be classified under a different subsection of § 351. Indeed, *SolarWorld* cites Commerce's statement that it "does not look at the 'next most similar program.'" 229 F. Supp. 3d at 1368. Assuming arguendo that *SolarWorld* does support Özdemir's interpretation, Özdemir has failed to establish that the 1986 Export Tax Rebate program falls under a subsection of § 351 such that it is bereft of similarity to the EFPT program, which falls under § 351.509, for AFA rate selection purposes. *See* Pl.'s Br. at 19–20. Indeed, at the time of the CWP&T 1986 proceeding, the subsidy identification regulatory regime under 19 C.F.R. §§ 351.504–20 was not in force. In the instant case, Commerce looked to the foreign government's treatment of the benefit in determining whether it is a "similar" program. On the record, it was well within Commerce's discretion to conclude that where the two programs are both tax programs, a sufficient nexus of similarity was established. In sum, Commerce is statutorily authorized to determine, and did reasonably determine, what constitutes similarity for the purposes of AFA rate selection, and Özdemir's argument that Commerce must apply some different standard, without textual or precedential support, is unavailing.

3. *Commerce Corroborated the AFA Rate to the Extent Practicable, with the Support of Substantial Evidence and in Accordance with Law.*

Özdemir argues that Commerce failed to corroborate the 14.01 percent rate, which the agency must do "to the extent practicable, . . . from independent sources that are reasonably at [its] disposal," whenever it uses "secondary information other than information obtained in the course of an investigation." Pl.'s Br. at 32 (quoting 19 U.S.C. § 1677e(c)(l)). Özdemir contends that the CWP&T 1986 Export Tax Rebate program is not relevant because it is not similar to the EFPT program based upon treatment of benefit. Pl.'s Br. at 33. Furthermore, to Özdemir, Commerce's application of a terminated program as AFA means "that Commerce did not evaluate probative value (relevance) with a full review of its own files." Pl.' s Reply at 3.

Özdemir additionally argues that "Commerce must select secondary information that has some grounding in commercial reality." *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010). Özdemir contends that, though the TPEA removed any statutory requirement "to demonstrate that the countervailable sub-

sidy rate . . . reflects an alleged commercial reality *of the interested party*," commercial reality remains relevant as it pertains to industry-wide or program-wide considerations. Pl.'s Br. at 32. Özdemir argues that on a program-wide basis, the 14.01 percent rate is far removed from the commercial reality of any alleged EFPT program benefits, which are typically far smaller than that amount. Pl.'s Br. at 33.

To the extent that Özdemir contends that Commerce's verification was not performed in accordance with law, that argument fails. As explained *supra*, Commerce is empowered to formulate the methodologies it uses to execute its statutory mandates. *Thai Pineapple*, 187 F.3d at 1365. In this case, as noted, the statute requires that Commerce "shall, to the extent practicable, corroborate [secondary information] from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c)(l). "Corroborate means that the [Commerce] will satisfy [itself] that the secondary information to be used has probative value." SAA[29] at 870. "The statute does not prescribe any methodology for corroborating secondary information ...." *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734,491 F. Supp. 2d 1273, 1278 (2007), *appeal dismissed*, 253 F. App'x 19 (2007). Commerce states that it "will, to the extent practicable, examine the reliability and relevance of the information to be used." IDM at 8. Özdemir has proffered no authority demonstrating -- and this court does not conclude -- that on its face Commerce's methodology is unreasonable or not in accordance with law.

To the extent that Özdemir attacks Commerce's findings regarding probative value for lack of substantial evidence support on the record, the court is again unpersuaded. Substantively, corroboration by Commerce requires satisfaction that the secondary information to be used, here the AFA rate from the CWP&T 1986 proceeding, has probative value. SAA at 870. Commerce demonstrates probative value by "demonstrating the rate is both reliable and relevant." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1354 (Fed. Cir. 2015). Critically, as noted, Commerce is charged with corroborating AFA rates selected from secondary information "to the extent practicable," and with "independent sources reasonably at [its] disposal." 19 U.S.C. § 1677e(c)(l). No more is required. Commerce explained that its corroboration was circumscribed by "the lack of certain record information concerning the programs under investigation," and, generally, the lack of "independent sources for data on company-specific benefits resulting from countervailable subsidy pro-

[29] Regarding the SAA, *see supra* p. 9 & n.8.

grams." *IDM* at 8. Commerce, empowered to craft methodology to execute its statutory mandate, thus confronted these limitations by reviewing information concerning Turkish subsidy programs in other cases. *Id*. Under those circumstances, Commerce determined that the CWP&T 1986 rate was relevant because it was similar, in the sense of 19 U.S.C. § 1677e(d)(l)(A)(i), to the EFPT program at issue. *Id*. Commerce's interpretation of the term "similar" is permissible and entitled to deference. Accordingly, here its analysis of relevance for the purposes of probative value and corroboration, performed "to the extent practicable," is supported by substantial evidence. Commerce determined that the CWP&T 1986 rate was reliable because it was "calculated in . . . previous Turkey CVD investigations or administrative reviews." *IDM* at 8. Under the limitations articulated by the agency, and under the statutory standard, Commerce's statement regarding reliability served the purposes of corroboration "to the extent practicable." 19 U.S.C. § 1677e(c)(l). Özdemir has not provided binding authority that would impose on Commerce a corroboration standard stricter than that identified in the statute and the legislative history. *See* § 1677e(c)(1); SAA at 869–70. For these reasons, on the facts before the court, Commerce's corroboration of its selected AFA rate, as well as its explanation of the probative value thereof, *IDM* at 8, was reasonable, and supported by substantial evidence.

Additionally, Özdemir's commercial reality argument fails because it is contrary to plain statutory language. Özdemir's case law citations, which interpret a prior version of the statute, do not persuade this court to read the current iteration of the statute contrarily to its unambiguous text. Commerce "is not required, for the purposes of subsection (c)," which covers corroboration of secondary information, "*or for any other purpose*. . . to demonstrate that the countervailable subsidy rate . . . [used] reflects an alleged commercial reality of the interested party." 19 U.S.C. § 1677e(d)(3) (emphasis added). As the current statute disclaims any obligation to consider an interested party's alleged commercial reality "for any . . . purpose," there exists no basis upon which to conclude that such an analysis remains relevant with regard to industry-wide or program-wide considerations, as Özdemir argues. Pl.'s Br. at 32; *see Fresh Garlic Producers Ass'n v. United States*, 39 CIT _, _, 121 F. Supp. 3d 1313, 1329 (2015) (comparing TPEA § 502(d)(3), 129 Stat. at 384, with *Gallant Ocean*, 602 F.3d at 1324). Commerce's decision not to rely on an interested party's "alleged commercial reality," § 1677e(d)(3), *IDM* at 5, when selecting an AFA rate was thus made in accordance with law.[30]

[30] To the extent Özdemir argues that Commerce's determination was not supported by substantial evidence because the agency did not address an alleged commercial reality in

C. *Commerce did not Treat Özdemir in an Arbitrary and Capricious Fashion vis-à-vis the Property Tax Exemption.*

Özdemir also asserts that Commerce treated it differently from similarly situated respondents so as to constitute arbitrary and capricious behavior. Pl.' s Br. at 33 (citing *SKF*, 263 F.3d at 1382). Özdemir points to Commerce's 2014 investigation of reinforcing bar from Turkey. Pl.'s Br. at 34 (citing *Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Affirmative Countervailing Duty Determination Final Affirmative Critical Circumstances Determination*, 79 Fed. Reg. 54,963 (Dep't Commerce Sept. 15, 2014) and accompanying IDM ("*Rebar from Turkey*")). In that proceeding, Turkish respondent Içdas reported that it had received no benefits under the "lump-sum" program, which allowed respondents to deduct 0.5 percent of their foreign exchange income from taxable income for tax purposes, only for Commerce to discover at verification that Içdas had received this benefit in the POI. *Id*. Commerce therefore determined that Içdas had failed to cooperate, and applied AFA. *Id*. However, Commerce explained that "[t]he Deductions for Taxable Income for Export Revenue program is well known to the Department, having examined, verified, and countervailed it in numerous Turkey CVD cases." *Id*. Commerce calculated an AFA benefit of 0.10 percent. *Id*. Özdemir argues that here, as in *Rebar from Turkey*, Commerce is familiar with the program at issue, having countervailed the EFPT program on numerous occasions, and that the record contains all information required to calculate the amount of the benefit. Pl.'s Br. at 34. Per Özdemir, the difference here is that Özdemir reported the non-use of the program, and Commerce verified that non-use, while in *Rebar from Turkey*, Commerce discovered the respondent's affirmative use of the program at issue during verification. *Id*. at 35. Altogether, Özdemir argues that "while Commerce filled the gap in the record for Içdas based upon the maximum possible benefit and record information about Içdas, Commerce here disregarded its institutional knowledge and record evidence, and instead sought the highest rate it could find to impose on Özdemir." *Id*.

The court does not find this argument persuasive. While *Rebar from Turkey* involved a Turkish respondent and a subsidy program that was "well known to [Commerce]," insofar as it had been countervailed numerous times beforehand, Özdemir fails to establish that Com-

any respect, the court disagrees, and holds that Commerce's determination was supported by substantial evidence. The operative point is that under the statute, Commerce need not analyze, or make any findings regarding, an alleged commercial reality. 19 U.S.C. § 1677e(d)(3)(B). As no record support, let alone the support of substantial evidence on the record, is required to buttress Commerce's determination, any argument based on lack of record support on that basis must fail. Özdemir has offered no precedent or binding authority holding otherwise.

merce's treatment of respondent Içdas constitutes a practice to which the agency must now be bound. That the operative statutory provisions, to wit, § 1677e(b), (c), were modified, and, in the case of (d), added, further defeats the contention that the two situations are sufficiently similar so as to bind Commerce's behavior in the latter investigation to that in the former. *SKF*, 263 F.3d at 1382. Even if *Rebar from Turkey* could be considered a "similar situation" to the underlying proceeding for the purposes of an arbitrariness analysis, the record does express "[]sufficient reasons" for Commerce's AFA selection and application to Özdemir. *SKF*, 263 F.3d at 1382. As described *supra*, under the new statutory standard imposed by the TPEA amendments, Commerce's AFA selection methodology, and ultimate selection, were supported by substantial evidence and made in accordance with law.

II. *Commerce's Benchmark Calculation was Not Supported by Substantial Evidence and in Accordance with Law.*

As noted, also before the court is Özdemir's contention that Commerce's inclusion of two particular land parcels --namely, those located in Istanbul and Yalova Altinova ("Yalova") -- in the Land for LTAR benchmark, is unsupported by record evidence and contrary to law. Citing 19 U.S.C. § 1677 and 19 C.F.R. § 351.511, the Government argues that Commerce's usage of its "preferred benchmark: publicly available, market-determined prices from industrial land sales between private parties in Turkey," was supported by substantial evidence. Def.'s Br. at 21–22 (citing *IDM* at 15).

As set forth, *supra* pp.3–4, to determine whether a foreign government provided a subsidy, Commerce must determine whether a government authority provides a specific financial contribution to a person and a benefit is conferred. 19 U.S.C. § 1677(5)(B). In determining whether a benefit is conferred, the statute provides that "a benefit shall normally be treated as conferred where there is a benefit to the recipient, including ... if such goods or services are provided for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv). The adequacy of remuneration is determined in relation to prevailing market conditions in the country that is subject to the investigation. "Prevailing market conditions include price, availability, marketability, transportation, and other conditions of purchase or sale." 19 U.S.C. § 1677(5)(E).

Consistent with the statute, Commerce's regulations set forth the basis for identifying appropriate market-determined benchmarks for measuring the adequacy of remuneration for government-provided goods. 19 C.F.R. § 351.511. Where feasible, Commerce should "com-

par[e] the government price to a market-determined price for the good . . . resulting from actual transactions in the country in question." *Id*. § 351.511 (a)(2)(i). When market-determined prices are unavailable or unusable, Commerce will resort to comparison to a world market price; if a world market price is also unavailable, Commerce may assess "whether the government price is consistent with market principles." *Id*. § 3 51.511 (a)(2)(ii)-(iii).

When Commerce uses an actual transaction price or a world market price, it will "adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported that product," including "delivery charges and import duties." 19 C.F.R. § 351.511(a)(2)(iv). "[T]his practice ensures that the Department engages in a fair comparison between the government price and the price that a company 'would pay if it imported the product.'" *United States Steel Corp. v. United States*, 33 CIT 1935, 1946 (2009) (quoting 19 C.F.R. § 351.511(a)(2)(iv)).

As noted, to calculate the land benchmark in the investigation here, Commerce used its preferred benchmark: publicly available, market-determined prices from industrial land sales between private parties in Turkey. *IDM* at 15. Specifically, Commerce used land parcels under the category "Investment Land for Industrial Facilities," a designation that corresponds to land suitable for production of subject merchandise. *Id*. at 28. To derive an average price from all the parcels, Commerce stated that it moderated any differences in the infrastructure levels of the land parcels, and claims that it satisfied the comparability requirements of 19 C.F.R. § 351.511.

Özdemir argues that Commerce's decision to include allegedly anomalous prices with the benchmark for land valuation is unsupported by record evidence and not in accordance with law. Pl.'s Br. at 35. "When confronted with a colorable claim that the data that Commerce is considering is aberrational, Commerce must examine the data and provide a reasoned explanation as to why the data it chooses is reliable and non-distortive." *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1135, 502 F. Supp. 2d 1295, 1308 (2007). Here, Commerce included a total of fourteen advertisements for sale of land parcels in Turkey in 2009 and 2010 (listed in descending price order in the table, below), and used the simple average of 89.62 TL/m2 as the benchmark:

Benchmark Land Price Data	
	Price (TL/m2) Indexed to 2008
Istanbul	**512.17**
Yalova Altinova	304.90
Gaziantep	67.09
Gaziantep	66.67
Gaziantep	59.09
Kirklarei	51.22
Kirklarei	42.35
Kirklarei	36.58
Kirklarei	36.58
Ankara	26.01
Tekirdag Corlu	23.47
Tekirdag Corlu	14.42
Tekirdag Corlu	11.29
Gaziantep	2.87
Simple Average TL/m2 Price	**89.62**

Özdemir argues that Commerce should not include parcels of land located in highly developed provinces, such as Yalova and Istanbul, because these properties are highly priced and anomalous vis-a-vis prices in areas outside ofIstanbul and Yalova. Pl.' s Br. at 41.

Özdemir further argues that Commerce's analysis of the types of properties being compared is based entirely upon petitioners' speculative statements. Pl.' s Br. at 42. Specifically, Özdemir contends that "Commerce's analysis is not based upon record evidence, however, but rather on petitioner's unsupported speculation about land values in Turkey." *Id*. Özdemir takes issue with Commerce's reliance on petitioners' arguments:

> We agree with the petitioners that the mere fact that past or current usage of the Istanbul and Yalova parcels was 'agricultural' does not undermine comparability for benchmarking purposes. What matters, as the petitioners correctly implied, is the usage for which these parcels were being offered on the market for future use. Specifically, these parcels were being offered for industrial development and, for that purpose, were classified as 'investment land for industrial facilities.' This puts them in essentially the same category in the land market as the other parcels in the benchmark, and in deriving an average price from all the parcels, we thereby moderate any differences in, e.g., the

> levels of infrastructure development, maintaining a reasonable level of comparability that satisfies the requirements of 19 C.F.R. § 351.511.

Pl.'s Br. at 38–39 (quoting *IDM* at 28).

The court is persuaded by Özdemir' s arguments that, based on the facts in the record, Commerce's creation of the land benchmark is deficient. Commerce must consider relevant record evidence in determining the comparability of land parcels it uses in creating a reasonable benchmark that lacks distortive pricing. *See* 19 C.F.R. § 351.511(a)(2)(i) ("In choosing such transactions or sales, [Commerce] will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.").

The land price data for Istanbul (512.17) and Yalova (304.90) deviate substantially from the land price data associated with the other parcels. As Özdemir points out, the Istanbul and Yalova property values are 571 percent and 340 percent, respectively, of the average ofall fourteen parcels; they are 763 percent and 454 percent, respectively, of the next-highest-priced parcel (67.06 TL/m2); and, when the highest two and lowest three parcel prices are removed, the Istanbul and Yalova parcels are 1127 percent and 671 percent of the 45.45 TL/m2 average of the remaining nine parcels. The court is satisfied that Özdemir's argument thus constitutes at least a "colorable claim that the data that Commerce is considering is aberrational." *Mittal Steel Galati S.A.*, 502 F. Supp. 2d at 1308. Regarding the "publicly available information concerning industrial land prices in Turkey [used] for purposes of calculating a comparable commercial benchmark price for land available m Turkey," Commerce summarily states that it found that the selected land prices, including those of the Yalova and Istanbul parcels, "serve as comparable commercial benchmarks under 19 CFR 351.51 l(a)(2)(i)." *IDM* at 15. Commerce also states that it effectively moderates any differences in the land parcels by "deriving an average price from all the parcels." *IDM* at 28. These concise statements do not constitute a reasoned explanation as to why the data Commerce chose is reliable and nondistortive, given the disparities noted *supra*, and in light of a colorable claim that the data are aberrational. *See Mittal Steel*, 502 F. Supp. 2d at 1308. Nor does Commerce explain how precisely a simple average of prices offsets the potentially distortive data which contributes to the derived average.

The court turns to Özdemir's arguments regarding the property location and level of development underlying the Yalova and Istanbul parcels. "As Commerce's own benchmarking method indicates, using

'comparables' of proximate parcels (e.g., in location, terrain, size, features) is an accepted proposition for purposes of land and realty valuation." *Toscelik Profil Ve Sac Endustrisi A.S. v. United States*, 38 CIT _, Slip Op. 14–126 at 14 n.14 (Oct.29.2014) (Not Reported in F. Supp. 3d). It may be that land located in highly developed areas is worth several times more than land in lesser developed areas in Turkey. *See* table *supra*. In light of the presence of a colorable claim that the relevant price data is aberrational, Commerce's summary statements in the *IDM* do not carry the support of substantial evidence in the resolution of the question. *See IDM* at 27. On remand, Commerce should consider, pursuant 19 C.F.R. § 351.511 (a)(2), the relevance of the locations, and the level of land development, of the Yalova and Istanbul parcels.

The court finally addresses Özdemir's argument that Commerce unduly emphasizes future use of the relevant properties, at the expense of their current and past uses. A reasonable person interested in participating in a real estate transaction could believe that actual current or past use are equally important as future use to consider in assessing the price of land offered in online advertisements. Conf. Joint App. Memo. To File, P.R. 200. Despite agreeing with petitioners' implication, Commerce does not explain in the *IDM* why potential future use factors more prominently in its analysis under 19 U.S.C. § 1677(5)(E)(iv) and 19 C.F.R. § 351.511(a)(2) than past or current uses. *IDM* at 28. Commerce must explain its focus on a land parcel's future use, at least as advertised in regard to the relevant parcel. *See Changzhou Wujin*, 701 F.3d at 1377 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." (quoting *SEC v. Chenery Corp*., 318 U.S. 80, 87)).

The court does not take issue with the Government's characterization that benchmark data "need not – and rarely does – perfectly match the benefit it is used to measure." Def. Br. at 23. However? as to each of the factual matters highlighted by Özdemir, and based on the record before the court, Commerce has failed, in constructing and applying its land benchmark, to articulate a rational connection between the facts it found and the choices it made. *See Motor Vehicle Mfr. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines Inc. v. United States*, 37 l U.S. 156, 168 (1962)). "[I]t is the agency's responsibility, not this Court's, to explain its decision," and Commerce must do so based on the record before it. *Id*. at 57. Commerce's determination therefore lacks the support of substantial evidence on the record. *Maverick Tube*, 857 F.3d at 1359.

The court thus remands this case for reconsideration and further explanation consistent with the court's opinion. If Commerce chooses to maintain its current position on remand, it must explain why, specifically, the prices associated with the land sale data for the Yalova and Istanbul provinces are not aberrational, and how its average price derivation successfully moderates the land parcel price disparities. Commerce should consider the record as a whole in reaching its conclusions regarding the comparability of those land parcels. *See CS Wind*, 832 F.3d at 1373 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."); 19 C.F.R. § 351.511. Commerce must also explain whether the Yalova and Istanbul parcels are located in a highly developed area of Turkey, as compared to other parts of Turkey, and how Commerce's findings with respect to that issue affect its overall analysis; and why future usage of the relevant land parcels, as purported in online advertisements, is "what matters" under 19 U.S.C. § 1677(E)(iv) and 19 C.F.R. § 351.511. *IDM* at 28.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Özdemir's motion for judgment on the agency record is denied in part; and it is further

ORDERED that Commerce's determination regarding the Land for LTAR issue is remanded for further consideration consistent with this opinion; and it is further

ORDERED that Commerce's *Final Determination* is sustained in all other respects; and it is further

ORDERED that Commerce shall file its remand determination with the court within 60 days of this date; and it is further

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

ORDERED that the parties shall have 15 days thereafter to file replies to comments on the remand determination.

Dated: October 16, 2017
New York, New York

Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 17–144

ADC TELECOMMUNICATIONS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00400

[On Customs' classification of certain value added modules, plaintiff's motion for summary judgment denied; defendant's cross motion for summary judgment granted.]

Dated: October 18, 2017

Michael E. Roll and *Brett Ian Harris*, Pisani & Roll LLP, of Los Angeles, CA, for the plaintiff.

Guy R. Eddon, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the defendant. On the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Beth C. Brotman*, Attorney, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

OPINION

Musgrave, Senior Judge:

This test case is before the court on cross-motions for summary judgment on the proper customs classification of a single entry of three types of "Value Added Modules" ("VAMs") imported from Mexico in June 2012. The plaintiff claimed to U.S. Customs and Border Protection ("Customs") that its VAMS are classifiable in Harmonized Tariff Schedule of the United States ("HTSUS"), subheading 8517.62.00, as "machines for the reception, conversion and transmission or regeneration of voice, images or other data", duty-free. Customs classified the VAMS in NY L80881 (Dec. 1, 2004) and at liquidation as "other optical appliances and instruments" within subheading 9013.80.90, HTSUS, and assessed customs duties of 4.5 percent. Upon denial of its protest, number 2402–13–100078, the plaintiff brought this suit. Having fulfilled the prerequisites therefor, 28 U.S.C. §2637(a), jurisdiction is proper pursuant to 28 U.S.C. §1581(a).

For the following reasons, judgment will be entered in favor of the defendant.

I. *Standard of Review*

The court hears *de novo* a civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 on the basis of the record made before the court. *See* 28 U.S.C. §2640(a)(1). On such actions, summary judgment is appropriate when "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). "[W]here . . . a question of law is before the [c]ourt on a motion for summary judgment, the statutory presumption of correctness is irrelevant." *Toy Biz, Inc. v. United States*, 27 CIT 11, 17 (2003), quoting *Blakley Corp. v. United States*, 22 CIT 635, 639, 15 F. Supp. 2d 865, 869 (1998). The court "must consider 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).

Determining the classification of imported merchandise is a two-step process. First, the court must determine the meaning of relevant tariff provisions, a question of law, and second, the court must determine whether the "nature" of the merchandise falls within the tariff provision as properly construed, a question of fact. *See, e.g., Orlando Food Corp. v. United States*, 140 F.3d 1437 (Fed. Cir. 1998). "When the nature of the merchandise is undisputed . . . the classification issue collapses entirely into a question of law." *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006). *See, e.g., Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998); *Clarendon Marketing, Inc. v. United States*, 144 F.3d 1464, 1466 (Fed. Cir. 1998). Here, the parties' separate factual recitations do not reveal any material factual disputes, and the matter may therefore be resolved summarily. In that analysis, a measure of deference is accorded to Customs classification rulings in proportion to their "power to persuade". *United States v. Mead Corp*., 533 U.S. 218, 235 (2001), citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

II. *Undisputed Facts*

The parties aver as follows. The merchandise at issue consists of fiber optic telecommunications network equipment. Plaintiff's Rule 56.3 Statement of Material Facts Not in Dispute ("Pl's MFNID"), ECF No. 33, ¶1; Defendant's Response to Plaintiff's Statement of Material Facts Not in Dispute ("Def's MFNID"), ECF No. 38, ¶1. Fiber optic telecommunications networks operate by pulses of light in the infrared wavelength range, which transmit voice, sound, images, video, e-mail messages, and other information from one point in the network to another. Pl's MFNID ¶2; Def's MFNID ¶2. Digital data is encoded into the light pulses by varying the amplitude and the length of laser light that is sent through the network. Pl's MFNID ¶3; Def's MFNID ¶3. Fiber optic telecommunications networks are generally-designed to use light at infrared wavelengths. Pl's MFNID ¶5; Def's MFNID ¶5. Optical fiber shows much lower transmission losses at

these wavelengths than comparable electrical or copper networks, meaning that there is little degradation or attenuation of the light signals even over long distances. *Id*. There is no other use for the merchandise other than in optical communication networks. Pl's MFNID ¶6; Def's MFNID ¶6. The wavelength of the light typically used to transmit data in a fiber optic telecommunications network is approximately 1260 nanometers to 1650 nanometers; whereas human eyes can *see* light only in the wavelength range from about 400 nanometers to 700 nanometers. Pl's MFNID ¶¶ 7–8; Def's MFNID ¶¶ 7–8. Assuming the telecommunications network equipment at issue is used as one would expect in conventional fiber optic telecommunication networks, humans would not be able to *see* the light that is used in that equipment or those networks. Pl's MFNID ¶8; Def's MFNID ¶8.

The merchandise at issue is included in the plaintiff's "Value Added Module" or "VAM" product line, and the format of each product is intended to ease installation of the articles into the plaintiff's telecommunications network operator customers' fiber optic networks. *See* Pl's MFNID ¶10; Def's MFNID ¶10. Two different features of the VAM products enable this ease of use: first, the optical fibers used in these products include connectors on the ends of the fibers, eliminating the need for telecommunications network providers to splice the fibers into their networks; second, the optical fibers in the VAM products are protected either in a housing or with a jacketing over the actual fiber itself. Pl's MFNID ¶11; Def's MFNID ¶11. This protects the fibers from damage either during the installation process or from the environment during use. *Id.*

The products at bar fall within three different categories of telecommunications network equipment -- splitter modules, monitor modules, and wavelength division multiplexer ("WDM") modules. Pl's MFNID ¶12; Def's MFNID ¶12. Splitter modules take individual signals from a single optical fiber and divide them, enabling that single signal to reach multiple telecommunication network subscribers.[1] Pl's MFNID ¶13; Def's MFNID ¶13. The plaintiff's monitor modules allow access to signaling and control functions of a communications network in order to evaluate performance and detect prob-

[1] A fiber optic cable that enters the housing directs the signal onto a planar lightwave circuit. As an optical data signal enters that circuit, it follows the divided paths established by the splits on the thin film waveguide until it is ultimately divided into the intended number of identical signals and exits the splitter module through 32 fibers with connectors on the output side. These connectors enable the network operator to plug the splitter into a fiber distribution hub, which permits the original signal to be directed to specific locations within the network. Pl's MFNID, ¶¶ 13–15; Def's MFNID, ¶¶ 13–15.

lems.[2] Pl's MFNID ¶16; Def's MFNID ¶16. Its WDM modules permit infrared signals of two different wavelengths to travel simultaneously on a single fiber, thereby increasing the capacity.[3] Pl's MFNID ¶21; Def's MFNID ¶21.

None of the products at issue contain any electronic components or electrical circuit boards. Pl's MFNID ¶28; Def's MFNID ¶28. Each of the products at issue is used primarily or exclusively for purposes of data transmission in a telecommunications network, and is operated exclusively using light in the infrared wavelength range. Pl's MFNID ¶29; Def's MFNID ¶29.

Customs issued New York Ruling Letter ("NYRL") L80881 to the plaintiff in 2004, advising the plaintiff that the VAMs were to be

[2] More precisely, the monitor modules at issue use fused biconic tapers to split the infrared light in the network into two or three different output signals: one (containing the majority of the original signal's power) for continuing transmission of data to the next point in the network, and the other(s) for monitoring the presence and strength of the signal in the network through an attached meter. A fused biconic taper is made from two optical fibers that are heated, fused together and pulled as they are fused, creating a coupling zone that permits light of specified wavelengths to travel between the fibers. (The parties disagree over the precise function of the fusing and pulling process, specifically whether it involves a "splitting" of light in a certain desired wavelength range or a "tapping off" of a fraction of the light power in a certain desired wavelength range, but that disagreement is immaterial to the decision here.) The fused biconic tapers used in the manufacture of the monitor modules at issue in this case were specifically designed to work on infrared light in the 1260 nanometer to 1650 nanometer wavelength range -- light that is outside the range of human vision. Pl's MFNID ¶¶ 17–20; Def's MFNID ¶¶ 17–20.

[3] WDM modules are used to increase the capacity of an optical communication link by simultaneously impressing two or more different wavelengths of light, each carrying a modulated information signal, onto a single optical fiber. A WDM module will typically have, on one side, two or more pairs of optical fiber connectors, with each pair accommodating an input fiber and an output fiber carrying a unique optical signal at a single wavelength. On the other side, the module will have only one pair of optical fiber connectors, accommodating an input fiber and an output fiber, each carrying all of the corresponding wavelength signals at the first side. The WDM modules in this case combine (*i.e.*, multiplex) two incoming signals at different wavelengths, and pass the combined signals on to a single output connector for output on a single fiber. The WDM modules also function in the opposite direction, by taking two signals at different wavelengths arriving on a single input fiber and separating them onto two separate output fibers. By allowing infrared signals of different wavelengths to travel on a single fiber, the WDM modules double the amount of data and bandwidth available for transmission in the network. The WDM modules at issue in this case perform their intended function either through the use of fused biconic tapers, described above, or thin film filters. The fused biconic tapers in the WDM modules are wavelength-sensitive and can be designed to either combine or separate wavelengths according to the length of the coupling region. A thin-film filtering device is composed of a "stack" of thin layers of glass, providing high spatial dispersion. The refractive index of each layer, observed at the boundaries between crystalline film layers, is different for the different wavelength(s) within an incident light beam. The different wavelengths of the incoming optical signal are thus bent (*i.e.*, refracted) at different angles. The considerable spatial separation realized, in multiple refractions, for the different wavelengths of the incoming signal permits the tapping off of each wavelength onto a separate output fiber. The thin film filter used in the WDM module at issue will only work on light at wavelengths of 1310 nanometers, 1490 nanometers, and 1550 nanometers, and each of these wavelengths is outside the range of human vision. Pl's MFNID, ¶¶ 22–27; Def's MFNID, ¶¶ 22–27.

classified in HTSUS subheading 9013.80.90. Pl's MFNID ¶30; Def's MFNID ¶30. There are no material differences between the subject merchandise and the VAMs that were the subject of NYRL L80881. Pl's MFNID ¶32; Def's MFNID ¶32. From 2009 to 2011, Customs approved 44 of the plaintiff's protests involving substantially identical VAMs to the VAMs at issue in this case. Pl's MFNID ¶12; Def's MFNID ¶12. Customs denied the protest at bar in year 2013. Pl's MFNID ¶¶ 37–39; Def's MFNID ¶¶ 37–39.

III. *Analysis*

A.

Proper classification under the HTSUS is directed by the General Rules of Interpretation ("GRIs") and, if relevant, the Additional U.S. Rules of Interpretation ("ARIs"). *See, e.g., Orlando Food Corp., supra*, 140 F.3d at 1439–40. The GRIs are statutory,[4] not optional, and they are applied in numerical order. *See Honda of America Manufacturing, Inc. v. United States*, 607 F.3d 771, 773 (Fed. Cir. 2010); *See also Orlando Food Corp.*, 140 F.3d at 1440; *Bauerhin Technologies Ltd. Partnership v. United States*, 110 F.3d 774, 777 (Fed. Cir. 1997) ("we begin our inquiry by examining the descriptions of the relevant headings, subheadings, and accompanying notes").

GRI 1 provides, *inter alia*, that the "titles of sections, chapters and subchapters are provided for ease of reference only" and that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to" GRIs 1 through 6. GRI 3, which codified a judicial rule of specificity, provides that when goods are, *prima facie*, classifiable under two or more headings, classification shall be effected in the following order: (a) by the heading that provides the most specific description over the more general description, (b) by the "material" or component which gives the goods their essential character, or (c) if headings merit equal consideration then by that which is last in numerical order. GRI 6 provides that classification at the subheading level shall be determined according to the terms of comparable subheadings and any related notes and, *mutatis mutandis*, to the preceding GRIs. *See, e.g.*, *Orlando Food Corp.*, 140 F.3d at 1440.

In that process, the terms of HTSUS are to be construed according to their common commercial meanings. *Millenium Lumber Distribution Ltd. v. United States*, 558 F.3d 1326, 1329 (Fed. Cir. 2009).

[4] *See Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (noting that the chapter and section notes of the HTSUS are statutory law, not optional interpretive rules).

Additional albeit non-binding guidance is available in the Explanatory Notes ("ENs") of the Harmonized Commodity Description and Coding System ("HCDCS"), maintained by the World Customs Organization Council, as these are considered "'generally indicative of the proper interpretation'" of the HTSUS. *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992), quoting H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 *U.S.C.C.A.N.* 1547, 1582; s*ee also* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The first step, then, is to determine which headings and accompanying notes describe the imported VAMs. Customs classified the merchandise in chapter 90, HTSUS, which covers "optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof." Of some interest here, "thereof," it is notable that heading 9001 includes "Optical fibers and optical fiber bundles" and "optical fiber cables other than those of heading 8544".[5] Heading 9013, in which Customs classified the VAMs, includes "other optical appliances and instruments, not specified or included elsewhere in this chapter; parts and accessories thereof".

Also noteworthy is Additional U.S. Note 3 to chapter 90, which provides:

> For the purposes of this chapter, the terms "*optical appliances*" and "*optical instruments*" refer only to those appliances and instruments which incorporate one or more optical elements, but do not include any appliances or instruments in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

Thus, "optical appliances" and "optical instruments" of heading 9013 must: (1) "incorporate one or more 'optical elements,'" and (2) the incorporated optical elements must not be "solely for viewing a scale or for some other subsidiary purpose." Further, for classification in heading 9013, they must also not be specified or included elsewhere in chapter 90. The defendant thus argues the VAMs are not so specified or included elsewhere in chapter 90, and that they were, and are, therefore properly classifiable under subheading 9013.80.90, HTSUS, as "Other optical appliances and instruments: Other". Def's Br. at 5.

[5] Heading 8544, HTSUS addresses (italics added) "Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; *optical fiber cables*, made up of individually sheathed fibers, whether or not assembled with electric conductors or fitted with connectors." The fibers used with these devices can be either bundled or individually sheathed. *See* Pl's MFNID, ¶ 11; Def's MFNID, ¶¶ 11.

On its burden of overcoming the presumption of correctness of Customs' classification, the plaintiff argues that VAMs are not classifiable as optical appliances or optical instruments because precedent dictates that an optical appliance or instrument must aid or enhance human vision, which these devices cannot do because they operate beyond the visible spectrum. Pl's Br. at 14–18. The plaintiff's preferred classification is in chapter 85, HTSUS, which covers "electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles." *Id.* at 18–20; *see* Chapter 85, HTSUS. The precise heading to which the plaintiff directs attention, 8517, HTSUS, includes "other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof". The plaintiff contends that the VAMs are properly classifiable as "Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other" under subheading 8517.62.00, HTSUS. Pl's Br. at 20–21.

B.

Comparing the language of the headings, on the one hand "other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network)" of heading 8517 would appear apt insofar as it describes the sole purpose of the VAMs. However, because it constitutes an imprecise description, heading 8517 is inapplicable, as discussed further below.

Where the meaning of the statute is plain and unambiguous, that meaning prevails. *See, e.g., Muwwakkil v. Office of Personnel Management*, 18 F.3d 921 (Fed. Cir. 1994). The parties acknowledge that the VAMS at bar are *fiber optic* telecommunications network equipment, Pl's Br. at 3, Def's Br. at 7, and while their papers assume a lack of definitive meaning of the term "optical" in the HTSUS, all of their inclinations at definitions are circular in using "optic" or some variation thereof (the plaintiff's argument also lends itself to an ambiguity claim, which would require further inquiry for resolution). The lack of an express definition in the HTSUS, however, does not make "optical" ambiguous: when drafting chapter 90, HTSUS, in addition to tradi-

tional "optical" devices operating within the visible spectrum, the authors made the express addition of heading 9001, HTSUS, thereby making plain their awareness of the "optical" properties of fiber optics in "light" transmission -- including that which is beyond the visible spectrum. The words themselves lead only to that conclusion. Indeed, it would be incredible if the drafters had not intended this provision of chapter 90 applicable to future fiber optic development, since tariff statutes are enacted "not only for the present but also for the future, thereby embracing articles produced by technologies which may not have been employed or known to commerce at the time of the enactment". *Corporacion Sublistatica v. United States*, 1 CIT 120, 126, 511 F. Supp. 805, 809 (1981). *See* Additional U.S. Note 3, HTSUS.

The appropriate classification of the VAMs at bar is thus resolved by the plain meaning of "optical" in the statute, as properly understood and apparent in heading 9013. The defendant's papers reference several lexicographic definitions that reinforce such understanding:

> An "optical element," the statutory term included in Additional U.S. Note 3 to Chapter 90, is defined as "a part of an optical instrument which acts upon the light passing through the instrument, such as a lens, prism or mirror." *McGraw Hill Dictionary of Scientific and Technical Terms* at 1044 (Exhibit 4). The *Oxford English Dictionary* defines "optical" to include "[o]f or relating to light, as the medium of sight, or in relation to its physical properties; of or relating to optics. Also in extended use: of or relating to radiation in the immediately adjacent parts of the electromagnetic spectrum, i.e. the infrared and ultraviolet." *Oxford English Dictionary*, definition of "optical" at 2 (Exhibit 5). The *Merriam-Webster Dictionary* provides several definitions for "optical," including "of, relating to, or utilizing light especially instead of other forms of energy," and "of or relating to the science of optics." *Merriam-Webster Dictionary*, definition of "optical" at 1 (Exhibit 6). "Optics" is defined as "a science that deals with the genesis and propagation of light, the changes that it undergoes and produces, and other phenomena closely associated with it." *Id*. at 4.

Def's Br. at 8–9.

In accordance with the foregoing, heading 9013's "other optical appliances and instruments, not specified or included elsewhere in this chapter" is (also) an apt description of the VAMs. This is so, because such appliances and instruments, used in conjunction with the "optical fibers" of heading 9001, HTSUS, are plainly covered by

chapter 90, HTSUS. *See* Additional U.S. Note 3 to Chapter 90; *see also infra*. "Optical" within the remainder of the chapter should not be interpreted in a way that would conflict with heading 9001, and *vice versa*, unless it is clear that the words used in the HTSUS or its notes are intended to that effect. *See, e.g., E.I. Dupont de Nemours & Co. v. United States*, 24 CIT 1301, 1303 (2000), referencing *Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1362 (Fed. Cir. 2000). An "optical" appliance or instrument with no purpose but to channel and direct information through fiber optic cables, and which is not the fibers themselves, would fall within heading 9013, HTSUS, *i.e.*, "other optical appliances and instruments, not specified or included elsewhere in this chapter". And the appropriate subheading of heading 9013 for the VAMs can only be "Other devices, appliances and instruments: Other", *i.e.*, subheading 9013.80.90, HTSUS, in accordance with Customs' original classification thereof.

The plaintiff's arguments do not obviate that 9013.80.90, HTSUS covers the optical, light-signal manipulation, functionality of the VAMs at bar. The plaintiff would juxtapose heading 9013 against heading 8517, HTSUS, but, as the defendant correctly points out, that is a dubious proposition[6] because the plaintiff's optical devices are excluded from chapter 85 by Note 1(m) to Section XVI (which covers chapter 85, HTSUS), which provides: "this section does not cover . . . [a]rticles of Chapter 90." *See* Def's Br. at 16–17. Simply put: as to which of chapter 90 and chapter 85 provides the "more specific" heading on an article's classification, there is no "comparison" involved, because Note 1(m) renders GRI 3 inapplicable. *Cf. Sharp Microelectronics Tech., Inc. v. United States*, 20 CIT 793, 802, 932 F. Supp. 1499, 1506 (1996) ("Note 1(m) to Section XVI is controlling under GRI 1"), *aff'd* 122 F.3d 1446 (Fed. Cir. 1997); *E.T. Horn Co. v. United States*, 945 F.2d 1540, 1544 (Fed. Cir. 1991) (relative specificity inapplicable where competing tariff provisions are mutually exclusive). The *Sharp* appellate court further observed that "[i]f one determines that . . . [the] device belongs in heading 9013 because it is not more specifically captured elsewhere in the schedule, then Note 1(m) complements the rule of relative specificity by excluding the

[6] If heading 8517 were indeed applicable, the foregoing would lend itself to application of GRI 3(a), pursuant to which the question is which of the two proposed headings would be the more specific; and such consideration would only lead to the conclusion that heading 9013 is the more precise, because "other apparatus for the transmission or reception of voice, images or other data" of heading 8517 encompasses a much broader range of goods than heading 9013's more specific description of the VAMs' "optical" functionality. In other words, *per* GRI 3(a), heading 9013, HTSUS, would be the more specific and appropriate heading for the VAMs at bar, as the plaintiff's arguments do not persuade otherwise. Furthermore, were it even necessary to apply GRI 3(b) or (c), the result would appear to be the same.

device from classification in" chapters 84 or 85. 122 F.3d at 1450. The plaintiff provided no compelling counter-argument but only reminded the court that Customs agents earlier reached a different conclusion on the plaintiff's VAMs. Pl's Resp. at 16. This court, however, is neither bound nor persuaded by these agents' determinations. The plaintiff's optical devices are *prima facie* classifiable in chapter 90 and are therefore excluded from chapter 85 pursuant to Note 1(m).

C.

A brief history of fiber optics and other relevant judicial decisions will clarify this court's decision. First, the court acknowledges that fiber optics are now a near-universal staple of modern technology using pulses of light and refraction in glass to efficiently transmit information quickly across long distances. In every moment, these systems are linking computer networks, transporting data for high speed internet, making long distance telephone conversations possible, and directing crystal clear images to television screens. Fiber optic technology is used to connect the world in ways inconceivable a mere century ago.

The science of fiber optics began developing in earnest in the mid-nineteenth century when European inventors experimented with light refraction over distances. MaryBellis, *How Fiber Optics Were Invented: The History of Fiber Optics from Bell's Photophone to Corning Researchers*, available at: https://www.thoughtco.com/birth-of-fiber-optics-4091837 (last visited this date). Over the next century this experimentation led to the theorization that this technology could be used to transfer data over much longer distances. *Id.* The only problem was discovering how to minimize loss to allow for efficient transmission. *Id.* In 1970 Corning Glass Works turned theory into reality, and thus paved the way for the commercialization of fiber optics for telecommunications; by the end of the 1970s, cities had begun installing optical telephone networks, and to this point the adoption of fiber optics in these United States has been relatively swift, as it is now "the" standard for fixed-line data transmission, having largely replaced copper line transmission thereof. *See id.*

The customs bar is not only presumed well-aware, but has been a principal driver, of the periodic updates to the tariff schedules to better reflect emerging technologies making their way into the channels of international commerce. As of 1984, the Tariff Schedules of the United States ("TSUS"; the predecessor to the HTSUS), Schedule 7, Part 2, Subpart A addressed "optical elements". Therein, TSUS items 708.01 to 708.93 described lenses, prisms, mirrors, telescopes and more. There was no mention of fiber optics. And by 1985, at least eight

cases[7] from this court and its predecessor as well as that of the Court of Appeals for the Federal Circuit had decided that the TSUS term "optical instrument" required that a device must aid human vision. None of these cases considered fiber optic network technologies.

In the 1985 update that encompassed Schedule 7, Part 2, Subpart A, the TSUS drafters added item 707.90, thus listing as the first item of that Subpart "optical fibers, whether or not in bundles, cables or otherwise put up, with or without connectors and whether mounted or not mounted". Item 707.90, TSUS. The statistical suffix included "put up in cables, ribbons, or similar form, for the transmission of voice, data, or video communications." Item 707.90.10, TSUS. Notably, these items were added during the aforementioned era of rapid growth in the then-emerging industry of fiber optics for data transmission, and they were adopted into the harmonized system in 1988, where they have remained at the start of the chapter on optical goods.

In 1997 the Court of Appeals for the Federal Circuit considered an appeal from the classification of a marine sextant device. *Celestaire v. United States*, 120 F.3d 1232 (Fed. Cir. 1997).[8] Relying on the criteria in *Ataka*,[9] *Celestaire* set forth three conditions for a particular item to be classified as an "optical instrument" under the HTSUS:

> 1. Whether the device acts on or interacts with light;
>
> 2. Whether the device permits or enhances human vision through the use of one or more optical elements; and
>
> 3. Whether the device uses the optical properties of the device in something more than a "subsidiary" capacity.

Id. at 1233, citing *Ataka*, 550 F.2d at 37 (and noting that the basis of this decision was the binding nature of decisions from the Court of Customs and Patent Appeals). The *Ataka* court also followed these requirements with the acknowledgment that "none of the foregoing criteria is determinative in every case, but they are useful in determining the statutory meaning of 'optical instrument(s).'" 550 F.2d at

[7] *See Decca Radar, Inc. v. United States*, 57 Cust. Ct. 165, 171 (1966) (microscopes); *Bendix Corp. v. United States*, 57 Cust. Ct. 184, 197 (1966) (polarimeter); *Paillard, Inc. v. United States*, 57 Cust. Ct. 439, 448 (1966) (anamorphic lenses and adapters); *Engis Equip. Co. v. United States*, 62 Cust. Ct. 29, 33, 294 F. Supp. 964, 967 (1969) (autocollimators); *Sumitomo Shoji New York, Inc. v. United States*, 64 Cust. Ct. 299, 302 (1970) (parabolic mirrors for ceilometer systems); *Parson Optical Laboratories v. United States,* 68 Cust. Ct. 143, 147 (1972) (applanation tonometers); *United States v. Ataka Am., Inc.*, 550 F.2d 33, 36 (CCPA 1977) ("*Ataka*") (gastrointestinal fiberscopes)*; EAC Engineering v. United States*, 9 CIT 534, 540, 623 F. Supp. 1255, 1260 (1985) (spark detectors).

[8] This is the only case to directly address the application of "optical" after the 1985 TSUS additions.

[9] *Ataka* predated the 1985 changes to the TSUS.

37. Critically, this case was also not about fiber optics and instead focused only on the traditional, pre-1980s tariff use of "optical". As a decision of the Court of Appeals for the Federal Circuit, the prescribed meaning of "optical" is binding on this court; however, it is not binding where the products are of a different nature or intended meaning within the statute, as envisioned in that court's clarification that the foregoing criteria is not determinative in every case.

"[I]t is a standard rule of statutory interpretation that 'where the same word or phrase is used in different parts of the same statute, it will be presumed, in the absence of any clear indication of a contrary intent to be used in the same sense throughout the statute.'" *Railtech Boutet, Inc. v. United States*, 27 CIT 1023, 1031 (2003), quoting *Productol Chemical Co. v. United States*, 74 Cust. Ct. 138, 151 (1975). To delimit the meaning of "optical" in heading 9013, HTSUS, to that part of the light spectrum that is visible to the naked human eye would render heading 9001, HTSUS, largely meaningless, and that limitation would necessarily apply to all of chapter 90 and the HTSUS as a whole. Accordingly, *Celestaire* cannot be read to mean what the plaintiff implores.

Beyond the HTSUS and precedent, the nonbinding Explanatory Notes anticipate optical to include light beyond the visible spectrum. *See* Def. Br. at 19–22. After the *Celestaire* decision was issued, it is noteworthy that the ENs to heading 9001 were revised (coincidentally or otherwise) to describe explicitly the term "optical element," the statutory term used in Additional U.S. Note 3 to chapter 90, by expressly referencing light that is not visible to humans. The ENs to heading 90.01(D) thus currently describe "optical elements" as follows:

> (D) Optical elements of any material other than glass, whether or not optically worked, not permanentlymounted (*e.g.*, elements of quartz (other than fused quartz), fluorspar, plastics or metal; optical elements in the form of cultured crystals of magnesium oxide or of the halides of the alkali or the alkaline-earth metals).
>
> Optical elements are manufactured in such a way that they produce a required optical effect. An optical element does more than merely allow light (*visible, ultraviolet or infrared*) to pass through it, rather the passage of light must be altered in some way, for example by being reflected, attenuated, filtered, diffracted, collimated, etc.

EN 90.01(D), HTSUS (Exhibit 8 at XVIII-9001–2) (italics added; bolding omitted). The ENs' definition of "optical element" precisely

describes the optical elements of the plaintiff's VAMs and is consistent with the common and commercial meaning. The ENs unambiguously state that the wavelengths of "light" with which the optical elements may interact include ultraviolet and infrared light in addition to visible light. *Id*. For the above reasons, the court finds no merit in the plaintiff's arguments against classification in heading 9013, HTSUS.

In passing, the court also notes the parties' argument over whether heading 8517, HTSUS, includes non-electronic machines. The court need not decide the broader contentions; suffice it to state here that heading 8517, HTSUS, addresses the antecedent fixed-line data-transmission technology of fiber optics (*i.e.*, via copper line) and otherwise gives no indication that optical fiber technology should be included therein in contravention of chapter 90, HTSUS, and as discussed above, other language in that chapter specifically proscribes classification of "optical" appliances or instruments such as the VAMs at bar from classification under chapter 85, HTSUS.

IV. *Conclusion*

In accordance with the foregoing, the court denies plaintiff's motion for summary judgment and grants defendant's cross-motion therefor, as Customs properly classified plaintiff's VAMs under subheading 9013.80.90, HTSUS. Judgment to that effect will be entered separately.

Dated: October 18, 2017
New York, New York

R. Kenton Musgrave

R. KENTON MUSGRAVE, SENIOR JUDGE