U.S. Court of International Trade

Slip Op. 17–170

INNER MONGOLIA JIANLONG BIOCHEMICAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and CP KELCO US, INC., Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 16–00187
PUBLIC VERSION

[The court remands the rescission of the antidumping duty new shipper review.]

Dated: December 21, 2017

Robert G. Gosselink, *Jonathan M. Freed*, *Jarrod M. Goldfeder*, Trade Pacific PLLC, of Washington, D.C., for plaintiff.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Catherine D. Miller*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

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OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiff Inner Mongolia Jianlong Biochemical Co., Ltd. ("Jianlong") appeals, Mot. for J. on Agency R., ECF No. 33, from the decision of the U.S. Department of Commerce ("Commerce" or "the Department") to rescind its antidumping duty new shipper review ("NSR"). *Xanthan Gum from the People's Republic of China*, 81 Fed. Reg. 56,586 (Dep't of Commerce Aug. 22, 2016) (rescission of NSR) ("*Rescission*") and accompanying Issues & Decision Mem. ("I&D Mem."). In particular, Jianlong challenges Commerce's determinations that: A) Jianlong's NSR request did not comply with Commerce's regulations and B) Jianlong's reported sale was non-*bona fide*. Because Commerce's reasoning as to both is unsupported in the record, the court grants Jianlong's motion and remands the proceedings to Commerce.

BACKGROUND

On June 4, 2013, Commerce entered an antidumping duty order on xanthan gum from China at a rate of 154.07%. *Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 33,351 (Dep't of Commerce June 4, 2013) (final determ.), *amended by Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 43,143 (Dep't of Commerce July 19, 2013) (am. final determ.). Jianlong, a Chinese shipper of xanthan gum, thereafter provided free samples to [[ ]] in three different intervals: three samples totaling [[ ]] for quality assurance purposes in January 2014; [[ ]] [[ ]] took while conducting a plant audit at Jianlong's facilities in March 2014; and, finally, samples of [[ ]] in June 2015. Section C & D Resp., Joint Appendix, ECF No. 51 ("J.A.") Tab 5 at I-3–4; Third Suppl. Section D Questionnaire Resp., J.A. Tab 8 at SuppD3–6, Ex. SD3–4. Near the end of that time period, Jianlong established a U.S. entity, Jianlong USA Corporation ("Jianlong USA"), and from May 29 to June 2 Jianlong, through Jianlong USA, negotiated a sale of xanthan gum to [[ ]]. J.A. Tab 5 at I-4. Per the terms of that sale, on June 30, 2015, Jianlong delivered [[ ]] of xanthan gum to [[ ]] at a rate of roughly [[ ]], for a total price of [[ ]]. Req. for NSR, J.A. Tab 1, Ex. 1 (June 26, 2015 Invoice); Section A Questionnaire Resp., J.A. Tab 4, Ex. A-5 (Purchase Order); *see also* Prelim. *Bona Fide* Sales Analysis, J.A. Tab 10 at 4.

On July 31, 2015, Jianlong requested a NSR, identifying its June 30, 2015 shipment as its only entry for consumption under 19 C.F.R. § 351.214(b)(2)(iv)(A). J.A. Tab 1, ¶ 5 ("Documentation in Exhibit 1 establishes the date on which subject merchandise produced and exported by Jianlong, was first entered, or withdrawn from warehouse, for consumption in the United States (*i.e.*, the 'import date')."), Ex. 1. Commerce then initiated the NSR on August 27, 2015. *Xanthan Gum from the People's Republic of China*, 80 Fed. Reg. 52,031 (Dep't of Commerce Aug. 27, 2015) (initiation of NSR). In an initial and then supplemental response to questionnaires from Commerce, Jianlong explained that it had earlier "provided" samples to [[ ]] and [[ ]] also "took" others during its audit of Jianlong's plant. J.A. Tab 5 at I-3–4; J.A. Tab 8 at SuppD3–6. Jianlong stated that "no consideration [was] given for any of the samples." J.A. Tab 8 at SuppD3–6.

On March 22, 2016, Commerce preliminarily determined that: A) Jianlong had failed to report certain entries of subject merchandise and B) Jianlong's one sale was non-*bona fide* under a "totality of the circumstances" test. *Xanthan Gum from the People's Republic of China*, 81 Fed. Reg. 15,240 (Dep't of Commerce Mar. 22, 2016) (pre-

lim. rescission of NSR). Ultimately, in its final *Rescission*, Commerce adopted these findings. In sum, Commerce concluded that Jianlong's omission of sample shipments proved fatal in its meeting the regulatory requirements imposed by 19 C.F.R. § 351.214(b)(2)(iv)(A). I&D Mem. 4. Additionally, Commerce rejected rebutting and clarifying information from Jianlong and also found that Jianlong's sale to [[ ]] was atypical, and thus non-*bona fide*, because of the timing of the sale, the establishment of Jianlong USA, and the sales price. *Id.* at 9–14.

On appeal, Jianlong challenges multiple aspects of Commerce's *Rescission*. Primarily, Jianlong disputes the "totality of the circumstances" test as conducted by Commerce as well as the Department's determination that 19 C.F.R. § 351.214(b)(2)(iv)(A) required Jianlong to identify its sample shipments in its NSR request. Relatedly, Jianlong contends that its submission of factual information was improperly rejected by Commerce as untimely filed.

JURISDICTION AND STANDARD OF REVIEW

This court's jurisdiction rests in 28 U.S.C. § 1581(c). Commerce's decisions will be sustained unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). In reviewing those decisions, this court examines the entire record, including that which detracts from the ultimate decision, to determine whether the record evidence and any reasonable inferences therefrom are sufficient to support Commerce's conclusions. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (citation omitted); *Daewoo Elecs. Co. v. Int'l Union of Elec. , Elec., Tech., Salaried & Mach. Workers*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (citation omitted).

DISCUSSION

This dispute presents two discrete questions for consideration. First, whether Commerce acted arbitrarily in rescinding Jianlong's NSR due to a purported failure to meet the regulatory requirements under 19 C.F.R. § 351.214(b)(2)(iv)(A). Second, whether substantial evidence supports Commerce's decision that Jianlong's sale was non-*bona fide*. The court remands to Commerce for further consideration of both issues.

a. Legal Framework

Congress has charged Commerce with reviewing shipments of goods that are subject to antidumping orders for the purposes of determining the price margin for antidumping duties. 19 U.S.C. § 1675(a). New shippers otherwise subject to these antidumping orders

have an opportunity to obtain a new dumping margin calculation by requesting a NSR. 19 U.S.C. § 1675(a)(2)(B)(i). The new shipper must establish that it: A) has not previously exported merchandise that was subject to an antidumping duty order to the U.S. during the period of investigation and B) is not "affiliated . . . with any exporter or producer who exported the subject merchandise to the United States . . . during that period . . . ." 19 U.S.C. § 1675(a)(2)(B)(i)(I)–(II). If the new shipper meets both of those requirements, Commerce will "conduct a review . . . to establish an individual weighted average dumping margin . . . ." 19 U.S.C. § 1675(a)(2)(B)(i). An exporter must initiate the review within a year of the first entry of the subject merchandise, 19 C.F.R. § 351.214(c), and the request must include, among other information:

> A) [t]he date on which subject merchandise of the exporter or producer making the request was first entered, or withdrawn from warehouse, for consumption, or, if the exporter or producer cannot establish the date of first entry, the date on which the exporter or producer first shipped the subject merchandise for export to the United States; B) [t]he volume of that and subsequent shipments; and C) [t]he date of the first sale to an unaffiliated customer in the United States . . . .

19 C.F.R. § 351.214(b)(2)(iv)(A)–(C).

Once Commerce has established that a new shipper has met the regulatory requirements for requesting a NSR, it calculates a dumping margin "based solely on the bona fide United States sales . . . made during the period covered by the review." 19 U.S.C. § 1675(a)(2)(B)(iv). In the absence of an "entry and sale to an unaffiliated customer," Commerce may rescind the NSR. 19 C.F.R. § 351.214(f)(2)(i). Individual transactions may be characterized as non-*bona fide* if they are found to be, in light of all the circumstances, "unrepresentative or extremely distortive." *See, e.g., Tianjin Tiancheng Pharm. Co. v. United States*, 29 CIT 256, 259, 366 F. Supp. 2d 1246, 1249 (2005) (citation omitted). If Commerce excludes all scrutinized sales as non-*bona fide*, the Department "necessarily must end the review, as no data will remain on the export price side of Commerce's antidumping duty calculation." *Id.*

b. Commerce's Determination that Jianlong Had Failed to Meet the Regulatory Requirements for Requesting a NSR

This court's standard of review demands that Commerce support its rescission of Jianlong's NSR with a well-reasoned decision, sufficiently explaining why the agency determined that Jianlong's NSR

request did not comply with the Department's regulations. *See Atar S.R.L. v. United States*, 730 F.3d 1320, 1325 (Fed. Cir. 2013) (quoting *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998)). As part of its review under 19 U.S.C. § 1516a(b)(1)(B)(i), the court must "first ask whether Commerce articulated an adequate[, non-arbitrary] reason for" requiring Jianlong to report its sample shipments in its request for a NSR. *See Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012) (applying the arbitrary and capricious standard to "the agency's reasoning" and the substantial evidence standard to that court's "review of factual determinations."). This court is not permitted to "supply a reasoned basis for [Commerce's] action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 443 (1983) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)). Thus, so as to prevent this court from "substitut[ing] its judgment for that of the agency," *id.*, Commerce must adequately articulate the analytical path it undertook to arrive at its conclusions. Here, Commerce's anemic reasoning fails to meet this standard such that the court must remand for further explanation.

Commerce concluded that Jianlong failed to meet the Department's regulatory requirement for requesting a NSR because Jianlong's "first sample shipment in January 2014 should have been reported in [its] request for a NSR . . . ." I&D Mem. 5. In finding that Jianlong "did not satisfy the requirements for requesting a NSR," *id.*, Commerce necessarily determined that the sample shipments were entered for consumption under 19 C.F.R. § 351.214(b)(2)(iv)(A). Such an inference is inescapable as there would be no need for Jianlong to identify the sample shipments if they had not been entered for consumption. *See* 19 C.F.R. § 351.214(b)(2)(iv)(A). In so concluding, Commerce cited no consistent departmental practice related to sample shipments, but rather relied on "the plain language of the regulatory requirements [] for requesting a NSR." I&D Mem. 5.

In the face of potentially conflicting treatments of sample shipments, Commerce has failed to identify its practice such that the court is unable to sustain the Department's decision on the grounds invoked by the agency. *See State Farm*, 463 U.S. at 43. While Commerce may maintain multiple divergent practices for the treatment of particular issues, the Department must justify why one, and not another, governs in a particular case. *See Nakornthai Strip Mill Pub. Co. v. United States*, 32 CIT 1272, 1276, 587 F. Supp. 2d 1303, 1307 (2008). Commerce's recent decision in *Certain Polyester Stable Fiber*

from the People's Republic of China, 81 Fed. Reg. 4,613 (Dep't of Commerce Jan. 27, 2016) (final determ.) highlights the Department's varying approaches. There, Commerce determined that a single sample shipment was a non-reviewable transaction for the purposes of a NSR and the NSR could not proceed in the absence of non-sample shipments. *Id.* Here, Commerce failed to identify how it treats sample shipments as entries for consumption under 19 C.F.R. § 351.214(b)(2)(iv)(A), but did cite to *Marvin Furniture (Shanghai) Co. v. United States*, 744 F.3d 1319, 1322–25 (Fed. Cir. 2014) as a prior instance in which the Department had considered sample shipments as entries for consumption. I&D Mem. 4–5. However, that one case with a distinguishable set of facts does not constitute a practice in this area.[1]

Under the reasoning of *Certain Polyester Stable Fiber from the People's Republic of China*, if Jianlong had identified its January 2014 sample shipments, it could have pointed only to non-reviewable sample shipments in the one-year period of review following that entry. Instead, Jianlong chose to submit its NSR request once it had completed a reviewable shipment. Such an understanding of the treatment of sample shipments is reasonable in light of Commerce's regulations and its decision in *Certain Polyester Stable Fiber from the People's Republic of China*, which potentially conflicts with *Marvin Furniture*. Commerce's differing interpretations seem to present Jianlong with an unworkable rubric for this transaction under which Jianlong could have either: A) reported its non-reviewable sample shipments prior to making a reviewable sale, leading to Commerce's rescission of the NSR, *see Certain Polyester Stable Fiber*, 81 Fed. Reg. at 4,614, or B) chose to wait to report those sample shipments until a reviewable shipment had occurred, risking a denial for failure to seek a NSR within one year. *See* 19 C.F.R. § 351.214(c) (triggering Commerce's review based on entries for consumption). Thus, Jianlong's NSR request seems to have been destined for rescission unless it could have aligned its sample shipments and its initial reviewable shipment within the same one-year period of review, something not required by either 19 U.S.C. § 1675 or Commerce's regulations.

As a result, there remains some doubt as to whether it is reasonable for Commerce to consider sample shipments of a negligible amount provided without consideration as entries for consumption in accor-

[1] In *Marvin Furniture*, Commerce rescinded Marvin's NSR because Marvin "did not report [sample] entries" and, thus, Commerce determined that Marvin had not met the regulatory requirements because it "failed to submit a request based on the date and volume of its first entry of subject merchandise." 744 F.3d at 1322. However, *Marvin Furniture* is distinguishable because the request for a NSR involved shipments that the exporter admitted were entered "for consumption." *Id.* at 1321–22. Here, Jianlong has made no such concession, but rather maintains that the samples were not "consumed" in the U.S.

dance with 19 C.F.R. § 351.214(b)(2)(iv)(A). However, in the absence of a well-reasoned decision by Commerce, the court is unable to discern Commerce's practice and cannot properly evaluate Commerce's conclusions. *See Diamond Sawblades Mfrs. Coal. v. United States*, 612 F.3d 1348, 1360 (Fed. Cir. 2010). As such, the court need not—and cannot—address whether substantial evidence supports Commerce's application of 19 C.F.R. § 351.214(b)(2)(iv)(A) to the facts of Jianlong's particular NSR. *See Changzhou Wujin*, 701 F.3d at 1377. Without the benefit of a clear articulation of Commerce's reasoning, "the court is powerless to affirm the administrative action . . . ." *Id.* at 1379 (citation omitted). Thus, the court remands to Commerce for a more fulsome consideration of Jianlong's sample shipments as entries for consumption and an articulation of Commerce's practice as it relates to the identification of sample shipments in a request for a NSR.

*c. Commerce's Determination that Jianlong's Sale Was Non-*Bona Fide

While Commerce did apply the proper legal test, there is insufficient record evidence to support the Department's conclusion that the totality of the circumstances show that Jianlong's sale to [[ ]] was a non-*bona fide* transaction.

Commerce employs a "totality of the circumstances" test to determine if a sale involved in a NSR is "unrepresentative or extremely distortive," *Tianjin Tiancheng*, 29 CIT at 259, 366 F. Supp. 2d at 1249 (citation omitted), so as to suggest that the transaction should be excluded as a non-*bona fide* sale. In conducting this analysis, Commerce considers a host of factors which may indicate that the sale in question is one that "is not likely to be typical of those which the producer will make in the future . . . ." *Id.* (citation omitted). No single factor can definitively resolve Commerce's inquiry and the specific factors to be considered depend on the facts of the case. *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1262–63, 641 F. Supp. 2d 1362, 1369 (2009).

Here, Commerce properly considered the establishment of a U.S. affiliate, the timing of the sale to [[ ]], and the sales price. *See Tianjin Tiancheng*, 29 CIT at 259, 366 F. Supp. 2d at 1250. However, there is not substantial evidence to support a "totality of the circumstances" finding that Jianlong's sale to [[ ]] was a non-*bona fide* transaction.

First, Commerce's analysis of the formation of Jianlong USA does not adequately support its conclusion. Commerce determined that "the lack of sales activity and the lack of evidence of ongoing U.S.

commercial operations" was sufficient to "raise[] questions as to whether [Jianlong]/Jianlong USA made the sale in order to obtain a NSR and whether the transaction is indicative of normal commercial practices." I&D Mem. 12. The latter does not necessarily follow from the former and Commerce cites to no practice or concrete evidence[2] that would compel such a result. *See id.* Rather, the Department relies on inferences unsupported by substantial evidence. *See id.* This court's standard of review requires more from Commerce than reference to a dearth of evidence and a conclusion based upon mere speculation. *See Thai Plastic Bags Indus. Co v. United States*, 37 CIT __, __, 904 F. Supp. 2d 1326, 1332 (2013) (citation omitted). Commerce's analysis did not adequately account for the prior relationship between Jianlong and [[ ]],[3] which included a plant inspection and a developing relationship over at least a year and a half, and did not attempt to grapple with the stated purposes for which Jianlong USA was established, "to provide better service for customers in the United States . . . ." J.A. Tab 5 at I-4. Sufficient consideration of these factors was lacking from Commerce's analysis and the Department ought to weigh their import as part of a holistic "totality of the circumstances" analysis.

Next, Commerce's determinations as to the timing of the sale lacked the requisite substantial evidence needed to support Commerce's decision. Commerce's main contention was that because the reviewable "transaction was completed towards the end of the [period of review]" and past departmental experience suggested that such timing was suspicious, Jianlong must have "timed the sale to occur before the end of the [period of review] for the purposing [*sic*] of obtaining a NSR." I&D Mem. 11. Commerce must rely on more than suspicion, speculation, and innuendo to support its conclusions. *See Thai Plastic Bags*, 37 CIT at __, 904 F. Supp. 2d at 1332. The Department's reference to a single prior NSR rescission, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, 80 Fed. Reg. 55,090 (Dep't of Commerce Sept. 14, 2015) (rescission of NSR), does not adequately

[2] The only record evidence referenced by Commerce allegedly "supporting the notion that Jianlong USA was established for the sole purpose of [Jianlong's] single sale for this NSR" is Section A Questionnaire Resp., J.A. Tab 4, Ex. A-5. I&D Mem. 12. This exhibit consists of a series of communications and documents exchanged between Jianlong USA and [[ ]]. J.A. Tab 4, Ex. A-5. There is no explanation from Commerce—not to mention very little from the record itself—as to how this particular record evidence supports Commerce's ultimate conclusion that that Jianlong USA was established for the sole purpose of instituting a NSR. *See id.*

[3] Commerce merely mentioned that Jianlong "had an established relationship with its first unaffiliated customer over a year and a half before the sale," but did not adequately contemplate the significance of that fact. I&D Mem. 12.

support the Department's conclusions. Lacking further consideration, this one reference does not adequately describe Commerce's practice or tie that prior decision to this particular set of facts. Without more, the court cannot sustain Commerce's determination.

Finally, Commerce's reasoning that the sales price of the [[ ]] transaction was suspicious so as to support a non-*bona fide* finding is certainly the least troublesome component of the Department's analysis. Commerce "compared the quantity and unit price of the sale under review to the quantities and unit prices of sales of similar subject merchandise, with similar sales terms" reported by other importers during the same time frame. J.A. Tab 10 at 4. In so doing, Commerce noted that the sales price of [[ ]] was "[[ ]] than the unit price reported [] for sales of xanthan gum of the same grade, and with similar terms," *id.*, as well as [[ ]] and [[ ]] than the comparators "[a]fter reducing [Jianlong's] sales price by [constructed export price] adjustments, U.S. movement expenses, international freight expenses and irrecoverable value added tax . . . ." *Id.* at 4 n.25. Yet, although sales price may weigh heavily in the "totality of the circumstances" test, on its own and without the support of additional findings, there is not substantial evidence to maintain Commerce's conclusion that a possibly atypical sales price here is suggestive of a non-*bona fide* transaction.[4]

Potentially of import in the analysis of the sales price, Jianlong also argues that Commerce impermissibly rejected "factual information [offered] to rebut, clarify, or correct factual information placed on the record of the proceeding by the Department . . . ." 19 C.F.R. § 351.301(c)(4). Specifically, Jianlong insists that Commerce's rejection of Exhibits 1, 2, and 3 and Exhibits 5 through 9 submitted in response to new factual information placed on the record in the Department's Preliminary *Bona Fide* Sales Analysis, J.A. Tab 10, was improper. Resp. to Req. to Reject Jianlong's Submission, J.A. Tab 12; *see also* Deadline for Submission of Comments on New Factual Information, J.A. Tab 11. Commerce contends that the documentation was properly rejected because: A) Exhibits 1, 2, and 3 were submitted to confirm the accuracy of the sales price comparators rather than to

[4] Additionally, Jianlong argues that Commerce "failed to consider the type of customers for, the sales terms (e.g., quantities) of, and timing differences between, the compared sales." I&D Mem. 9. Commerce declined to consider those factors, stating that it considers the best information available. *Id.* at 10. Rather than reject those factors out of hand, Commerce ought to weigh their significance in its continued "totality of the circumstances" assessment. *See Catfish Farmers*, 33 CIT at 1262–63, 641 F. Supp. 2d at 1369 ("An examination of whether a sale is a bona fide transaction may include a variety of . . . factors, depending upon the circumstances of each case."). Ultimately, Commerce may, in its discretion, determine that these factors are not indicative of either a *bona fide* or non-*bona fide* sale, but it should not simply dismiss them as inapplicable and unworthy of mere consideration.

"rebut, clarify, or correct" that data and B) Exhibits 5 through 9 were offered to rebut the Department's analysis, not any "factual information placed on the record of the proceeding." I&D Mem. 13–14; Rejection Mem., J.A. Tab 14 at 1–2. As such, Commerce considered Jianlong's submission to be untimely filed as it did not "rebut, clarify, or correct" factual information the Department had put on the record. J.A. Tab 14 at 2 (citing 19 C.F.R. § 351.302(d)(1)(i)).

As this court has previously stated, 19 C.F.R. § 351.301(c)(4) does not define "factual information to rebut, clarify, or correct" such that deference to Commerce's interpretation of its own regulation is warranted so long as that construction is not erroneous or inconsistent with the regulation. *Husteel Co. v. United States*, 39 CIT __, __, 98 F. Supp. 3d 1315, 1341 (2015) (citing *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 37 CIT __, __, 925 F. Supp. 2d 1332, 1350 (2013)). Jianlong submitted Exhibits 5 through 9 in order to "identif[y] the Department's practice" as well as to rebut or clarify certain "presumption[s]," "description[s]," and the "reliability" of information placed on the record. J.A. Tab 12 at 3–4. By its own admission, Jianlong intended that these documents rebut Commerce's analysis rather than the underlying factual information. *Id.* As such, Commerce reasonably concluded that Exhibits 5 through 9 were not offered to "rebut, clarify, or correct *factual information* placed on the record . . . ." 19 C.F.R. § 351.301(c)(4) (emphasis added); *see also RZBC Group Shareholding Co. v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1196, 1203 (2017) (finding that Commerce did not err in rejecting documents that attempted to rebut "a new conclusion" made by the Department). The court, therefore, sustains Commerce's rejection of Jianlong's submission of Exhibits 5 through 9.

However, Commerce's characterization of Exhibits 1, 2, and 3 as mere confirmation of factual information, J.A. Tab 14 at 1, is unreasonable. Jianlong specifically stated that the excerpted data used as the basis for comparison by Commerce could not "be relied upon unless the full sales data reported" was considered and so maintained that Exhibits 1, 2, and 3 were offered as "appropriate clarification information." J.A. Tab 12 at 2–3. With apparent indifference to Jianlong's justification for its submission, Commerce rejected the information because the Department claimed that Jianlong had "failed to explain how the submission of the full sales data rebuts, clarifies, or corrects the Department's new factual information." J.A. Tab 14 at 2. Commerce's reasoning in support of its rejection of Exhibits 1, 2, and 3 was flawed as it failed to consider how those documents may serve to clarify. *See id.* A rejection that does not account for the reasons for which the submission was offered runs counter to the regulation's

dictates that "[a]n interested party is permitted one opportunity to submit factual information to rebut, clarify, or correct factual information placed on the record of the proceeding by the Department by a date specified by the Secretary." *See* 19 C.F.R. § 351.301(c)(4). Because it denied Jianlong its opportunity to clarify new factual information placed on the record, Commerce's determination here that the filing was untimely is "plainly erroneous or inconsistent with the regulation." *Baroque Timber*, 37 CIT at __, 925 F. Supp. 2d at 1349 (citation omitted). Commerce must consider the documents' powers to clarify on remand before arriving at a decision on their timeliness. Therefore, the court remands for further consideration.

In sum, while its rejection of Exhibits 5 through 9 was reasonable, Commerce's "totality of the circumstances" assessment lacks substantial evidence and its rejection of Exhibits 1, 2, and 3 was inconsistent with the Department's regulations. As such, the court is unable to sustain Commerce's *bona fide* analysis.

CONCLUSION AND ORDER

For the foregoing reasons, the court remands three issues to Commerce for further consideration in conformance with this opinion. Accordingly, after carefully reviewing all briefs and the administrative record, it is hereby:

ORDERED that the *Rescission* is remanded to Commerce for redetermination in accordance with this Opinion and Order; it is further

ORDERED that Commerce issue a redetermination in accordance with this Opinion and Order that is in all respects supported by substantial evidence and in accordance with law; it is further

ORDERED that Commerce provide a reasoned explanation regarding the treatment of sample shipments as entries for consumption under 19 C.F.R. § 351.214(b)(2)(iv)(A) and apply that reasoning to Jianlong's NSR request; it is further

ORDERED that Commerce conduct a "totality of the circumstances" analysis sufficiently supported by substantial evidence, explaining how the establishment of Jianlong USA, the timing of the sale, and the sales price support a finding that the transaction in question was, or was not, *bona fide*; it is further

ORDERED that Commerce consider the reasons for which Exhibits 1, 2, and 3 were submitted in order to determine if they were timely filed as clarifying information; it is further

ORDERED that all other challenged determinations of Commerce are sustained; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its redetermination, which shall comply with all directives in this Opinion and Order; that

the Plaintiff and Defendant-Intervenors shall have thirty (30) days from the filing of the redetermination in which to file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiff's and Defendant-Intervenors' comments to file comments.

Dated: December 21, 2017
New York, New York

Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 17–171

SOLARWORLD AMERICAS, INC. Plaintiff, SINO-AMERICAN SILICON PRODUCTS INC. and SOLARTECH ENERGY CORP., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and KYOCERA SOLAR, INC. and KYOCERA MEXICANA S.A. de C.V., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 17–00208

[Defendant-Intervenors' motion to modify preliminary injunction is denied.]

Dated: December 21, 2017

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Jarrod Mark Goldfeder, Trade Pacific, PLLC, of Washington, D.C., for Consolidated Plaintiffs.

Joshua Ethan Kurland, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant. Of counsel was *Reza Karamloo*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

J. Kevin Horgan, deKieffer & Horgan, PLLC, of Washington, D.C., for Defendant-Intervenors. With him on brief was *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, D.C.

MEMORANDUM AND ORDER

Choe-Groves, Judge:

This case involves the judicial review of the final results in the first administrative review of the antidumping duty order on certain crystalline silicon photovoltaic products ("solar panels") from Taiwan. Upon the request of an interested party and upon a proper showing, the court may enjoin the liquidation of entries covered by an antidumping duty order of the United States Department of Commerce ("Commerce") pursuant to 19 U.S.C. § 1516a(c)(2). Entries of merchandise covered by a published determination of Commerce that are enjoined in accordance with § 1516a(c)(2) "shall be liquidated in accordance with the final court decision in the action." 19 U.S.C. § 1516a(e)(2) (2012).

Defendant-Intervenors Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. (collectively "Kyocera" or "Defendant-Intervenors") filed a Motion to Modify Preliminary Injunction, Oct. 31, 2017, ECF No. 37 ("Motion to Modify Statutory Injunction"),[1] requesting that the court modify its September 5, 2017 statutory injunction that enjoins, during the pendency of this litigation, the liquidation of certain entries of solar panels from Taiwan covered by an antidumping duty order.

[1] This court will refer to a preliminary injunction under 19 U.S.C. § 1516a(c)(2) as a statutory injunction.

Kyocera requests that the court exercise its discretion to modify the statutory injunction to allow the liquidation of entries of subject solar panels assembled by Kyocera Mexicana S.A. de C.V. in Mexico and exported to the United States. *Id.* at 1. Plaintiff SolarWorld Americas, Inc. ("SolarWorld") opposes Kyocera's Motion to Modify the Statutory Injunction. *See* Opp'n Def.-Intervenor's Mot. Modify Prelim. Inj., Nov. 20, 2017, ECF No. 41 ("SolarWorld's Opp'n"). The issue presented is whether the court should exercise its discretion to modify the statutory injunction to allow liquidation of Kyocera's entries of solar panels prior to a final decision on the merits. For the foregoing reasons, the court denies the Motion to Modify the Statutory Injunction.

BACKGROUND

On December 23, 2014, Commerce issued its final antidumping determination that certain solar panel products from Taiwan were being sold, or were likely to be sold, in the United States at less than fair value. *See Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 79 Fed. Reg. 76,966 (Dep't Commerce Dec. 23, 2014) (final determination of sales at less than fair value). Kyocera was assigned an all-others weighted-average dumping margin of 19.50 percent. *Id.* at 76,969. Commerce conducted an administrative review and issued its final results of the administrative review on July 7, 2017, assigning a final weighted-average dumping margin of 4.10 percent to Kyocera. *See Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 82 Fed. Reg. 31,555, 31,556 (Dep't Commerce July 7, 2017) (final results of administrative antidumping duty review for 2014–2016) ("July 7, 2017 Final Order").

Plaintiff SolarWorld appealed the final results of Commerce's administrative review in this court. On September 1, 2017, Plaintiff SolarWorld filed a consent motion requesting that the court issue a statutory injunction order to enjoin liquidation of certain entries until the final resolution of this action, including entries that: (1) were covered by the July 7, 2017 Final Order; (2) were entered, or were withdrawn from warehouse for consumption, on or after July 31, 2014, through and including January 31, 2016; and (3) were produced and/or exported by any of the following exporters: Sino-American Silicon Products Inc./Solartech Energy Corp., Motech Industries, Inc., AU Optronics Corporation, EEPV CORP, E-TON Solar Tech. Co., Ltd., Gintech Energy Corporation, Inventec Energy Corporation, Inventec Solar Energy Corporation, Kyocera Mexicana S.A. de C.V., Sunengine Corporation Ltd., TSEC Corporation, and Win Win Precision Technology Co., Ltd. *See* Consent Mot. Prelim. Inj. 1–2, Sept. 1, 2017, ECF No. 13.

The court held a conference call with the parties on September 5, 2017 and issued a statutory injunction order the same day. *See* Teleconference, Sept. 5, 2017, ECF No. 16; Order, Sept. 5, 2017, ECF No. 17 ("Inj. Order"). The court's September 5, 2017 statutory injunction order directed that:

> [D]efendant United States, together with its delegates, officers, agents, and employees of the International Trade Administration of the United States Department of Commerce and the United States Department of Homeland Security, and United States Customs and Border Protection, shall be, and hereby are ENJOINED immediately upon the entry of this Order and pending a final and conclusive court decision in this litigation, including all appeals and remand proceedings, from causing or permitting liquidation of unliquidated entries of certain crystalline silicon photovoltaic products from Taiwan....

Inj. Order at 2. Kyocera filed a Consent Motion to Intervene as Plaintiff-Intervenor and Defendant-Intervenor on October 2, 2017. *See* Consent Mot. Intervention, Oct. 2, 2017, ECF No. 28. This court granted the request on October 3, 2017. *See* Order, Oct. 3, 2017, ECF No. 33.

On October 31, 2017, Kyocera filed its Motion to Modify Statutory Injunction requesting modification of the court's September 5, 2017 statutory injunction. *See* Mot. Modify Prelim. Inj. Kyocera requests that the court modify the statutory injunction to allow the liquidation of entries of solar panels imported by Kyocera. *Id.* at 1. Kyocera argues that modification of the statutory injunction is warranted because: (1) the liquidation of entries of Kyocera's solar panels will not cause irreparable harm to SolarWorld; (2) there has been no showing that SolarWorld is likely to prevail on its claims in a manner that would impact the assessment of duties on Kyocera's entries; (3) the court's initial decision granting the injunction did not consider the hardship on Kyocera in its balance of hardships analysis; and (4) the public interest does not favor granting extraordinary relief in the form of a preliminary injunction delaying implementation of an administrative determination in the absence of either a strong showing of a likelihood of irreparable harm or a strong showing that the requesting party is likely to prevail on the merits of its claims. *Id.* at 1–2.

Plaintiff SolarWorld opposes Kyocera's Motion to Modify the Statutory Injunction. SolarWorld argues that modification of the statutory injunction is not justified because Kyocera "has offered no meaningful reasons for the Court to reverse its decision with respect to Kyocera's

entries." SolarWorld's Opp'n at 3. SolarWorld contends that "the criteria for granting injunctive relief remain satisfied in this case, and as such, the Court should deny Defendant-Intervenor's motion." *Id.* According to Kyocera, Defendant United States opposes the Motion to Modify the Statutory Injunction, maintaining "that Kyocera's entries are covered by the underlying antidumping duty order and are properly included within the scope of the lawful injunction requested by SolarWorld, consented to by the Government, and issued by the Court." Mot. Modify Prelim. Inj. at 5. Kyocera indicated that "Counsel for Sino-American Silicon Products Inc., et al., states that, 'without additional information regarding the scope of Kyocera's entries that would be subject to Kyocera's requested exclusion from the injunction including, but not limited to, the identity of the Taiwanese producers and/or exporters of the crystalline silicon photovoltaic cells, we are unable at this time to develop a position regarding Kyocera's motion.'" *Id.*

DISCUSSION

A. Statutory Injunction

The relevant statutory language provides that:

> If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—
>
> ...
>
> (2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section, shall be liquidated in accordance with the final court decision in the action.

19 U.S.C. § 1516a(e)(2) (2012). This court has recognized that modification of a statutory injunction is not justified prior to a final court decision that includes all appeals and remands. *See Aimcor v. United States*, 23 CIT 932, 937, 83 F. Supp. 2d 1293, 1297 (1999) ("The statutory language is clear, it is undisputed that there has been no final decision in this case, and therefore, under the terms of the statute, liquidations remain enjoined until a final decision.").

In addition, the court's September 5, 2017 statutory injunction order directed that the United States and relevant agencies "shall be, and hereby are, ENJOINED immediately upon the entry of this Order and pending a final and conclusive court decision in this litigation, including all appeals and remand proceedings, from causing or permitting liquidation of unliquidated entries of certain crystalline silicon photovoltaic products from Taiwan...." Order at 2.

Under the statute and the express terms of the statutory injunction order, liquidation of subject entries shall be enjoined until resolution of the final and conclusive court decision in this litigation, including all appeals and remand proceedings. The pending litigation in this court is in the early stages of the proceedings, and no final and conclusive court decision has yet been rendered. After this court issues its dispositive decision, the parties will have an opportunity to appeal the court's decision that may lead to a final and conclusive court decision. It is well settled that "19 U.S.C. § 1516a(c)(2) envisions the use of preliminary injunctions in the antidumping context to preserve proper legal options and to allow for a full and fair review of duty determinations before liquidation." *Qingdao Taifa Group Co. v. United States*, 581 F.3d 1375, 1382 (Fed. Cir. 2009); *see also Ad Hoc Shrimp Trade Action Comm. v. United States*, 34 CIT 1275, 1277, 724 F. Supp. 2d 1373, 1380 (2010).

For the foregoing reasons, the court concludes that it is premature to modify the statutory injunction order to allow liquidation of Kyocera's entries before a final and conclusive court decision in this litigation. Modification of the statutory injunction is denied.

B. Changed Circumstances

An examination of the "changed circumstances" test establishes an additional basis to deny Kyocera's request for a modification of the statutory injunction. This court has the authority to modify a statutory injunction when it finds that there is a sufficient change of circumstances. *Aimcor*, 23 CIT at 938, 83 F. Supp. 2d at 1299 (citing *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961)). In order to obtain a modification of a statutory injunction, "Defendant-Intervenor must establish a change in circumstances of the parties from the time the injunction was issued that would make the modification necessary. Additionally, the party seeking to modify a [statutory] injunction bears the burden of establishing a change in circumstances that would make continuation of the original [statutory] injunction inequitable." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 32 CIT 666, 670, 562 F. Supp. 2d 1383, 1388 (2008) (citing *SNR Roulements v. United States*, 31 CIT 1762, 1764, 521 F. Supp. 2d 1395, 1398 (2007)); *see also Aimcor*, 23 CIT at 938, 83 F. Supp. 2d at 1299 ("[A] party moving for modification bears the burden of showing that changed circumstances, legal or factual, make the continuation of the injunction inequitable.").

Kyocera's Motion to Modify Statutory Injunction fails to mention the applicable changed circumstances test. Kyocera does not set forth any facts or legal arguments to show a change in circumstances that would make continuation of the original statutory injunction inequitable. Because Kyocera, as the movant, did not make a sufficient showing under the applicable legal standard of changed circumstances, the court denies the Motion to Modify Statutory Injunction.

C. Defendant-Intervenor's Arguments

Kyocera fails to address the applicable changed circumstances test in its motion, and instead argues that the court's September 5, 2017 statutory injunction order should not have been granted. Kyocera urges the court to reexamine the four-part statutory injunction test, which requires a party to show that: (1) it will be immediately and irreparably injured; (2) there is a likelihood of success on the merits; (3) the public interest would be better served by the relief requested; and (4) the balance of hardships on all the parties favors the petitioner. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983).

Kyocera argues in its motion that the statutory injunction is improper because: (1) the liquidation of entries of Kyocera's solar panels will not cause irreparable harm to SolarWorld; (2) there has been no showing that SolarWorld is likely to prevail on its claims in a manner that would impact the assessment of duties on Kyocera's entries; (3) the court's initial decision granting the injunction did not consider the hardship on Kyocera in its balance of hardships analysis; and (4) the public interest does not favor granting extraordinary relief in the form of a preliminary injunction delaying implementation of an administrative determination in the absence of either a strong showing of a likelihood of irreparable harm or a strong showing that the requesting party is likely to prevail on the merits of its claims. Mot. Modify Prelim. Inj. at 1–2.

Kyocera fails to convince the court that it should reexamine the four-part statutory injunction test or that it should partially dissolve the statutory injunction to allow the liquidation of Kyocera's entries of solar panels prior to final resolution of the litigation. To the contrary, "dissolution of the preliminary injunction may eviscerate the remedial effects conferred" by the antidumping duty statute and "the potential for a dissolution prior to a final decision to cause irreparable harm to plaintiffs is obvious." *Aimcor*, 23 CIT at 939, 83 F. Supp. 2d at 1299. It is clear that § 1516a(c)(2) contemplates that the statutory injunction should preserve the status quo pending the final and

conclusive disposition of the litigation. "Liquidation of a party's entries is the final computation or ascertainment of duties accruing on those entries. Once liquidation occurs, it permanently deprives a party of the opportunity to contest Commerce's results for the administrative review by rendering the party's cause of action moot." *SFK USA Inc. v. United States*, 28 CIT 170, 173, 316 F. Supp. 2d 1322, 1327 (2004) (citations omitted). As noted earlier, the court has explained that, "19 U.S.C. § 1516a(c)(2) envisions the use of preliminary injunctions in the antidumping context to preserve proper legal options and to allow for a full and fair review of duty determinations before liquidation." *Ad Hoc Shrimp Trade Action Committee v. United States,* 34 CIT 1275, at 1277, 724 F. Supp. 2d 1373,at 1376 (2010) (quoting *Qingdao Taifa*, 581 F.3d at 1382).

Similarly, in order to preserve proper legal options and to allow for a full and fair review of Commerce's antidumping duty determinations, the court will continue to enjoin the liquidation of subject entries under the September 5, 2017 statutory injunction pending the final and conclusive court decision in this litigation.

CONCLUSION

Upon consideration of the motion and all other papers and proceedings herein, it is hereby

ORDERED that Defendant-Intervenor's motion is denied.

Dated: December 21, 2017
New York, New York

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

Slip Op. 17–172

LF USA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 16–00087

[Denying Plaintiff's motion for summary judgment and granting Defendant's cross-motion for summary judgment.]

Dated: December 22, 2017

John Blaise Pellegrini, McGuireWoods, LLP, of New York, NY, for LF USA, Inc.

Jamie L. Shookman, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, International Trade Field Office, of New York, NY, for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of Counsel on the brief was *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Kelly, Judge:

The action before the court concerns the classification of imported children's clogs. Plaintiff, LF USA, Inc., moves for summary judgment, requesting the court to find as a matter of law that Plaintiff's imports are properly classified within subheading 6401.99.80, Harmonized Tariff Schedule of the United States (2014) ("HTSUS"),[1] and requesting the court to order United States Customs and Border Protection ("CBP") to reliquidate the subject entries as such and refund the excess duties paid with interest. Pl.'s Mot. Summary J., July 7, 2017, ECF No. 21; Pl.'s Mem. Supp. Mot. Summary J., July 7, 2017, ECF No. 21–1 ("Pl.'s Br."). Defendant opposes the motion and cross-moves for summary judgment, requesting the court to find as a matter of law that the imports are properly classified within subheading 6402.99.31, HTSUS, within which CBP classified and liquidated the subject entries. Def.'s Cross Mot. Summary J., Aug. 14, 2017, ECF No. 25; Mem. Opp'n Pl.'s Mot. Summary J. and Supp. Def.'s Cross-Mot. Summary J., Aug. 14, 2017, ECF. No. 25 ("Def.'s Br."). For the reasons that follow, Plaintiff's motion is denied and Defendant's motion is granted.

[1] All references to the HTSUS refer to the 2014 edition, the most recent version of the HTSUS in effect at the time of the last entries of subject merchandise. *See* Pl.'s Statement of Material Facts Not In Dispute ¶ 1, July 7, 2017, ECF No. 21–2; Def.'s Resp. Pl.'s Rule 56.3 Statement of Material Facts to Which There Is No Genuine Dispute ¶ 1, Aug. 14, 2017, ECF No. 25–1. The 2011 and 2013 editions of the HTSUS, in effect respectively when Plaintiff entered the rest of the subject merchandise, are the same in relevant part to the 2014 edition.

BACKGROUND

At issue is the proper classification of six entries of children's clogs. Pl.'s Statement of Material Facts Not In Dispute ¶ 1, July 7, 2017, ECF No. 21–2 ("Pl.'s 56.3 Statement"); Def.'s Resp. Pl.'s Rule 56.3 Statement of Material Facts to Which There Is No Genuine Dispute ¶ 1, Aug. 14, 2017, ECF No. 25–1 ("Def.'s Resp. Pl.'s 56.3 Statement"). CBP classified and liquidated the subject entries under subheading 6402.99.31, HTSUS, Pl.'s 56.3 Statement ¶ 2; Def.'s Resp. Pl.'s 56.3 Statement ¶ 2, which provides:

> Other footwear with outer soles and uppers of rubber or plastics: Other footwear: Other: Other: Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics (except footwear having a foxing or a foxing-like band applied or molded at the sole and overlapping the upper and except footwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather): Other: Other.

Subheading 6402.99.31, HTSUS, dutiable at 6 percent.

Plaintiff timely filed administrative protests challenging CBP's classification of the subject merchandise under subheading 6402.99.31, HTSUS, and asserting that the proper classification for the entries is subheading 6401.99.80, HTSUS. Pl.'s 56.3 Statement ¶ 3; Def.'s Resp. Pl.'s 56.3 Statement ¶ 3. Subheading 6401.99.80, HTSUS, provides:

> Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes: Other footwear: Other: Other: Other: Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics (except footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper).

Subheading 6401.99.80, HTSUS, duty free. CBP denied Plaintiff's protests. Pl.'s 56.3 Statement ¶ 4; Def.'s Resp. Pl.'s 56.3 Statement ¶ 4.

Plaintiff commenced this action to contest CBP's denial of its protests. Summons, May 25, 2016, ECF No. 1; Compl., July 20, 2016, ECF No. 6. Plaintiff alleges that the subject merchandise was improperly classified within subheading 6402.99.31, HTSUS, and is instead classifiable within subheading 6401.99.80, HTSUS. Compl. ¶¶ 12–13. Specifically, Plaintiff alleges that the subject merchandise is classifiable within subheading 6401.99.80, HTSUS, *id.* at ¶ 13, because the shoes are waterproof and complete and fully functional without the back strap, such that the strap is not an essential element of the upper. Pl.'s Br. 3, 7–13. Plaintiff contends that the shoe's backstrap is an "auxiliary element of the shoe," *id.* at 3, which does not assemble the upper, as would preclude classification within subheading 6401.99.80, HTSUS. *Id.* at 3, 8–10. Defendant contends that the shoes are not classifiable within subheading 6401.99.80, HTSUS, because they are not waterproof for classification purposes, the rubber strap is an essential part of the upper rather than an attachment, and the upper is assembled by riveting. *See* Def.'s Br. 7–19. Defendant argues that the shoes are precluded from classification within subheading 6401.99.80, HTSUS, and are accordingly properly classified within subheading 6402.99.31. *Id.* at 19–20.

JURISDICTION AND STANDARD OF REVIEW

The court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [Tariff Act of 1930, as amended, 19 U.S.C. § 1515 (2012)]," 28 U.S.C. § 1581(a) (2012), and reviews such actions de novo. 28 U.S.C. § 2640(a)(1) (2012).

The court will grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). In order to raise a genuine issue of material fact, it is insufficient for a party to rest upon mere allegations or denials, but rather that party must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastic Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

UNDISPUTED FACTS

The subject merchandise, six entries of imports of children's clogs, entered at the port of Los Angeles between 2011 and 2014. Pl.'s 56.3 Statement ¶ 1; Def.'s Resp. Pl.'s 56.3 Statement ¶ 1. The clogs have a

closed toe and open heel. Pl.'s 56.3 Statement ¶ 8; Def.'s Resp. Pl.'s 56.3 Statement ¶ 8. The clogs have "an upper and outer sole of rubber or plastics" and "a separate rubber or plastics heel strap," which is "attached" by "single rubber or plastic rivet at each end of the strap." Pl.'s 56.3 Statement ¶ 8; Def.'s Resp. Pl.'s 56.3 Statement ¶ 8. "The strap may be moved forward to rest on the front of the clog."[2] Pl.'s 56.3 Statement ¶ 9; Def.'s Resp. Pl.'s 56.3 Statement ¶ 9. The subject merchandise "does not provide protection against water, oil, grease, or chemicals or cold or inclement weather." Pl.'s 56.3 Statement ¶ 14; Def.'s Resp. Pl.'s 56.3 Statement ¶ 14.

DISCUSSION

Classification involves two steps. First, the court determines the proper meaning of the tariff provisions, which is a question of law. *See Link Snacks, Inc. v. United States*, 742 F.3d 962, 965 (Fed. Cir. 2014). Second, the court determines whether the subject merchandise properly falls within the scope of the tariff provisions, which is a question of fact. *Id.* Where there is no genuine "dispute as to the nature of the merchandise, then the two-step classification analysis collapses entirely into a question of law." *Id.* at 965–66 (citation omitted). In such a case, the court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). The court must find the correct classification, irrespective of the subheadings asserted by the parties. *See id.*

A. The Meaning of the Tariff Terms

Classification of merchandise under the HTSUS is governed by the principles set forth in the General Rules of Interpretation ("GRIs") and the Additional United States Rules of Interpretation. *See Roche Vitamins, Inc. v. United States*, 772 F.3d 728, 730 (Fed. Cir. 2014). The

[2] Plaintiff contends that "[t]here is agreement that the clog is complete and usable as footwear without the strap or with the strap moved forward to rest on the front of the clog." Pl.'s Br. 9. However, Defendant does not admit as an undisputed fact that the clog is complete and usable without the strap in place at the back of the heel. *See* Def.'s Resp. Pl.'s 56.3 Statement ¶ 12. Specifically, Defendant

> [a]vers that it is unclear what is meant by "complete" and "useable," as these terms are not defined. Admits that a user could wear the imported footwear without the rubber strap or with the strap moved forward to rest on the front of the clog, but avers that the strap is an essential part of the imported footwear because it "can be used to secure the shoe to the foot," and because a user's foot might slip out of the imported footwear if that person were to wear it without the strap, or with the strap moved forward to rest on the front of the clog.

Id. (citations omitted). Accordingly, the court does not consider the parties to be in agreement as to whether the clog is "complete and usable as footwear without the strap" in place at the back of the heel, despite Plaintiff's statement to the contrary. *See* Pl.'s Br. 9. This disagreement is not relevant to the court's determination of the case.

GRIs are applied in numerical order beginning with GRI 1 which provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes," *La Crosse Technology, Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013), which are part of the HTSUS statute. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). The Additional U.S. Notes included within the Chapter Notes "'are legal notes that provide definitions or information on the scope of the pertinent provisions or set additional requirements for classification purposes.'" *Del Monte Corp. v. United States*, 730 F.3d 1352, 1355 (Fed. Cir. 2013) (quoting What Every Member of the Trade Community Should Know About: Tariff Classification 32 (U.S. Customs & Border Prot. May 2004). These Additional U.S. Notes are also part of the legal text of the HTSUS, *see* Preface at 1 n.2, HTSUS, and are accordingly "statutory provisions of law." *Del Monte Corp.*, 730 F.3d at 1355 (internal quotation marks omitted).

The terms of the HTSUS are "construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). The court defines HTSUS tariff terms relying upon its own understanding of the terms and "may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc.*, 195 F.3d at 1379 (citation omitted). The court may also be aided by the Harmonized Commodity Description and Coding System's Explanatory Notes ("Explanatory Notes") to help construe the relevant chapters where appropriate. *See Store-WALL, LLC v. United States*, 644 F.3d 1358, 1363 (Fed. Cir. 2011). Although the "Explanatory Notes are not legally binding, [they] may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision." *Roche Vitamins*, 772 F.3d at 731.

Heading 6402, HTSUS, under which CBP liquidated Plaintiff's merchandise, covers "Other footwear with outer soles and uppers of rubber or plastics." Heading 6402, HTSUS. Heading 6401, HTSUS, covers "Waterproof footwear with outer soles and uppers of rubber or plastics." Heading 6401, HTSUS. No other heading applies to footwear with outer soles and uppers of rubber or plastics. *See* Chapter 64, HTSUS. Heading 6402 is an "other" category for footwear with outer soles and uppers of rubber or plastics not classifiable within heading 6401.

The court must first look to the words of the tariff to discern its meaning. Plaintiff's preferred heading 6401, HTSUS, covers "[w]aterproof footwear with outer soles and uppers of rubber or plastics, the

uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes." Heading 6401, HTSUS. Note 3 of the Additional U.S. Notes to Chapter 64 provides that "[f]or the purposes of heading 6401, 'waterproof footwear' means footwear specified in the heading, designed to protect against penetration by water or other liquids, whether or not such footwear is primarily designed for such purposes."[3] Additional U.S. Note 3, Chapter 64, HTSUS. Therefore, waterproof footwear must protect the foot by not allowing water or other liquid to penetrate the shoe. Plaintiff suggests a much narrower interpretation of the phrase "waterproof footwear." *See* Pl.'s Br. 7–8; *see also* Pl.'s Sur-Reply 2, Oct. 27, 2017, ECF No. 32–1. Plaintiff argues that the tariff language "the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes" suggests that the term "waterproof footwear" refers only to the method of assembling the footwear. Pl.'s Br. 7–8 ("The limited scope of the prohibition strongly suggests that 'waterproof' refers to the means of assembly. It is not intended to mean that footwear must be impervious to water.").

In the phrase "waterproof footwear," the word "waterproof" modifies "footwear," not assembly or construction.[4] Therefore the footwear is what protects, not what is protected. Further, contrary to Plaintiff's position, the words of the heading indicate that the drafters envisioned two requirements for footwear covered within heading 6401: 1) that the footwear is waterproof, and 2) that the footwear is composed of single piece construction. *See* Heading 6401, HTSUS. This interpretation is reinforced by the accompanying Explanatory Notes, which provide that "[n]on-waterproof footwear [of rubber or plastics]

[3] Several dictionary definitions aid the court in discerning the common and commercial meaning of "waterproof." *See Waterproof, Oxford English Dictionary* Vol. XIX, 1003 (J.A. Simpson & E.S.C. Weiner eds., Oxford University Press, 2nd ed. 1989) (*Waterproof*: impervious to water; capable of resisting the deleterious action of water.); *Waterproof, Webster's Third New International Dictionary* 2584 (Philip Babcock Gove, Ph.D. and Merriam-Webster Editorial Staff eds., Merriam-Webster, Incorporated 1993) (*Waterproof*: 1a: impervious to water: as covered or treated with a material (as a solution of rubber) to prevent permeation by water.); *Waterproof*, oed.com, available at http://www.oed.com/view/Entry/226269?rskey=D3Xshs&result=1&isAdvanced=false#eid (last visited Dec. 19, 2017) (*Waterproof*: Impervious to water, impermeable; That is not damaged or washed away by water.); *Waterproof*, Merriam-Webster.com, *available at* https://www.merriam-webster.com/dictionary/waterproof (last visited Dec. 19, 2017) (*Waterproof*: Impervious to water; Especially: covered or treated with a material (such as a solution of rubber) to prevent permeation by water.).

[4] Further, the Explanatory Notes clarify that heading 6401 covers footwear "of rubber . . . , plastics or textile material with an external layer of rubber or plastics being visible to the naked eye . . ., *provided* the uppers are neither fixed to the sole nor assembled by the processes named in the heading." Explanatory Note 64.01 to Chapter 64 (2014) (emphasis in original). This phrasing also clarifies that the waterproof requirement does not refer to the method of assembly.

produced in one piece (for example, bathing slippers)" are classifiable within heading 6402. Explanatory Note 64.02(f) to Chapter 64 (2014). By identifying "non-waterproof footwear" of rubber or plastics produced in one piece as a category distinct from waterproof footwear, the clarification indicates that, even if footwear is made of rubber or plastics and is of single construction, the footwear must still also be waterproof to be classifiable within heading 6401. The Explanatory Note therefore confirms that there are two separate requirements to classification within heading 6401. It indicates that "waterproof footwear" means something more than footwear made of plastics or rubber. *See* Heading 6401, HTSUS. Accordingly, Plaintiff's more narrow interpretation of "waterproof footwear" is unpersuasive.[5]

Plaintiff also argues that a narrow interpretation of heading 6401 is necessary, contending that, without such an interpretation, subheading 6401.99, which provides for footwear "[d]esigned to be worn over, or in lieu of other footwear as a protection against water," would not make sense. *See* Pl.'s Br. 8. Plaintiff's theory seems to be that if all subheadings within heading 6401 were meant to be impervious to water, then this subheading would not be necessary. Plaintiff's argument ignores the fact that subheading 6401.99, HTSUS, identifies a special subset of waterproof footwear, *i.e.*, footwear that is "designed to be worn over, or in lieu of, other footwear as protection against water, oil, grease or chemicals or cold or inclement weather." *See* Subheading 6401.99, HTSUS. Contrary to Plaintiff's suggestion, it is not illogical that there may be some footwear which is specifically designed to provide protective properties for the user, and that those styles of footwear would also be considered "waterproof footwear." Furthermore, Additional U.S. Note 3 to Chapter 64 specifies that "waterproof footwear" refers to footwear that is "designed to protect against penetration by water or other liquids, whether or not such footwear is primarily designed for such purposes." *See* Additional U.S. Note 3, Chapter 64, HTSUS. This phrasing recognizes that some waterproof footwear is primarily designed for waterproof protection while other waterproof footwear is not designed primarily to protect the wearer from water or other liquids, but nonetheless is designed to be waterproof.

[5] The court rejects Plaintiff's argument that "waterproof footwear" cannot mean "impervious to water" because "Heading 6401 includes HTSUS subheadings 6401.99.80 and 6401.99.90, both cover footwear that does not provide protection against water, *i.e.*, footwear that is not impervious to water," *see* Pl.'s Br. 8, because it assumes the answer to the question at issue here: whether subheadings 6401.99.80 and 6401.99.90, HTSUS, require that the footwear be impervious to water.

Heading 6401 also requires that footwear be made of plastic or rubber uppers which are "neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes." Heading 6401, HTSUS. The HTSUS does not define "uppers," and the parties both proffer definitions for the term. Defendant supplied several sources to support its interpretation of "upper" as

> '. . . part of the shoe above the separate sole or that portion of the shoe which covers the sides and top of the foot if there is no separate sole. An "Upper" can cover the whole leg, thigh, hips, and chest (e.g., fishermen's chest waders) or can consist simply of straps, laces or thongs (e.g., Roman sandals).' This definition is confirmed by dictionaries, which define the "upper" as the part of the shoe above the sole that covers the top and sides of the foot.

Def.'s Br. 9 (quoting *Footwear Definitions,* Treasury Decision 93–88, 27 Cust. B. & Dec. 312, 312 (Oct. 25, 1993) ("Treasury Decision 93–88"); other citations omitted). Plaintiff "asserts that the upper is that part of a shoe covering the top and sides of the foot when the upper and sole are a unit." Pl.'s Reply Mem. Supp. Its Mot. Summary J. & Opp'n Def.'s Cross Mot. Summary J. 3, Sept. 14, 2017, ECF No. 26. Plaintiff quotes Treasury Decision 93–88 for the interpretation that "'[t]he "upper" is[]that portion of the shoe which covers the sides and top of the foot if there is no separate sole.'" *Id.* The definitions provided by Plaintiff and Defendant are not at odds. The upper is the part of the shoe above the separate sole or that portion of the shoe which covers the sides and top of the foot if there is no separate sole. Footwear within heading 6401 must have uppers that are "neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes." Heading 6401, HTSUS. This language means that footwear covered by heading 6401 is not created using any of the prohibited processes to affix the sole to the upper or to assemble various parts of the upper.

Heading 6402, HTSUS, covers "[o]ther footwear with outer soles and uppers of rubber or plastics." Heading 6402, HTSUS. Heading 6401, HTSUS, covers waterproof footwear with outer soles and uppers of rubber or plastics. Heading 6401, HTSUS. As heading 6402 is an "other" category for footwear not classifiable within heading 6401, the meaning of the tariff term is dependent upon the meaning of heading 6401. "Other footwear with outer soles and uppers of rubber or plastics" refers to footwear with outer soles and uppers (the part of

the shoe above the separate sole or that portion of the shoe which covers the sides and top of the foot if there is no separate sole) of rubber or plastics, which do not meet the definitions above for the tariff terms within heading 6401, HTSUS.

B. The Merchandise at Issue

Here, there is no dispute as to the nature of the subject merchandise. The parties agree that the merchandise is children's clogs that have a closed toe and open heel. Pl.'s 56.3 Statement ¶¶ 6, 8; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 6, 8. The parties also agree that the footwear has "an upper and outer sole of rubber or plastics" and "a separate rubber or plastics heel strap," which is "attached" by a "single rubber or plastic rivet at each end of the strap," Pl.'s 56.3 Statement ¶ 8; Def.'s Resp. Pl.'s 56.3 Statement ¶ 8, which "may be moved forward to rest on the front of the clog." Pl.'s 56.3 Statement ¶ 9; Def.'s Resp. Pl.'s 56.3 Statement ¶ 9. It is undisputed that the footwear "does not provide protection against water, oil, grease, or chemicals or cold or inclement weather." Pl.'s 56.3 Statement ¶ 14; Def.'s Resp. Pl.'s 56.3 Statement ¶ 14.

C. The Proper Classification of the Goods

The first requirement of footwear covered within heading 6401, HTSUS, is that the footwear is waterproof. As discussed above, "waterproof footwear" is footwear that protects the foot by not allowing water or other liquid to penetrate the shoe. It is undisputed that "the subject footwear does not provide protection against water, oil, grease, or chemicals or cold or inclement weather." Pl.'s 56.3 Statement ¶ 14; Def.'s Resp. Pl.'s 56.3 Statement ¶ 14. Accordingly, the subject merchandise does not fit within the definition of "waterproof footwear," and, as a matter of law, the subject footwear is not classifiable as "[w]aterproof footwear" within heading 6401, HTSUS.

Additionally, footwear covered by heading 6401, HTSUS, must have uppers of plastics or rubber "which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes." Heading 6401, HTSUS. An "upper" is the part of the shoe above the separate sole or that portion of the shoe which covers the sides and top of the foot if there is no separate sole. The court does not need to reach the issue as to whether the subject merchandise is footwear having "uppers of plastics or rubber which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes" because the court has found that the

subject merchandise does not fit within definition of "waterproof footwear" such that it is not classifiable within heading 6401.[6]

CONCLUSION

For the foregoing reasons, the subject merchandise at issue in this case is properly classifiable within subheading 6402.99.31, HTSUS. Therefore, Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted. Judgment will enter accordingly.

Dated: December 22, 2017
New York, New York

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

[6] Although the court does not reach the issue here, the court has serious concerns about whether, even if the footwear were determined to be waterproof, the subject merchandise would be classifiable within heading 6401 because of the heel strap. Footwear classifiable within heading 6401 must have uppers that are "neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes." Heading 6401, HTSUS. The court interprets this phrase to mean that footwear covered by heading 6401 does not use any of the prohibited processes to either affix the sole to the upper or to assemble various parts of the upper. The upper is that portion of the shoe which covers the sides and top of the foot. It is undisputed that the subject merchandise has a plastic or rubber upper with "a separate rubber or plastics heel strap," which is "attached" by "single rubber or plastic rivet at each end of the strap." Pl.'s 56.3 Statement ¶ 8; Def.'s Resp. Pl.'s 56.3 Statement ¶ 8. The strap appears to be part of the upper. It is undisputed that the strap is attached with riveting, *see* Pl.'s 56.3 Statement ¶ 8; Def.'s Resp. Pl.'s 56.3 Statement ¶ 8, and it is therefore likely that the strap would preclude the clog being classified in plaintiff's preferred subheading.

Slip Op. 17–173

HYUNDAI STEEL COMPANY, Plaintiff, v. UNITED STATES, Defendant, and STEEL DYNAMICS, INC., et.al., Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 16–00238
PUBLIC VERSION

[Commerce's *Final Results* are sustained.]

Dated: December 27, 2017

J. David Park and *Henry D. Almond*, Arnold & Porter Kaye Scholer LLP, of Washington, DC, argued for plaintiff. With them on the brief was *Daniel R. Wilson* and *Sylvia Y. Chen*.

Patricia M. McCarthy, Assistant Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Renee A. Burbank*, Senior Trial Counsel. Of counsel was *Lydia Pardini* and of counsel on the brief was *Christopher Hyner*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Paul C. Rosenthal, Kelley Drye & Warren LLP, of Washington, DC, argued for defendant-intervenor, ArcelorMittal USA LLC. With him on the joint response brief were *Roger B. Schagrin* and *Christopher T. Cloutier*, Schagrin & Associates, of Washington, DC, for defendant-intervenor, Steel Dynamics, Inc.; *Stephen A. Jones* and *Daniel L. Schneiderman,* King & Spalding, LLP, of Washington, DC, for defendant-intervenor, AK Steel Corporation; *Jeffrey D. Gerrish* and *Luke A. Meisner*, Skadden Arps Slate Meager & Flom, LLP, of Washington, DC, for defendant-intervenor, United States Steel Corporation; and *Alan H. Price*, *Timothy C. Brightbill* and *Chris B. Weld*, Wiley Rein LLP, of Washington DC, for defendant-intervenor, Nucor Corporation.

OPINION

Katzmann, Judge:

What is the extent of the responsibility of a respondent company to develop the administrative record upon which the United States Department of Commerce ("Commerce") bases its final determination in an antidumping duty investigation? What is the extent of Commerce's authority to apply adverse inferences to a respondent who has not developed the record? May Commerce, in accordance with law, deny a constructed export price offset when such an adjustment had been previously granted to the same company in similar, but not identical, circumstances? These questions are now before the court.

Plaintiff Hyundai Steel Company ("Hyundai") challenges the final determination of sales at less-than-fair-value in the antidumping investigation by Commerce in *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 53,419 (Dep't Commerce Aug. 12, 2016) ("*Final Results*"). In particular, Hyundai contends that Commerce should not have applied adverse facts available ("AFA") in adjusting Hyundai's reported expenses with respect to its transac-

tions with certain affiliated companies. Hyundai further argues Commerce should have granted a constructed export price offset—in other words, Commerce should have made adjustments commensurate with differences between Hyundai's selling activities in the Korean and U.S. markets as part of its analysis. The court finds neither of these contentions persuasive, and sustains Commerce's determination.

BACKROUND

I. Legal Background

Pursuant to United States antidumping law, Commerce must impose antidumping duties on subject merchandise that "is being, or is likely to be, sold in the United States at less than fair value" and that causes material injury or threat of material injury to a domestic industry. 19 U.S.C. § 1673 (2012).[1] "Sales at less than fair value are those sales for which the 'normal value' (the price a producer charges in its home market) exceeds the 'export price' (the price of the product in the United States)." *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1326 (Fed. Cir. 2017). Normal value is defined as "the price at which the foreign like product is first sold . . . in the exporting country [i.e., the home market]." 19 U.S.C. § 1677b(a)(l)(B)(i). Here, "normal value" refers to the price of Hyundai's hot-rolled steel sold in Korea. Export price, or constructed export price ("CEP"), means the price at which the subject merchandise is first sold to an unaffiliated purchaser in the United States. 19 U.S.C. § 1677a(a)–(b). Commerce uses CEP when a seller affiliated[2] with the

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1677e, 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). The TPEA amendments are applicable to all determinations made on or after August 6, 2015, and therefore, are applicable to this proceeding. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,794 (Dep't Commerce Aug. 6, 2015).

[2] Per 19 U.S.C. § 1677(33), affiliated entities are:

(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
(B) Any officer or director of an organization and such organization.
(C) Partners.
(D) Employer and employee.
(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
(G) Any person who controls any other person and such other person.

producer makes the first sale to an unaffiliated purchaser in the United States. 19 U.S.C. § 1677a(b).

When making a comparison between export price, or CEP, and normal value, Commerce seeks to ensure that a producer's costs are reflective of the market value of those goods or services, and may adjust both values. *See* 19 U.S.C. § 1677b(a), (b). Companies sometimes use affiliated companies to provide services like shipping, insurance, and other similar services for both home market sales and United States sales. Because of the companies' affiliation, the costs may be distorted and not reflect the true market price of those services. Therefore, when a party sells its goods by using services from an affiliated company, Commerce must determine whether the transactions with the affiliated company were made at arm's-length, or comparable to transactions conducted with an unaffiliated party. For home market sales, if a party cannot establish that a transaction with the affiliated party was made at arm's-length, Commerce may make an "arm's-length adjustment." *See* 19 U.S.C. § 1677b(b) (permitting Commerce to determine whether home market sales are distorted); 19 U.S.C. § 1677b(f)(2) ("A transaction directly or indirectly between affiliated persons *may be disregarded* if . . . the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration."); 19 C.F.R. § 351.402(e) (2015).[3]

For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

Commerce's regulation 19 C.F.R. § 351.102(b)(3) further provides that:

"Affiliated persons" and "affiliated parties" have the same meaning as in [§ 1677(33)]. In determining whether control over another person exists, within the meaning of [§ 1677(33)], [Commerce] will consider the following factors, among others: Corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. [Commerce] will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. [Commerce] will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.

[3] 19 C.F.R. § 351.402(e) provides:

Treatment of payments between affiliated persons. Where a person affiliated with the exporter or producer incurs any of the expenses deducted from constructed export price under [19 U.S.C. § 1677a(d)] and is reimbursed for such expenses by the exporter, producer or other affiliate, [Commerce] normally will make an adjustment based on the actual cost to the affiliated person. If [Commerce] is satisfied that information regarding the actual cost to the affiliated person is unavailable to the exporter or producer, [Commerce] may determine the amount of the adjustment on any other reasonable basis, including the amount of the reimbursement to the affiliated person if [Commerce] is satisfied that such amount reflects the amount usually paid in the market under consideration.

All citations to Title 19 of the Code of Federal Regulations are to the official 2015 edition.

Information that producer respondents submit to Commerce during an investigation is subject to verification. *See* 19 U.S.C. § 1677m(i)(1).[4]

A. Adverse Facts Available

When either necessary information is not available on the record, or 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 in reaching the applicable determination." 19 U.S.C. § 1677e(a). This subsection thus provides Commerce with a methodology to fill informational gaps when necessary or requested information is missing from the administrative record. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003).

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). 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). If Commerce uses an adverse inference under § 1677e(b)(1)(A) in selecting among facts otherwise available, Commerce is not required to demonstrate that the dumping margin used "reflects an alleged commercial reality of the interested party." 19 U.S.C. § 1677e(d)(3).

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."

[4] 19 U.S.C. § 1677m(i)(1) provides: "The administering authority shall verify all information relied upon in making a final determination in an investigation."

Ozdemir Boru San. ve Tic. Ltd. Sti. v. United States, 41 CIT ___, ___, 2017 WL 4651903, at *5 (Ct. Int'l Trade 2017) (citations omitted). 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.CAN. at 4199 ("SAA"));[5] *compare* 19 U.S.C. § 1677e(d)(3).

B. CEP Offset

Commerce may also adjust the normal value to take into account differences in the level of trade between the home market and U.S. market to "reconstruct the price at a specific, 'common' point in the chain of commerce, so that value can be fairly compared on an equivalent basis." *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1303 (Fed. Cir. 2001) (quoting *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1568 (Fed. Cir. 1994)); *see* 19 U.S.C. § 1677b(a)(1)(B). Level of trade adjustments are made when the difference in the level of trade (i) involves the performance of different selling activities; and (ii) demonstrably affects price comparability, based on a pattern of consistent prices differences between the sales at the different levels of trade. 19 U.S.C. 1677b(a)(7)(A); *see Micron*, 243 F.3d at 1303 (quoting *Koyo Seiko Co. v. United States*, 36 F.3d at 1568).

In cases where "normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price, but the data available do not provide an appropriate basis to determine . . . a level of trade adjustment," a CEP offset will be appropriate, and the "normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 1677a(d)(1)(D)." 19 U.S.C. § 1677b(a)(7)(B). "The effect is to reduce the price of the more advanced level of trade by 'indirect selling expenses' that have been included in the price on the apparent theory that such costs would not have been incurred if the sale had been made on a less advanced level of trade." *Micron*, 243 F.3d at 1305.

[5] 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).

According to the SAA, the foreign exporter must supply evidence that "the functions performed by the sellers at the same level of trade in the U.S. and foreign markets are similar, and that different selling activities are actually performed at the allegedly different levels of trade" to qualify for a CEP offset. SAA at 829. Although neither the statute nor the SAA defines "same level of trade," the phrase is understood "to mean comparable marketing stages in the home and United States markets, e.g., a comparison of wholesale sales in Korea to wholesale sales in the United States." *Micron*, 243 F.3d at 1305; *see* 19 C.F.R. § 351.412(c)(2) ("[Commerce] will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent)."). The differences in selling functions performed in the U.S. and home markets must be "substantial" to qualify for a CEP offset. 19 C.F.R. § 351.412(c)(2) ("Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing."); *see also Sucocitrico Cutrale Ltda. v. United States*, 2012 WL 2317764, at *6 (Ct. Int'l Trade 2012) ("Although Cutrale may perform more selling functions or may perform selling functions more intensely in its home market, these differences do not warrant a CEP offset. The CEP offset provision applies in situations in which there is a substantial difference in the level of trade." (citing *Micron*, 234 F.3d at 1305)) (Not Reported in F. Supp. 2d).

In short, Commerce will only grant a CEP offset where: (1) normal value is compared to CEP; (2) normal value is determined at a more advanced level of trade than the level of trade of the CEP; and (3) despite a company's cooperation to the best of its ability, whether the difference in the level of trade affects price comparability cannot be determined based on available data. 19 C.F.R. § 351.412(f).

II. Factual Background

On August 11, 2015, domestic steel producers AK Steel Corporation, ArcelorMittal USA LLC, Nucor Corporation, SSAB Enterprises, Steel Dynamics, Inc., and United States Steel Corporation — the defendant-intervenors in this action — filed an antidumping duty petition with Commerce, concerning imports of certain hot-rolled steel flat products (hot-rolled steel) from Korea. On September 9, 2015, Commerce initiated an antidumping duty investigation concerning certain hot-rolled steel flat products. *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, and the Republic of Turkey: Initiation of Less-Then-Fair-Value Investigations*, 80 Fed. Reg. 54,261 (Dep't Commerce Sept. 9, 2015). The Period of Investigation ("POI") was July 1, 2014,

through June 30, 2015. *Id.* at 54,262. On October 1, 2015, Commerce issued a memorandum stating that it had selected Hyundai Steel as one of the mandatory respondents in the investigation based on its volume of subject imports over the POI, pursuant to 19 U.S.C. § 1677f-1(c)(2).[6] *See* Respondent Selection Memorandum (Oct. 1, 2015), P.R. 75, C.R. 25.

On October 5, 2015, Commerce issued an antidumping duty questionnaire to Hyundai, and Hyundai provided its responses to the questionnaire sections throughout that November. *See* Antidumping Duty Questionnaire, P.R. 81; Section A Questionnaire Resp. (Nov. 2, 2015) ("Sec. A QR"), P.R. 110, C.R. 50; Sections B & C Questionnaire Resp. (Nov. 23, 2015) ("Sec. B-C QR"), P.R. 141, C.R. 98; Section D Questionnaire Resp. (Nov. 19, 2015) ("Sec. D QR"), P.R. 136, C.R. 76. Commerce issued supplemental questionnaires between December 2015 and February 2016, to which Hyundai replied between January and March 2016. *See* Commerce's Suppl. Questionnaire (Dec. 23, 2015), P.R. 165, C.R. 133; Hyundai's Sections A-C Suppl. Questionnaire Resp. (Jan. 20, 2016) ("Sec. A-C SQR"), P.R. 190, C.R. 209; Hyundai's Sections B & C Suppl. Questionnaire Resp. (Feb. 25, 2016) ("Sec. B-C SQR"), P.R. 240, C.R. 324.

On March 22, 2016, Commerce published its preliminary determination in the investigation. *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 Fed. Reg. 15,228 (Dep't Commerce Mar. 22, 2016), and accompanying Preliminary Decision Memorandum, P.R. 253 ("*PDM*"). Commerce calculated a preliminary antidumping duty margin of 3.97 percent for Hyundai Steel. *PDM*.

Prior to issuing a final determination, Commerce conducted sales, cost and further manufacturing verifications at the offices of Hyundai and certain of their United States affiliates during the months of January, April and June 2016. Thus, from January 18 through January 29, 2016, Commerce verified Hyundai's responses with respect to

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

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

cost. *See* Cost Verification Report (May 26, 2016), P.R. 278, C.R. 576. From April 18 through April 22, 2016, Commerce conducted a verification of Hyundai's home market and U.S. sales data, and from June 12 through June 15, 2016, Commerce conducted a verification of Hyundai's U.S. sales data. *See* Sales Verification Outline (Apr. 11, 2016), P.R. 266, C.R. 352; Sales Verification Report (July 5, 2016), P.R. 289, C.R. 617. During the second verification, Commerce requested contract information between Hyundai's affiliated service providers and their unaffiliated customers. *See* Sales Verification Report at 13–15. Hyundai was unable to supply this requested information. *Id.*

On August 12, 2016, Commerce published the *Final Results*, in which it calculated a final margin of 9.49 percent for Hyundai. In the *Final Results*, Commerce applied AFA to Hyundai, on the basis of Hyundai's inability to supply information regarding its affiliates' transactions with unaffiliated parties, which Commerce requested at the June 2016 verification. *IDM* at 18–20. Specifically, Commerce verified that, of Hyundai's affiliated freight provider's[7] ("Freight Affiliate") two largest shareholders, one shareholder is a part owner of Hyundai Steel and the other shareholder is the Vice Chairman of Hyundai Steel. *IDM* at 19. Commerce further verified that these two individuals are father and son. *Id.* Commerce noted that it performed a similar analysis with regard to Hyundai's affiliated insurance provider[8] ("Insurance Affiliate") and found that Hyundai and that company were affiliated. *Id.* Thus, Commerce found, "as confirmed at verification, that Hyundai Steel and the affiliated companies were held and commonly controlled by the same family members during the POI." *Id.* Commerce also found "that Hyundai Steel failed the completeness portion at verification with regard to this issue, *i.e.*, failed to demonstrate the arm's-length nature of these services provided by the affiliated companies. Accordingly, we find that we are unable to determine the arm's-length nature of transactions provided by these affiliates." *IDM* at 19. Commerce therefore concluded that "the necessary information to make this determination is not on the record due to Hyundai Steel's failure to provide it," and thus resorted to facts otherwise available under 19 U.S.C. § 1677e(a). *Id.* Furthermore, Commerce found that "Hyundai Steel failed to cooperate by not acting to the best of its ability to provide this requested information," and thus applied AFA under 19 U.S.C. § 1677e(b) to these transactions. Commerce applied AFA in the following manner:

[7] Hyundai's Freight Affiliate is named [[ ]].

[8] Hyundai's Insurance Affiliate is named [[ ]].

> For the final determination, we will apply AFA to Hyundai Steel's home market inland freight, home market warehousing expenses, international freight, marine insurance, and domestic inland freight for U.S. sales. For home market inland freight and warehousing, we will apply Hyundai Steel's lowest reported values for its home inland freight and warehousing fields for the final determination. For marine insurance and international freight (including wharfage), we will apply the highest reported values for the final determination. For domestic inland freight for U.S. sales, we have selected the highest value as AFA.

IDM at 19.

Commerce also denied Hyundai a statutory CEP offset to adjust for differences between levels of trade in its home market and U.S. sales. *IDM* at 24–26. Commerce found that Hyundai had performed selling functions at virtually the same level of intensity in the U.S and home markets, and thus that no level of trade difference existed that merited a CEP offset. *Id.*

Commerce issued the corresponding antidumping duty order on October 3, 2016. *Certain Hot-Rolled Steel Flat Products From Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders*, 81 Fed. Reg. 67,962 (Dep't of Commerce Oct. 3, 2016). Hyundai commenced this action on November 2, 2016, and filed its complaint on December 2. Summons, ECF No. 1; Compl., ECF No. 9. Hyundai filed its motion for judgment on the agency record on May 2, 2017, and its final motion for judgment on the agency record the next day. ECF Nos. 45– 47 ("Pl.'s Br."). The Government filed its responsive brief in opposition to Hyundai's motion on August 2, 2017. ECF Nos. 53–54 ("Def.'s Br."). Defendant-intervenors filed their joint responsive brief in opposition to Hyundai's motion on the same day. ECF Nos. 51–52 ("Def.Inter.'s Br."). Hyundai filed its reply brief on October 2, 2017. ECF No. 55 ("Pl.'s Reply"). Oral argument was held before the court on December 11, 2017. ECF No. 64.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(l)(B)(i): "[t]he court shall hold unlawful any determination,

finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

DISCUSSION

I. Commerce's AFA Application

Hyundai's argument that Commerce's application of AFA was unsupported by substantial evidence and contrary to law is essentially tripartite. Hyundai argues (1) that Commerce's determination to apply AFA with respect to transactions with its affiliated service providers was contrary to law; (2) that the record regardless confirms that Hyundai's transactions with those affiliates were made on an arm's-length basis; and (3) that Commerce's AFA adjustments were inconsistent with Hyundai's verified questionnaire responses.

A. Commerce's Determination to Apply AFA with Respect to Transactions with Hyundai's Affiliated Service Providers was Supported by Substantial Evidence and in Accordance with Law.

Hyundai argues that Commerce's finding that Hyundai did not cooperate to the best of its ability, per 19 U.S.C. § 1677e(b), was contrary to law because Hyundai provided all requested information during the fact-gathering phase of the investigation,[9] and generally cooperated to the best of its ability at each of the three verifications conducted by the agency. Pl.'s Br. at 12. Hyundai asserts that Commerce "never requested information regarding its service providers' sales prices to unaffiliated *customers* prior to the very last verification," and that Commerce's Sales Verification Outline did not signal that Commerce would reopen the record to request additional sales contracts information from Hyundai's affiliates. Pl.'s Br. at 12 (emphasis added). Hyundai notes that Commerce did, in fact, request that same information from Hyundai in the separate investigation involving cold-rolled steel flat products from Korea. *IDM* at 18 (citing *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 49953 (July 28, 2016)). However, Hyundai argues, that proceeding is irrelevant because Commerce there made its request during the ques-

[9] In response to Commerce's Supplemental Questionnaire request for additional documentation regarding the arm's-length nature of its affiliates' transactions, Hyundai provided the freight contract between the Freight Affiliate and one of its subcontractors, [[ ]], Sec. A-C SQR at Ex. S-38, a worksheet comparing the freight charged by the Freight Affiliate and the freight charged by its subcontractor, *id.* at Ex. S-56, the ocean freight contract between the Freight Affiliate and another of its sub-contractors, [[ ]], *id.* at S-59, and invoices billed to Hyundai Steel by the Freight Affiliate and the invoice billed to the Freight Affiliate by its subcontractor, *id.* at Ex. S-60.

tionnaire phase of the proceeding; further, Hyundai indicated in that proceeding that it had been unable to obtain the same data. Pl.'s Br. at 13.

Hyundai characterizes Commerce's verification-phase request as an ultra vires expansion of the scope of verification in a manner contrary to its purpose, asserting that "[n]owhere in the procedural framework for AFA . . . does the statute or this Court's (or the Federal Circuit's) precedent allow for assessing AFA based on data that were never requested in Commerce's questionnaire or subsequent supplemental questionnaires." Pl.'s Br. at 14. Rather, "the purpose of verification is to verify the accuracy of the information already on the record, not to continue the information-gathering stage of the Department's investigation." Pl.'s Br. at 14 (quoting *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 39 CIT ___, ____, 61 F. Supp. 3d 1306, 1349 (2015)). Hyundai argues that here, the agency's conduct did nothing to "promote cooperation or accuracy or reasonable disclosure by cooperating parties." *Bowe Passat v. United States*, 17 CIT 335, 343 (1993) (Not Reported in F. Supp.). In sum, Hyundai argues that it did in fact cooperate to the best of its ability by doing the maximum it was able to do under the circumstances, and thus the application of AFA per 19 U.S.C. § 1677e(b) was unwarranted. Pl.'s Br. at 14–15.

The court first considers Commerce's decision to resort to facts otherwise available under 19 U.S.C. § 1677e(a) and finds that it was supported by substantial evidence.[10] As has been noted, *supra* pp. 4–5, under the statute, Commerce shall use the facts otherwise available in reaching its final determination if necessary information is not available on the record, or, relevantly, an interested party either withholds information that has been request by Commerce or fails to provide such information by the deadlines for submission. 19 U.S.C. § 1677e(a)(1), (2)(A), (2)(B). Here, Commerce stated that "the necessary information to make [the arm's-length] determination is not on the record due to Hyundai Steel's failure to provide it." *IDM* at 19.

[10] 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)).

Commerce had previously requested in its Supplemental Questionnaire freight contracts between Hyundai's affiliates and all unaffiliated freight providers during the POI for freight and warehousing services in both the U.S. and home market. Supplemental Questionnaire at 16–17, 22–23, 25. Hyundai provided what it characterized as representative examples of various transactions between Hyundai, its affiliates, and unaffiliated parties, but did not furnish in entirety the documents requested by Commerce. Sec. A-C SQR at 31–33, 43–48, Exs. S-38, S-56, S-59, S-60. Finding that information insufficient for the purposes of its arm's-length determination, Commerce at verification again requested freight and insurance documentation between Hyundai, its affiliates, and other unaffiliated parties. *IDM* at 18; Sales Verification Report at 14–15. Commerce explained that this documentation would be used in its sales-trace procedure, which it utilizes to trace the selected sale from initial inquiry and order through a company's records to receipt of payment from the Customer. Sales Verification Report at 14–15; Sales Verification Outline at 9–10. Hyundai did not provide this documentation, instead proffering rates charged by unaffiliated service providers. Hyundai hoped to establish, by way of price comparison, the arm's-length nature of its transactions with its affiliates. *IDM* at 18; Sales Verification Report at 14–15. However, having asked for information of great volume and different variety, and in light of the agency's discretion under the statute, *see infra*, Commerce reasonably found that Hyundai's alternate submissions were insufficient, and that the arm's-length transaction analysis could not be completed without the information that Commerce had requested. *IDM* at 19. Accordingly Commerce's resort to facts otherwise available per 19 U.S.C. § 1677e(a) in order to complete its analysis was reasonable.

The court next considers Commerce's decision to apply AFA under 19 U.S.C. § 1677e(b) with respect to Hyundai's Steel's transactions with its Freight Affiliate and Insurance Affiliate. "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)(1)(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 1353, 1360 (Fed. Cir. 2017) (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*." *Id.* (quoting *Nippon Steel*, 337 F.3d at 1382) (emphasis added).

The procedural background here requires the court to consider the extent of Hyundai's ability to comply with Commerce's request for documentation between its affiliates and unaffiliated parties. Commerce found that "Hyundai Steel and the affiliated companies were held and commonly controlled by the same family members during the POI," to wit, by a "group" possessing "the ability to directly or indirectly control its group members." *IDM* at 19; *see* 19 U.S.C. § 1677(33); *see also Ta Chen Stainless Steel Pipe, Inc. v. United States,* 298 F.3d 1330, 1336 (Fed. Cir. 2002). "[A] person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33). Pertinently, the agency verified that of the Freight Affiliate's two largest shareholders, one is part owner of Hyundai and the other is the Vice Chairman of Hyundai Steel; these individuals are father and son, respectively. *IDM* at 19. Commerce made a similar finding regarding the cross-ownership, by family members, of Hyundai and its Insurance Affiliate. *Id.*; Sales Verification Report at 15. Hyundai does not dispute these findings in the instant proceeding. *See* Pl.'s Br. Commerce's factual determination that the overarching "group" possesses "the ability to directly or indirectly control" its members, including Hyundai, its Freight Affiliate, and its Insurance Affiliate, is supported by substantial evidence.

Given Commerce's finding that these entities were under common control, the agency reasonably expected that Hyundai would be able to access its affiliates' documentation. *IDM* at 19. 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). The record does not disclose that Hyundai attempted to collect the information requested by Commerce at verification nor that Hyundai requested additional time during which to acquire that information. *IDM* at 18; Sales Verification Report at 14–15. Rather, per Commerce, "Hyundai Steel stated that despite the ownership, managerial, and familial affiliations between [Hyundai and its Freight Affiliate], it was not within the Hyundai's Steel's [sic] capability to obtain the requested data." Sales Verification Report at 14. The court emphasizes that Hyundai does not challenge Commerce's findings regarding common control, *see* 19 U.S.C. 1677(33), and that the record contains no explanation for Hyundai's purported inability to gather the requested information, or the nature of Hyundai's attempts to acquire it during this proceeding. Without further explanation of its alleged inability to acquire the requested information, Hyundai cannot be said to have put forth its "maximum efforts" in responding to Commerce's request. *Compare Maverick Tube*, 857 F.3d at 1361 ("[The respondent] effectively concedes that it possessed information necessary to Commerce's investigation, that Commerce requested that information, and that [the respondent] did not provide that information. Such behavior cannot be considered 'maximum effort to provide Commerce with full and complete answers.'").

Hyundai's submissions in lieu of the requested information, *see* Sales Verification Report at 14–15, do not cure Hyundai's failure to act to the best of its ability in responding to Commerce's request. Commerce possesses wide latitude over verification procedures, *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997), including its informational requests. Further, "the burden of creating an adequate record lies with interested parties and not with Commerce." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337 (Fed. Cir. 2016). "The placement of the burden on interested parties stems from the fact that [Commerce] has no subpoena power." *Id.* Accordingly the court is not persuaded that a respondent's submission of substitute information constitutes its "maximum efforts" to comply where the respondent has not offered an adequate explanation for its inability to comply with Commerce's primary request for information. *IDM* at 18–19; Sales Verification Report at 14–15; *compare Husteel v. United States*, 39 CIT ___, ___, 98 F. Supp. 3d 1315, 1361 (2015) ("Failing to provide data requested by Commerce is not the same as being unable to provide the requested data and providing a reasonable alternative.").

The court is further unpersuaded by Hyundai's arguments that it was not on notice that Commerce could request information regarding its affiliates' transactions with unaffiliated customers. Hyundai was aware from Commerce's questionnaires, Sales Verification Outline, and the overarching scheme to determine whether Hyundai's transactions with its affiliates were made at arm's length—and therefore comparable to transactions with unaffiliated parties, per 19 C.F.R. §§ 351.402(e), 351.403[11]—that Commerce required information regarding Hyundai's affiliates and the affiliates' service providers. As a preliminary point, and as explained *supra*, Commerce's determination that Hyundai's controlling group wielded the ability to directly or indirectly control Hyundai's affiliates was supported by substantial record evidence. More substantively, the record demonstrates that Commerce did place Hyundai on notice that its affiliates' contractual documentation could be subject to verification. Indeed, Commerce signaled from the beginning of the proceeding that Hyundai's relationship with its affiliates was subject to scrutiny pursuant to the arm's-length transaction analysis. *See* Initial Questionnaire; *compare Ta Chen*, 298 F.3d at 1336. In its Section A, B, and C questionnaires, Commerce requested, and Hyundai provided, information about the nature of Hyundai's affiliates and their ownership. Sec. A QR at A-10–13; Sec. B-C QR at B-28–31, C-26–28, C-30–31. Commerce later in the Supplemental Questionnaire requested freight contracts between Hyundai's affiliates and all unaffiliated freight providers during the POI for freight and warehousing services in both the U.S. and home market. Supplemental Questionnaire at 16–17, 22–23, 25. Commerce instructed Hyundai to "[r]eview the nature of any affiliations between Hyundai Steel and other companies, including, but not limited to, all suppliers and customers, as reported in your submissions," and to "[i]dentify the shareholders and officers in Hyundai Steel and every affiliated company involved in the production and sale of hot-rolled steel." Sales Verification Outline at 6. Pursuant to its sales-trace procedure, Commerce instructed Hyundai to "incorporate affiliated party documents in the sales trace package" if an affiliated party is involved in the chain of distribution for a specific sales transaction. *Id.* at 9–10. Further, Commerce explicitly characterized its Sales Verification Outline as "not necessarily all inclusive" and "reserve[d] the right to request any additional information or materials necessary for a complete verification." *Id.* at 1. Commerce's regulation covering verification procedures, 19 C.F.R. § 351.307, likewise places respondents on notice that Commerce will

[11] 19 C.F.R. § 351.403 "clarifies the authority of [Commerce] to use sales to or through an affiliated party as a basis for normal value."

request access to all files, records, and personnel relevant to the submitted factual information concerning (1) producers, exporters, or importers; (2) persons affiliated with those producers, exporters, or importers; or (3) unaffiliated purchasers. 19 C.F.R. § 351.307(d).

Similarly, the court is not persuaded by Hyundai's use of the proposition that "[t]he purpose of verification is to verify the accuracy of information already on the record, not to continue the information-gathering stage of [Commerce's] investigation." Pl.'s Br. at 14 (quoting *Borusan*, 61 F. Supp. 3d at 1350 (quoting *Certain Oil Country Tubular Goods From the Republic of Turkey*, 79 Fed. Reg. 41,964 (Dep't Commerce July 18, 2014) (final affirmative countervailing duty determination), accompanying IDM ("COTG IDM") at 55)). That citation iterates Commerce's position that "*parties* may not submit new factual information at verification under the deadlines in 19 C.F.R 351.301."[12] *Borusan*, 61 F. Supp. 3d at 1349 (quoting COTG IDM at 55) (emphasis added). Commerce, by contrast, possesses considerable latitude in the formation and application of its verification procedures, and is authorized to request the submission of factual information "at any time during a proceeding." 19 C.F.R. § 351.301(a); *see Micron*, 117 F.3d at 1396 ("Congress has implicitly delegated to Commerce the latitude to derive verification procedures ad hoc.").

Hyundai additionally argues that Commerce ignored its statutory procedural requirements under 19 U.S.C. § 1677m(d),[13] which requires the agency to provide a respondent "an opportunity to remedy or explain" any alleged deficiency in its informational submissions in light of impending statutory or regulatory deadlines. Pl.'s Br. at 11;

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[12] 19 C.F.R. § 351.301 prescribes time limits for submission of factual information to Commerce during antidumping and countervailing duty proceedings. It provides, in relevant part:

> The Department obtains most of its factual information in antidumping and countervailing duty proceedings from submissions made by interested parties during the course of the proceeding. Notwithstanding paragraph (b) of this section, the Secretary may request any person to submit factual information at any time during a proceeding or provide additional opportunities to submit factual information.

[13] 19 U.S.C. § 1677m(d) provides, in relevant part:

> If [Commerce] determines that a response to a request for information under this subtitle does not comply with the request, [Commerce] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—
>
> (1) [Commerce] finds that such response is not satisfactory, or
>
> (2) such response is not submitted within the applicable time limits,
>
> then [Commerce] may, subject to subsection (e) of this section, disregard all or part of the original and subsequent responses.

Pl.'s Reply at 6–8. Hyundai asserts that Commerce here arranged its AFA determination as a trap, wherein the agency did not request the affiliates' information until verification, yet found an adverse inference warranted due to an alleged reporting error attributable to Hyundai's questionnaire responses.

Hyundai's arguments do not persuade the court that Commerce was statutorily required by 19 U.S.C. § 1677m(d) to take additional actions in the underlying investigation. If Commerce "determines that a response to a request for information under this subtitle does not comply with the request," then it "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established." 19 U.S.C. § 1677m(d). Here, as has been noted, Commerce, in issuing its supplemental questionnaire to Hyundai, specifically stated that it had "reviewed [Hyundai's] responses to [the previous questionnaires] and ha[d] identified certain areas which require additional information, as detailed in the enclosed supplemental questionnaire." The Supplemental Questionnaire explicitly requested documents regarding Hyundai's affiliates. Supplemental Questionnaire at 16–17, 22–23, 25. The Supplemental Questionnaire thereby did provide Hyundai an opportunity to cure purported deficiencies in satisfaction of the highlighted statutory safeguards. *See Maverick Tube*, 857 F.3d at 1361 ("[The respondent] had already failed to provide the information requested in Commerce's original questionnaire, and the supplemental questionnaire notified [the respondent] of that defect. § 1677m(d) does not require more."). However, Hyundai's SQR did not fully comply with Commerce's requests for additional documentation, providing instead individual contracts that it characterized as representative samples. Sec. A-C SQR at 31–33, 43–48, Exs. S-38, S-56, S-59, S-60. As explained *supra*, Commerce had adequately noticed Hyundai that it was investigating the activities of the company's affiliates for the purposes of its arm's-length determination. Upon reviewing the cross-ownership between Hyundai and its affiliates at verification, Commerce found, with the support of substantial evidence, that they operated under common "group" control pursuant to 19 U.S.C. § 1677(33). *IDM* at 18–19. Commerce thus reasonably requested during verification access to the affiliates' documentation, which Hyundai asserted it could not provide. Commerce was not obligated to provide Hyundai with additional safeguards under 19 U.S.C. § 1677m(d).

B. Commerce's Determination that the Transactions were not Made on an Arm's-Length Basis is Supported by Substantial Evidence.

Hyundai also argues that Commerce's determination that Hyundai had "failed to demonstrate the arm's-length nature" of the services provided by its affiliates, *IDM* at 19–20, was unsupported by the evidence in the record, which instead supports the opposite conclusion. Pl.'s Br. at 15.

As to home market inland freight expenses, home market warehousing expenses, and domestic inland freight expenses for export, Hyundai argues that the materials it provided to Commerce — ostensibly demonstrating that the price the Freight Affiliate charged to Hyundai was greater than the cost the Freight Affiliate incurred for procuring the freight service from an unaffiliated provider, Sec. A-C SQR at Ex. S-56 — were the same materials Commerce requested from Hyundai to demonstrate that the services were provided on an arm's-length basis. Pl.'s Br. at 15. Hyundai states that these materials were sufficient for Commerce to conclude that the services were provided on an arm's-length basis in the *Preliminary Results*. *Id.*

Regarding international freight expenses, Hyundai asserts it demonstrated both that its Freight Affiliate passed on the full costs of its services to Hyundai, Sec. A-C SQR at 48, Exs. S59–61, and that Hyundai was charged comparably for the same services by an unaffiliated service provider. Pl.'s Br. at 16–17 (citing Sales Verification Report at 10; Sales Verification Exhibits at Ex. 27).

Finally, as to marine insurance, Hyundai asserts that Commerce verified the expenses charged by the Insurance Affiliate were arm's-length because the prices charged by an unaffiliated provider were comparatively lower. Pl.'s Br. at 16 (citing Sales Verification Report at 15, 21).

The court is not persuaded by Hyundai's argument that the documentation it provided to Commerce necessarily constituted the record evidence required for Commerce to complete its arm's-length determination. Assuming *arguendo* that Hyundai's submissions could support the conclusion that the transactions at issue were made on an arm's-length basis, "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)).

It is also true that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *CS Wind*, 832 F.3d at 1373. Further, 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." *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)). Here, Commerce acknowledged Hyundai's submission of its supportive materials, and reasonably concluded that they did not constitute substantial record evidence that would necessitate Hyundai's preferred conclusion, or permit the completion of the arm's-length analysis pursuant to 19 U.S.C. § 1677b(f)(2). Sales Verification Report at 14–15. Indeed, Hyundai's submissions did not meet the extent of materials requested by Commerce in the Supplemental Questionnaire at 16–17, 22– 23, 25. As has been noted, at verification Commerce requested freight and insurance documentation between Hyundai's affiliates and other unaffiliated parties for the purpose of verifying Hyundai's submitted factual information as it relates to the arm's-length nature of the relevant affiliate transactions. *IDM* at 18. In sum, the court finds reasonable and supported by substantial evidence Commerce's determination that Hyundai's purportedly representative contractual information did not permit a complete arm's-length analysis.

C. Commerce's AFA Adjustments were Made in Accordance with Law.

Hyundai argues that Commerce's AFA adjustments themselves were inconsistent with its verified questionnaire responses, and thus unreasonable.[14] Pl.'s Br. at 18.

Regarding international freight expenses, Hyundai takes issue with Commerce's application of "the highest transaction value . . . to *all* transactions as an AFA adjustment," including those between Hyundai and an unaffiliated provider, rather than to only those transactions between Hyundai and its affiliated provider. Pl.'s Br. at 19 (citing *IDM* at 18–21) (emphasis added). Similarly, regarding domestic inland freight to port, Hyundai argues that Commerce erroneously applied an AFA adjustment to sales for which Hyundai had used an

[14] As to marine insurance expenses, Hyundai argues that it demonstrated, and that Commerce confirmed at verification, that these expenses were on an arm's-length basis, specifically because the rate charged by the Insurance Affiliate exceeded the insurance premium rate charged to Hyundai by an unaffiliated provider. Pl.'s Br. at 18–19. The court, however, reiterates that Commerce's determination regarding the arm's-length nature of Hyundai Steel's transactions was supported by substantial evidence, as discussed *supra*.

unaffiliated freight provider.[15] Pl.'s Br. at 20–21 (citing *IDM* at 19; Sales Verification Report at 20; Sales Verification Exhibits at Exs. 25, 26, 29).

Finally, regarding home market inland freight, Hyundai argues that Commerce was incorrect to apply, as an AFA adjustment, the absolute lowest reported amount for inland freight to the warehouse and inland freight to the customer, where the reported amount was greater than zero, regardless of destination. Pl.'s Br. at 21 (citing Final Determination Calculation Memorandum at 2–3). Specifically, Hyundai argues that Commerce improperly decreased the reported expense for home market sales, while increasing expenses for U.S. sales. *Id.* Rather, Hyundai asserts, Commerce should have applied the same upwards adjustment, in both markets, to all related expenses from a given provider. Pl.'s Br. at 21–22. Hyundai further argues that Commerce erred by using the absolute lowest reported amount as an AFA adjustment, rather than using the lower amount relevant to a given destination. Pl.'s Br. at 22. Per Hyundai, this broad application of the same low value to transactions with freight expenses that logically vary based on destination runs counter to the ostensible purpose of adjusting towards an arm's-length expense. Pl.'s Br. at 22.

The court is satisfied that Commerce acted in accordance with law in utilizing AFA for its arm's-length adjustments in the manner it did. Generally, "Commerce has wide, though not unbounded, discretion 'to select adverse facts that will create the proper deterrent to noncooperation with its investigations and assure a reasonable margin.'" *Papierfabrik*, 843 F.3d at 1380 (quoting *De Cecco*, 216 F.3d at 1032). That discretion is bounded by the relevant statutory framework.

Pursuant to 19 U.S.C. § 1677b(f)(2), Commerce may adjust various expenses incurred for inputs or services provided by affiliates in the dumping margin calculation to reflect market values, if necessary. *See* 19 C.F.R. §§ 351.402(e), 351.403. As has been noted, *supra* pp. 4–5, after finding that a respondent has failed to cooperate by not acting to the best of its ability to comply with a request for information, 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)(1)(A). Under the adverse facts available framework, Commerce's decision to apply, as adverse inferences, the highest values to the expenses incurred in the U.S. market, and the lowest values to expenses incurred in the home market, was reasonable and in accordance with law. As described *supra*, Commerce's determination that it did not possess sufficient record evidence to complete its

[15] This unaffiliated freight provider is named [[ ]].

arm's length analyses was supportable. The agency thus reasonably resorted to facts otherwise available per 19 U.S.C. § 1677e(a), and ultimately AFA pursuant to § 1677e(b), upon determining that Hyundai did not act to the best of its ability in responding to Commerce's request for certain information. Here, Commerce determined that Hyundai failed to satisfy the completeness part of verification with regard to international freight and inland freight, and properly applied AFA adjustments to those categories of transactions.[16] Sales Verification Report at 14–15; *IDM* at 19. Further, Commerce was not required to demonstrate that the application of AFA "reflect[ed] an alleged commercial reality" of Hyundai. 19 U.S.C. § 1677e(d)(3). The court therefore finds unpersuasive Hyundai's argument that home market inland freight expenses should have been adjusted, adverse inference notwithstanding, in reflection of the relativity of expenses among freight to different locations. Commerce's AFA application and execution of the arm's-length adjustments pursuant to 19 U.S.C. §§ 1677e, 1677b, respectively, were thus reasonable and in accordance with law.

II. CEP Offset

Hyundai contends that Commerce's determination that Hyundai Steel did not qualify for a CEP offset (1) was not supported by substantial evidence on the record and (2) was arbitrary and capricious because Commerce had granted Hyundai CEP offsets in proceedings involving different but similarly distributed products. Pl.'s Br. at 22; Pl.'s Reply at 12–13. The court is not persuaded by Hyundai's arguments.

A. Commerce's Denial of a CEP Offset Is Supported by Substantial Evidence.

Hyundai contends that Commerce's CEP offset denial was unsupported by substantial evidence because Hyundai's home market level of trade is more advanced than its U.S. level of trade. Pl.'s Br. at 22. As previously discussed, substantial evidence is "more than a mere scintilla," but "less than the weight of the evidence." *Altx*, 370 F.3d at 1116. "A finding is supported by substantial evidence if a reasonable mind might accept the evidence as sufficient to support the finding."

[16] Regarding Hyundai's arguments that Commerce's application of AFA adjustments to transactions with unaffiliated service providers was improper, the court notes that Hyundai did not fully develop the record. As to domestic inland freight, Hyundai did not provide Commerce with information that would have allowed the agency to determine which vendor provided inland freight services on a sale-by-sale basis. As to international freight, Commerce noted that "[w]hile the company had reported [[ ]] as a subcontractor for [[ ]], we observed that based on the documentation for this transaction, [[ ]] itself was the ocean freight provider." Sales Verification Report at 21.

Maverick Tube, 857 F.3d at 1359 (citing *Consol. Edison*, 305 U.S. at 229). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *CS Wind*, 832 F.3d at 1373. This includes "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica*, 44 F.3d at 985 (quoting *Universal*, 340 U.S. at 487).

In Hyundai's view, the record established that Hyundai Steel performed significantly less selling activities related to its U.S. affiliates than its unaffiliated home market customers in all four categories of selling activities that Commerce usually considers in its CEP offset analysis: (1) sales and marketing activities; (2) freight and delivery; (3) inventory and warehousing; and (4) warranty and technical support. Pl.'s Br. at 23; *IDM* at 24; *see*, *e.g.*, *Certain Orange Juice from Brazil*, 75 Fed. Reg. 50,999 (Dep't of Commerce Aug. 18, 2010) and accompanying *IDM* at cmt. 7 (dividing selling functions into the four categories).

Regarding (1) sales and marketing activities, Hyundai argues that, although it "plays a supporting role to its [U.S.] affiliates," Hyundai alone performs these activities in its very large and profitable home market and thus performs them to a greater degree in its home market. Pl.'s Br. at 24; HCUSA CEP Sales Verification Exhibits at Exhibit 10, P.R. 275, C.R. 496; Sec. A QR at Ex. A-1; Sec. B-C QR at Ex. B-9. With respect to (2) freight and delivery activities, Hyundai acknowledges that Hyundai delivered its products to both the home market and the U.S. market, but that the volume of home market shipments, variation in shipment quantity, and number of home market customers indicate that it performed this function at a more intense level in its home market. Pl.'s Br. at 25. As for (3) inventory and warehousing, Hyundai states that it incurred warehousing expenses for some home market sales but for no U.S. sales, and argues that this selling function was thus performed to a greater degree in its home market. Pl.'s Br. at 25; Sec. B-C QR at Ex. B-29, Ex. C-31. Finally, regarding (4) warranty and technical support, Hyundai contends that although it guarantees its products in all markets, it only manages and incurs warranty expenses in its home market, which Hyundai argues establishes that the warranty function was performed at different levels of trade in the U.S. and home markets. Pl.'s Br. 25; Sec. B-C QR at Ex. C-38.

The court is not persuaded that Commerce's determination is unsupported by substantial evidence. Although Hyundai argues that its home market's significantly greater size — and accompanying greater number of customers and sales transactions — means that its home market is at a more advanced level of trade with regards to category

(1), sales and marketing activities, these factors do not have an impact on the type of selling functions performed or the level of intensity of those selling functions in a market. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.*, 60 Fed. Reg. 10,900, 10,940–41 (Dep't of Commerce Feb. 28, 1995) (final administrative review) ("[N]umber of sales to customers at a given level of trade is irrelevant to rendering determinations regarding the existence of distinct levels of trade"); *Furfuryl Alcohol From the Republic of South Africa*, 63 Fed. Reg. 11,209, 11,211 (Dep't Commerce Mar. 6, 1998) (preliminary administrative review) ("[O]ur examination is not contingent on the number of customers nor on the number of sales for which the activity is performed.").

Regarding category (2), freight and delivery, Hyundai stated in the administrative record that "Hyundai is responsible for arranging the entire freight service process for both the U.S. and home market sales" and reported a "high degree of activity for freight services in both the U.S. and home market sales," which supports Commerce's finding that this category of selling functions was performed at the same level of trade in both markets. Sec. A-C SQR at 9. Further, as explained above, the number of customers or transactions are not taken into account as part of the level of trade analysis. *See Furfuryl Alcohol*, 63 Fed. Reg. at 11,211.

Regarding category (3), inventory and warehousing and category (4), warranty and technical support, Hyundai's claims that it incurred greater warehousing and warranty expenses in its home market are not sufficient to render Commerce's denial unsupported by substantial evidence. First, Hyundai reported more intense involvement with the warranty selling function in the U.S. market than the home market. Sec. A QR at Ex. A-13. More importantly, the minor differences in these categories Hyundai emphasizes are not enough to merit a CEP offset: "[a]lthough [an importer] may perform more selling functions or may perform selling functions more intensely in its home market, these differences do not warrant a CEP offset. The CEP offset provision applies in situations in which there is a substantial difference in the level of trade." *Sucocitrico Cutrale*, 2012 WL 2317764, at *6 (citing *Micron*, 234 F.3d at 1305). Minor differences are inadequate; the variation in selling functions must be substantial, "such as the difference between wholesale and retail," to merit a CEP offset. *Id.*; *see* 19 C.F.R. § 351.402(c)(2) ("Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing.").

Commerce reasonably determined that the differences here were not substantial. *IDM* at 25. According to evidence in the record, overall, only two out of the sixteen selling functions — cash discounts and direct guarantees — provided in the home market were not provided in the U.S. market. *Id.* Further, according to the selling functions chart Hyundai placed on the record, it provided most services at the same level of intensity in both markets. Sec. A QR at Ex. A-13. Even though Hyundai reported lower levels of intensity for some selling activities in the U.S. market, for about as many others, it reported higher levels of activity in the U.S. market. *Id.*

This Court has found previously that Commerce reasonably determined that such minor differences are not substantial enough to merit a CEP offset, and the court finds the underlying reasoning persuasive here:

> Commerce determined that Cutrale performed seven common selling functions at a similar level of intensity in both its home and U.S. markets, with "relatively minor differences" between the levels in the two markets. *See* Gov't Br. at 27. Commerce also found that the one additional home market function Cutrale performed-advertising-was not significant. Although Commerce noted minor differences between the two markets, these differences do not rise to the level required by the statute, such as the difference between wholesale and retail. *See Micron Tech.*, 234 F.3d at 1305. Thus, Commerce's factual determination that there is not a substantial difference in the levels of trade in the two markets is reasonable and supported by substantial evidence. Therefore, this Court upholds Commerce's decision that Cutrale is not entitled to a CEP offset.

Sucocitrico Cutrale, 2012 WL 2317764, at *6.

In light of the foregoing considerations, the court finds that Commerce's denial of the CEP offset was supported by substantial evidence.

B. Commerce's CEP Offset Denial Was Not Arbitrary and Capricious.

"[A]n agency's finding may be supported by substantial evidence," yet "nonetheless reflect arbitrary and capricious action." *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012) (quoting *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974)). While

"the substantial evidence standard applies to review of factual determinations," where "we are evaluating the agency's reasoning . . . [we] review[ ] under the arbitrary and capricious (or contrary to law) standard." *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983)); *see* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012) (directing that the Court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). "[W]here the agency is vested with discretion to set the procedure by which it administers its governing statute, the court reviews such decisions for abuse of discretion . . . . In abuse of discretion review, 'an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.'" *Jiangsu Jiasheng Photovoltaic Tech. v. United States*, 38 CIT ___, ___, 28 F. Supp. 3d 1317, 1323 (2014) (quoting *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001)).

Hyundai contends that Commerce's determination that Hyundai Steel did not qualify for a CEP offset was arbitrary and capricious because Commerce had granted Hyundai CEP offsets in proceedings involving different but similarly distributed products. Pl.'s Reply at 12–13. According to Hyundai, "Commerce provided no meaningful justification for reaching the opposite conclusion regarding the same sales channels and similar products in" this case, and thus violated the "fundamental principle of administrative law that '[w]hen an agency changes its practice, it is obligated to provide an adequate explanation for the change.'" Pl.'s Reply at 14–15 (quoting *SKF USA, Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011)).

"While it is true that [a]n agency is obligated to follow precedent," Commerce retains "discretion to . . . adapt its views and practices to the particular circumstances of the case at hand, so long as the agency's decisions are explained and supported by substantial evidence on the record." *M.M. & P. Maritime Advancement, Training, Educ. & Safety Program v. Dep't Commerce*, 729 F.2d 748, 755 (Fed. Cir. 1984); *Nakornthai Strip Mill Public Co. Ltd. v. United States*, 31 CIT 1272, 1276–77, 587 F. Supp. 2d 1303, 1307–08); *see also Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1135, 724 F. Supp. 2d 1327, 1343 (2010). Hyundai took into account the "particular circumstances of the case at hand" when reaching its decision, as discussed *supra*. The other cases Hyundai mentions involve different products, markets, and time periods, and the record before the court does not show how similar the selling functions Hyundai performed in those situations were to the selling functions Hyundai performed in this case. The selling functions in those cases could well have differed from the

functions Hyundai performed here, and thus Commerce could reasonably have come to a different conclusion about the applicability of a CEP offset in those cases based on the particular relevant facts. Therefore, the court is not persuaded that Commerce's "opposite conclusions" in those cases mean that Commerce acted arbitrarily here.

Further, "[e]ven assuming Commerce's determinations at issue are factually identical, as a matter of law a prior administrative determination is not legally binding on other reviews before this court." *Alloy Piping Prod., Inc. v. United States*, 33 CIT 349, 358–59 (2009) (rejecting the plaintiffs' contention that, because the facts were nearly identical in a previous administrative review and the review at issue, Commerce acted arbitrarily by denying a CEP offset in one review but granting it in the other (citing *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1352 (Fed. Cir. 2006))) (Not Reported in F. Supp. 2d). Moreover, Commerce is not bound by decisions made in different segments of a proceeding, let alone decisions made in different proceedings. *See Pakfood*, 724 F. Supp. 2d at 1345 (finding that "Commerce makes determinations based upon the record of the relevant segment of the proceeding, not previous segments, and [that] the record of this review supports Commerce's determination" in the third administrative review despite coming to the opposite conclusion in the first and second administrative reviews of the same antidumping duty order). Thus, the court does not find that Commerce acted arbitrarily and capriciously in denying the CEP offset.

CONCLUSION

For the foregoing reasons, Commerce's *Final Results* are sustained. ***So Ordered***.

Dated: December 27,2017
New York, New York

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