

U.S. Customs and Border Protection



Slip Op. 13–94

ALCAN FOOD PACKAGING (SHELBYVILLE), Plaintiff, v. UNITED STATES,
Defendant.

Before: Judith M. Barzilay, Senior Judge
Court No. 09–00095
Public Version

[On classification of Flexalcon material, summary judgment granted for Defendant.]

Dated: July 25, 2013

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Aimee Lee, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Paula Smith*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

BARZILAY, Senior Judge:

This case is before the court on cross-motions for summary judgment. Plaintiff Alcan Food Packaging (Shelbyville) (“Alcan”), challenges the decision of Defendant U.S. Customs and Border Protection (“Customs”) denying Alcan’s protests of Customs’s classification of its “Flexalcon” (short for Flexible Aluminum Conserve) packaging material within the Harmonized Tariff Schedule of the United States (“HTSUS”). Customs classified the subject merchandise under the provision for “plastics” and rejected Alcan’s proposed classification of the merchandise under the provision for “aluminum foil.” More specifically, Customs classified the subject merchandise under HTSUS subheading 3921.90.40, which carries a 4.2% *ad valorem* duty. Alcan, however, contends that the subject merchandise is properly classified under HTSUS subheading 7607.20.50, which is duty free. Alcan filed an application for further review, which Customs denied in a Ruling Letter. *See* HQ Ruling H008142 (Nov. 26, 2008). This matter involves imported merchandise from Germany, entered through the Ports of

Louisville, Blaine, and Detroit between October 2005 and September 2006. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). For the reasons set forth below, Plaintiff's motion for summary judgment is denied and Defendant's motion is granted.

I. STANDARD OF REVIEW

The court reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine dispute as to any material fact . . ." USCIT R. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering whether material facts are in dispute, the evidence must be considered in a light most favorable to the non-moving party, drawing all reasonable inferences in its favor, as well as all doubts over factual issues. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 253–54.

A classification decision involves two steps. The first addresses the proper meaning of the relevant tariff provisions, a question of law. *See Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). The second step determines the nature of the imported merchandise and is a question of fact. *See id.* When there is no factual dispute regarding the merchandise, as is the case here, the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998).

While the court accords deference to Customs' classification rulings relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

II. UNDISPUTED FACTS

The following facts are not in dispute. The subject merchandise is known commercially as Flexalcon. It consists of plastic film and aluminum foil. Flexalcon is produced by laminating aluminum foil with multiple layers of plastic film. [[

]]. Flexalcon is imported on reels as two separate products (base and lid material). The base material is formed into a pouch and the lid material covers the base.

The base and lid materials are designed to form a package that holds food. Flexalcon packages store and extend the shelf-life of food in the form of ready-to-eat meals. They are a substitute for conventional preserve packaging such as aluminum cans, steel cans, or glass jars.

[[] Flexalcon is used by the United States military to package ready-to-eat meals for soldiers (called “Meals, Ready-to-Eat” or “MREs”). The remaining imported Flexalcon material is used for packaging the same type of meals for allied forces. From World War II until 1980, U.S. Army field rations were supplied as shelf stable processed foods in metal cans, called “C-rations.” In 1980, the first retort pouch rations (MREs) were procured by the military and have subsequently been deployed in ground operations around the world. *See* Def. Ex. G at 4 n.2 (Dunn Declaration).

Flexalcon has the following components: (1) Polyethylene Terephthalate (PET) film: provides tensile strength during production, processing, and in the final product. It also has the heat resistance properties necessary to withstand the retort and sealing processes. PET film is a print carrier film and therefore can accommodate printing; (2) Aluminum Foil: provides the barrier properties for Flexalcon. Specifically, it provides an absolute barrier against gas, moisture, and light. Aluminum foil enhances the packaging stiffness, provides support, and is able to withstand the deep drawing process; (3) Polypropylene (PP) film: provides the layer of film that is used to seal the Flexalcon base and lid materials and form a package. It has high heat resistance for the retorting process. It is the layer of film that comes in direct contact with the food. PP film also provides support to the aluminum foil, prevents corrosion of the foil, and enhances the finished package’s stiffness; (4) Oriented Polyamide (OPA) film: provides durability for the entire laminate structure by increasing the burst strength and improving piercing and flex-crack/pinhole resistance. It improves the overall durability and reliability of the package and therefore reduces production and inspection related costs. Is also contributes to the flatness of the laminate by reducing curling; and (5) Oriented Polypropylene (OPP) film: protects the aluminum foil layer of the base material (pouch) from external abuse and stiffens the filled pouch. The materials are laminated [[]].

Flexalcon base material has [[]] layers: [[]] layers of plastic film and [[]] layer of aluminum foil. From outside to inside, the base material is composed of (1) [[]] microns of oriented polypropylene (plastic), (2) [[]] microns of aluminum strip (aluminum foil), (3) [[]] microns of oriented polyamide film (plastic), and (4) [[]] microns of polypropylene film (plastic). The plastic layers account for

[[]] of the thickness, [[]] of the weight, and [[]] of the value of the material. The foil layer accounts for [[]] of the thickness, [[]] of the weight, and [[]] of the value. Adhesive accounts for the balance. Some of the base material is made in colored styles (*i.e.*, olive green or sand beige). [[]].

Flexalcon lid material has [[]] layers: [[]] layers of plastic film and [[]] layer of aluminum foil. From outside to inside, the lid material is composed of (1) [[]] microns of polyethylene terephthalate film (plastic), (2) [[]] microns of aluminum strip (aluminum foil), and (3) [[]] microns of polypropylene film (plastic). The plastic layers account for [[]] of the thickness, [[]] of the weight, and [[]] of the value of the material. The foil layer accounts for [[]] of the thickness, [[]] of the weight, and [[]] of the value of the lid. Some of the lid material is made in the same colored styles. [[]].

After the food is placed inside the base material, the base and lid material are hermetically¹ sealed to form a package. The seal is formed by applying pressure with heated bars to melt the PP layers together. The sealed package then undergoes a retorting process, which is a method of heat sterilization (250 degrees for approximately 45–60 minutes). It destroys any impurities that may exist in the food. The sealed package prevents light, water vapor, oxygen, microorganisms, mold, yeast, odor, and insects from reaching the food contents. It also prevents the loss of aroma, vitamins, liquid, fat, and carbon dioxide/nitrogen. It therefore protects and preserves the contents inside the package safely over a long shelf-life (three years) with no refrigeration. The aluminum foil provides barrier properties that give MREs a three-year shelf-life. Although the plastic layers provide some barrier properties, they allow oxygen migration and therefore cannot provide the same barrier properties as aluminum foil. The plastic layers, however, do provide specific support functions for the aluminum foil by (1) improving deep drawing formability, which refers to the extent to which the material can be drawn or stretched to form a pocket in the base material; (2) improving piercing and pinhole strength; (3) improving flex-crack resistance; (4) protecting the foil from environmental influences; (5) improving overall package durability; and (6) providing a seal for the package.

III. DISCUSSION

The “General Rules of Interpretation (“GRIs”) govern classification of merchandise under the HTSUS, and are applied in numerical

¹ A hermetic seal is defined as “a seal that is impervious to air and other fluids.” Academic Press, Dictionary of Science and Technology at 1015 (1992).

order.” *Honda of Am. Mfg. v. United States*, 607 F.3d 771, 773 (Fed. Cir. 2010) (internal quotations and citations omitted). “What is clear from the legislative history of the World Customs Organization (“WCO”) and case law is that GRI 1 is paramount.” *Telebrands Corp. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1277, 1280 (2012). When determining the correct classification for merchandise, a court first construes the language of the headings in question, in light of any related section or chapter notes. *See* GRI 1; *Faus Grp., Inc.*, 581 F.3d at 1372 (citing *Orlando Food Corp.*, 140 F.3d at 1440). Similarly, GRI 6 states that “classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related notes and, *mutatis mutandis*, to the above rules.” GRI 6. The “terms of the HTSUS are construed according to their common commercial meanings.” *Millenium Lumber Distrib. Ltd. v. United States*, 558 F.3d 1326, 1329 (Fed. Cir. 2009). To ascertain the common commercial meaning of a tariff term, the court “may rely on its own understanding of the term as well as lexicographic and scientific authorities.” *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The court may also refer to the Harmonized Description and Coding System’s Explanatory Notes (“Explanatory Notes”) “accompanying a tariff subheading, which—although not controlling— provide interpretive guidance.” *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron*, 334 F.3d at 1309).

The dispute in this case concerns whether Flexalcon is properly classified as plastic film under HTSUS subheading 3921.90.40 or aluminum foil under the HTSUS subheading 7607.20.50. The applicable tariff provisions provide:

3921	Other plates, sheets, film, foil and strip, of plastics:	
3921.90	Other:	
3921.90.40	Flexible	4.2%
	* * *	
7607	Aluminum foil (whether or not printed, or backed with paper, paper-board, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2mm:	
7607.20	Backed:	
7607.20.50	Other	Free

HTSUS subheadings 3921.90.40, 7607.20.50. The subheadings are *eo nomine* provisions, or more simply, provisions “that describe[] an article by a specific name, not by use.” *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (citing *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)). Absent

limiting language or contrary legislative intent, an *eo nomine* provision covers all forms of the named article. *Nidex Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995).

Plaintiff argues that Flexalcon is properly classified as “backed aluminum foil” under HTSUS subheading 7607.20.50. Plaintiff claims that plastic-aluminum foil laminations are provided for under Heading 7607. Pl. Br. 16. More specifically, Plaintiff argues that Flexalcon should be classified using an “essential character” analysis under GRI 1. Pl. Br. 10. Plaintiff suggests that the court should focus its essential character analysis “primarily on comparing each component of Flexalcon as it relates to the use and function of this product,” rather than comparing the relative “thickness, weight, and value” of the component materials. Pl. Br. 11. Plaintiff claims that the “primary and indispensable function of the Flexalcon material is to provide an extended shelf-life to packaged foods.” Pl. Br. 12. Plaintiff then observes that it is the aluminum foil, rather than the plastic film, that gives Flexalcon its extended shelf-life (*i.e.*, its essential character), thereby justifying classification under HTSUS subheading 7607.20.50. Pl. Br. 11–16; Pl. Resp. Br. 1, 5–12.

Customs, however, maintains that Flexalcon is properly classified as “flexible plastic film” under HTSUS subheading 3921.90.40. Customs contends that proper classification of the subject merchandise can be accomplished through a routine application of GRI 1 and does not require an “essential character” analysis. Def. Br. 9–16. More specifically, Customs argues that the “presence of a thin aluminum layer in the Flexalcon material does not preclude classification under . . . Heading 3921 [because the tariff provision] covers sheets or films of plastics combined with other materials including metal (*i.e.*, aluminum) foil. Examining Heading 3921 in the context of the surrounding tariff headings, demonstrates that ‘other’ plates, sheets, film, foil and strip of plastics include the combination of plastics and metal.” Def. Br. 10. Customs also argues that the Explanatory Notes to Heading 3921 support its classification of Flexalcon because the tariff provision covers “cellular products or those which have been reinforced, laminated, supported or similarly combined with other materials.” Def. Br. 11 (quoting Explanatory Notes to Heading 3921) (emphasis in original). Customs claims that the Explanatory Notes to Chapter 39 are even more compelling because they provide for “Plates, sheets, etc., of plastics, separated by a layer of another material such metal foil, paper, paperboard.” Def. Br. 12 (quoting Explanatory Notes to Chapter 39) (emphasis in original). Alternatively, Customs argues that even if an “essential character” analysis is appropriate, the majority of factors suggest that Flexalcon has the

essential character of plastic, not aluminum foil. Def. Br. 16. Customs claims that the primary function of Flexalcon is to serve as a package for holding food, something that can only be accomplished by sealing the PP layers of the base and lid materials. Def. Br. 19–22.

The court will begin by defining the applicable tariff terms and then consider the proper classification of the subject merchandise. The court will first consider HTSUS Heading 3921 and then move to HTSUS Heading 7607.

A. Definition of Plastic Film Under Heading 3921

The “expression plastics means those materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by molding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.” Notes to Chapter 39, Note 1. Plastic film “is made from polyvinyl chloride, polyethylene, polypropylene, polystyrene, Mylar, and other resins; used for wrapping, sealing, garment waterproofing, and coating wood, paper, or fabric.” McGraw Hill Dictionary of Scientific and Technical Terms at 1613 (2003).

Heading 3921 covers “Other plates, sheets, film, foil and strip, of plastics.” Given that the heading refers to “*other* plates, sheets, etc.,” it should be read together with the preceding headings that cover similar products. For example, Heading 3918 covers “Floor coverings of plastics; . . . wall and ceiling coverings of plastics”; Heading 3919 covers “Self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics”; and Heading 3920 covers “Other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials.” HTSUS Headings 3918, 3919, and 3920. Heading 3920 is very similar to Heading 3921. The former *excludes* plastic film that has been “reinforced, laminated, supported or similarly combined” and the latter *includes* plastic film that has been combined with other materials. Therefore, Heading 3921 covers composite products that would be excluded under Heading 3920.

Note 10 of Chapter 39 provides:

In headings 3920 and 3921, the expression “*plates, sheets, film, foil and strip*” applies only to *plates, sheets, film, foil and strip (other than those of chapter 54)* and to *blocks of regular geometric shape*, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) *but not further worked* (even if when so cut they become articles ready for use).

Notes to Chapter 39, Note 10 (emphasis added). With regard to Note 10, the parties dispute whether the term “but not further worked” modifies both preceding clauses (“plates, sheets, film, foil and strip” and “blocks of regular geometric shape”) or just the immediately preceding clause (“blocks of regular geometric shape”). Customs argues, albeit in an exhibit, that the modifier *but not further worked* applies only to the immediately preceding clause. Pl.’s Br. Ex. 26 ¶ 7(a); HQ Ruling H008142. Plaintiff, however, argues that the modifier *but not further worked* applies to both preceding clauses. Pl. Br. 20–21.

The last antecedent rule provides that “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). In this case, though, the limiting clause that begins with “whether or not” is separated from the preceding clause with a comma. With the comma, the limiting clause that begins with “whether or not”—which includes the modifier *but not further worked*—can be applied to Note 10 generally and therefore modifies both preceding clauses. See, e.g., Antonin Scalia & Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts* 161 (2012). In past cases, moreover, Customs has construed the limiting language in Note 10 as reaching back to the first clause. See HQ Ruling 967463at 4 (Feb. 10, 2005) (“Note 10 to Chapter 39, HTSUSA, states, in relevant part, that the expression ‘*plates, sheets, film, foil and strip*’ in heading 3921 . . . includes plates, sheets, film, foil and strip *whether or not printed or otherwise surface worked, uncut or cut into rectangles, but not further worked.*”) (emphasis in original); HQ Ruling 966944 (Oct. 22, 2004) (“Note 10 to Chapter 39, HTSUS, includes film whether or not surface worked but not further worked.”); HQ Ruling N013255 (July 19, 2007) (“The perforation is considered to be a further working of the sheet that excludes it from classification in heading 3920.”). In the HQ Ruling for this case, however, Customs changed its position but did not reconcile its views or cite any authority that might justify some level of deference. See HQ Ruling H008142. The court therefore construes the limiting language in Note 10 as applying to both preceding clauses. The net effect is that Heading 3921 does not cover plastic film that has been “further worked.”

The Explanatory Notes provide further guidance on the scope of Chapter 39. They specifically address plastics that have been combined with other materials:

This Chapter also covers the following products, whether they have been obtained by a single operation or by a number of successive operations **provided** that they retain the *essential*

character of articles of plastics:

. . . .

(b) Plates, sheets, etc., of plastics, separated by a layer of another material such as metal foil, paper, paperboard.

Explanatory Notes to Chapter 39 at VII-39-13 (2012) (bold in original) (emphasis added). This language suggests that an “essential character” analysis may be necessary to determine whether certain products are properly classifiable as plastics. The Explanatory Notes for Heading 39.21 state:

This heading covers plates, sheets, film, foil and strip, of plastics, **other than** those of **heading 39.18, 39.19 or 39.20** or of **Chapter 54**. It therefore covers only cellular² products or those which have been reinforced, laminated, supported or similarly combined with other materials.

at VII-3921-1 (bold in original). Together, the Explanatory Notes specifically reference plastic film that incorporates a layer of “metal foil” and plastic film that has been “laminated” with other materials. Plastic film that has these characteristics is classifiable under Heading 3921, which follows logically from Heading 3920, which excludes plastic film that has been “reinforced, laminated, supported or similarly combined with other materials.” HTSUS Heading 3920.

Under Heading 3921, therefore, plastic film whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use), includes (1) plastic products that are separated by a layer of another material such as metal foil, paper, paperboard; and (2) plastic products that have been reinforced, laminated, supported or similarly combined with other materials, provided they retain their essential character as articles of plastics. At the subheading level, subheading 3921.90.40 covers “flexible” plastic film or plastic film that is “capable of being flexed.” *See Webster’s Third New International Dictionary* at 869 (1993).

B. Definition of Aluminum Foil Under Heading 7607

Aluminum “is a bluish-white metal characterized by its lightness. It is very ductile and easily rolled, drawn, forged, stamped, and may be case, etc. Like other soft metals, aluminum is also very suitable for extrusion and die-casting.” General Explanatory Notes to Chapter 76

² “Cellular plastics are plastics having many cells (either open, closed or both), dispersed throughout their mass. They include foam plastics, expanded plastics and microporous or microcellular plastics. They may be either flexible or rigid.” Explanatory Notes to Chapter 39 at VII-39-12.

at XV-76-3 (2012). Aluminum foil is a “thin aluminum sheet, widely used as a food wrapping, cooking sheet, and insulation backing.” Academic Press of Science and Technology at 87 (1992). It is “often backed with paper, paperboard, plastics or similar backing materials, either for convenience of handling or transport, or in order to facilitate subsequent treatment, etc.” Explanatory Notes to Heading 74.10 at XV-7410-1 (2012) (Explanatory Note to Heading 74.10 (copper foil) applies *mutatis mutandis* to Heading 76.07).

Heading 7607 covers “Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2mm.” Note 1(d) of Chapter 76 defines the scope of Heading 7607:

Headings 7606 and 7607 apply, . . . to plates, sheets, strip and foil with patterns (for example, grooves, ribs, checkers, tears, buttons, lozenges) and to such products which have been perforated, corrugated, polished or coated, provided that they do not thereby *assume the character* of articles or products of other headings.

Notes to Chapter 76, Note 1(d) (emphasis added). Note 1(d) also indicates that an “essential character” analysis may be appropriate to determine whether certain products are properly classifiable as aluminum foil.

The General Explanatory Notes to Chapter 76 provide:

Products and articles of aluminum are frequently subjected to various treatments to improve the properties or appearance of the metal, to protect it from corrosion, etc. These treatments are generally those referred to at the end of the General Explanatory Note to *Chapter 72*, and do not affect the classification of the goods.

General Explanatory Notes to Chapter 76 at XV-76-4 (2012) (emphasis added). In turn, the General Explanatory Notes to Chapter 72 provide:

(C) Subsequent manufacture and finishing

The finished products may be subjected to further finishing treatments or converted into other articles by a series of operations such as:

....
(2) **Surface treatments** or other operations, . . . , to improve the properties or appearance of the metal, protect it against rusting and corrosion, etc. Except as otherwise provided in the text of certain headings, such treatments do not affect the heading in which the goods are classified. They include:

....
(d) Surface finishing treatment, including:

....
(v) coating with non-metallic substances, e.g., ...
coating with ceramics or plastics[.]

....
(g) Lamination[.]

General Explanatory Notes to Chapter 72 at XV-72–10, -11 (bold in original). The Explanatory Notes to Chapter 72 mention “lamination” as a type of surface finishing treatment that would also apply to Chapter 76. This would expand the scope of the Heading 7607 to include foil products that have been perforated, corrugated, polished or coated, and laminated.

Under Heading 7607, therefore, aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2mm, include products which have been surface treated (*i.e.*, polished, coated, or laminated), provided that they do not thereby assume the character of articles or products of other headings. At the subheading level, subheading 7607.20.50 provides for “backed” aluminum foil and then further divides the subheading to cover “other” backed aluminum foil. *See* HTSUS Subheading 7607.20.50. The HTSUS does not define the term “backed.” The term is generally described as foil products that have been combined with “paper, paperboard, plastics or similar backing materials, either for convenience of handling or transport, or in order to facilitate subsequent treatment, etc.” Explanatory Notes to Heading 74.10 at XV-7410–1. The parties dispute whether the term “backed” is limited to aluminum foil products that have been reinforced (backed) with another material on one-side only or can include aluminum foil products that have been reinforced on both sides. Pl. Br. 22; Def. Br. 26. As discussed in the next section, it is not necessary to decide this issue because the court has determined that Heading 7607 does not cover this particular product.

C. Classification of the Subject Merchandise

Flexalcon is a composite product made of aluminum foil and various types of plastic film. A GRI 3(b) analysis is often applied to resolve classification disputes involving composite goods but here it is not necessary because both tariff provisions contemplate goods that have been combined with other materials. *See 3G Mermet Fabric Corp. v. United States*, 25 CIT 174, 176, 135 F. Supp. 2d 151, 154–55 (2001). Flexalcon satisfies the definition of “plastic film” under HTSUS

Heading 3921. It is undisputed that Flexalcon base and lid materials contain [[]] layers of cellular plastic film combined with a [[]] layer of aluminum foil. As defined by the court, Heading 3921 provides for this type of product. The Explanatory Notes specifically state that Chapter 39 covers “[p]lates, sheets, etc., of plastics, separated by a layer of another material such as metal foil,” Explanatory Notes to Chapter 39. The Explanatory Note to Heading 3921 borrows language from Heading 3920 to describe the type of composite materials provided for under Heading 3921. It states that Heading 3921 “covers only cellular products or those which have been reinforced, laminated, supported or similarly combined with other materials.” See Explanatory Note to Heading 39.21; see also HTSUS Heading 3920. The Explanatory Notes, therefore, provide a good deal of specificity on the scope of Heading 3921. They indicate that Heading 3921 covers plastic film laminates “separated by a layer of another material such as metal foil,” which describes Flexalcon fairly well. Flexalcon base and lid material can reasonably be described as plastic film separated by a layer of aluminum foil. As for the proper subheading, there is no dispute that Flexalcon is flexible. Flexalcon, therefore, is classifiable as flexible plastic film under HTSUS subheading 3921.90.40.

Moreover, the aluminum foil layer does not change the “essential character” of Flexalcon from an article of plastic under Heading 3921 to an article of aluminum foil under Heading 7607. See Explanatory Notes to Chapter 39 at VII-39–13. An essential character test is a fact intensive analysis. See, e.g., *Arko Foods Intern., Inc. v. United States*, 654 F.3d 1361, 1365 (Fed. Cir. 2011). The GRI’s do not define “essential character” but the Explanatory Note to GRI 3(b) states that “the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.” Explanatory Notes to GRI 3(b) at GIR-5 (2012) (bold in original). The “factor which determines essential character will vary as between different kinds of goods” and “may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.” *Id.* In making this determination, the Court will consider whether the component part (plastic film or aluminum foil) imparts qualities that are “indispensable” to the functioning of the subject merchandise. *3G Mermet Fabric Corp.*, 135 F. Supp. 2d at 158–159 (citing *Better Home Plastics Corp. v. United States*, 20 CIT 221, 227, 916 F. Supp. 1265, 1269 (1996), *aff’d* 119 F.3d 969 (Fed. Cir. 1997)).

In this case, the plastic layers predominate in terms of “bulk, quantity, weight or value.” More specifically, the plastic film outweighs aluminum foil in terms of quantity (base material: [[]]

plastic to aluminum foil layers, lid material: plastic to aluminum foil), bulk (base material thickness: plastic film, aluminum foil); lid material thickness: plastic film, aluminum foil), weight (base material: even split of weight for both plastic and aluminum foil; lid material: of weight is plastic film, aluminum foil), and value (base material: of cost attributable to plastic, to aluminum foil; lid material: of cost attributable to plastic, to aluminum foil). In addition, the court considers the “role of a constituent material in relation to the use of the goods.” Explanatory Notes to GRI 3(b). This part of the essential character test implicates use. Although undertaking a use analysis to classify merchandise provided for *eo nomine* is inappropriate unless the tariff provision “itself inherently suggests a type of use,” *Carl Zeiss, Inc.*, 195 F.3d at 1379, the Explanatory Notes expressly mention that an “essential character” inquiry may be necessary to classify plastic-aluminum foil composites like Flexalcon. Part of that inquiry involves looking at the relationship between the constituent materials and how the product is used.

Here, both materials (plastic film and aluminum foil) are indispensable to the functioning of Flexalcon. The subject merchandise is used to package ready-to-eat-meals for the military. The plastic film and aluminum foil play critical roles in making Flexalcon a viable material to package military meals. There is no dispute that the aluminum foil imparts barrier properties that give MREs a three-year shelf life. *See* Pl. Ex. 22 at 389 (Fundamentals of Packaging Technology) (“Of the flexible packaging materials, only intact aluminum foil is potentially a 100% barrier to all gases.”). This three-year threshold is a requirement. *See* Pl. Ex. 15³ at 1 (Letter from U.S. Dep’t of Defense) (“From a barrier standpoint, the most critical component of the flexible packaging is the aluminum layer because of its inherent barrier properties.”); Def. Ex. A at 5 (Defendant’s First Interrogatories and Requests for Production) (“Flexalcon is used by U.S. Army to package [MREs], which have stringent shelf life requirements (*i.e.*, 3 years at 85° F.)”); Pl. Ex. 8 at 155 (Wagner Deposition) (“Is it possible to make a package that would meet the military specifications with just plastic materials in this case? . . . It would meet all of the specifications except the three-year shelf life because there’s no barrier.”). Although some of the plastic film layers also provide barrier properties, they cannot (individually or together) satisfy the three-year shelf life requirement without the aluminum foil. *See* Pl. Ex. 6 at 97 (Dietrich Deposition) (“If you just take the aluminum out and make a package just of out the plastics, you will end up in a shelf life of two to four

³ The court disagrees with Defendant’s characterization of this exhibit as hearsay.

weeks. And if you put the aluminum in you will end up in a shelf life of three to five years.”). Compared to other barrier materials, aluminum foil also imparts the ability to form a three-dimensional package that conforms to the food contents. *See* Pl. Ex. 15 at 2. Therefore, aluminum foil is indispensable to the functioning of Flexalcon.

Likewise, it is also undisputed that the plastic film layers impart properties that allow the meals to be packaged (contained) in a soft pouch rather than a metal can. *See* Pl. Ex. 6 at 33 (“Prior to the development of Flexalcon, what was being used? . . . Cans.”). Considering the package’s ability to withstand the retorting process, flex-crack and puncture resistance, deep drawing capability, hermetic sealing, and just overall durability, the plastic film layers provide the key ingredients that permit ready-to-eat meals to be sold in the form of soft, flexible packages. *See* Def. Ex. G at 7 (Dunn Expert Report) (“Plastic in Flexalcon, as a result of its inherently formable, shapeable nature, is tough and durable. It seals the pouch closed, protects its contents, and creates a high performance packaging material.”); Def. Ex. J (Sherman PPT); Pl. Ex. 3 (Retort Training PPT); *see also* Def. Ex. C at 2 (Military Specification) (“This specification covers the performance criteria for packaging materials and the packaging of food in flexible pouches to include the filling and hermetic sealing of the pouches, the thermal processing of the filled and sealed pouches for commercial sterility. . . .”). Aluminum foil, by itself, is not durable enough to serve as a packaging material for MREs. *See* Pl. Ex. 22 at 389 (“In the thinner gauges used for most packaging, . . . foils suffer from pinholing—minute holes through the foil. Furthermore, foil is not durable to repeated flexing and can develop flex-cracks during machining and shipping.”); Def. Ex. G at 7 (“By itself, aluminum foil is fragile; it does not and cannot serve as a package.”). Therefore, the features just described indicate that the plastic film is also indispensable to the functioning of Flexalcon.

Although both materials are indispensable based on functionality, it is the plastic elements that give Flexalcon packages their strength and flexibility. The plastic layers impart qualities that define Flexalcon as a flexible food packaging solution for the military. Both aluminum foil and plastic are critical but the plastic layers provide the constituent materials that permit military field rations to be distributed in the form of soft, lightweight packages. Flexalcon packages have very different and advanced characteristics from the old C-rations—they are light, flexible, easier to transport—and this advancement is made possible by the properties imparted by the plastic film. In addition, the plastic layers outweigh the aluminum foil under

the traditional measures of “essential character.” In the court’s view, Flexalcon does retain the essential character of plastic and does not assume the character of aluminum foil. See Explanatory Notes to Chapter 39 at VII-39–13.

Alcan, however, claims that Flexalcon is not classifiable under Heading 3921 because it has been “further worked.” Pl. Br. 19; see Note 10 to Chapter 39. This argument is not persuasive. The Federal Circuit has defined the term “further worked” as to “form, fashion, or shape an existing product to a greater extent.” *Cummins Inc. v. United States*, 454 F.3d 1361, 1365 (Fed. Cir. 2006) (“*Cummins*”) (quoting *Winter-Wolff, Inc. v. United States*, 22 CIT 70, 78, 996 F. Supp. 1258, 1265 (1998) (“*Winter-Wolf*”). Although this provides a general definition of the term “further worked,” it does not address the term within the context of Heading 3921 or, more specifically, whether plastic film that has been laminated to aluminum foil constitutes a further working under Heading 3921. The court is not persuaded that it does. The most obvious problem with this interpretation is that it is inconsistent with the Explanatory Notes, which specifically provide for plastic film products that have been laminated with other materials. See Explanatory Notes to Chapter 39 & Heading 39.21. If plastic film that has been laminated to another material constitutes “further worked,” then the Explanatory Notes are incorrect, and laminations are excluded from Heading 3921. This seems unlikely.

Even without this inconsistency, the term “further worked” does not apply to the subject merchandise. In *Cummins*, for example, the subject merchandise (crankshafts) was “forged and then trimmed, coined, shot blasted, milled, and mass centered,” which satisfied the definition of “further worked.” *Id.* at 1365. The court concluded that the crankshafts had been “further worked beyond being roughly shaped by forging.” *Id.* In *Winter-Wolf*, the subject merchandise (aluminum foil) underwent a laser treatment that “rounded” the edge of the foil. *Winter-Wolf*, 996 F. Supp. 2d at 1265. The court concluded that the aluminum foil had been further worked because the laser treatment “deformed” the edge of the foil. *Id.* at 1266. Here, the plastic film has not undergone the same type of processing, shaping, or forming. There is no indication that it is physically altered as described in *Cummins* or *Winter-Wolf*. The lamination process does not shape, form, round, or otherwise alter the physical properties of the plastic film. Accordingly, Flexalcon has not been “further worked” and may therefore be classified under HTSUS subheading 3921.90.40.

Contrary to Alcan's proposed classification, Flexalcon is not classifiable under HTSUS Heading 7607. The aluminum foil represents just [[]] layer among several in the engineered laminated product. The foil is effectively sandwiched between [[]] layers of plastic film in the lid material and [[]] layers in the base material. *See* Pl. Ex. 1 at 6–7 (Pl.'s Resp. to Def.'s Interrogatories) (providing illustration of Flexalcon layers). The plastic layers give the product additional properties (both in terms of physical characteristics and functioning) that aluminum foil does not possess. There is no question that the foil is important to the functioning of the product as food packaging, but it does not characterize the whole such that the whole could be properly described as aluminum foil. This product has so many layers other than the foil layer, and so many properties beyond that of aluminum foil, that the heading term "aluminum foil (whether or not . . . backed with . . . plastics . . .)" cannot be said to encompass Flexalcon.

Although Heading 7607 provides for aluminum foil products that have been coated, laminated, and backed with other materials, the court is not persuaded that these aluminum foil composites cover the subject merchandise. For example, the Explanatory Notes, by reference to Chapter 72, mention "lamination" as a type of "surface treatment" but in this case Flexalcon undergoes a lamination process that is distinguishable from a finishing treatment "to improve the properties or appearance of the metal, protect it against rusting and corrosion, etc." General Explanatory Notes to Chapter 76 at XV-76–4. The plastic layers in Flexalcon cannot be described as a surface treatment to aluminum foil. Specifically, plastic film is the dominant input in Flexalcon and provides the essential features that permit Flexalcon base and lid material to be formed into a strong, flexible package. That is not a surface treatment as described by Explanatory Notes. Alcan also argues that Flexalcon fits the description of "backed" aluminum foil under subheading 7607.20.50. Pl. Br. 22. But "backed" aluminum foil must still have the characteristics of aluminum foil. The court has determined that Flexalcon retains the essential character of plastic and does not assume the character of aluminum foil. Therefore, Heading 7607 is not the appropriate tariff provision for this product, which also includes "backed" aluminum foil under subheading 7607.20.50. The subject merchandise is properly classified under HTSUS subheading 3921.90.40 (flexible plastic film).

IV. CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of Defendant. Judgment will be entered accordingly.

Dated: July 25, 2013
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE

Slip Op. 13–95

CAMAU FROZEN SEAFOOD PROCESSING IMPORT EXPORT CORPORATION, et al.,
Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE
ACTION COMMITTEE and AMERICAN SHRIMP PROCESSORS ASSOCIATION,
Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 11–00399¹

[remanding the Final Results of Redetermination Pursuant to Court Remand for
further explanation or reconsideration]

Dated: July 31, 2013

Matthew R. Nicely, Hughes Hubbard & Reed LLP, of Washington, DC, on behalf of
Plaintiffs Camau Frozen Seafood Processing Import Export Corp.; Minh Phu Seafood
Corp.; Minh Phat Seafood Co., Ltd.; Minh Qui Seafood Co., Ltd.; and Viet I-Mei Frozen
Foods Co., Ltd.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division,
U.S. Department of Justice, of Washington, DC, on behalf of Defendant. With him on
the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General; *Jeanne
E. Davidson*, Director; and *Patricia M. McCarthy*, Assistant Director. Of counsel on the
briefs was *Mykhalo A. Gryzlov*, Senior Attorney, Office of the Chief Counsel for Import
Administration, U.S. Department of Commerce, of Washington, DC.

Andrew W. Kentz, *Jordan C. Kahn*, *Nathaniel M. Rickard*, and Nathan W. Cun-
ningham, Picard Kentz & Rowe LLP, of Washington, DC, for the Defendant-Intervenor
Ad Hoc Shrimp Trade Action Committee.

Terence P. Stewart, *Geert M. De Prest*, and *Elizabeth J. Drake*, Stewart and Stewart,
of Washington, DC, and Edward T. Hayes, Leake & Andersson, LLP, of New Orleans,
LA, for the Defendant-Intervenor American Shrimp Processors Association.

OPINION

Pogue, Judge:

This case returns to court following remand by Camau Frozen
Seafood Processing Import Export Corp. v. United States, __ CIT __,
880 F. Supp. 2d 1348 (2012) (“Camau I”). Camau I reviewed chal-
lenges to the final results of the fifth administrative review (“AR”) of
the antidumping duty order covering certain frozen warmwater

¹ This action is consolidated with court no. 11–00383. Order, Dec. 20, 2011, ECF No. 30.

shrimp from the Socialist Republic of Vietnam (“Vietnam”).² *Id.* at 1351. Specifically, *Camau I* rejected a facial challenge to Commerce’s use, in the fifth AR, of its New Labor Methodology,³ but remanded the *Final Results* for Commerce to further explain or reconsider its determination to value labor solely on the basis of data from the Bangladesh Bureau of Statistics (“BBS”) in light of Commerce’s prior surrogate labor policy and the apparent discrepancy between the Bangladeshi labor data and the Philippine labor data on the record. *Id.* at 1358–61. In the *Final Results of Redetermination Pursuant to Court Remand*, A-552–802, ARP 09–10 (Apr. 12, 2013), ECF No. 90 (“Remand Results”), Commerce determined that it would continue to value labor solely on the basis of the BBS data.

For the reasons that follow, the court will order a second remand for Commerce to further explain or reconsider its determination to value labor in this case solely on the basis of the BBS data.

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006)⁴ and 28 U.S.C. § 1581(c) (2006).

STANDARD OF REVIEW

The court will sustain the Department’s determination upon remand if it complies with the court’s remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law.” *Jinan Yipin Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1185 (2009) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)).

DISCUSSION⁵

Prior to adoption of the New Labor Methodology, Commerce used multi-country averaging to value labor because “wage data from a single surrogate country does not constitute the best available information for purposes of valuing the labor input due to the variability that exists between wages and GNI. . . . As a result, we find reliance on wage data from a single surrogate country to be unreliable and

² *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 76 Fed. Reg. 56,158 (Dep’t Commerce Sept. 12, 2011) (final results and final partial rescission of anti-dumping duty administrative review) (“*Final Results*”) and accompanying Issues & Decision Memorandum, A-552–802, ARP 09–10 (Aug. 31, 2011) (“*I & D Mem.*”).

³ *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 (Dep’t Commerce June 21, 2011) (“*New Labor Methodology*”).

⁴ All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition, unless otherwise noted.

⁵ The facts of this case were summarized in the court’s prior opinion. *Camau I*, __ CIT at __, 880 F. Supp. 2d at 1351–53, 1357–58. Familiarity with *Camau I* is presumed, and only those facts necessary to the disposition are reiterated here.

arbitrary.”⁶ When Commerce adopted the New Labor Methodology, it did not repudiate this reasoning. Rather, Commerce acknowledged in the New Labor Methodology that “[d]ue to the variability in wage rates among economically comparable [market economy countries], the Department has tried to include wage data from as many countries as possible that were also economically comparable to the [non-market economy country (“NME”)] and significant producers of comparable merchandise” New Labor Methodology, 76 Fed. Reg. at 36,093; *see also* *Camau I*, 880 F. Supp. 2d at 1358–59. But, based on its experience in light of *Dorbest Ltd. v. United States*, 604 F.3d 1363 (Fed. Cir. 2010) (“*Dorbest IV*”) and *Shandong Rongxin Import & Export Co. v. United States*, __ CIT __, 774 F. Supp. 2d 1307 (2011),⁷ Commerce concluded that “the base for an average wage calculation would be so limited that there would be little, if any, benefit to relying on an average of wages from multiple countries for purposes of minimizing the variability that occurs in wages across countries.” *New Labor Methodology*, 76 Fed. Reg. at 36,093. *Camau I* held this to be a reasonable basis for Commerce’s change in policy, 880 F. Supp. 2d at 1358; therefore, the decision to change the labor valuation policy is not before the court on review of the *Remand Results*. Nonetheless, insofar as Commerce maintains that (1) valuing labor based on a single surrogate country may be distortive given the variability in wage rates among countries that Commerce considers to be economically comparable and (2) the variability in wage rates corresponds to variability in GNI, the record in this case presents the possibility of just such a distortion.

As noted in *Camau I*, Commerce considered two wage rate values in the *Final Results* : one from Bangladesh, based on the BBS data, and one from the Philippines, based on Chapter 5B of the International Labor Organization Yearbook of Labour Statistics (“ILO Chapter 5B”). *Id.* at 1359–60 & n.12. The wage rate value for the Philippines is several orders of magnitude larger than the wage rate value for

⁶ *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, Issues and Decision Mem., A-552–802, ARP 08–09 (July 30, 2010) (adopted in 75 Fed. Reg. 47,771, 47,772 (Dep’t Commerce Aug. 9, 2010) (final results and partial rescission of antidumping duty administrative review)) (“*AR 4 I & D Mem.*”), cmt. 9 at 27.

⁷ *Dorbest IV* invalidated the regulation, 19 C.F.R. § 351.408(c)(3), that Commerce relied upon to value labor using a multi-country regression analysis, holding that the regulation “improperly require[d] using data from both economically comparable and economically dissimilar countries, and it improperly use[d] data from both countries that produce comparable merchandise and countries that do not.” *Dorbest IV*, 604 F.3d at 1372. *Shandong Rongxin*, held that Commerce was including countries in the surrogate labor average that produced little or no comparable merchandise in contravention of the statutory requirement that a surrogate country be a significant producer of comparable merchandise. *Shandong Rongxin*, __ CIT at __, 774 F. Supp. 2d at 1316.

Bangladesh. *See Id.* at 1360 (comparing GNI and wage rates of the Philippines and Bangladesh). In light of Commerce’s prior policy and findings, it comes as no surprise that the Philippine GNI is also several times larger than the Bangladeshi GNI. *Id.* On these facts, Commerce’s non-repudiated prior reasoning suggests that a single surrogate country value for labor could introduce distortion.⁸ While an averaging system that eliminates such distortion may not be possible, that fact alone is not a reasoned explanation for Commerce’s choice between the two datasets. Therefore, *Camau I* remanded this issue for an explanation of why, in light of Commerce’s prior reasoning and the record evidence in this case, valuing labor solely on the basis of the BBS data was reasonable and the best available information. *Id.*

Commerce justifies its decision in the Remand Results by invoking its policy of valuing all surrogate values from a single surrogate country when possible. Remand Results at 7–8. Commerce contends that using a single surrogate country to value all FOPs “better reflects the trade-off between labor costs and other factors’ costs, including capital, based on their relative prices.” *Id.* at 8. This is the only affirmative basis Commerce offers to support its choice of the Bangladeshi data. Thus, Commerce argues that its policy of favoring a single surrogate country to value all FOPs, and the reasoning supporting that policy, is sufficient to value labor solely on the basis of the BBS data in this case.

This basis alone, however, is not sufficient to address the remand order in *Camau I*. Commerce’s policy of valuing all factors of production from a single surrogate country when possible, *see* 19 C.F.R. § 351.408(c)(2) (2011), may be reasonable because, among other reasons, it reduces surrogate value distortions introduced by out-of-market prices, *see Clearon Corp. v. United States*, Slip Op. 13–22, 2013 WL 646390, at *6 (CIT Feb. 20, 2013); nonetheless, Commerce has the statutory authority to use multiple surrogate countries, 19 U.S.C. § 1677b(c)(1), and has invoked that authority when it deemed such to be appropriate – specifically as part of its prior labor valuation methodology, *see, e.g., Grobest & I-Mei Indus. (Viet.) Co. v. United States*, __ CIT __, 815 F. Supp. 2d 1342, 1356–60 (2012) (affirming Commerce’s decision to use multi-country averaging for surrogate labor valuation); *Peer Bearing Co.-Changshan v. United States*, __ CIT __, 804 F. Supp. 2d 1337, 1353 (2011) (noting Commerce’s use of Indian and Thai data for different surrogate values in the same

⁸ The court makes no judgment regarding which dataset is the best available information. That decision is reserved to Commerce so long as it supports its determination with a reasoned explanation. *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011).

review). Therefore, it is not sufficient for Commerce to cite the policy of using a single surrogate country where, as here, there is reason to believe that the primary surrogate country may not provide the best available information for a particular FOP.

Case law repeatedly emphasizes that “use of a single surrogate country is justified when . . . all other factors are fairly equal” *Clearon Corp.*, 2013 WL 646390, at *6 (internal quotation marks omitted); *Peer Bearing*, __ CIT at __, 804 F. Supp. 2d at 1353 (“[T]he preference for use of data from a single surrogate country could support a choice of data as the best available information where the other available data ‘upon a fair comparison, are otherwise seen to be fairly equal’”) (quoting *Peer Bearing Co.-Changshan v. United States*, __ CIT __, 752 F. Supp. 2d 1353, 1373 (2011)) (second alteration in original). In light of Commerce’s prior reasoning with regard to labor values, however, the evidence on the record in this case cannot, without more, be considered fairly equal.⁹ Thus, because there is reason to doubt the primary surrogate country value, Com-

⁹ Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee (“AHSTAC”) also argues that the BBS is not fairly equal because the labor rate drawn from the BBS data, \$0.21 USD/hour, is aberrational. Ad Hoc Shrimp Trade Action Comm.’s Comments on Final Results of Redetermination Pursuant to Court Remand, ECF No. 94 (“AHSTAC’s Comments”) at 22–28. AHSTAC’s claim of aberration is premised on the Bangladeshi labor rate being the lowest on the record. AHSTAC cites *Xinjiaimei Furniture (Zhangzhou) Co. v. United States*, Slip Op. 13–30, 2013 WL 920276 (CIT Mar. 11, 2013), and *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 502 F. Supp. 2d 1295 (2007), in support of its argument that data can be found aberrational by comparison to other data on the record. AHSTAC’s Comments at 22–25. But *Xinjiaimei Furniture* and *Mittal Steel* are distinguishable from this case. It is true that both cases found aberrational a surrogate value chosen by Commerce that was significantly different from other values on the record; however, both cases also found that the source of the aberrational surrogate value was of such a low volume that its reliability was questionable. See *Xinjiaimei Furniture*, 2013 WL 920276, at *5 (“[T]he evidence produced by plaintiff is sufficient to cause any reasonable mind to seek some explanation as to how such a small sample could be non-distortive and potentially the best available information.”) (internal quotation marks omitted); *Mittal Steel*, 31 CIT at 1135, 502 F. Supp. 2d at 1307–08 (“The court remands this issue to Commerce for further explanation in light of the data placed on the record that demonstrates that the limestone value that Commerce selected was much higher than the value of limestone imported in other countries and applied to a small volume of imports.”). In this case, AHSTAC does not offer any basis for finding the Bangladeshi labor values aberrational beyond the fact that the Bangladeshi values are the lowest on the record. Furthermore, unlike *Xinjiaimei Furniture* and *Mittal Steel*, the Bangladeshi labor values are not significantly different from most or all of the other values on the record. Rather, the prices that AHSTAC offers for comparison form a nearly straight line continuum from the Bangladeshi data on the low end to the Philippine ILO Chapter 6A data on the high end. AHSTAC’s Comments at 22 (comparing the following values: \$0.21 (BBS); \$0.41 (Indonesia ILO Chapter 5B); \$0.70 (India ILO Chapter 6A); \$0.82 (Guyana ILO Chapter 6A); \$1.02 (Nicaragua ILO Chapter 6A); \$1.91 (Philippines ILO Chapter 5B); \$2.41 (Philippines ILO Chapter 6A)). On this record, the Bangladeshi data is not aberrational, it is merely the lowest price in a range of prices.

merce must address the conflicting evidence on the record that may counsel against the policy of valuing all FOPs from the primary surrogate country. Not addressing the conflicting evidence on the record, as noted in *Camau I*, fails the substantial evidence test because it does not take into account record evidence contrary to Commerce's determination. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Commerce has not, however, addressed the conflicting evidence on the record in the *Remand Results*.¹⁰ While “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being support by substantial evidence,” *Consolo v. Fed. Maritime Comm’n*, 383 U.S. 607, 620 (1966), Commerce must, nonetheless, provide a reasonable basis for its determination, see *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351–52 (Fed. Cir. 2006); *Amanda Foods (Viet.) Ltd. v. United States*, __ CIT __, 647 F. Supp. 2d 1368, 1378–79 (2009). Instead, Commerce argues that the Bangladeshi data and the Philippine data are collected at different levels of aggregation; therefore, Commerce asserts that the two data sets are not comparable and a disparity in wage rates cannot be deduced from the data. *Remand Results* at 8–9. Commerce’s argument is unpersuasive.

First, Commerce provides no explanation for why the different levels of aggregation render the data incomparable. Different levels of aggregation alone do not, necessarily, prevent two datasets from being compared. What is of consequence is the particular factors that make the datasets similar enough to compare or too different to compare – for example, the relative levels of aggregation, the relationship between the levels of aggregation, and the purpose of the comparison. In short, Commerce must provide some reason to justify its determination that the datasets are too different to compare, see *Amanda Foods*, __ CIT at __, 647 F. Supp. 2d at 1378–79, and level of aggregation is a description not a reason.

Second, Commerce’s treatment of the ILO data in other circumstances suggests that it may, in fact, be comparable with the BBS data. It is Commerce’s default policy to use ILO data when valuing

¹⁰ AHSTAC contends that Commerce also improperly ignored other available data on the record, including ILO Chapter 6A data for the Philippines, Guyana, Nicaragua, and India. AHSTAC Comments at 19–21. The court recognizes that this evidence is on the record for Commerce’s consideration, but, as in *Camau I*, the court makes no determination regarding the role this evidence would play in an ultimately reasonable determination by Commerce regarding the surrogate value for labor. Whether this evidence is useful in reaching a reasonable determination is for Commerce to decide in the first instance. See *Zhejiang DunAn Hetian*, 652 F.3d at 1341.

labor.¹¹ Commerce considers data reported at an International Standard Industrial Classification (“ISIC”) level representative of the industry in question to be industry specific. *See New Labor Methodology*, 76 Fed. Reg. at 36,094 & nn. 10, 11; Surrogate Values for the Preliminary Results, A-552–802, APR 09–10 (Feb. 28, 2011), Admin. R. Pt. 1 Pub. Doc. 144 (“Surrogate Value Mem.”) at 7. Prior to adopting the standards from the *New Labor Methodology* in this case, Commerce determined that ISIC-Revision 3, sub-classification 15, described as “manufacture of food products and beverages,” was industry specific because it included “processing and preservation of fish and fishery products.” *Id.* The fact that Commerce considers the ILO data to be industry specific and would otherwise employ the ILO data but for the particular facts of this case – i.e., no ILO data for Bangladesh and an alternative industry-specific dataset – suggests that the ILO data and the BBS are comparable despite the different levels of aggregation. That is, the data sets are a least comparable enough in Commerce’s view for them to be theoretically interchangeable for the purpose of valuing labor.¹²

Thus, Commerce’s reasoning in the Remand Results remains an insufficient explanation, and the court remains unable to affirm Commerce’s determination in the *Final Results*. Commerce’s policy of valuing all surrogate values on the basis of the primary surrogate country is a reasonable choice insofar as there is no reason to believe that a value from the primary surrogate country would be distortive or inaccurate. Record evidence in this case continues to raise such a possibility, and Commerce has not addressed that evidence in the *Remand Results*. Furthermore, Commerce’s attempt to avoid the troubling disparities between the surrogate values for labor by suggesting that the datasets are not comparable is unconvincing. Commerce provides no justification for its conclusion of incomparability other than the different levels of aggregation – a distinction that, absent further explanation, is not a meaningful difference.

CONCLUSION

In light of the foregoing, the Final Results are again remanded to Commerce for further explanation or reconsideration of the surrogate

¹¹ Commerce’s preference, as expressed in the *New Labor Methodology*, is to use ILO Chapter 6A data. *New Labor Methodology*, 76 Fed. Reg. at 36,093. Prior to the *New Labor Methodology* Commerce used ILO Chapter 5B data. *Id.*; *see also I & D Mem.*, cmt. 2.I at 22–23.

¹² Arguably, the dataset comparability is more than theoretical given that Commerce chose to value labor in the fourth administrative review using ILO Chapter 5B data, *AR 4 I & D Mem.*, cmt. 9 at 30, while using the BBS data in this, the subsequent, review.

value for labor consistent with this opinion and *Camau I*. Commerce shall have until September 30, 2013, to complete and file its remand redetermination. Plaintiffs and Defendant-Intervenors shall have until October 15, 2013, to file comments. Plaintiffs, Defendant, and Defendant-Intervenors shall have until October 29, 2013, to file any reply.

It is **SO ORDERED**.

Dated: July 31, 2013
New York, NY

/s/ Donald C. Pogue

DONALD C. POGUE, CHIEF JUDGE

ERRATA

Camau Frozen Seafood Processing Import Export Corp., et al., v. United States, Court No. 11-00399, Slip Op. 13-95, dated July 31, 2013.

Page 2: **Pogue, Judge** should be changed to **Pogue, Chief Judge**

Page 2: The “footnote continued” message at the bottom of the page should be removed.

August 1, 2013

Slip Op. 13–96

BAROQUE TIMBER INDUSTRIES (ZHONGSHAN) COMPANY, LIMITED, et al.,
Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR
AMERICAN HARDWOOD PARITY, et al., Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 12–00007¹

[final determination of sales at less than fair value affirmed in part and remanded
in part]

Dated: July 31, 2013

Francis J. Sailer, Mark E. Pardo, Andrew T. Schutz, and John M. Foote, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for Baroque Timber Industries (Zhongshan) Co., Ltd.; Riverside Plywood Corp.; Samling Elegant Living Trading (Labuan) Ltd.; Samling Global USA, Inc.; Samling Riverside Co., Ltd.; and Suzhou Times Flooring Co., Ltd.

Gregory S. Menegaz, James K. Horgan, and John J. Kenkel, deKieffer & Horgan, PLLC, Washington, DC, for Zhejiang Layo Wood Industry Co., Ltd.; Changzhou Hawd Flooring Co., Ltd.; Dunhua City Jisen Wood Industry Co., Ltd.; Dunhua City Dexin Wood Industry Co., Ltd.; Dalian Huilong Wooden Products Co., Ltd.; Kunshan Yingyi-Nature Wood Industry Co., Ltd.; and Karly Wood Product Ltd.

Kristin H. Mowry, Jeffrey S. Grimson, Jill A. Cramer, Susan L. Brooks, Sarah M. Wyss, and Rebecca M. Janz, Mowry & Grimson, PLLC, of Washington, DC, for Fine Furniture (Shanghai) Ltd.; Great Wood (Tonghua) Ltd.; and Fine Furniture Plantation (Shishou) Ltd.

Kristen S. Smith and Mark R. Ludwikowski, Sandler, Travis & Rosenberg, PA, of Washington, DC, for Lumber Liquidators Services, LLC; Armstrong Wood Products (Kunshan) Co., Ltd.; and Home Legend, LLC.

Jeffrey S. Neeley, Michael S. Holton, and Stephen W. Brophy, Barnes, Richardson & Colburn, Washington, DC, for Zhejiang Yuhua Timber Co., Ltd.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for the United States. With him on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Shana Hofstetter*, Attorney, International Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, for the Coalition for American Hardwood Parity.

¹ This action was consolidated with court nos. 11–00452, 1200013, and 12–00020. Order, May 31, 2012, ECF No. 37. The complaint filed by the Coalition for American Hardwood Parity in court no. 11–00452 was heard and decided separately in *Baroque Timber Industries (Zhongshan) Co. v. United States*, __ CIT __, 853 F. Supp. 2d 1290 (2012), and *Baroque Timber Industries (Zhongshan) Co. v. United States*, __ CIT __, 865 F. Supp. 2d 1300 (2012). The Coalition's complaint was ultimately dismissed. *Baroque Timber Indus.*, 865 F. Supp. 2d at 1311.

OPINION

Pogue, Chief Judge:

This is a consolidated action seeking review of determinations made by the Department of Commerce (“Commerce”) in the anti-dumping duty investigation of multilayered wood flooring from the People’s Republic of China (“China”).² Currently before the court is Respondents’ Motion for Judgment on the Agency Record. Respondents³ challenge nine aspects of Commerce’s Final Determination including: (1) Commerce’s decision to apply its targeted dumping method on the basis of non-dumped sales; (2) Commerce’s withdrawal of the targeted dumping regulations; (3) Commerce’s use of zeroing in an investigation; (4) the surrogate value of Layo’s core veneer used for plywood production; (5) the surrogate value of Layo’s high density fiberboard (“HDF”) input; (6) the surrogate value of Samling’s HDF input; (7) the surrogate value of Layo’s plywood inputs; (8) the surrogate value of brokerage and handling fees; and (9) Commerce’s rejection of certain surrogate financial statements.

In response, Commerce requests voluntary remand to reconsider the valuation of Layo’s plywood input and Samling’s HDF input. Commerce also requests voluntary remand to reconsider the application of its method for analyzing targeted dumping in light of any changes in value that may result from reconsideration of the two surrogate values for which remand is requested and in light of its current standards for applying its targeted dumping method. Commerce contests the remaining challenges to the *Final Determination*.

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2006)⁴ and 28 U.S.C. § 1581(c) (2006).

As explained below, the Final Determination is affirmed in part and remanded in part: (1) Commerce’s request for remand to reconsider the surrogate value determinations for Layo’s plywood input and

² *Multilayered Wood Flooring from the People’s Republic of China*, 76 Fed. Reg. 64,318 (Dep’t Commerce Oct. 18, 2011) (final determination of sales at less than fair value) (“*Final Determination*”) and accompanying Issues & Decision Memorandum, A-570-970, POI Apr. 1, 2010 – Sept. 30, 2010 (Oct. 11, 2011) (“*I & D Mem.*”).

³ The Respondents who are party to this case include Baroque Timber Industries (Zhongshan) Co., Ltd., Riverside Plywood Corp., Samling Elegant Living Trading (Labuan) Ltd., Samling Global USA, Inc., Samling Riverside Co., Ltd., Suzhou Times Flooring Co., Ltd., Zhejiang Layo Wood Industry Co., Ltd., Changzhou Hawd Flooring Co., Ltd., Dunhua City Jisen Wood Industry Co., Ltd., Dunhua City Dexin Wood Industry Co., Ltd., Dalian Huilong Wooden Products Co., Ltd., Kunshan Yingyi-Nature Wood Industry Co., Ltd., Karly Wood Product Ltd., and Fine Furniture (Shanghai) Ltd. Resp’ts’ Mem. L Supp. Mot. J. Agency R., ECF No. 63 (“Resp’ts’ Br.”) at 1 n.1.

⁴ All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition, unless otherwise noted.

Samling's HDF input is granted; (2) Commerce's targeted dumping determination is remanded for reconsideration in light of any changes to the surrogate value determinations and in light of Commerce's current standards; (3) the surrogate value determinations for Layo's core veneer, Layo's HDF input, and the brokerage and handling fees are remanded for further explanation or reconsideration consistent with this opinion; and (4) Commerce's rejection of Respondents' late filed surrogate financial statements is affirmed.

BACKGROUND⁵

Responding to a petition by the Coalition for American Hardwood Parity ("CAHP" or "Petitioners"), Commerce initiated an antidumping duty investigation of multilayered wood flooring from China on November 18, 2010. Multilayered Wood Flooring from the People's Republic of China, 75 Fed. Reg. 70,714 (Dep't Commerce Nov. 18, 2010) (initiation of antidumping duty investigation). As permitted by the statute, Commerce chose three mandatory respondents for the investigation: Zhejiang Yuhua Timber Co., Ltd. ("Yuhua"), Zhejiang Layo Wood Industry Co., Ltd. ("Layo"), and the Samling Group⁶ ("Samling"). *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 30,656, 30,658 (Dep't Commerce May 26, 2011) (preliminary determination of sales at less than fair value) ("*Preliminary Determination*"); see also 19 U.S.C. § 1677f-1(c)(2)(B). Commerce published its *Final Determination* on October 18, 2011, finding that the subject merchandise was being sold at less than fair value in the United States, i.e., dumped. *Final Determination*, 76 Fed. Reg. at 64,323–24. Commerce determined that a *de minimis* dumping margin existed for Yuhua, but assigned margins of 3.98% and 2.63% to Layo and Samling respectively. *Id.*

STANDARD OF REVIEW

When reviewing Commerce's decisions made in antidumping investigations, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

⁵ This is background relevant to all the issues presented; facts relevant only to particular issues are found in the discussion section.

⁶ The Samling Group includes Baroque Timber Industries (Zhongshan) Co., Ltd., Riverside Plywood Corp., Samling Elegant Living Trading (Labuan) Ltd., Samling Global USA, Inc., Samling Riverside Co., Ltd., and Suzhou Times Flooring Co., Ltd. Resp'ts' Br. at 1 n.1.

DISCUSSION

I. Voluntary Remand

Commerce requests voluntary remand to reconsider two determinations that it may have made in error: (1) the surrogate value⁷ of Layo's plywood input and (2) the surrogate value of Samling's HDF input. Def.'s Resp. to Pls.' Consol. Mot. J. Admin. R., ECF No. 76 ("Def.'s Resp. Br.") at 28–29. Commerce also requests remand to reconsider the application of its method for analyzing targeted dumping in light of any changes to these two surrogate values and in light of its current standards. Def.'s Resp. Br. at 29; Def.'s Supplemental Br., ECF No. 116, at 16–18.

While a reviewing court will refuse a request for voluntary remand that is frivolous or in bad faith, "if the agency's concern is substantial and legitimate, a remand is usually appropriate." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Commerce's concerns are considered substantial and legitimate when (1) Commerce supports its request with a compelling justification, (2) the need for finality does not outweigh the justification, and (3) the scope of the request is appropriate. *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 882 F. Supp. 2d 1377, 1381 (2013). This three-pronged test will be applied to each of Commerce's requests in turn.

A. Layo's Plywood Input

The agency justifies its first remand request on the basis that, "Commerce has discovered that there is conflicting evidence on the record as to the range of Layo Wood's plywood thicknesses." Def.'s Resp. Br. at 28. Clarifying and correcting a potentially inaccurate determination is a compelling justification. *See Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007) ("[A]n overriding purpose of Commerce's administration of antidumping laws is to

⁷ Commerce has designated China a non-market economy country ("NME"). NME data for measuring normal value is presumed to be unreliable due to the absence of market forces in the country; therefore, Commerce calculates normal value for merchandise from an NME using surrogate values for factors of production drawn from a market economy country. 19 U.S.C. § 1677b(c)(1); *see also Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341(2004). Surrogate values must be based on the best available information, § 1677b(c)(1), drawn from "one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise," § 1677b(c)(4). The statute does not define best available information, but it is Commerce's policy to "choose a surrogate value that represents country-wide price averages specific to the input, which are contemporaneous with the [POI], net of taxes and import duties, and based on publicly available, non-aberrational, data from a single surrogate [market economy] country." *I & D Mem.*, cmt. 13 at 59.

calculate dumping margins as accurately as possible . . .”). In the context of a routine appeal of a final determination, the need to accurately calculate margins is not outweighed by the interest in finality. See *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1523–24, 412 F. Supp. 2d 1330, 1337–38 (2005). In addition, the scope of Commerce’s remand request — to clarify the record evidence and revise the determination if warranted — is an appropriate response to Commerce’s concern. Therefore, Commerce’s request for remand to reconsider the surrogate value determination for Layo’s plywood input is granted.⁸

B. Samling’s HDF Input

Commerce also requests remand to reconsider the surrogate value determination for Samling’s HDF input because the Harmonized Tariff Schedule (“HTS”) category used to value Samling’s HDF input may not accurately represent Samling’s HDF input. Def.’s Resp. Br. at 29. The voluntary remand analysis above also applies to this determination and supports granting Commerce’s request. As noted above, accuracy is a compelling justification, which is not outweighed by finality in this case, and the scope of the remand request is appropriate.

CAHP objects to remand of this determination on the grounds that Samling failed to exhaust its administrative remedies.⁹ Def.-

⁸ The court will not, as Layo suggests, require Commerce to adopt Layo’s recommended procedures and calculations for valuing the plywood input. Resp’ts’ Reply Br., ECF No. 87, at 21. In matters of method, the court “defer[s] to the agency whose expertise, after all, consists of administering the statute.” *Gleason Indus. Prods., Inc. v. United States*, 31 CIT 393, 396 (2007); cf. *NLRB v. Enter. Ass’n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters, Local Union No. 638*, 429 U.S. 507, 522 n.9 (1977) (“When an administrative agency has made an error of law, the duty of the Court is to correct the error of law committed by that body, and after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.”) (alteration in original) (citation omitted) (internal quotation marks omitted).

⁹ When reviewing challenges to antidumping determinations, this court “shall, where appropriate, require the exhaustion of administrative remedies.” 28 U.S.C. § 2637(d) (2006). Requiring parties to exhaust their administrative remedies “allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review — advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency.” *Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, __ CIT __, 880 F. Supp. 2d 1348, 1355 (2012) (quoting *Carpenter Tech. Corp. v. United States*, 30 CIT 1595, 1597, 464 F. Supp. 2d 1347, 1349 (2006)). While the “general rule [is] that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice,” *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37(1952)), the statute permits the court discretion to decide when requiring exhaustion is appropriate, see *Camau Frozen Seafood*, __ CIT at __, 880 F. Supp. 2d at 1356.

Intervenor's Resp. to Pls.' Consol. Mot. J. Admin. R., ECF No. 82 ("Def.-Intervenor's Resp. Br.") at 6–9. But refusing Commerce's remand request on exhaustion grounds is not appropriate on the facts of this case. During verification, Layo submitted additional information to Commerce regarding the proper HTS category for the HDF input. Layo Case Br., A-570–970, POI Apr. 1, 2010 – Sept. 30, 2010 (Aug. 5, 2011), Admin. R. Pt. 2 Pub. Doc. 2, at 25–26. In light of Layo's submission, Commerce altered the HTS category used to value Layo's HDF input. *I & D Mem.*, cmt. 20 at 81–82. Although HDF is an input common to Layo and Samling, Commerce did not seek similar information from Samling or change the HTS category used to value Samling's HDF input. *See Id.* Thus, the issue was before Commerce, but Commerce declined to address it with regard to Samling. *Cf. Calgon Carbon Corp. v. United States*, Slip Op. 1121, 2011 WL 637605, at *6 (CIT Feb. 17, 2011) ("Commerce had no obligation to accept additional evidence at verification. Once Commerce did accept such evidence, however, Commerce had an obligation to treat [plaintiff] fairly by giving it a similar opportunity."). Moreover, because Commerce has requested voluntary remand there is little concern that the alleged failure to exhaust will "deprive[] the agency of the opportunity to consider these arguments in the first instance." *Carpenter Tech.*, 30 CIT at 1598, 464 F. Supp. 2d at 1349. Rather, remand will "allow[] the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review" *Id.*

Therefore, Commerce's request for remand to reconsider the proper HTS category for valuing Samling's HDF input is granted.

C. Targeted Dumping

Third, Commerce requests remand to reconsider the application of its targeted dumping method in light of "any changes in surrogate values [for Layo's plywood input and Samling's HDF input] and in accordance with its current standards." Def.'s Resp. Br. at 29. Commerce contends that changes in surrogate values and application of updated standards for applying the targeted dumping method may result, on remand, in a determination that the targeted dumping method should not be applied to either Samling or Layo; therefore, Plaintiffs' targeted dumping challenges may become moot. Def.'s Supplemental Br. at 10–18. The Government's Response Brief did not clearly explain the basis for seeking remand to reconsider the application of the targeted dumping method; however, in supplemental

briefing filed with leave of the court, the Government presented a persuasive argument explaining why the targeted dumping issues may become moot on remand.¹⁰

To explain: Commerce is permitted by statute to use an average-to-transaction method, referred to as the targeted dumping method,¹¹ to calculate the dumping margin if “(i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (ii) [Commerce] explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) [the commonly employed average-to-average method] or (ii) [the transaction-to-transaction method].” § 1677f-1(d)(1)(B).

¹⁰ The court does not reach the merits of Plaintiffs’ targeted dumping challenges; however, it does note the recent decision in *Gold East Paper (Jiangsu) Co. v. United States*, Slip Op. 13–74, 2013 WL 2996231 (CIT June 17, 2013). *Gold East Paper* decided a challenge to the withdrawal of the targeted dumping regulations similar to that raised by the Plaintiffs in this case, holding that the regulations were improperly withdrawn. *Id.* at *5–8. While the issue is not decided here, considered in light of *Gold East Paper*, the Government’s defense of the withdrawal does not appear strong. Specifically, it does not appear persuasive to respond to the Administrative Procedure Act’s notice and comment requirement by providing an opportunity to comment in a general way on the application of the targeted dumping methodology. The government presents no reason to believe that this general notice, on a different subject, should be considered adequate notice of an outright withdrawal of the subject regulations. Nor are the cases the Government cites to support this method of rulemaking apposite. The withdrawal of the targeted dumping regulations was neither a “logical outgrowth” of the prior opportunities to comment, *cf. Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299–1300 (D.C. Cir. 2000) (denying notice and comment challenge where “the final rule was not wholly unrelated or surprisingly distant from what the [agency] initially suggested”), nor was the withdrawal simply an alteration of a previously proposed rule, *see First Am. Discount Corp. v. Commodity Futures Trading Comm’n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000); *cf. Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (“Although perhaps [the agency] should not have labeled the First through Third rules as ‘final,’ the agency has made a compelling showing that it provided a meaningful opportunity to comment before the Fourth Final Rule became effective.”) (citations omitted) (internal quotation marks omitted). Finally, because Commerce had ample opportunity to provide notice and comment, it does not appear appropriate to claim that this was an “emergency situation[], or [a situation] where delay would result in serious harm.” *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (citation omitted), such as would warrant application of the good cause exception.

¹¹ Commerce determines whether merchandise is sold at less than fair value, i.e. dumped, by comparing export price to normal value. 19 U.S.C. § 1677(34), (35)(A) (defining dumping and dumping margin). The statute provides two default methods for making the less than fair value determination in an investigation. § 1677f-1(d)(1)(A). Commerce may compare either (1) the weighted average normal value to the weighted average export price for sales of comparable merchandise, the “average-to-average” or “A-A” method, § 1677f-1(d)(1)(A)(i), or (2) the normal values of individual transactions to the export prices of individual transactions, the “transaction-to-transaction” or “T-T” method, § 1677f-1(d)(1)(A)(ii). If, however, Commerce makes the necessary findings pursuant to § 1677f-1(d)(1)(B), discussed below, then it may compare the weighted average of the normal values to the export prices of individual transactions, the “average-to-transaction” or “A-T” method. § 1677f-1(d)(1)(B).

To satisfy the first element of the statutory test, “a pattern of export prices . . . that differ significantly among purchasers, regions, or periods of time,” § 1677f-1(d)(1)(B)(i), Commerce relies on a test first introduced in the antidumping investigation of *Certain Steel Nails from the People’s Republic of China* (the “Nails from China Test”).¹² *I & D Mem.*, cmt. 4 at 29–31. When Commerce applied the Nails from China Test in this case, the test did not take into account what proportion of a respondent’s total sales volume consisted of targeted sales. Def.’s Supplemental Br. at 17. Commerce has altered its practice since publication of the *Final Determination* and now examines a respondent’s targeted dumping by volume as a component of the pattern requirement. *Id.* at 16–17; *Certain Stilbenic Optical Brightening Agents from Taiwan*, 76 Fed. Reg. 68,154, 68,156 (Dep’t Commerce Nov. 3, 2011) (preliminary determination of sales at less than fair value and postponement of final determination), *unchanged in Certain Stilbenic Optical Brightening Agents from Taiwan*, 77 Fed. Reg. 17,027 (Dep’t Commerce Mar. 22, 2012) (final determination of sales at less than fair value).

Plaintiffs have argued that their proportion of targeted sales by volume is minimal. Particularly, Plaintiffs contend that only 2.66% of Layo’s sales were found to be targeted and only 7.40% of Samling’s sales were found to be targeted. Resp’ts’ Br. at 18; *see also* Def.’s Supplemental Br. at 18. In light of the changes to the Nails from China Test and the argument put forward by Plaintiffs, Commerce, on remand, may find that there was not a pattern of significant price differences pursuant to 19 U.S.C. § 1677f-1(d)(1)(B)(i).¹³

¹² *Certain Steel Nails from the People’s Republic of China*, 73 Fed. Reg. 33,977 (Dep’t Commerce June 16, 2008) (final determination of sales at less than fair value and partial affirmative determination of critical circumstances) and accompanying Issues & Decision Memorandum, A-570–909, POI Oct.1, 2006 – Mar. 31, 2007 (June 6, 2008) cmts. 3–7 at 15–23.

The Nails from China Test has two steps. In step one, Commerce “determines the share of the alleged targeted customer’s purchases of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted-average price to all customers, targeted and non-targeted,” and if such share of sales exceeds thirty-three percent of the total volume of a respondent’s sales of subject merchandise to the alleged targeted customer, then Commerce considers there to be a pattern of price differences. *I & D Mem.*, cmt. 4 at 30. In the second step, Commerce examines all sales of identical merchandise by a respondent to the alleged targeted customer and “determines the total volume of sales for which the difference between the weighted-average price of sales to the allegedly targeted customer and the next higher weighted-average price of sales to a non-targeted customer exceeds the average price gap (weighted by sales volume) for the non-targeted group,” and if such share of sales exceeds five percent, Commerce considers there to be a significant difference in prices. *Id.* at 30–31.

¹³ Petitioner’s argue that permitting Commerce to apply its modified Nails from China Test on remand would be fundamentally unfair and possibly improper retroactive action. Def.-

To satisfy the second part of the statutory test, i.e., to show that the differences cannot be taken into account using the A-A method, § 1677f-1(d)(1)(B)(ii), Commerce calculates the dumping margin using both the A-A method and the A-T method. See, e.g., Bottom Mount Combination Refrigerator-Freezers from Mexico, 77 Fed. Reg. 17,422, 17,424 (Dep't Commerce Mar. 26, 2012) (notice of final determination of sales at less than fair value and affirmative critical circumstances determination). If the A-A and A-T methods yield insignificantly different margins, then Commerce considers any price differences found pursuant to the Nails from China Test to be taken into account by the A-A method and does not apply the targeted dumping method. *Id.* Because the dumping margin is affected by changes in surrogate value, the request for remand of certain surrogate values, discussed above, and the court's remand of other surrogate values, discussed below, may alter the relative margins produced by the A-A and A-T methods. In particular, Samling argues, and Commerce acknowledges, that changing the HTS category used to value Samling's HDF input – which Commerce has requested remand to reconsider – is likely to result in a *de minimis* margin for Samling using either the A-A or A-T method. Resp'ts' Br. at 64; Def.'s Supplemental Br. at 14. Thus, because the court is remanding surrogate value determinations for reconsideration, Commerce may, on remand, determine that part two of the statutory test is unsatisfied for one or both Plaintiffs.

It follows that Commerce has presented a persuasive argument that reconsideration upon remand may result in both Plaintiffs failing to meet the statutory test for application of the targeted dumping method. If, on remand, Commerce does not apply the targeted dumping method to any Plaintiff, then the targeted dumping arguments raised by Plaintiffs will become moot. The possibility that the targeted dumping method will not be applicable to Plaintiffs upon remand is a compelling justification for remand, and the possibility that Intervenor's Resp. to Def.'s Supplemental Br., ECF No. 119 at 5–9. Commerce's request, however, falls squarely within the parameters for remand articulated in *SKF USA*:

[T]he agency may request a remand because it believes that its original decision is incorrect on the merits and wishes to change the result. . . . The more complex question, however, involves a voluntary remand request associated with a change in agency policy or interpretation. . . . Where there is no step one *Chevron* issue, we believe a remand to the agency is required, absent the most unusual circumstances verging on bad faith. Under *Chevron*, agencies are entitled to formulate policy and make rules “to fill any gap left, implicitly or explicitly, by Congress.” Furthermore, an agency must be allowed to assess “the wisdom of its policy on a continuing basis.” Under the *Chevron* regime, agency discretion to reconsider policies does not end once the agency action is appealed.

SKF USA, 254 F.3d at 1029–30 (quoting *Chevron U.S.A. Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 843, 864 (1983)).

any decision this court would make on the merits regarding the targeted dumping challenges will become moot diminishes concerns of finality. *See Ad Hoc Shrimp Trade Action Comm.*, __ CIT at __, 882 F. Supp. 2d at 1381. For this reason, the court grants Commerce's request for voluntary remand to reconsider application of the targeted dumping method in light of changes to surrogate values and in conformity with current standards.¹⁴

II. Other Surrogate Values

A. Surrogate Value of Layo's Core Veneer

Commerce defined MLWF for purposes of the investigation as wood flooring that is "composed of an assembly of two or more layers or plies of wood veneer(s) in combination with a core. The several layers, along with the core, are glued or otherwise bonded together to form a final assembled product." Preliminary Determination, 76 Fed. Reg. at 30,657 (footnote omitted). Layo produces multilayered wood flooring composed of a face veneer, core layer, and back layer. Layo Sales & FOP Verification Report, A-570-970, POI Apr. 1, 2010 – Sept. 30, 2010 (July 22, 2011), Admin. R. Pt. 1 Pub. Doc. 599 ("Layo Verification Report") at 13. Layo uses core grade wood sheets and chips, or core veneer,¹⁵ to produce plywood for the core layer of its wood flooring. Layo Section C & D Questionnaire, A-570-970, POI Apr. 1, 2010 – Sept. 30, 2010 (Feb. 23, 2011), Admin. R. Pt. 1 Pub. Doc. 321 ("Layo C & D Questionnaire") at 10–11.

In the *Preliminary Determination*, Commerce valued Layo's core veneer using Philippine National Statistics Office ("NSO") data, specifically values for Philippine HTS subheading 4408.90.10, which applies to non-coniferous, non-tropical ("NCNT") face veneer. *I & D Mem.*, cmt. 16 at 73; Preliminary Surrogate Value Mem., A-570-970, POI Apr. 1, 2010 – Sept. 30, 2010 (May 19, 2011), Admin. R. Pt. 1 Pub. Doc. 523, at 7. In comments on the *Preliminary Determination*, both Layo and Petitioners agreed that Layo's core veneers are properly classified under Philippine HTS subheading 4408.90.90-06, which is

¹⁴ In light of the possibility that Plaintiffs' substantive challenges to the method for analyzing targeted dumping will become moot on remand, it is also possible that Commerce will not use zeroing in this investigation, thus rendering moot Plaintiffs' challenge to the use of this practice in investigations. Accordingly, any consideration of zeroing will also be deferred.

¹⁵ The parties refer to the core-grade wood sheets and chips used to produce the core layer in a variety of ways, including core veneer, core chips and sheets, and core material. Consistent with the Issues and Decision Memorandum in this case, the court will refer to the materials used to produce the core layer as core veneer. The core veneer, used to produce the core layer, is distinct from face veneer, the top-most or exterior layer of finished MLWF. *I & D Mem.*, cmts. 14–16 at 66–74 (discussing different surrogate values for face veneers and core veneers).

the HTS subheading for “sheets for plywood.” *I & D Mem.*, cmt. 16 at 73. The parties did not, however, agree on a dataset that would provide a basis for valuing core veneer using the ten digit subheading, HTS 4408.90.90–06. Petitioners argued that the only data available for HTS 4408.90.90–06 reflected a low volume of imports from a single country during 2009, a non-contemporaneous period; therefore, Petitioners argued, Commerce should value core veneer using the eight digit basket subheading HTS 4408.90.90, which includes the ten digit subheading HTS 4408.90.90–06 along with other ten digit subheadings.¹⁶ *Id.* In response, Layo argued that the NSO data did not provide values for the specific subheading at issue and Commerce should value core veneer on the basis of HTS 4408.90.90–06 drawn from Global Trade Atlas (“GTA”) data. *Id.* Commerce agreed with Petitioners and valued Layo’s core veneer using the basket category, HTS 4408.90.90, drawn from the NSO data. *Id.* Layo challenges this determination on the grounds that HTS 4408.90.90 was not the best available information because it lacked specificity and was unreasonable because it resulted in a value for core veneer that exceeded the value for face veneer. *Resp’ts’ Br.* at 52–57.

When considering Layo’s challenges, the court will not substitute its judgment regarding what evidence constitutes the best available information for that of Commerce, so long as Commerce’s determination is reasonable. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011). There are two aspects of Commerce’s determination, however, that, absent further explanation, make it unreasonable.

First, the NSO data does not reflect any imports specific to the input at issue. The 2010 NSO data contains no record of imports under HTS 4408.90.90–06, the subheading all parties agree is most appropriate for core veneer. *Ex. 4 to Resp’ts’ Br.*; *Ex. 9 to Pet’rs’ Rebuttal Surrogate Data*, A-570970, POI Apr. 1, 2010 – Sept. 30, 2010 (Mar. 21, 2011), *Admin. R. Pt. 1 Pub. Doc. 374*. Therefore, the basket

¹⁶ The breakdown of the basket subheading HTS 4408.90.90 is as follows:

4408.90.90: Other

4408.90.90–01: A. Sheets for veneering which are obtained by slicing laminated wood

4408.90.90 B. Other

4408.90.90–02: Sheets for plywood, of White Lauan

4408.90.90–03: White Lauan, sawn lengthwise, sliced or peeled

4408.90.90–04: Tanguile, sawn lengthwise, sliced or peeled

4408.90.90–05: Veneer corestock

4408.90.90–06: Sheets for plywood

4408.90.90–07: Narra, sawn lengthwise, sliced or peeled

4408.90.90–09: Other

Philippine Standard Commodity Classification, *Ex. 2 to Pet’rs’ Factor Data*, A-570–970, POI Apr. 1, 2010 – Sept. 30, 2010 (July 5, 2011), *Admin. R. Pt. 1 Pub. Doc. 581* (asterisks omitted).

category that Commerce opted to use was a basket containing no like product to that being valued. In other words, by valuing core veneer on the basis of HTS 4408.90.90 drawn from the 2010 NSO data, Commerce valued the core veneer on the basis of exclusively non-core veneer imports to the Philippines. The unreasonableness of valuing the core veneer in this way is further revealed by the unreasonable outcome that resulted, as discussed below.

Valuing core veneer on the basis of HTS 4408.90.90 results in a surrogate value for core veneer that is higher than the surrogate value for face veneer.¹⁷ In the *Final Determination*, Commerce valued Layo's face veneer at 173.41 USD/m³ and Layo's core veneer at 300.08 USD/m³. Layo Final Surrogate Value Sheet, A-570-970, POI Apr. 1, 2010 – Sept. 30, 2010, Admin. R. Pt. 2 Pub. Doc. 23. Were core veneer more expensive than face veneer, however, there would be no incentive for Layo, or any wood flooring manufacturer, to use core veneer materials or invest labor costs in constructing a plywood core layer from core veneer – a process Layo reported performing and Commerce verified. Layo Supplemental Section D Questionnaire, A-570-970, POI Apr. 1, 2010 – Sept. 30, 2010 (Apr. 8, 2011), Admin. R. Pt. 1 Pub. Doc. 404 at 5; Layo Verification Report at 13–15. It follows that Commerce's decision to value core veneer at a price higher than face veneer, when both the record and common sense dictate that core veneers are less valuable than face veneers, is unreasonable. Therefore, this determination is remanded to Commerce for reconsideration.

B. Surrogate Value of Layo's HDF Input

Fiberboard is available in a range of densities measured in kilograms per meter cubed ("kg/m³"). These densities can be grouped into categories such as medium density fiberboard ("MDF") and high

¹⁷ Commerce argues that the court should not consider Layo's argument regarding the relative values of core veneer and face veneer because Layo did not raise this argument before Commerce and, therefore, did not exhaust its administrative remedies. Def.'s Resp. Br. at 14–17. For a summary of the exhaustion doctrine, see *supra* note 9. Commerce's recapitulation of the record appears to be incorrect. A review of Layo's Case Brief reveals the following passage, which the court believes sufficiently raised the issue to preserve it for appeal:

[T]he value reflected in the GTA import statistics for HTS 4408.90.9006 is rational because it is lower than the value for "face veneers" under Philippine HTS 4408.90.10 from the NSO data at USD 173.41/M³ as the Department found and as indicated in the above table. In contrast, the value offered by petitioners after the preliminary determination is *higher* than the value determined by the Department for face veneers. Thus, not only is the basis for petitioners' recommended surrogate value for core veneer less specific but it also defies the economics of MLWF manufacturing and costs. The core sheets are used as the primary cheap filler wood whereas face veneer is used precisely because it is more expensive.

Layo Case Br. at 19.

density fiberboard (“HDF”). The Philippine NSO defines fiberboard ranging in density from 500– 800 kg/m³ as MDF, HTS 4411.21, and fiberboard with a density above 800 kg/m³ as HDF, HTS 4411.11. I & D Mem., cmt. 20 at 82.

Layo reported using fiberboard that ranged in density from 760 kg/m³ to 880 kg/m³,¹⁸ but did not report quantities of each density. *Id.* Therefore, Commerce used a simple average of the two HTS categories, HTS 4411.11 and HTS 4411.21, to determine the value of Layo’s fiberboard input. *Id.* Layo now argues that Commerce should have either used only HTS 4411.11, because Layo reported 820 kg/m³ as the most common density it used, or, if averaging, Commerce should not have converted the values for both HTS categories from USD/kg to USD/m³ using the same measure of density, 820 kg/m³. Resp’ts’ Br. at 60–61.

Layo’s contention that Commerce should have used only HTS 4411.11 is not persuasive. Layo argues that “most of the fiberboard [Layo] consumed had a density of 820kg/m³.” *Id.* at 60. Layo further contends that Commerce agrees with this assertion based on its use of 820 kg/m³ in calculating the surrogate value for the *Final Determination*. *Id.* at 60; see also Layo Final Surrogate Value Sheet (employing 820 kg/m³ as a conversion factor for the HDF surrogate value). But Layo’s contentions are not supported by the record. Layo reported that it consumed fiberboard in densities ranging from 760 kg/m³ to 880 kg/m³, but nothing in the record indicates that Layo reported quantities or percentages of particular densities. See I & D Mem., cmt. 20 at 82; Layo Case Br. at 27. The simple average of Layo’s reported range of densities is 820 kg/m³; however, because this is a simple average and not a weighted average, it does not indicate that 820 kg/m³ was the most common density consumed by Layo. Thus, there is no record evidence to support Layo’s contention that 820 kg/m³ is the most common density of fiberboard it consumes. Furthermore, even if Layo predominately consumed fiberboard of a density that fell within HTS 4411.11, it is reasonable for Commerce to account for the other fiberboard Layo consumes, which falls within HTS 4411.21.

Layo’s second argument regarding the conversion factor, however, warrants further explanation or reconsideration by Commerce. Commerce used a two-step calculation to derive the surrogate value for fiberboard. In step one, Commerce averaged the values of HTS 4411.11 and HTS 4411.21. In step two, the average value was con-

¹⁸ Commerce incorrectly identifies the range of densities as 760 kg/m³ to 990 kg/m³ in its Response Brief. Def.’s Resp. Br. at 18.

verted from USD/kg (as reported in the NSO) to USD/m³ (as reported by Layo). The parties' dispute centers on the proper order of these steps.

In the *Final Determination*, Commerce averaged the HTS values first, arriving at an average value of 0.54 USD/kg. See Layo Final Surrogate Value Sheet. Commerce then multiplied the average value by the average density of Layo's fiberboard, 820 kg/m³, to arrive at a surrogate value of 442.90 USD/m³. See *Id.* Layo contends that Commerce should have first converted each HTS category into USD/m³, by multiplying the value by an appropriate average density, and then averaged the resultant values. According to Layo, converting each HTS category to USD/m³ would be more accurate because HTS 4411.21, which covers 500–800 kg/m³, would be converted using a density appropriate to that category rather than the average density for Layo's input, 820 kg/m³, which would otherwise fall into HTS 4411.11. Resp'ts' Br. at 61.

Commerce is afforded wide discretion in its selection and calculation of surrogate values. *Grobtest & I-Mei Indus. (Viet.) Co. v. United States*, __ CIT __, 815 F. Supp. 2d 1342, 1351 (2012). “[The] court’s duty is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.” *Id.* (quoting *Zhejiang DunAn*, 652 F.3d at 1341 (alteration in original) (internal quotation marks omitted)). Nonetheless, agency action that is unsupported by a reasoned explanation will not be affirmed. See *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (“[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.”).

Commerce has not provided any explanation for its decision to convert the average HTS value by the average density of Layo's fiberboard input. While the court will not substitute its judgment for that of the agency, Layo has raised legitimate questions about the propriety of Commerce's calculation. If Commerce had chosen to perform the calculation differently, it would likely have changed the surrogate value for HDF. Without an explanation of its decision, the court cannot affirm Commerce's determination. See *Id.* Therefore, the surrogate value for Layo's fiberboard is remanded for further explanation or reconsideration.

C. Brokerage and Handling Fees

When calculating the export price, Commerce deducts “the amount, if any, included in such price, attributable to any additional costs, charges, or expenses . . . which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States,” such as brokerage and handling fees. 19 U.S.C. § 1677a(c)(2)(A). In this case, Commerce valued brokerage and handling fees using data for the Philippines from the World Bank report *Doing Business 2011: Making a Difference for Entrepreneurs* (“*Doing Business Report*”). Preliminary Surrogate Value Mem. at 17; *Doing Business Report*, Ex. 9 to Preliminary Surrogate Value Mem.

Layo contends that the brokerage and handling fees reflected in the *Doing Business Report* are overstated because they include fees for obtaining a letter of credit, which is not a component of Layo’s costs. Resp’ts’ Br. at 81–82. Commerce contends that there is no indication that letter of credit costs are included in the *Doing Business Report* and, if they are, such costs are generally paid by the purchaser not the exporter. *I & D Mem.*, cmt. 8 at 48.

The record evidence does not support Commerce’s determination. The World Bank uses data from its Trading Across Borders Survey to compile the *Doing Business Report*. See Trading Across Borders Survey, Ex. 11 to Layo Surrogate Data, A-570–970, POI Apr. 1, 2010 – Sept. 30, 2010 (Mar. 15, 2011), Admin. R. Pt. 1 Pub. Doc. 364.¹⁹ Layo points out that the survey asks respondents to “assume that the method of payment will be a Letter of Credit . . .,” Trading Across Borders Survey at 3, and provides respondents an opportunity to detail the costs associated with an “Export Letter of Credit,” Trading Across Borders Survey at 5. Commerce responds that the *Doing Business Report* contains a list of documents required for export that does not include a letter of credit, thereby indicating that letters of credit are not included in the World Bank’s calculations. *I & D Mem.*, cmt. 8 at 48; *Doing Business Report* at 11.

Commerce’s argument is unpersuasive. The Trading Across Borders Survey not only contemplates the possibility of exporters using a letter of credit, it directs the respondent to assume use of a letter of credit, which indicates that letter of credit expenses are included as a cost of doing business. Moreover, in a website discussing the meth-

¹⁹ The Trading Across Borders Survey establishes a hypothetical import/export scenario between the survey respondent and a fictional company located in a foreign market. The survey establishes certain parameters for the hypothetical, including shipping method and value of goods, and asks the survey respondent to describe the process for importing and exporting the hypothetical goods into and out of his or her country. Trading Across Borders Survey at 3.

odology of the Trading Across Borders Survey and *Doing Business Report*, the World Bank states that “[p]ayment is made by letter of credit, and the time, cost and documents required for the issuance or advising of a letter of credit are taken into account.” Trading Across Borders Methodology, Ex. 12 to Layo Surrogate Data. Nor is the absence of a letter of credit on the list of necessary export documents particularly informative. First, a letter of credit may not be a *necessary* document for exporting, but it is assumed as part of the exercise. Furthermore, the absence of a letter of credit from this list does not negate the fact that survey respondents are told to assume the use of a letter of credit in constructing their survey response and asked for information related to acquiring a letter of credit. It is unreasonable to assume the non-existence in the report of that which the report’s authors expect the survey respondents to assume.

Nor is Commerce’s argument that letter of credit expenses are born by the purchaser persuasive. Commerce asserts this proposition with no record evidence to support it. See *I & D Mem.*, cmt. 8 at 48. Layo, in contrast, placed on the record a printout of a page from the CreditManagementWorld.com website pertaining to letter of credit fees, which states that some letter of credit fees are borne by the seller and lists the relevant fees. Export Letter of Credit Fees, Ex. 14 to Layo Surrogate Data. The court does not decide what, if any, weight to give to this evidence, but, at a minimum, Commerce has failed to consider record evidence that detracts from its determination. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”).²⁰

²⁰ A recent case, *Since Hardware (Guangzhou) Co. v. United States*, __ CIT __, 911 F. Supp. 2d 1362 (2013), affirmed Commerce’s refusal to deduct letter of credit expenses from brokerage and handling fees valued using Indian data from the World Bank *Doing Business Report*. But the *Since Hardware* court was presented with a very different record than that at issue here. Specifically, the *Since Hardware* court concluded that “without knowing the exact breakdown of the data included in the World Bank Report, [Commerce] can no more deduct a letter of credit expense than add extra expenses which [plaintiff] incurred but are not reflected by the World Bank data.” *Id.* at 1378 (quoting *Remand Results* at 19–20) (first alteration in original). Although the *Since Hardware* court also noted that “[l]etters of credit are not included in the eight listed expenses for document preparation,” it did not draw any explicit conclusion from this fact. *Id.* As discussed above, the record in the case at issue here does not support a finding that the list of documents for export settles the matter of whether letter of credit expenses are part of the World Bank report’s brokerage and handling expenses. In addition, Commerce made no claim in this case regarding its inability to determine an amount for letter of credit expenses to deduct from the brokerage and handling expenses, as it did in *Since Hardware*. For these reasons, *Since Hardware* is distinguishable, and it is appropriate, on the facts of this case, to remand this issue to Commerce for further explanation consistent with the foregoing discussion.

For the foregoing reasons, Commerce's refusal to adjust the brokerage and handling fees to account for letter of credit fees is not supported by a reasonable reading of the record. Therefore, the determination is remanded to Commerce for further explanation or reconsideration.

D. Surrogate Financial Ratios

Respondents also challenge Commerce's calculation of surrogate financial ratios. In particular, Respondents argue that Commerce improperly rejected, as untimely filed, certain of Respondents' surrogate financial statements and, alternatively, that Commerce did not use the best available information when it declined to factor 2009 financial statements on the record into the surrogate financial ratio calculations.

Commerce has established deadlines for submission of factual information during an investigation. Pursuant to 19 C.F.R. § 351.301(c)(3)(i) (2010), interested parties have forty days after the publication of the preliminary determination to submit surrogate value information. Any interested party may offer factual information to "rebut, clarify, or correct" another interested party's factual submission within a minimum of ten days following an initial submission of factual information. § 351.301(c)(1).²¹ Commerce has interpreted § 351.301(c)(1) to exclude the submission of new surrogate value information in rebuttal. *I & D Mem.*, cmt. 3 at 23–24. On this basis, Commerce rejected new surrogate financial statements submitted by Respondents outside of the forty day window for surrogate data submissions but within the period permitted for rebuttals. *Id.* at 23–25.

The court defers to an agency's interpretation of its own regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Amanda Foods (Viet.) Ltd. v. United States*, __ CIT __, 807 F. Supp. 2d 1332, 1342 (2011) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). This deference "is broader than deference to the agency's construction of a statute, because in the latter case the agency is addressing Congress's intentions, while in

²¹ Section 351.301(c)(1) reads in full:

Any interested party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party at any time prior to the deadline provided in this section for submission of such factual information. If factual information is submitted less than 10 days before, on, or after (normally only with the Department's permission) the applicable deadline for submission of such factual information, an interested party may submit factual information to rebut, clarify, or correct the factual information no later than 10 days after the date such factual information is served on the interested party or, if appropriate, made available under APO to the authorized applicant.

the former it is addressing its own.” *Cathedral Candle Co. v. United States Int’l Trade Comm’n*, 400 F.3d 1352, 1363–64 (Fed. Cir. 2005). Furthermore, the court owes Commerce deference in crafting and executing the procedures necessary to evaluate the record. *See* *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760 (Fed. Cir. 2012) (“[A]bsent [constitutional] constraints or [extremely compelling] circumstances, courts will defer to the judgment of an agency regarding the development of the agency record.”). As the Court of Appeals has made clear, it is not this court’s role to “intrude[] upon Commerce’s power to apply its own procedures for the timely resolution of antidumping [proceedings]. The role of judicial review is limited to determining whether the record is adequate to support the administrative action.” *Id.* at 761.

Respondents contend that Commerce’s interpretation of § 351.301(c)(1) is plainly erroneous and inconsistent with the regulation because (1) the regulation does not prohibit the submission of new factual information or surrogate values and (2) prohibiting submission of new surrogate values in rebuttal denies parties a meaningful right to respond, as contemplated by the regulation.²² Resp’ts’ Br.

Respondent’s textual argument is not persuasive. Respondents contend that “[n]owhere in Section 351.301(c)(1) does it limit what type of ‘factual information’ can be submitted to ‘rebut, clarify, or correct.’” Resp’ts’ Br. at 74. Respondents are only partially correct. Section 351.301(c)(1) does not permit the submission of *any* new factual information; rather, it limits the submission to “factual information to rebut, clarify, or correct.” § 351.301(c)(1) (emphasis added). Thus, the type of factual information permitted under § 351.301(c)(1) is limited to information that rebuts, clarifies, or corrects previously submitted factual information. This is not an unambiguous construction, but such ambiguity is for Commerce to interpret in the first instance. *See Cathedral Candle Co.*, 400 F.3d at 1363 (“The gap between the text of the regulation and the Commission’s interpretation of section 777 is filled by the Commission’s interpretation of the regulation.”).

²² Respondents also argue that Commerce’s interpretation of § 351.301(c)(1) disadvantages NME respondents in comparison to market economy respondents. Resp’ts’ Br. at 75–77. Respondents’ argument conflates two different procedures in two different types of proceedings without a clear justification. Furthermore, Commerce has discretion to order its market economy proceedings and NME proceedings differently, as they require different types of procedures. *See Rhone-Poulenc, Inc. v. United States*, 20 CIT 573, 586–87, 927 F. Supp. 451, 462–63 (1996) (“Commerce’s Antidumping Manual expressly provides for NME-related investigation methods distinct from those applicable in market economies. The treatment of exports from market economies has no bearing here, whether contained in the [Antidumping Manual] or in a prior Federal Register Notice given contrary statutory language.”) (citations omitted).

Commerce has interpreted “factual information to rebut, clarify, or correct” to exclude new surrogate value data. Nothing in this interpretation is erroneous or inconsistent with the regulation itself. The regulation for rebuttal, clarification, or correction of factual information is part of a larger regulatory section setting forth time limits for submission of factual information. Interpreting “factual information to rebut, clarify, or correct” to be limited by comparison to the other provisions of § 351.301 is consistent with the creation of a distinct subsection for this purpose. Commerce’s interpretation is also consistent with the purpose of the subsection, which is to respond to factual information that has been placed on the record, not to expand the scope of the record. Finally, interpreting § 351.301(c)(1) to exclude new surrogate value data prevents Commerce from facing a scenario in which either a party has no opportunity to rebut, clarify, or correct new surrogate values submitted in a rebuttal, or Commerce must accede to rolling rebuttals while also complying with the statutory deadlines for completing investigations and reviews.

Nor is Respondents’ second argument, concerning the meaningful right to respond, persuasive. The following facts are relevant to this aspect of Respondents’ argument: Prior to the Preliminary Determination, Petitioners argued that Indonesia should be the surrogate country and submitted surrogate value data for Indonesia. *I & D Mem.*, cmt. 3 at 25. In the Preliminary Determination, Commerce chose the Philippines as the surrogate country. *Id.* Petitioners submitted their post-preliminary surrogate values on the last day of the period for submissions, pursuant to § 351.301(c)(3)(i), but instead of submitting data on Indonesian surrogate values Petitioners changed course and submitted surrogate value data for the Philippines, which included 2010 financial statements for Philippine plywood producers. *Pet’rs’ Factor Data* at 16–22. Respondents offered alternative 2010 financial statements of Philippine plywood producers in rebuttal, but these statements were rejected by Commerce. *I & D Mem.*, cmt. 3 at 22–23. Respondents now argue that they were prejudiced by having no opportunity to submit new surrogate value data for the Philippines in response to the surrogate value data submitted by Petitioners.

But Respondents’ argument misconstrues the nature of the proceeding. Respondents were aware that Commerce selected the Philippines as the primary surrogate country in the Preliminary Determination and were on notice that Petitioners might choose to submit surrogate value data for the Philippines. Respondents had access to the surrogate value data later rejected by Commerce and an opportunity to put that data on the record during the forty day window for

submission of new surrogate value data, pursuant to § 351.301(c)(3)(i). Furthermore, Respondents were aware that Commerce uses contemporaneity as one of the factors in considering which surrogate value data to use, *see supra* note 7, and that the 2009 financial statements on the record prior to the *Preliminary Determination* were not contemporaneous with the POI. Finally, Commerce explicitly notified parties that it does not consider new surrogate value data on rebuttal. *See I & D Mem.*, cmt. 3 at 24. Thus, Respondents had all the notice and opportunity they needed to put the rejected financial statements on the record in the forty day window provided, pursuant to § 351.301(c)(3)(i), and they chose not to do so. The right to “rebut, clarify, and correct” is not a substitute for a party’s obligation to develop the record in a timely manner, nor were Respondents prejudiced on the facts of this case.²³

Finally, Respondents argue that Commerce abused its discretion by not factoring the 2009 financial statements on the record into its surrogate financial ratio determination. Resp’ts’ Br. at 78–81. Commerce determined that the 2010 financial statements submitted by Petitioners were the best available information because they were contemporaneous with the POI and that the 2009 financial statements should be rejected as non-contemporaneous. *I & D Mem.*, cmt. 1 at 12. Commerce has provided a reasoned explanation for its determination, and the court will not substitute its judgment for that of the agency. *Zhejiang DunAn*, 652 F.3d at 1341.

For these reasons, Commerce’s rejection of Respondents’ late filed surrogate financial statements is affirmed.

CONCLUSION

In light of the foregoing: (1) the court grants Commerce’s request for remand to reconsider the surrogate value determinations for Layo’s plywood input and Samling’s HDF input; (2) the court grants Commerce’s request for remand of the targeted dumping determination for reconsideration in light of any changes to the surrogate value determinations and in light of Commerce’s current standards for applying the targeted dumping method; (3) the court remands the surrogate value determinations for Layo’s core veneer input, Layo’s HDF input, and the brokerage and handling fees for further expla-

²³ In their briefing, Respondents raise a scenario in which a party submits new surrogate value data on the fortieth day of the § 351.301(c)(3)(i) period relating to a surrogate country that no party argued for prior to the preliminary determination and which Commerce did not choose in the preliminary determination. Resp’ts’ Reply Br. at 23–25. Certainly, Commerce’s refusal to accept alternative surrogate values in such a scenario would be reviewed for abuse of discretion. *See Wuhu Fenglian Co. v. United States*, __ CIT __, 836 F. Supp. 2d 1398, 1403 (2012). The court also acknowledges, without deciding, that on the stated facts an opposing party may be prejudiced. But, those are not the facts of this case.

nation or reconsideration consistent with this opinion; and (4) the court affirms Commerce's rejection of Respondents' late filed surrogate financial statements.

Commerce shall have until September 30, 2013, to complete and file its remand redetermination. Plaintiffs and Defendant-Intervenors shall have until October 15, 2013, to file comments. Plaintiffs, Defendant, and Defendant-Intervenors shall have until October 29, 2013, to file any reply.

IT IS SO ORDERED.

Dated: July 31, 2013
New York, NY

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

Slip Op. 13-97

UNITED STATES STEEL CORP. Plaintiff, v. UNITED STATES, Defendant,
and HYUNDAI HYSKO LTD., Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Court No. 12-00070

[Commerce's determination is upheld.]

Dated: July 31, 2013

Jeffrey D. Gerrish, Nathaniel B. Bolin, and Robert E. Lighthizer, Skadden, Arps, Slate, Meagher & Flom, LLP, of Washington, D.C., for plaintiff.

Tara Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Sapna Sharma*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce.

Brady W. Mills of Morris, Manning & Martin, LLP, of Washington D.C. for defendant-intervenors. With him on the brief were *Donald B. Cameron, Julie C. Mendoza, R. Will Planert* and *Mary S. Hodgins*.

OPINION

Musgrave, Senior Judge:

Plaintiff United States Steel Corp. ("Plaintiff") challenges the Department of Commerce's ("Commerce") final results in the 2009 countervailing duty administrative review of *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 77 Fed. Reg. 13093 (Dept. Commerce, Mar. 5, 2012) Public Record Part 1 Doc. ("PR1") 49 ("Final Results"). Plaintiff challenges the benchmark interest rate used by Commerce to determine whether and to what

extent sales in the U.S. of Defendant-Intervenor Hyundai Hysco Ltd.'s ("Hysco") products were affected by a countervailable subsidy.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Commerce's final determination will be upheld unless it is found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings or conclusions for substantial evidence the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the anti-dumping statute. See *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous"). Commerce's interpretation will not be set aside unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778.

FACTS

Commerce reviewed loans that Hysco received from the government-owned Export-Import Bank of Korea (KEXIM), for the period of calendar year 2009. Commerce had previously determined that the KEXIM program loans were countervailable. Issues and Decision Memorandum in *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 77 Fed. Reg. 13093 (Dept. Commerce Mar. 5, 2012) ("I&D Memo") at 2–3.

The KEXIM loans were short-term, variable rate loans, whose interest rate changed monthly. I&D Memo at 3. Hysco received the KEXIM loans in 2008 and by their terms they extended into 2009. Commerce initially determined that the KEXIM loans should be benchmarked against all 2008 commercial loans received by Hysco. *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 76 Fed. Reg. 54208 (Dept. Commerce Aug. 31, 2011) ("Preliminary Results"). Hysco pointed out that the 2008 interest rates were much higher than the rates charged in 2009 and argued that the 2009 KEXIM loan payments should be judged against annual average 2009 interest rates. In response, Commerce decided that only Hysco's short term variable interest rate loans were comparable to the KEXIM loans and requested further information from Hysco. Commerce removed Hysco loans taken out in 2009 from the benchmark, because

the KEXIM loans were taken out in 2008. *Final Results*, 77 Fed. Reg. at 13093.

Commerce then determined how the commercial loans' variable interest rates were calculated. It identified the commercial loans' monthly base CD rate regularly reported by the Korean Financial Investment Association, and their specific fees and interest rate spreads. I&D Memo at 10–11. Commerce then applied a weighted average calculation to determine monthly rates for the 2009 review period. Plaintiff's Memorandum In Support of Motion for Judgment on the Agency Record under Rule 56.2 ("Pl. Br.") at 11, and sources cited therein. Commerce concluded that the resulting rates reflected the interest rates that Hysco would have paid had the commercial loans extended into 2009 and been paid on the same date as Hysco's KEXIM loan payments. I&D Memo at 10–11. Commerce thus determined what the short-term commercial loan rates would have been had Hysco made payments under the 2008 loans in 2009. I&D Memo at 11; see 19 C.F.R. § 351.505. Commerce stated:

HYSCO took out comparable, variable rate, short-term financing in 2008, which is the year in which the KEXIM short-term financing was taken out. Therefore, we used the variable rate loans provided by commercial banks during 2008 to determine our weighted-average commercial benchmark and compared the benchmark rate to the interest rate charged on the KEXIM loans. To determine the benefit from the KEXIM loan, we then compared the amount of actual interest paid on the KEXIM loan to the amount HYSCO should have paid at the commercial benchmark.

I&D Memo at 11. Commerce found that the *ad valorem* subsidy rate fell from a preliminary finding of 0.09% to the final determination of only 0.03% subsidy. I&D Memo at 3. Commerce determined for this review period that the benefit enjoyed by Hysco under the program was a *de minimis* rate of 0.46% and thus not countervailable. *Final Results*, 77 Fed. Reg. at 13094.

ANALYSIS

The relevant statute provides:

(E) Benefit conferred

A benefit shall normally be treated as conferred where there is a benefit to the recipient, including---

- (ii) in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the

amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market. . . .

19 U.S.C. § 1677(5)(E)(ii). Commerce determines a loan benchmark by looking at loans the company received from commercial lenders, 19 C.F.R. § 351.505(a)(3)(i), provided those loans are comparable to the government loan involved. 19 C.F.R. § 351.505(a)(2)(i). Commerce “normally will rely on the actual experience of the firm in question in obtaining comparable commercial loans.” 19 C.F.R. § 351.505(a)(3)(i).

Plaintiff argues that Commerce incorrectly used an “artificial” benchmark rate derived from commercial loans made to Hysco in 2008. Pl. Br. at 10. “Commerce’s loan benchmarks represented purely artificial loans that it constructed, not the interest rates charged on loans that HYSKO -- or any other company -- actually obtained or could have obtained from commercial lenders in Korea.” Pl. Br. at 11. Plaintiff implies that the actual commercial loan rates charged to Hysco (had it obtained any such loans in 2009) would have been much greater than the ones the Commerce calculated using the formula from the 2008 commercial loan agreements and the 2009 base rates. Plaintiff’s Reply Brief (“Pl. Reply”) at 3–4, 9.

The government points out that Commerce calculated a comparable benchmark for Hysco’s short term, variable interest rate KEXIM loans which accounted for the variability of interest rates over the review period. Defendant’s Opposition to Plaintiff’s Motion for Judgment on the Agency Record (“Def’t. Br.”) at 5–6. In the absence of any specific guidance from the statute or regulations to account for the variability of interest rates on variable rate loans, Commerce developed a reasonable methodology to do so in accordance with 19 U.S.C. § 1677(5)(E)(ii) and 19 C.F.R. § 351.505(a)(2)(iv). Def’t. Br. at 12. Commerce accounted for the variability of the interest rate on the KEXIM loans by calculating what the interest rate for comparable commercial loans would have been had the payments been made on the same dates as payments were made on the KEXIM loans. Def’t. Br. at 6, 13.

Hysco points out that “[h]ad Commerce used the interest rates on the [commercial] loans that were paid in 2008 it would have been comparing variable interest rates set in 2008 with variable interest rates paid on the KEXIM loans in 2009.” Hyundai Hysco Ltd. Brief in Opposition to the Motion of Plaintiff U.S. Steel Corp. for Judgment on the Agency Record (“Hysco Br.”) at 10 (emphasis in original). Hysco argues that using the higher 2008 rates to benchmark 2009 interest payments would have overstated the benefit to Hysco of the KEXIM loans. Hysco Br. at 11.

Plaintiff admits that the commercial loans obtained by Hysco in 2008 were comparable to the government loans in question. Pl. Reply at 2. Indeed, plaintiff states that the 2008 commercial loans satisfy “each and every one of the factors considered by Commerce when assessing comparability of short term loans.” Pl. Reply at 3. But plaintiff seeks to use those loans *in toto*, including their 2008 rates, to judge the 2009 short term rates charged by the government. Pl. Reply at 2–3. This argument fails because the rates differed significantly during the two periods, a factor Commerce recognized.

Plaintiff also argues that Commerce should have used a national average interest rate in this case because Hysco did not take out any commercial loans in 2009. Pl. Br. at 16–17, 19. This argument fails because the regulation requires Commerce to judge the KEXIM loans by comparison with commercial loans taken out in the same year as the KEXIM loans. Hysco took out the commercial loans relied upon by Commerce during 2008, the same year that the subject KEXIM loans were taken out. I&D Memo at 10; 19 C.F.R. § 351.505(a)(2)(iv). Furthermore, the court agrees with Commerce that the use of annual average interest rates is inappropriate when Commerce benchmarks short term variable interest rate government loans.

The court finds plaintiff’s arguments speculative and an invitation to interpose the court’s own judgment for that of the agency. The court declines to do so. The court is not convinced that, as plaintiff claims, the benchmark rates determined by Commerce were “hypothetical” or “artificial”. Plaintiff has failed to convince the court that Commerce has overstepped its bounds under *Chevron*. Commerce’s use of the loan calculation methodology from Hysco’s 2008 commercial loans in order to benchmark the payments Hysco made on the KEXIM loans in 2009 was appropriate under the applicable laws and regulations. The court has reviewed the record and finds that Commerce’s decision was reasonable under the circumstances.

CONCLUSION

Based upon the record developed before Commerce and upon the papers and proceedings before this court, for the reasons set forth above, the court sustains Commerce’s decision to benchmark the KEXIM loans using 2008 commercial loan calculation methodology and 2009 variable interest rates.

Dated: July 31, 2013

New York, New York

/s/ R. Kenton Musgrave

R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 13–98

ALPINESTARS S.P.A., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 09–00271

[Summary judgment granted for Plaintiff; summary judgment denied for Defendant.]

Dated: August 02, 2013

Erik D. Smithweiss, Robert B. Silverman, Frances P. Hadfield, Robert F. Seely, Joseph M. Spraragen, and Heather Litman for Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt of New York, NY and Los Angeles, CA on behalf of Plaintiff Alpinestars S.p.A.

Jason M. Kenner, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice for Defendant United States. With him on the brief were *Stuart F. Delery*, Principal Acting Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge. Of counsel on the brief was *Michael W. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of Washington, DC.

OPINION

Gordon, Judge:

This case is before the court on cross-motions for summary judgment. *See* Def.’s Mot. for Summ. J., ECF No. 50 (“Def.’s Br.”); Pl.’s Cross-Mot. for Summ. J., ECF No. 57 (“Pl.’s Br.”). Plaintiff Alpinestars S.p.A. (“Alpinestars”) challenges the decision of Defendant U.S. Customs and Border Protection (“Customs”) denying Alpinestars’ Protest of Customs’ classification of the imported Tech 8 motocross boot within the Harmonized Tariff Schedule of the United States (“HTSUS”). Customs classified the merchandise as “Other footwear with outer soles and uppers of rubber or plastics: Other footwear: Covering the ankle: Other: Other: Other: Valued over \$12/pair” under subheading 6402.91.90, HTSUS, which carries a 20% duty rate. Plaintiff claims that the merchandise is properly classified as “Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Other: Other: Other” under subheading 9506.99.60 of the HTSUS, which carries a 4% duty rate. Alternatively, Plaintiff argues that the subject merchandise is classifiable as “Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: Other footwear: Covering the ankle: For men, youths and boys” under HTSUS subheading 6403.91.60 with a 8.5% duty rate, or as “Other footwear with outer

soles and suppers of rubber or plastics: Sports footwear: Other: Other: Valued over \$12/pair,” under subheading 6402.19.90, HTSUS, dutiable at 9%. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006).¹ For the reasons set forth below, Plaintiff’s motion for summary judgment is granted, and Defendant’s motion is denied.

I. Undisputed Facts

The following facts are not in dispute. *See* Def.’s Statement Undisp. Mat. Facts, ECF No. 50 (“Def.’s Undisp. Facts”); Pl.’s Resp. to Def.’s Statement Undisp. Mat. Facts, ECF No. 62 (“Pl.’s Resp. to Def.’s Undisp. Facts”); Pl.’s Statement Add’l Undisp. Facts, ECF No. 59 (“Pl.’s Add’l Undisp. Facts”); Def.’s Resp. to Pl.’s Statement of Add’l Undisp. Facts, ECF No. 68 (“Def.’s Resp. to Pl.’s Undisp. Facts”). Alpinestars is a world renowned manufacturer of technical, high performance protective gear for motorcycle and auto racing. Pl.’s Add’l Undisp. Facts ¶ 1; Def.’s Resp. to Pl.’s Undisp. Facts ¶ 1. This case concerns the classification Alpinestars’ Tech 8 motocross boots, Model No. 201106 (“Tech 8”), imported by Plaintiff in June 2008 under Entry Number GEO4000478–6. Def.’s Undisp. Facts. ¶ 1; Pl.’s Resp. to Def.’s Undisp. Facts ¶ 1. Customs classified the motocross boots at issue under HTSUS 6402.91.90, which provides for “Other footwear with outer soles and uppers of rubber or plastics: Other footwear: Covering the ankle: Other: Other: Other: Valued over \$12/pair” dutiable at 20% ad valorem and liquidated the entries in September 2008. Def.’s Undisp. Facts ¶ 2; Pl.’s Resp. to Def.’s Undisp. Facts ¶ 2.

The Tech 8 is designed for motocross sports. Pl.’s Add’l Undisp. Facts ¶ 51; Def.’s Resp. to Pl.’s Undisp. Facts ¶ 51. Traditional motocross is a motorcycle race on a closed dirt course of approximately two miles. The dirt course incorporates jumps, ruts, and hairpin turns. Other forms of off-road motorcycle sports include supercross, freestyle, endure, cross-country, adventure, and recreation off-road racing. Pl.’s Add’l Undisp. Facts ¶ 3; Def.’s Resp. to Pl.’s Undisp. Facts ¶ 3. Motocross sports are dangerous and riders who participate in the sport either competitively or as a hobby must protect their bodies from injuries that may be caused by collisions with other riders, flying objects such as rocks and debris, and falls from the motorcycle. Pl.’s Add’l Undisp. Facts ¶ 4; Def.’s Resp. to Pl.’s Undisp. Facts ¶ 4. A rider primarily controls the motorcycle with his hands and feet. Pl.’s Add’l Undisp. Facts ¶ 13; Def.’s Resp. to Pl.’s Undisp. Facts ¶ 13. The connection between a rider’s feet and the motorcycle footpegs is crucial to the rider’s performance in motocross

¹ Further citation to Title 28 of the U.S. Code is to the 2006 edition.

sports. Pl.'s Add'l Undisp. Facts ¶ 60; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 60. The Tech 8 is necessary, useful, or appropriate for participating in motocross sports. Pl.'s Add'l Undisp. Facts ¶ 53; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 53. The boot is a high level motocross boot and is designed to provide protection to riders in motocross sports. Def.'s Undisp. Facts ¶ 6; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 6; Pl.'s Add'l Undisp. Facts ¶ 52; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 52. The Tech 8 is designed to protect riders from serious injuries caused by collisions, flying objects, and debris. Pl.'s Add'l Undisp. Facts ¶ 54; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 54.

When it was in production, the Tech 8 was the second most protective Alpinestars' boot on the market. Def.'s Undisp. Facts ¶ 8; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 8. The Tech 8 sold for approximately \$350.00. Def.'s Undisp. Facts ¶ 9; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 9. Each boot weighs over four pounds. Pl.'s Add'l Undisp. Facts ¶ 5; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 5. The Tech 8 consists of an interior bootie and an external shell that are designed to work together to protect the foot and lower leg of a motocross rider. Pl.'s Add'l Undisp. Facts ¶ 6; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 6. The ankle area of the Tech 8 bootie has thick padding and incorporates gel inserts for additional impact protection. Pl.'s Add'l Undisp. Facts ¶ 7; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 7.

The Tech 8 external shell incorporates a heavy durable sole, a hard plastic protective shin guard, and padding to further protect a rider against injury from blows, collisions, and flying objects. Pl.'s Add'l Undisp. Facts ¶ 8; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 8. A hard plastic ankle protector or "ankle brace" is sandwiched between the lining and the outer surface of the upper in the area of the ankle and heel. The ankle protector is stitched to the insole last. Pl.'s Add'l Undisp. Facts ¶ 9; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 9. The ankle protector provides protection and support for the wearer's ankle and heel bone. Pl.'s Add'l Undisp. Facts ¶ 10; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 10.

The "shin plate" is an essential structural component of the upper. Pl.'s Add'l Undisp. Facts ¶ 21; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 21. The "shin plate" is a large hard plastic piece at the front of the shaft that is contoured to protect the shin of the wearer. Pl.'s Add'l Undisp. Facts ¶ 19; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 19. The material underneath the shin plate is a thin textile lining and padded foam, which are not suitable materials for the external surface area of the upper. Pl.'s Add'l Undisp. Facts ¶ 20; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 20. The leather on the medial side of the shaft is reinforced with a "heat shield" fabricated from polyethylene that is 2.5 mm thick

and coated with 70 microns of aluminum. Pl.'s Add'l Undisp. Facts ¶ 17; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 17. The heat shield is sandwiched between the leather and the lining, and is designed to protect the rider's calf from the heat of the motorcycle engine. Pl.'s Add'l Undisp. Facts ¶ 18; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 20.

The PX Protector (Part No. 53) is also an essential structural component of the upper of the Tech 8. Pl.'s Add'l Undisp. Facts ¶ 11, Def.'s Resp. to Pl.'s Undisp. Facts ¶ 11. The material underneath the PX Protector is a non-woven fibrous material that is not suitable material for the external surface of the upper. Pl.'s Add'l Undisp. Facts ¶ 12; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 12.

The upper of the Tech 8 does not contain any eyelet stays, ankle patches, tabs, or edging. Def.'s Undisp. Facts ¶ 16; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 16. The external surface of the lower front and lateral side of the Tech 8 incorporates leather that is between 3.2 and 3.4 mm thick. Pl.'s Add'l Undisp. Facts ¶ 13; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 13. This leather is internally reinforced at the ankle and heel area with a layer of material called "flexon" that protects the ankle/heel area from impacts. *Id.* The external surface of the shaft portion of the Tech 8 incorporates leather that is between 2.8 and 3.4 mm thick. Pl.'s Add'l Undisp. Facts ¶ 14; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 14.

The Tech 8 employs a system of floating buckles for fastening. Pl.'s Add'l Undisp. Facts ¶ 22; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 22. The Tech 8 has four straps with four buckles and two floating buckle bases. Def.'s Undisp. Facts ¶ 15; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 15; Pl.'s Add'l Undisp. Facts ¶ 22; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 22. The exterior shell of the Tech 8 has a Velcro® closure at the top of the shaft, which helps keep the Tech 8 closed, even without the buckles. Pl.'s Add'l Undisp. Facts ¶ 23; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 23.

The "Listino" (Part No. 41), also called a "calf support" or "calf protector," is made of high modulus polyurethane ("PU") plastic and is stitched to the leather upper in the calf area. Pl.'s Add'l Undisp. Facts ¶ 24; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 24; Def.'s Undisp. Facts ¶ 17; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 17. The intended functions of the "Listino" are (1) to securely attach a floating buckle base and a buckle receiver as part of the floating buckle system, (2) to provide a location to place the vertical Alpinestars' logo, and (3) to cover and reinforce the rear zigzag seam on the shaft. Pl.'s Add'l Undisp. Facts ¶ 25; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 25. The "Listino" protects the vertical zigzag seam from damage. Pl.'s Add'l Undisp. Facts ¶ 26; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 26. The "Listino" may provide some protection from abrasion and impact due

to the fact it is made from high modulus plastic and is placed over the leather upper. Pl.'s Add'l Undisp. Facts ¶ 28; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 28. Alpinestars' marketing material describes the calf support component as a "contoured calf protector plate [which] is injected with PU for high impact resistance." Def.'s Undisp. Facts ¶ 17; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 17.

The buckle receiver holder (Part No. 48) component of the Tech 8 is composed of high modulus PU plastic and is affixed to the leather by stitching. Def.'s Undisp. Facts ¶ 10; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 10. The rear buckle holder (Part No. 46) component is composed of high modulus PU plastic and is affixed to the leather by stitching. Def.'s Undisp. Facts ¶ 10; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 10. The intended function of the buckle receiver holder is to accommodate an adjustable buckle strap as part of the floating buckle system so that the strap does not penetrate the inside of the leather upper. Pl.'s Add'l Undisp. Facts ¶ 35; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 35.

The butterfly-shaped heel counter (Part No. 58) is made of high modulus PU plastic and is stitched to the leather. Def.'s Undisp. Facts ¶ 12; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 12. The stamped steel heel guard is composed of steel and is called the "iron heel." Def.'s Undisp. Facts ¶ 14; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 14. The "iron heel" (Part No. 68) is made from steel and is screwed to the leather upper by two screws. Pl.'s Add'l Undisp. Facts ¶ 40; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 37; Def.'s Undisp. Facts ¶ 14; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 14.

The sole of the Tech 8 protects the rider's foot. Pl.'s Add'l Undisp. Facts ¶ 45; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 45. The sole is comprised of three separate layers (1) a plastic insole that is 10 mm thick and includes an embedded steel shank, (2) a 5 mm thick rubber midsole, and (3) an outer sole made of rubber that incorporates a hard replaceable sole that covers the middle portion of the bottom of the foot. Pl.'s Add'l Undisp. Facts ¶ 46; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 46. A stitchdown process is used to last the multi-layered sole to exterior boot upper. Pl.'s Add'l Undisp. Facts ¶ 47; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 47. The multilayered upper, including internal ankle brace, is stitched horizontally to the rib of the insole last. Pl.'s Add'l Undisp. Facts ¶ 48; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 48.

The metal "toe-box" ("steel toe cap") is a replaceable component on the front of the sole of the boot. Def.'s Undisp. Facts ¶ 27; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 27. The replaceable steel toe cap is affixed to the juncture of the outsole and the upper of the Tech 8. Pl.'s Add'l Undisp. Facts ¶ 49; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 49. The steel toe cap wraps around and slightly protrudes from the outsole of the

Tech 8, where it is attached with two screws. *Id.* The flat metal surface of the steel toe cap that faces the ground is smooth. *Id.* The steel toe cap helps the Tech 8 to better slide if a rider places his foot down while riding. Pl.'s Add'l Undisp. Facts ¶ 66; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 66.

The hard replaceable sole is a rubber portion of the sole of the boot. Def.'s Undisp. Facts ¶ 26; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 26. It is composed of a hard rubber compound that is harder than the remainder of the sole of the boot. Def.'s Undisp. Facts ¶ 26; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 26. A tight grip on the footpegs makes the rider's foot less likely to slip off the footpegs, and the rider has a more secure command of the motorcycle. Pl.'s Add'l Undisp. Facts ¶ 61; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 61. The hard replaceable sole covers the middle of the Tech 8 outsole, the portion of the outsole that rests on the footpeg. Pl.'s Add'l Undisp. Facts ¶ 63, Def.'s Resp. to Pl.'s Undisp. Facts ¶ 63.

The buckle receiver holder covers 3.7% of the surface area of the upper of the Tech 8 boot. Def.'s Undisp. Facts ¶ 29; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 29. The rear buckle holder covers 4.7% of the surface area of the upper of the Tech 8 boot. Def.'s Undisp. Facts ¶ 30; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 30. The stamped steel heel guard covers 0.9% of the surface area of the upper of the Tech 8 boot. Def.'s Undisp. Facts ¶ 31; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 31. The butterfly-shaped heel counter covers 0.9% of the surface area of the upper of the Tech 8 boot. Def.'s Undisp. Facts ¶ 32; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 32. The calf support covers 12.0% of the surface area of the upper of the Tech 8 boot. Def.'s Undisp. Facts ¶ 33; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 33. The uncontested rubber/plastic of the surface area of the upper of the Tech 8 boot is 43.5%. Def.'s Undisp. Facts ¶ 34; Pl.'s Resp. to Def.'s Undisp. Facts ¶ 34.

II. Standard of Review

The court reviews Customs' protest decisions de novo. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine issue as to any material fact . . ." USCIT R. 56(c); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering whether material facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

A classification decision involves two steps. The first step addresses the proper meaning of the relevant tariff provisions, which is a question of law. See *Faus Group, Inc. v. United States*, 581 F.3d 1369,

1371–72 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed, which, when disputed, is a question of fact. *Id.*

When there is no factual dispute regarding the merchandise, the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998). This is such a case, and summary judgment is appropriate. *See Bausch & Lomb*, 148 F.3d at 1365–66.

While the court accords deference to Customs classification rulings relative to their “power to persuade,” *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the court has “an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms.” *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

III. Discussion

Classification disputes under the HTSUS are resolved by reference to the General Rules of Interpretation (“GRIs”) and the Additional U.S. Rules of Interpretation. *See Carl Zeiss*, 195 F.3d at 1379. The GRIs are applied in numerical order. *Id.* Interpretation of the HTSUS begins with the language of the tariff headings, subheadings, their section and chapter notes, and may also be aided by the Explanatory Notes published by the World Customs Organization. *Id.* “GRI 1 is paramount . . . The HTSUS is designed so that most classification questions can be answered by GRI 1 . . .” *Telebrands Corp. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1277, 1280 (2012).

Pursuant to GRI 1, merchandise that is described “in whole by a single classification heading or subheading” is classifiable under that heading. *CamelBak Prods. LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). If that single classification applies, the succeeding GRIs are inoperative. *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998). Here, GRI 1 resolves the classification of Alpinestars’ Tech 8 motocross boot, and the court does not reach Alpinestars’ other arguments under subsequent GRIs. *See* Pl.’s Br. at 15–18.

The court construes tariff terms according to their common and commercial meanings, and may rely on both its own understanding of

the term as well as upon lexicographic and scientific authorities. See *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The court may also refer to the Explanatory Notes “accompanying a tariff subheading, which—although not controlling—provide interpretive guidance.” *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron*, 334 F.3d at 1309).

The dispute in this case concerns whether Alpinestars’ Tech 8 boots are properly classified under headings, 6402, 6403, or 9506, HTSUS. The pertinent provisions of Chapter 64 and 95 of the HTSUS are as follows:

6402	Other footwear with outer soles and uppers of rubber or plastics: Sports footwear: Other: Other:	Valued over \$12/pair9%
6402.19.90		
...		
Other footwear:		
6402.91	Covering the ankle: Other: Other: Other:	Valued over \$12/pair20%
6402.91.90		
* * *		
6403	Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: Sports footwear: Other: For men, youths and boys: Other:	Other4.3%
6403.19.40		
Other footwear:		
6403.91	Covering the ankle: Other: Other:	For men, youths and boys8.5%
6403.91.60		
* * *		
9506	Articles and equipment for general physical exercise, gymnastics, ath- letics, other sports (including table-tennis) or outdoor games, not speci- fied or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Other:	
9506.99	Other:	
9506.99.60	Other4%

HTSUS subheadings 6402.19.90, 6402.91.90, 6403.19.40, 6403.91.60, 9506.99.60. The subheadings are *eo nomine* provisions, or more simply, provisions “that describe[] an article by a specific name, not by use.” *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (citing *CamelBak Prods.*, 649 F.3d at 1364). Absent limiting language or contrary legislative intent, an *eo nomine* provision covers all forms of the named article. *Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995).

Plaintiff argues that the Tech 8 boots are classifiable under Chapter 95, HTSUS subheading 9506.99.60 “Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Other: Other: Other.” Pl.’s Br. at 6. In the alternative, Plaintiff argues the proper classification for the boot is under Chapter 64 as footwear with uppers of leather, either under 6403.19.40 as “sports footwear” or under “other footwear” of 6403.91.60, HTSUS. *Id.* Last, if the upper is rubber or plastic, Plaintiff argues the Tech 8 is classifiable as “sports footwear” under subheading 6402.19.90, HTSUS. *Id.* Customs, however, contends that the Tech 8 was properly classified under subheading 6402.91.90, HTSUS, for other footwear with uppers of rubber or plastic.

The initial question for the court is whether the Tech 8 is classifiable under Chapter 64 footwear or Chapter 95 sports equipment. If the Tech 8 is footwear and thus classifiable under Chapter 64, the court then must determine whether the upper is leather and classifiable under Heading 6403, or plastic or rubber and classifiable under Heading 6402. To determine the material of the upper, the court must identify, and exclude, all components that are accessories or reinforcements. If, after excluding accessories or reinforcements, the court concludes that the upper is leather, then the court must determine whether the Tech 8 is “Sports footwear” under 6403.19.40 or “Other footwear” under 6403.91.60. Here, the court concludes that the Tech 8 is footwear (not sports equipment), that the material of the upper is leather, and that it does not satisfy the requirements of “Sports footwear.” Accordingly, the Tech 8 is classifiable as “Other footwear” under 6403.91.60, HTSUS.

A. Chapter 95

Plaintiff argues the proper classification for the Tech 8 is under HTSUS Chapter 95, Heading 9506, as sports equipment. Alpinestars contends that, because “the Tech 8 is protective and . . . necessary, useful, or appropriate sports equipment of motocross and other of-

froading riding sports,” it is sports equipment and is classifiable under Heading 9506. Pl.’s Br. at 13. Further, Plaintiff contends the Tech 8 is similar to the items listed in Example 13 of the Chapter 95 Explanatory Notes. *Id.* at 11. Defendant counters arguing that the Tech 8 is footwear—not sports equipment—and was properly classified under Chapter 64 as footwear. Def. Br. at 27. Further, Defendant cites to Note 1(g) of Chapter 95, which excludes sports footwear from the Chapter. *Id.* at 35; Chapter 95 Notes, Note 1(g), HTSUS.

Heading 9506 provides for “Articles and equipment for . . . sports,” which is referred to as “sports equipment.” The HTSUS does not define the term “sports equipment.” However, the Federal Circuit has defined sports equipment within Heading 9506. In *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1250–51 (Fed. Cir. 2004), the Federal Circuit defined the term as articles that are “necessary, useful or appropriate” for that sport. The Federal Circuit further refined its definition of sports equipment in *LeMans Corp. v. United States*, 660 F.3d 1311 (Fed. Cir. 2011). In *LeMans*, a case involving the classification of motocross jerseys, pants, and jackets, the Federal Circuit held the apparel not to be sports equipment within 9506. *Id.* The Court in *LeMans* clarified the meaning of sports equipment by looking to the Explanatory Notes:

In deciding [in *Bauer*] that merchandise can be sports equipment as long as the goods are “useful” or “appropriate” for a sport, we did not address the extent to which the Explanatory Notes to Section 9506 clarified the meaning of the term “sports equipment,” an issue we find persuasive in this case, as discussed below.

....

[T]he Explanatory Notes to Section 9506 indicate that, to the extent “sports equipment” encompasses articles worn by a user, those articles are not apparel-like and are almost exclusively protective in nature.

...

Accordingly, we find that the CIT properly looked to the Explanatory Notes to Section 9506 to assist with the interpretation of Heading 9506. The vast majority of the examples in those notes are items that a user **would not wear on his or her body, but instead consist of articles that are entirely separate from the user** (e.g., tennis nets, children’s playground equipment, archery targets, bobsleds), held by the user in his or her hand (e.g., golf clubs, tennis rackets, polo mallets, hockey sticks), or are accessories fastened to a user (e.g., snow skis, water skis, ice skates). **The few examples that a user actually would wear, which are identified in Example**

(13), are almost exclusively used for protection and would complement, or be worn in addition to, apparel worn for a particular sport.

Id. at 1319–22 (emphasis added). Therefore, the Federal Circuit determined that sports equipment is defined as non-apparel-like merchandise that is necessary, useful, or appropriate for a sport, and if the merchandise is worn by a user, those articles are almost exclusively protective in nature and would complement, or be worn in addition to, apparel worn for a particular sport. *Id.* ; see also *Riddell, Inc. v. United States*, 37 CIT ___, Slip. Op. 13–37 (Mar. 20, 2013).

It is undisputed that the Tech 8 boot is necessary, useful, or appropriate for the sport of motocross. However, the Federal Circuit explained that sports equipment that is worn by a user must also complement or be in addition to apparel worn for a particular sport. Unlike the examples listed in the Explanatory Notes, Example 13—fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards—the Tech 8 boot is not worn to complement or be worn in addition to other apparel. See Explanatory Notes, 95.06(B)(13) (2007).² Clothing and footwear are the two essential items that people wear, regardless of whether one is dressing for a sport. The Tech 8 boot is exactly that, a *boot*. It is simply footwear and not an item used to enhance, *i.e.*, “complement or be in addition” to apparel. *LeMans*, 660 F.3d at 1322. Therefore, it is not sports equipment under Heading 9506, and the court, therefore, does not address Defendant’s arguments under Chapter 95, Note 1(g). Since the Tech 8 is not classified under both Chapter 95 sports equipment and Chapter 64 footwear, the court does not reach Plaintiff’s alternative arguments under GRI 3(a).

B. Chapter 64

Having determined that the Tech 8 is not classifiable under Heading 9506, the court turns to whether it is properly classifiable under footwear headings, 6403 or 6402. Heading 6402 is for “Other footwear with outer soles and uppers of rubber or plastics,” while Heading 6403 captures “Footwear with outer soles of rubber, plastic, leather or composition leather and uppers of leather.” For purposes of this case, the key difference between these two headings is the material of the footwear’s upper: rubber or plastic (Heading 6402), or leather (Heading 6403). Note 4(a) to Chapter 64 explains that “[t]he material of the upper shall be taken to be the constituent material having the great-

² Further citations to the Explanatory Notes are to the relevant provisions of the 2007 edition, which were in effect at the time of the importation of the subject merchandise.

est external surface area, no account being taken of accessories or reinforcements such as ankle patches, edging, ornamentation, buckles, tabs, eyelet stays or similar attachments.” Therefore, the court must determine the material having the “greatest surface area” of the upper of the Tech 8. Note 4(a), Chapter 64, HTSUS.

The Tech 8 upper is made of different components of various materials. In determining the material with the greatest external surface area no account may be given to “accessories or reinforcements.” *Id.* It is therefore important to first identify which components are “accessories or reinforcements” to properly exclude them. *Id.* At the outset, the parties agree that at a minimum, 43.5% of the upper is rubber or plastic, and 34.3% is leather.³ Def.’s Brief at Ex. L; Def.’s Undisp. Facts ¶¶ 33–34; Pl.’s Resp. to Def.’s Undisp. Facts ¶¶ 33–34. Therefore, the materials of the remaining components (“the contested components”), comprising 22.2% of the upper’s surface area, will determine whether the upper is rubber or plastic, or leather. The contested components and their respective percent of the upper’s surface area are as follows: Listino/calf support (Part No. 41) 12%; rear buckle holder (Part No. 46) 4.7%; buckle receiver holder (Part No. 48) 3.7%; stamped steel heel guard (Part No. 68) 0.9%; butterfly shaped heel counter (Part No. 58) 0.9%. Def.’s Brief at Ex. L; Def.’s Undisp. Facts ¶¶ 29–34; Pl.’s Resp. to Def.’s Undisp. Facts ¶¶ 29–34. With the exception of the steel heel guard composed of metal, the other contested components are made of rubber or plastic and are stitched onto the leather upper. Pl.’s Add’l Undisp. Facts ¶¶ 24, 31, 34, 37, 40. Def.’s Resp. to Pl.’s Undisp. Facts ¶¶ 24, 31, 34, 37, 40.

Plaintiff argues the contested components are “accessories or reinforcements,” and therefore should be excluded from the external surface area of the upper. Pl.’s Br. at 19. If these components are excluded, the underlying leather would be the “material with the greatest surface area,” resulting in classification under Heading 6403. Note 4(a), Chapter 64, HTSUS. Defendant, however, argues that the contested components are not accessories or reinforcements and that they should therefore be included in calculating the materials of the surface area. Def.’s Br. at 19. With all but one of the contested components made of plastic or rubber, if the components are *not* “accessories or reinforcements,” then plastic or rubber would constitute the greatest surface area, mandating classification under Heading 6402.

³ Defendant erred in its brief and USCIT Rule 56(h) statement by listing 34.5% of the upper as leather when its cited source, Def.’s Ex. L, provides that 34.3% of the upper is leather. *See* Def.’s Br. at 18; Def. Undisp. Facts ¶ 35. Regardless, two-tenths of a percent is not outcome determinative in this case.

The HTSUS does not define “accessories or reinforcements.” Chapter 64, Note 4(a) merely provides that when determining the external surface area of the upper, no account be taken of “accessories or reinforcements such as ankle patches, edging, ornamentation, buckles, tabs, eyelet stays or similar attachments.” The Explanatory Notes to Chapter 64 further add, “if the upper consists of two or more materials, classification is determined by the constituent material which has the greatest external surface area, no account being taken of accessories or reinforcements such as ankle patches, *protective or ornamental strips or edging, other ornamentation (e.g., tassels, pompons or braids)*, buckles, tabs, eyelet stays, *laces or slide fasteners*. The constituent material of any lining has no effect on classification.” General Explanatory Note, Chapter 64, HTSUS (emphasis added). Because the phrase “accessories or reinforcements” contains the disjunctive “or,” each term, “accessories” and “reinforcements,” must be defined.

Plaintiff defines “accessory” as “a component, not essential to the upper, which adds function or ornamentation (beauty).” Pl.’s Br. at 20. Dictionaries define “accessory” as “an object or device that is not essential in itself but that adds to the beauty, convenience, or effectiveness of something else;” or as “something subordinate or supplementary; adjunct.” Webster’s Third New International Dictionary 11 (2002); The American Heritage Dictionary 71 (2nd College ed. 1985). Plaintiff defines “reinforcement” as a “material that strengthens or provides additional support.” Pl.’s Br. at 20. Further, Plaintiff cites to dictionaries that define “reinforcement” as something that reinforces, with “reinforce” defined as “to strengthen or make stronger, as by patching, propping, adding a new material, etc.” *Id.* (citing Webster’s New World Dictionary 1198 (2d College ed. 1986)). In contrast, Defendant does not define accessory or reinforcement, but instead relies upon the Note 4(a) examples of accessories or reinforcements: patch, edging, ornamentation, buckle, eye stay, and tab. Def. Br. at 14–15. From these examples, Defendant argues that “accessories and reinforcements within the meaning of Note 4(a) are two categories of shoe components: (1) decorative items; and (2) aids to fastening and closure systems.” *Id.* at 15. Defendant also contends that “accessories or reinforcements” are generally flimsy and do not contribute more than *de minimis* strength, support, or durability to the upper.” *Id.* at 15–16.

After reviewing the respective arguments, the definitions, the examples in Note 4(a), and the Explanatory Notes, the court determines that within Chapter 64 an “accessory” refers to a nonessential article that adds to the aesthetics, convenience, or effectiveness of the foot-

wear, with a “reinforcement” referring to a nonessential article that strengthens, provides additional assistance, or support to the footwear. Having defined “accessory” and “reinforcement,” the court next determines whether the contested components satisfy either of these definitions.

1. Contested Components

a. Listino (Part No. 41)

The Listino (Part No. 41), also called the calf protector, covers 12% of the upper’s surface area, and is a plastic strip that is stitched to the leather upper on the back shaft of the Tech 8. Pl.’s Add’l Undisp. Facts ¶ 24; Def.’s Resp. to Pl.’s Undisp. Facts ¶ 24; Def.’s Undisp. Facts ¶ 33; Pl.’s Resp. to Def.’s Undisp. Facts ¶ 33. The plastic of the Listino is made of high modulus PU plastic. The intended functions of the Listino are (1) to securely attach a floating buckle base and a buckle receiver as part of the floating buckle system, (2) to provide a location to place the vertical Alpinestars’ logo, and (3) to cover and reinforce the rear zigzag seam on the shaft. *Id.* It also protects the vertical zigzag seam from damage.

The floating buckle system is not essential to the Tech 8 because it is not necessary to keep the boot closed as the Velcro® alone keeps it closed. Pl.’s Add’l Undisp. Facts ¶ 23; Def.’s Resp. to Pl.’s Undisp. Facts ¶ 23. Therefore, attaching the floating buckle system adds to the convenience of the boot. Similarly, providing a location for the Alpinestars logo and covering the seam both lend to the aesthetics of the boot. The Listino is an accessory (which is a nonessential article that adds to the aesthetics, convenience, or effectiveness of the footwear), and is therefore excluded from the upper.⁴ Accordingly, the underlying leather, comprising 12% of the surface area, is added to the uncontested 34.3% leather, bringing the total to 46.3% leather, and 43.5% plastic or rubber.

b. Rear Buckle Holder (Part No. 46)

The rear buckle holder (Part No. 46) covers 4.7% of the upper’s surface area and is stitched onto the leather near the heel of the boot. Def.’s Undisp. Facts ¶ 30; Pl.’s Resp. to Def.’s Undisp. Facts ¶ 30. It is made of high modulus PU plastic, and its intended function is to accommodate an adjustable buckle strap, as part of the floating buckle system, so that the strap does not penetrate the inside of the leather upper. Def.’s Undisp. Facts ¶ 10; Pl.’s Resp. to Def.’s Undisp. Facts ¶ 10. As explained, the floating buckle system is not needed to

⁴ Having determined this component to be an accessory, the court does not reach whether it is a reinforcement.

keep the Tech 8 boot closed. Pl.'s Add'l Undisp. Facts ¶ 23; Def.'s Resp. to Pl.'s Undisp. Facts ¶ 23. Based on the rear buckle holder's intended function, it is not essential to the boot. Instead, it merely supports the adjustable buckle strap as part of the floating buckle system. Buckles add to the convenience of putting on and securing footwear on one's foot. Therefore, the rear buckle holder is a nonessential article adding to the convenience of the Tech 8. It is an accessory. This conclusion is also supported by Note 4(a), which specifically lists "buckles" as one of the examples for accessories or reinforcements. Since the rear buckle holder cannot be included within the upper, and it sits on leather, its 4.7% surface area must be designated as leather. This component increases the total surface area for leather to 51% (46.3% + 4.7%) of the upper. Since that is more than half of the surface area of the upper, leather is the material with "the greatest surface area," and thus, the material of the upper.

2. Heading 6403

Having determined the Tech 8's upper is leather, the court turns to HTSUS Heading 6403, "footwear with . . . uppers of leather." Plaintiff argues the Tech 8 qualifies as "sports footwear" under subheading 6403.19.40 because it has components that fulfill the requirements of Subheading Note 1 to Chapter 64. Pl.'s Br. at 35–40. In the alternative, Plaintiff argues the Tech 8 should be classified under subheading 6403.91.60 as "[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: Other footwear: covering the ankle: Other: Other: For men, youths and boys." *Id.* at 1. Defendant disagrees and argues the Tech 8 cannot be classified under either of those subheadings because the Tech 8's upper is rubber or plastic—not leather. Def.'s Br. at 27. Defendant further contends that it is not classifiable under subheading 6403.91.40 because it lacks the necessary components to be considered "sports footwear." *Id.*

For footwear to qualify as "sports footwear," Subheading Note 1 to Chapter 64 explains:

For the purpose of subheadings 6402.12, 6402.19, 6403.12, 6403.19 and 6404.11, the expression "*sports footwear*" applies only to:

- a) Footwear which is designed for a sporting activity and has, or has provision for the attachment of spikes, sprigs, cleats, stops, clips, bars or the like;
- b) Skating boots, ski-boots and cross-country ski footwear, snow-board boots, wrestling boots, boxing boots and cycling shoes.

Subheading Note 1, Chapter 64, HTSUS (emphasis added). As a motocross boot, Tech 8 is not “[s]kating boots, ski-boots and cross-country ski footwear, snowboard boots, wrestling boots, boxing boots and cycling shoes.” Subheading Note 1(b), Chapter 64, HTSUS. Therefore, the question is whether the Tech 8 boots are footwear that “has, or has provisions for the attachment of spikes, sprigs, cleats, stops, clips, bars, or the like.” Subheading Note 1(a), Chapter 64, HTSUS.

Plaintiff argues that the Tech 8’s hard replaceable sole and steel toe cap are like spikes, sprigs, cleats, stops, clips, and bars. Pl.’s Br. at 35. First, the hard replaceable sole is a portion of the sole composed of a hard rubber compound. Def.’s Undisp. Facts ¶ 26; Pl.’s Resp. to Def.’s Undisp. Facts ¶ 26. It is located in the middle of the Tech 8 outsole—the portion of the outsole that rests on the footpeg. Pl.’s Add’l Undisp. Facts ¶ 63; Def.’s Resp. to Pl.’s Undisp. Facts ¶ 63. A tight grip on the footpeg makes the rider’s foot less likely to slip giving the rider a more secure command of the motorcycle. Pl.’s Add’l Undisp. Facts ¶ 61; Def.’s Resp. to Pl.’s Undisp. Facts ¶ 61. Plaintiff argues that the hard replaceable sole is like the examples listed in Subheading Note 1(a) because it “helps secure the connection between the Tech 8 and the motorcycle.” Pl.’s Br. at 38. The court disagrees. Although the court understands Plaintiff’s argument, it is a stretch to equate spikes, sprigs, cleats, stops, and bars with a harder portion of a sole. None of the examples in Subheading Note 1(a) are distinguished from the sole by simply being composed of a harder composition of the same material. Many forms of footwear possess soles that contain portions with harder rubber than the remainder of the sole, and soles may be replaced. This is not enough to make footwear “sports footwear” under Subheading 6403.19.

Next, Plaintiff argues that the steel toe cap is also like the examples in Subheading Note 1(a). Plaintiff argues that the steel toe cap “helps provide an element of non-toe drag resistance to aid the rider’s performance.” Pl.’s Br. at 40. Defendant, however, argues that “the primary purpose of the [steel] toe cap is to prevent the sole of the shoe from separating. In other words, the primary function is to enhance the *durability* of the boot.” Def.’s Br. at 31 (original emphasis). The steel toe cap is located where the outsole and the upper of the Tech 8 join, and is wrapped around the outsole of the boot. Pl.’s Add’l Undisp. Facts ¶ 49; Def.’s Resp. to Pl.’s Undisp. Facts ¶ 49. The flat metal surface of the steel toe cap, that faces the ground, is smooth. *Id.* Although a flat metal surface would reduce friction in comparison to rubber, this is not enough to make it similar to the examples of Subheading Note 1(a). Plaintiff contends that “the steel toe cap,

which is a slightly protruding attachment to the bottom of the Tech 8 outsole, has a function related to traction and in that way is like the other attachments in Chapter 64 Subheading Note 1(a).” Pl.’s Br. at 40. Having a “function related to traction” alone does not make it like spikes, sprigs, cleats, stops, clips, bars. Moreover, the location of the steel toe cap, joining the upper and the outsole of the boot, does lend support to Defendant’s contention that its primary purpose is to prevent the sole from separating from the upper. Therefore, the steel toe cap is also unlike the examples of Subheading Note 1(a). The Tech 8 boot is accordingly not “sports footwear” and cannot be classified under HTSUS subheading 6403.19.40.

Finally, the court turns to whether the Tech 8 is properly classified under 6403.91.60 as “[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather: Other footwear: Covering the ankle: Other: Other: For men, youths and boys.” Having already determined the upper is leather, there is no dispute that the Tech 8 covers the ankle, and is for men, youths, and boys. The Tech 8 boot is therefore *prima facie* classifiable under HTSUS subheading 6403.91.60, which carries an 8.5% duty rate.

3. Headquarters Ruling HQ H015088

Last, Defendant argued that Customs’ Headquarters Ruling, HQ H015088 (Oct. 29, 2007), is entitled to deference and that “Customs’ decisions are entitled to a statutory presumption of correctness.” Def.’s Br. at 10. First, because this case is on summary judgment, the presumption of correctness is not relevant as it attaches to evidentiary matters. *See Universal Elecs. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) (“The presumption of correctness certainly carries force on any factual components of a classification decision The situation is quite different, however, with respect to pure questions of law, such as the proper interpretation of a particular tariff provision or term.”); *Goodman Mfg., LP v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (“Because there was no factual dispute between the parties, the presumption of correctness is not relevant.”). The court also disagrees that Customs Ruling HQ H015088 is entitled to deference. Customs’ ruling is entitled to deference proportional to its “power to persuade.” *Mead*, 533 U.S. 218, 235; *Skidmore*, 323 U.S. 134, 140. Ruling HQ H015088 is not persuasive.

In HQ H015088, Customs classified the Tech 8 boot under Heading 6402 for footwear with uppers of rubber or plastic. Instead of first determining whether the components were accessories or reinforcements, Customs focused on whether they were part of the external surface area of the upper (“ESAU”). Customs found those components

to be part of the ESAU, and therefore, not accessories or reinforcements. Customs applied the following factors in assessing whether the contested components were part of the ESAU: “(a) [t]he external plastic material was lasted under and attached to the foot bed; (b) [t]he external layer of plastics covered the majority of the outer surface of the upper, (c) [c]omponents made from plastics were not similar to examples of accessories or reinforcements cited in note 4(a); and (d) [t]he external layer of plastics contributed to the structural strength of the sandal and provided support of the foot.” HQ H015088. In applying the factors, Customs found the components were part of the ESAU, and therefore, not accessories or reinforcements. Customs accordingly determined that the Tech 8 had a rubber or plastic upper. *Id.*

Determining whether certain components constitute the ESAU is *not* necessarily the same as determining whether the contested components are accessories or reinforcements. First, certain Chapter 64 subheadings specifically *include* Note 4(a)’s “accessories or reinforcements” within the ESAU. *See* HTSUS 6402.19.05 (“Other footwear with outer soles and uppers of rubber or plastics: Sports footwear: Other: Having uppers of which 90% of the external surface area (*including any accessories or reinforcements such as those mentioned in note 4(a) of this chapter*) is rubber or plastic . . . “ (emphasis added)); *Carrini, Inc. v. United States*, 25 CIT 857, 859 (2001) (classification of women’s shoes under a Chapter 64 subheading that included Note 4(a)’s accessories or reinforcements within the ESAU). In this case, however, Customs determined ESAU with four factors, one of which—factor (c)—excluded accessories or reinforcements. This factor states that the “components made from plastic were not similar to examples of accessories or reinforcements cited in note 4(a).” However, it does not define accessories or reinforcements, nor does it provide a means to analyze whether components are accessories or reinforcements. For these reasons, Customs’ determination of ESAU cannot serve as the proper basis for deciding whether components are accessories or reinforcements.

HQ H015088 provides no analysis on the meaning of accessories or reinforcements, and is therefore, not persuasive. Accordingly, the ruling does not warrant deference.

III. Conclusion

Alpinestars’ Tech 8 boots are properly classified under HTSUS subheading, 6403.91.60. The court will therefore enter judgment denying Defendant’s motion for summary judgment, and granting Plaintiff’s motion for summary judgment.

Dated: August 02, 2013
New York, New York

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

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES,
Defendant.

Before: Donald C. Pogue, Chief Judge
Consol. Court No. 12-00223¹

[affirming in part and remanding in part the Department of Commerce's final results of antidumping duty administrative review]

Dated: August 2, 2013

David A. Yocis, Nathaniel Maandig Rickard and Jordan C. Kahn, Picard Kentz & Rowe LLP, of Washington, DC, for Plaintiff Ad Hoc Shrimp Trade Action Committee.

Robert G. Gosselink, Trade Pacific PLLC, of Washington, DC, for Plaintiffs Marine Gold Products Ltd., Pakfood Public Co. Ltd., Thai Royal Frozen Food Co. Ltd., Thai Union Frozen Products Public Co., Ltd., and Thai Union Seafood Co. Ltd.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. Also on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Michael T. Gagain*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

OPINION

Pogue, Chief Judge:

This consolidated action seeks review of two determinations by the United States Department of Commerce (“Commerce”) in the 2010–2011 administrative review of the antidumping duty order on certain frozen warmwater shrimp from Thailand.² Specifically, Respondent Plaintiffs³ challenge Commerce’s decision not to calculate an individual dumping margin for Marine Gold.⁴ In addition, Plaintiff

¹ This action is consolidated with *Marine Gold Prods. Ltd. v. United States*, Court No. 12-00220. Order, Nov. 20, 2012, ECF No. 22.

² See *Certain Frozen Warmwater Shrimp from Thailand*, 77 Fed. Reg. 40,574 (Dep’t Commerce July 10, 2012) (final results of antidumping duty administrative review) (“*Final Results*”) and accompanying Issues & Decision Mem., A-549-822, ARP 10-11 (July 3, 2012) (“*I & D Mem.*”).

³ Respondent Plaintiffs are Marine Gold Products Limited (“Marine Gold”), Pakfood Public Company Limited, Thai Royal Frozen Food Company Limited, Thai Union Frozen Products Public Company Limited, and Thai Union Seafood Company Limited (collectively the “Respondents”).

⁴ See Mem. of Points & Auths. in Supp. of [Resp’ts’] [Mot.] for J. Upon the Agency R., ECF No. 28 (“Resp’ts’ Br.”). Respondents’ brief also presents arguments in support of additional

Ad Hoc Shrimp Trade Action Committee (“AHSTAC”) – an association of domestic warmwater shrimp producers who participated in this review – challenges Commerce’s decision not to reduce respondents’ export prices by the amount of antidumping deposits paid for entries of subject merchandise.⁵

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),⁶ and 28 U.S.C. § 1581(c) (2006).

As explained below, Commerce’s *Final Results* are remanded for reconsideration and/or further explanation regarding Commerce’s rejection of Marine Gold’s request for individual examination as a voluntary respondent. As also explained below, Commerce’s denial of an export price adjustment for the payment of antidumping deposits is sustained.

STANDARD OF REVIEW

This court will uphold Commerce’s antidumping determinations if they are in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). Where the antidumping statute does not directly address the question before the agency, the court will defer to Commerce’s construction of its authority if it is reasonable. *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (relying on *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

DISCUSSION

I. *Marine Gold’s Voluntary Respondent Request*

Respondents challenge Commerce’s denial of Marine Gold’s request for individual examination as a voluntary respondent in this review. Resp’ts’ Br. at 12–18. Commerce argues that the Court should decline to adjudicate the merits of this challenge because of Respondents’ alleged failure to exhaust their administrative remedies on this issue.⁷ In the alternative, Commerce contends that denying Marine Gold’s request for individual examination comports with a reasonable

challenges that Respondents are no longer pursuing. *See* Pls.’ Reply Mem. in Supp. of Rule 56.2 Mot. for J. Upon the Agency R., ECF No. 49, at 1. This opinion does not address those matters.

⁵ *See* Mem. of L. in Supp. of Pl. [AHSTAC]’s USCIT Rule 56.2 Mot. for J. on the Agency R., ECF No. 29 (“AHSTAC’s Br.”).

⁶ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

⁷ Def.’s Mem. in Opp’n to Pls.’ Rule 56.2 Mots. for J. Upon the Agency R., ECF No. 42 (“Def.’s Resp.”) at 8–13; *see Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013) (“The court ‘shall, where appropriate, require the exhaustion of

interpretation and application of Commerce's statutory authority because granting the request would have been unduly burdensome for the agency. Def.'s Resp. at 16–18; see 19 U.S.C. § 1677m(a) (providing that Commerce may decline to calculate individual weighted average dumping margins for voluntary respondents not selected for mandatory examination if “individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation”). Each argument will be addressed in turn.

First, the requirement for administrative exhaustion does not preclude consideration of Respondents' claim. Certainly litigants challenging Commerce's determinations in antidumping proceedings are generally limited to the arguments submitted to Commerce in their administrative case briefs below. *E.g.*, *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 675 F. Supp. 2d 1287, 1300 (2009). But here Respondents argued in their case brief, as they do before the court, that Commerce's decision to deny Marine Gold's request for voluntary respondent status failed to comply with 19 U.S.C. § 1677m(a) because Commerce's finding regarding the undue burden of granting Marine Gold's request was unreasonable.⁸ Thus Commerce was put on notice of Respondents' challenge to the agency's finding of undue burden under 19 U.S.C. § 1677m(a).⁹ That Respondents have now structured their argument to take into account relevant legal interpretations that were contained in a decision issued subsequent to the filing of their case brief below¹⁰ does not alter the essence of

administrative remedies.' The doctrine of exhaustion provides 'that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted.'" (quoting 28 U.S.C. § 2637(d) and *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)), respectively).

⁸ Compare *Case Br. of [Resp'ts]*, A-549–822, ARP 10–11 (May 11, 2012), Admin. R. Pub. Doc. 146, at 4–8, reproduced in Def.'s Resp. pub. app., ECF No. 43, at tab 3, with, Resp'ts' Br. at 12–18.

⁹ Cf. *Pakfood Pub. Co. v. United States*, __ CIT __, 724 F. Supp. 2d 1327, 1352 (2010) (noting that the exhaustion doctrine requires parties to preserve arguments for judicial review by including them in their administrative case briefs because doing so puts the agency on notice of the relevance of such arguments and affords it an opportunity to fully consider and explain its response to specific challenges).

¹⁰ See Resp'ts' Br. at 15–18 (arguing that Commerce's denial of Marine Gold's request for voluntary respondent status rendered 19 U.S.C. § 1677m(a) meaningless because “Commerce failed to show that the burden of reviewing Marine Gold as a voluntary respondent would have exceeded that presented in the typical antidumping review”) (relying on *Grobtest & I-Mei Indus. (Viet.) Co. v. United States*, __CIT __, 853 F. Supp. 2d 1352, 1362–65 (2012) (holding that 19 U.S.C. § 1677m(a) is rendered meaningless where Commerce applies this provision to deny voluntary respondent status without showing “that the burden of reviewing a voluntary respondent would exceed that presented in the typical antidumping or countervailing duty review”)); Def.'s Resp. at 8 (arguing that the court should apply the exhaustion doctrine because Respondents' case brief did not include the specific argument

their legal challenge.¹¹ Accordingly, the requirement for administrative exhaustion does not preclude consideration of Respondents' claim.

As to the merits of Respondents' challenge, the antidumping statute provides that if it is "not practicable" for the agency to determine individual weighted average dumping margins for each known exporter and producer of the subject merchandise, then Commerce is authorized to limit its examination to "a reasonable number of exporters or producers." 19 U.S.C. § 1677f1(c)(2). Notwithstanding this provision, Commerce is nevertheless required to calculate an individual weighted average dumping margin "for any exporter or producer not initially selected for individual examination under [19 U.S.C. § 1677f-1(c)(2)]" – i.e., for any voluntary respondent – if that exporter/producer submits to Commerce the information requested from exporters or producers who were selected for examination, if "(1) such information is so submitted by the date specified . . . for exporters and producers that were initially selected for examination . . . and (2) the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation." *Id.* at § 1677m(a).

The "unduly burdensome" standard was recognized in a prior decision holding that, when considering a request for individual examination pursuant to 19 U.S.C. § 1677m(a), Commerce "cannot draw its § 1677m(a) analysis so narrowly that it mirrors the analysis under § 1677f-1(c)(2)" because doing so would render § 1677m(a) meaningless. *Grobtest*, __ CIT at __, 853 F. Supp. 2d at 1364. *Grobtest* ordered Commerce to individually examine a voluntary respondent where the facts that Commerce put forward to support its conclusion that such examination would be unduly burdensome merely referred to "the same burdens that occur in every review." *Id.* at 1364–65; *see id.* at 1364 n.12 (listing factual circumstances proffered to support Commerce's conclusion that examination of an additional respondent would present an undue burden). *Grobtest* held that to support a finding of *undue* burden, Commerce must "show that the burden of reviewing a voluntary respondent would exceed that presented in the typical antidumping of countervailing duty review." *Id.* at 1365.

that Commerce's reasoning in denying Marine Gold's request for voluntary respondent status renders 19 U.S.C. § 1677m meaningless).

¹¹ *Cf. JTEKT Corp. v. United States*, 642 F.3d 1378, 1384 (Fed. Cir. 2011) (explaining that where a litigant did not have the benefit of a subsequently rendered legal decision, and thus could not have argued on that specific basis in briefing below, the litigant on appeal may rely on such subsequent decisions if the decisions support the arguments preserved for appeal).

Here, Commerce decided that individually examining Marine Gold would present an undue burden and inhibit the timely completion of the review based on factual circumstances very similar to those presented in *Grobest. Compare I & D Mem. cmt. 2* at 16–17, with *Grobest*, __ CIT at __, 853 F. Supp. 2d at 1364 n.12.¹² As in *Grobest*, “the facts that Commerce put forward to support that conclusion do not distinguish this case from the paradigmatic review of an antidumping or countervailing duty order.” *Grobest*, __ CIT at __, 853 F. Supp. 2d at 1364. Indeed, Commerce’s own emphasis on prior experience with conducting administrative reviews – comparing the expected burden of examining Marine Gold to that of examining mandatory respondents in prior reviews¹³ – suggests that what Commerce has here deemed to be undue burden is merely the usual burden of conducting a thorough review, which is insufficient to satisfy § 1677m(a)’s standard for rejecting a voluntary respondent request. *Grobest*, __ CIT at __, 853 F. Supp. 2d at 1364–65.

This matter is therefore remanded on the same grounds as those stated in *Grobest. Grobest*, __ CIT at __, 853 F. Supp. 2d at 1364–65. On remand, Commerce must either “show that the burden of reviewing [Marine Gold] would exceed that presented in the typical antidumping or countervailing duty review,” *id.* at 1365, or else review Marine Gold as a voluntary respondent.

II. Denial of Antidumping Duty Export Price Adjustment

Next, AHSTAC argues that Commerce should have reduced the export prices calculated in this review by the amount of antidumping

¹² Commerce emphasized the volume of data the agency was required to examine; the need to issue multiple respondent-specific supplemental questionnaires; prior experience showing that examination of one of the mandatory respondents is likely to necessitate multiple supplemental questionnaires and extensions of time; the fact that one of the mandatory respondents had not been previously reviewed and so would necessitate extra time to review; and the fact that the Import Administration generally, and the Operations Office handling this review in particular, was conducting multiple concurrent reviews. *See I & D Mem. cmt. 2* at 16. This list of grievances is virtually identical to that rejected by the court in *Grobest. See Grobest*, __ CIT at __, 853 F. Supp. 2d at 1364 n.12. As the court explained in that case, none of these factual circumstances are extraordinary or suggest an undue burden on Commerce because they merely describe the administrative burden that Commerce must generally face in any antidumping duty administrative review. Accordingly, to permit Commerce to reject voluntary respondent requests on these bases alone would render § 1677m(a) meaningless because such factual circumstances are generally present in every case. *See id.* at 1364–65.

¹³ *See I & D Mem. cmt. 2* at 16–17 (emphasizing the burdens of previously examining Marine Gold as a mandatory respondent in a prior administrative review, including the need for “four supplemental questionnaires for which [Commerce] granted eight extension requests,” but implicitly demonstrating the comparability of this burden to that of examining other respondents in prior proceedings, which Commerce describes as similarly involving multiple supplemental questionnaires and numerous deadline extensions).

deposits paid on the subject entries. See AHSTAC's Br. at 8–24.¹⁴ Relying on 19 U.S.C. § 1677a(c)(2)(A),¹⁵ AHSTAC argues that the payment of antidumping deposits on these entries constitutes a duty, cost, charge, or expense “incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States,” AHSTAC's Br. at 11 (quoting 19 U.S.C. § 1677a(c)(2)(A)), and must therefore be deducted from export price. Commerce defends its decision not to deduct the paid deposits from the export prices calculated in this review by relying on its long-standing and judicially-affirmed statutory interpretation that antidumping duty deposits “are not costs, expenses, or import duties within the meaning of [19 U.S.C. § 1677a(c)(2)(A)].”¹⁶ As explained below, because Commerce's decision not to reduce export prices by the amount of the antidumping deposits paid on the corresponding entries was based on a reasonable interpretation of an ambiguous statutory provision,¹⁷ this decision is sustained.

¹⁴ Although AHSTAC repeatedly refers to the “final assessed antidumping duties” paid on entries of the subject merchandise, e.g., AHSTAC's Br. at 10, this characterization is misleading because the subject entries have yet to be liquidated and thus the final antidumping duties owed on them have yet to be actually assessed. Cf., e.g., *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1047 (Fed. Cir. 2012) (describing the United States' retroactive antidumping duty assessment system, in which “cash deposits [are] collected upon entry [as] estimates of the duties that the importer will ultimately have to pay as opposed to payments of the actual duties”); *Hoogovens Staal BV v. United States*, 22 CIT 139, 145, 4 F. Supp. 2d 1213, 1219 (1998) (“Under the [antidumping] statute, final duties are assessed upon liquidation of all subject merchandise entered during the period of review. The uncertainty of knowing the final amount of duties due at the time of entry is simply an inherent part of importing merchandise into the United States.”) (internal quotation marks and citation omitted).

¹⁵ (“The price used to establish export price . . . shall be . . . reduced by . . . the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States. . . .”).

¹⁶ *I & D Mem. cmt. 3 at 22–23* (citing, *inter alia*, *Certain Cold-Rolled Carbon Steel Flat Products from Korea*, 63 Fed. Reg. 781, [787] (Dep't Commerce Jan. 7, 1998) (final results of antidumping duty administrative review); *Hoogovens Staal*, 22 CIT at 146, 4 F. Supp. 2d at 1220; *AK Steel Corp. v. United States*, 21 CIT1265, 1280, 988 F. Supp. 594, 607 (1997)).

¹⁷ *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359–60 (Fed. Cir. 2007) (“[I]t is clear that Congress has not defined or explained the meaning or scope of ‘United States import duties’ as set forth in 19 U.S.C. § 1677a(c)(2)(A). . . . Thus, because Congress has not directly spoken to the precise question at issue, this court finds that the statute is ambiguous and proceeds to step two of *Chevron*. Under *Chevron* step two, . . . this court must give deference to [Commerce]’s interpretation of the statute . . . if the agency’s interpretation is reasonable.”) (internal quotation marks omitted) (relying on *Chevron*, 467 U.S. at 843–44); see also *AK Steel*, 21 CIT at 1280 & n.12, 988 F. Supp. at 608 & n.12 (holding that the antidumping statute is ambiguous regarding whether or not antidumping deposits constitute “import duties” or “additional costs, charges, and expenses” in the context of export price adjustment).

AHSTAC is correct that in order to achieve a fair comparison between export price and normal value, the antidumping statute directs Commerce to make certain adjustments designed “to permit comparison of the two prices at a similar point in the chain of commerce.”¹⁸ But while it is true that the antidumping deposit paid on entries of subject merchandise has no corollary within the normal value of a foreign like product, it is not, strictly speaking, an additional cost included in the export price because it is a refundable security deposit to ensure that the importer does not purchase its merchandise below fair value. If upon review of the relevant pricing data Commerce determines that the subject entries were purchased at fair prices, then the importer will be refunded its deposit; but if the review reveals that the entries were obtained at prices below normal value, then the deposit may be forfeited and, to the extent that the deposit is exceeded by the actual antidumping duties owed, will require additional payment. 19 U.S.C. § 1673f; *Sioux Honey*, 672 F.3d at 1047.

As the antidumping deposit merely serves to provide an incentive to ensure fair export prices, rather than to burden importers with additional costs, Commerce’s practice of not reducing export price by the amount of antidumping deposits paid on the subject merchandise has repeatedly been upheld because making such an adjustment would result in double-counting.¹⁹ AHSTAC now argues that in fact there is no such risk of double-counting. AHSTAC’s Br. at 13. As shown below, however, AHSTAC is incorrect.

To illustrate why an antidumping deposit adjustment to export price would result in double-counting, consider a simple hypothetical involving just one arms-length transaction per year. Assume a normal value (“NV”) (after all relevant adjustments) of \$110. Prior to the imposition of an antidumping duty order, Commerce investigates whether the merchandise is being sold in the United States at less

¹⁸ *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995); see also *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1571–72 (Fed. Cir. 1983) (explaining that Commerce must adjust both normal value and export price “in an attempt to reconstruct the price at a specific, ‘common’ point in the chain of commerce, so that the value can be fairly compared on an equivalent basis”). For example, the export price is reduced by the cost of delivering the subject merchandise from the exporting country to the United States, 19 U.S.C. § 1677a(c)(2)(A), because this additional cost is not a part of normal value and so distorts the comparison.

¹⁹ *E.g.*, *Hoogovens Staal*, 22 CIT at 146, 4 F. Supp. 2d at 1220 (upholding “Commerce’s long-standing policy and practice” of not treating antidumping deposits as import duties or costs); *AK Steel*, 21 CIT at 1280, 988 F. Supp. at 607 (upholding Commerce’s explanation that reducing export prices to account for antidumping duties “would result in double-counting”); *PQ Corp. v. United States*, 11 CIT 53, 67, 652 F. Supp. 724, 737 (1987) (“If deposits of estimated antidumping duties entered into the calculation of present dumping margins, then those deposits would work to open up a margin where none otherwise exists.”).

than its normal value. Assume that during its investigation, Commerce calculates an export price (“EP”) (after all relevant adjustments) of \$100. Assuming an affirmative injury finding by the International Trade Commission, an antidumping duty order is issued and an estimated duty deposit rate is set for the producer/exporter in question at 10 percent $((NV - EP) / EP = (110 - 100) / 100 = 0.1 = 10$ percent).²⁰ For each entry of subject merchandise from this producer/exporter made subsequent to the effective date of the antidumping duty order, the importer of record must now pay an antidumping deposit in the amount of 10 percent of the export price. Importantly, however, the *actual* antidumping duties owed on such entries are not calculated until one year following the issuance of the antidumping duty order, at which time (if a review is requested) the actual export prices of such entries are compared to contemporaneous normal values and an actual antidumping duty assessment rate is calculated. If the review reveals that export prices have now risen to match normal value, then the dumping margin (and so the antidumping duty assessment rate) will be zero, and the antidumping deposit will be returned in full (with interest).

Continuing the hypothetical, assume that the next U.S. sale of subject merchandise that occurs after imposition of the antidumping duty order is made at an export price of \$110 (after all relevant adjustments, but not including any adjustment for the antidumping deposit). Thus the importer pays \$110 for the merchandise, as well as a 10 percent (\$11) antidumping deposit. Assume for the sake of simplicity that this is the only transaction involving the subject merchandise during the first period of review. In reviewing this transaction to assess actual antidumping duties owed under the antidumping duty order, Commerce will compare the export price to the merchandise’s normal value (which remains at \$110). And here we come to the matter at issue.

AHSTAC’s argument implies that Commerce should deduct from the export price the \$11 antidumping deposit paid by the importer. Under this approach, the weighted average dumping margin (and so the actual antidumping duty assessment rate) for this transaction would be $(NV - EP) / EP = (110 - (110 - 11)) / 110 = (110 - 99) / 110 = 11/110 = 0.1 = 10$ percent. Because the duty assessment rate is equivalent to the antidumping deposit rate on the transaction, the importer would not receive any portion of its deposit back. Thus, under AHSTAC’s proposed statutory interpretation, the importer

²⁰ To arrive at the weighted average dumping margins that will form the basis for antidumping duty assessment for each producer/exporter, Commerce divides its aggregate normal-to-export price comparisons by the aggregate export prices of the subject merchandise. See 19 U.S.C. § 1677(35)(B).

pays a total of \$121 (the \$110 export price plus the \$11 antidumping duty), even though normal value is only \$110. In other words, this approach would force the importer to pay an antidumping duty even where the importer bought at normal value prices.

Under Commerce's long-standing and judicially-approved practice, on the other hand, the dumping (if any) is equalized by the assessment of antidumping duties, but the cessation of purchases at dumped prices is rewarded with the return of the deposit. Thus, Commerce does not reduce the (adjusted) export price by the amount of the importer's deposit (which the importer expects to be refunded if it buys at fair value): $(NV - EP) / EP = (110 - 110) / 110 = 0$, so the deposit is refunded to the importer, and the importer appropriately pays only the fair price (\$110 export price plus the \$11 antidumping deposit, minus the \$11 deposit refund = \$110, which is equivalent to normal value).

As this hypothetical makes clear, Commerce's explanation that reducing export price by the amount of the antidumping deposit would result in double-counting is logical. Reducing the export price by the amount of the antidumping deposit before comparing the export price to normal value would essentially force the importer to pay twice – once when paying an export price raised to normal value from the previously dumped price, and again when paying an antidumping duty notwithstanding having already paid a non-dumped export price.²¹

²¹ Contrary to AHSTAC's argument, this result is unchanged by the circumstances presented here, where the producer/exporter also served as the importer who paid the antidumping deposit. See AHSTAC's Br. at 10 (emphasizing that two respondents acted as their own importers). Just like the antidumping deposit paid by any other importer, the deposits at issue here will be refunded in the event that the administrative review reveals that normal values did not exceed export prices; deducting the deposits from the export prices prior to their comparison to normal value "would reduce the U.S. price – and increase the margin – artificially." *Hoogovens Staal*, 22 CIT at 146, 4 F. Supp. 2d at 1220. Moreover, the distortion remains even where export prices do not rise to fully match normal value. Assume that in the original unfair pricing investigation Commerce calculated a (properly adjusted) normal value of \$150 and a (properly adjusted) export price of \$100, thereby setting an antidumping deposit rate at 50 percent $((150-100)/100)$. Assume that only one entry of subject merchandise is made prior to final antidumping duty assessment at liquidation. In reviewing that entry, Commerce calculates an export price of \$120 and a normal value of \$150. Without any deduction for the 50 percent antidumping deposit, Commerce would calculate a final antidumping duty assessment rate for this entry at 25 percent $((150-120)/120)$, such that the importer would pay a total of \$150 (\$120 export price plus \$30 antidumping duty (25 percent of export price)), thereby exactly matching the merchandise's normal value. But with a deduction to export price for the antidumping deposit, the assessment rate would be 75 percent $((150-(120-60))/120 = 90/120)$. In this scenario, the importer would pay a total of \$210 (\$120 in export price plus \$90 antidumping duty (75 percent of export price)) even though normal value is only \$150.

AHSTAC also argues that the non-reimbursement regulation – pursuant to which Commerce reduces the export prices paid by importers whose antidumping duties are reimbursed by the producers or exporters of subject merchandise – provides support for its position. See AHSTAC’s Br. at 21–22 (relying on 19 C.F.R. § 351.402(f)(1)(i) (2012) (the “non-reimbursement regulation”).²² But this claim is similarly unpersuasive.

AHSTAC argues that where, as here, the producer/exporter also acts as the importer, the circumstances are indistinguishable from those leading to an export price reduction pursuant to the non-reimbursement regulation.²³ But the non-reimbursement regulation exists to ensure that the antidumping duty order’s incentive for importers to buy at non-dumped prices is not negated by exporters who sell at dumped prices while removing the importer’s exposure to antidumping liability.²⁴ The regulation does not entail, as AHSTAC suggests, treating antidumping duties as costs or charges to be deducted from export price to achieve a fair comparison.

To the contrary, Commerce’s application of the non-reimbursement regulation supports the agency’s reasoning that making an antidumping deposit deduction to export price in the absence of reimbursement would result in double-counting because Commerce applies the non-reimbursement regulation – which requires an export price deduction for reimbursed duty payments – by effectively double-counting the dumping margin.²⁵ It follows that where, as here, the

²² (“In calculating the export price (or the constructed export price), [Commerce] will deduct the amount of any antidumping duty . . . which the exporter or producer: (A) Paid directly on behalf of the importer; or (B) Reimbursed to the importer.”).

²³ AHSTAC’s Br. at 22 (“[O]n what grounds does Commerce distinguish the reimbursement situation from the undisputed facts of this case. . . ? The record is devoid of any answer to this question . . .”).

²⁴ *Hoogovens Staal*, 22 CIT at 143, 4 F. Supp. 2d at 1218 (“The [non-]reimbursement regulation provides that the calculation of U.S. price include an adjustment for the amount of any antidumping duties reimbursed or paid by the exporter. . . . Without the regulation, a foreign exporter or producer could assume the cost of antidumping duties owed and thereby nullify the effect of the duties in the U.S. market.”) (citations omitted). Although *Hoogovens Staal* concerned 19 C.F.R. § 353.26 (1994) – the predecessor to the current non-reimbursement regulation, 19 C.F.R. § 351.402(f) – the substance of the regulation remained unchanged when the regulation was renumbered. See *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296 (Dep’t Commerce May 19, 1997) (final rule) (announcing the final renumbering).

²⁵ See, e.g., *Nereida Trading Co. v. United States*, __ CIT __, 683 F. Supp. 2d 1348, 1353 (2010) (“Because [an importer] had not filed a certificate of non-reimbursement . . . , Customs doubled the assessed duty margin”); Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316 (1994) at 886, reprinted in 1994 U.S.C.C.A.N. 4040, 4211 (noting that Commerce’s practice in applying the non-reimbursement regulation “is to instruct Customs to double the duties if the importer fails to furnish a certificate of non-reimbursement to Customs prior to liquidation of entries”). To

circumstances do not support a finding of reimbursement,²⁶ deducting the antidumping duty deposit payments from the export price would arbitrarily double-count the dumping margin.

Therefore, because Commerce's decision not to reduce export prices by the amount of antidumping deposits paid on subject entries was, as explained above, based on a reasonable interpretation of an ambiguous statutory provision, this decision is sustained.

CONCLUSION

For all of the foregoing reasons, Commerce's Final Results are sustained except with regard to Commerce's rejection of Marine Gold's request for individual examination as a voluntary respondent. This issue is remanded for further consideration, consistent with this opinion. Commerce shall have until September 9, 2013, to complete and file its remand results. Plaintiffs shall have until September 23, 2013, to file comments. The parties shall have until October 3, 2013, to file any reply.

see why this is so, assume that, during the investigation upon which an antidumping duty order is based, Commerce calculated a (properly adjusted) normal value of \$110 and a (properly adjusted) export price of \$100, there by setting an antidumping deposit rate of 10 percent $((110-100)/100)$. After the antidumping duty order goes into effect, the importer must now pay a 10 percent deposit on entries of subject merchandise, which will be refunded only if the importer buys at non-dumped prices. But now assume that the exporter promises to reimburse the importer for the 10 percent deposit, permitting the importer to continue to buy at dumped prices without threat of losing its deposit. Assume that only one entry of subject merchandise is made prior to final antidumping duty assessment at liquidation. In reviewing that entry, Commerce calculates an export price of \$100 and a normal value of \$110. In the absence of the non-reimbursement regulation, the weighted-average dumping margin (and so the actual antidumping duty assessment rate) for that entry would be 10 percent $((110-100)/100)$. But acting pursuant to the non-reimbursement regulation (based on the exporter's agreement to reimburse the importer for its antidumping liability), Commerce deducts the reimbursed deposit (10 percent of $100 = 10$) from the export price $(100 - 10 = 90)$, thereby effectively doubling the dumping margin $((110-90)/100 = 20/100 = 20$ percent). Thus, contrary to AHSTAC's argument, Commerce's application of the non-reimbursement regulation supports Commerce's reasoning that, where this regulation is not applicable, deducting antidumping duty deposit payments from the export price would result in an arbitrary double-counting of the dumping margin.

²⁶ As Commerce explained, the non-reimbursement regulation is inapplicable here because "the respondents are not reimbursing or paying the assessed duties on behalf of the importer – they are paying the duties as the importer." *I & D Mem.* cmt. 3 at 24; *see also id.* ("This position is consistent with [Commerce]'s uniformly-applied interpretation of 19 C.F.R. § 351.402(f)(1)(i) that a party cannot 'reimburse' itself when acting as its own importer of record.") (citing *Brass Sheet and Strip from Germany*, Am. Issues & Decision Mem., A-428-602, ARP 08-09 (Oct. 28, 2010) (adopted in 75 Fed. Reg. 66,347 (Dep't Commerce Oct. 28, 2010) (amended final results of antidumping duty administrative review)) cmt. 9; *Circular Welded Non-Alloy Steel Pipe and Tube from Mexico*, 63 Fed. Reg. 33,041, 33,044 (Dep't Commerce June 17, 1998) (final results of antidumping duty administrative review)); AHSTAC's Br. at 21 ("AHSTAC recognizes that Commerce's practice is not to apply the [non-reimbursement] regulation [when the producer/exporter acts as the importer of record] . . .").

It is SO ORDERED.
Dated: August 2, 2013
New York, NY

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

Slip Op. 13–100

TIANJIN WANHUA CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00070

JUDGMENT

In this action Defendant sought and received a voluntary remand. *See* ECF No. 32 (Def.'s motion for voluntary remand); ECF No. 34 (order granting voluntary remand). Defendant filed its remand results on July 22, 2013. *See* Final Results of Redetermination Pursuant to Court Order, *Tianjin Wanhua Co. v. United States*, Court No. 11–00070 (July 22, 2013) (“*Redetermination*”), ECF No. 39. All parties concur with the *Redetermination*. *See* ECF No. 41 (letter on behalf of all parties that court should sustain remand results). Accordingly, it is hereby

ORDERED that the *Redetermination* is sustained; and it is further **ORDERED** that the subject entries enjoined in this action, *see* ECF No. 12 (order granting consent motion for preliminary injunction), must be liquidated in accordance with the final court decision, as provided for in Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e) (2006).

Dated: August 6, 2013
New York, New York

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

Slip Op. 13–101

HOME MERIDIAN INTERNATIONAL, INC. D/B/A SAMUEL LAWRENCE FURNITURE Co. and PULASKI FURNITURE Co.; and IMPORT SERVICES, INC., Plaintiffs, GREAT RICH (HK) ENTERPRISES Co., LTD., DONGGUAN LIAOBUSHANGDUN HUADA FURNITURE FACTORY, NANHAI BAIYI WOODWORK Co., LTD., and DALIAN HUAFENG FURNITURE GROUP Co., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE and VAUGHAN-BASSETT FURNITURE COMPANY, INC., Intervenor Defendants.

Before: Jane A. Restani, Judge
Consol. Court No. 11–00325

[Intervenor Defendants' motion for reconsideration or to reopen the record is denied.]

Dated: August 7, 2013

Kristin H. Mowry, Jeffrey S. Grimson, Jill A. Cramer, Rebecca M. Janz, Sarah M. Wyss, and Susan L. Brooks, Mowry & Grimson, PLLC, of Washington, DC, for Plaintiffs¹ and Consolidated Plaintiffs Great Rich (HK) Enterprises Co., Ltd. and Dongguan Liaobushangdun Huada Furniture Factory.

Ned H. Marshak, Bruce M. Mitchell, and Mark E. Pardo, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, for Consolidated Plaintiff Nanhai Baiyi Woodwork Co., Ltd.

Lizbeth R. Levinson and Ronald M. Wisla, Kutak Rock LLP, of Washington, DC, for Consolidated Plaintiff Dalian Huafeng Furniture Group Co., Ltd.

Carrie A. Dunsmore and Joshua E. Kurland, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With them on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Shana A. Hofstetter*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

J. Michael Taylor, Daniel L. Schneiderman, Joseph W. Dorn, Mark T. Wasden, Prentiss L. Smith, Sarah K. Davis, King & Spalding, LLP, of Washington, DC, for Intervenor Defendants.

OPINION AND ORDER

Restani, Judge:

Intervenor Defendants American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Co., Inc. (collectively “AFMC”) move for reconsideration of the court’s decision in *Home Meridian International, Inc. v. United States*, Slip Op. 13–81, 2013 Ct. Intl. Trade LEXIS 83 (CIT June 25, 2013), pursuant to

¹ Mowry & Grimson, PLLC withdrew as counsel for Import Services, Inc. on July 31, 2013. The court gave Import Services, Inc. thirty days to retain counsel. It has not done so as of the date of this opinion.

USCIT R. 59.² Mem. in Supp. of the AFMC’s Mot. for Reconsideration or, in the Alternative, for an Order Directing Commerce to Reopen the R. on Remand (“AFMC’s Mot.”) at 1. Alternatively, AFMC seeks an order requiring Commerce to reopen the record. *Id.* Plaintiffs Home Meridian Int’l, Inc. d/b/a Samuel Lawrence Furniture Co. and Pulaski Furniture Co., as well as Consolidated Plaintiffs Great Rich (HK) Enterprises Co., Ltd. and Dongguan Liaobushangdun Huada Furniture Factory (collectively “HMI”) oppose the motion. *See* Resp. of Home Meridian Int’l, Inc. d/b/a Samuel Lawrence Furniture Co. & Pulaski Furniture Co.; Great Rich (HK) Enterprises Co., Ltd. & Dongguan Liaobushangdun Huada Furniture Factory to the AFMC’s Mot. for Reconsideration or, in the Alternative, for an Order Directing Commerce to Reopen the R. on Remand. Although not endorsing the court’s decision in *Home Meridian*, Defendant United States also contends that AFMC’s motion is inappropriate. *See* Def.’s Resp. to AFMC’s Mot. for Reconsideration (“Def.’s Resp.”) (noting also that Commerce declined to move to reopen the record and instead issued a draft redetermination on July 31, 2013).

In its previous opinion, the court reviewed and remanded to the Department of Commerce (“Commerce”) its Final Results of Redetermination Pursuant to Court Order (Dep’t Commerce Feb. 25, 2013) (“*Remand Results*”), Dkt. No. 97. In *Home Meridian*, the court held, on the unique facts of this case, that Commerce’s determination that Dalian Huafeng Furniture Group Co., Ltd. (“Huafeng”) did not use market economy (“ME”) wood inputs in manufacturing the subject merchandise was not based on substantial evidence. 2013 Ct. Intl. Trade LEXIS 83, at *22–26. Additionally, the court held that the actual market economy prices paid for those inputs were, as a matter of law, the best information available on the record for valuing the inputs, as opposed to the surrogate values chosen by Commerce. *Id.* at *26–36. The background of this case is set forth in the court’s previous opinion. *See id.* at *3–5. The court presumes familiarity with that decision.

A motion for reconsideration will be granted “only in limited circumstances,” such as for “1) an error or irregularity, 2) a serious evidentiary flaw, 3) the discovery of new evidence which even a diligent party could not have discovered in time, or 4) an accident, unpredictable surprise or unavoidable mistake which impaired a party’s ability to adequately present its case.” *Target Stores v. United States*, 31 CIT 154, 157, 471 F. Supp. 2d 1344, 1347 (2007). The grant or denial of a motion for reconsideration rests within the discretion of

² AFMC does not cite the rule under which it seeks reconsideration, but the court assumes the motion was made under this rule.

the court. *Id.* at 157, 471 F. Supp. 2d at 1346–47. A motion for reconsideration will not be granted “merely to give a losing party another chance to re-litigate the case.” *Totes-Isotoner Corp. v. United States*, 32 CIT 1172, 1173, 580 F. Supp. 2d 1371, 1374 (2008) (citation omitted).

AFMC alleges the court erred by resting its decision “on the false predicate that 100 percent of the lumber inputs used in production during the period of review (“POR”) were purchased from a market economy (“ME”) supplier.” AFMC Mot. 1. Additionally, AFMC faults the court for “failing to defer to Commerce’s reasonable interpretation of its own regulations to value lumber inputs.” *Id.* These arguments have been raised repeatedly in this case, and the court will not entertain them again through a motion to reconsider.

Contrary to AFMC’s claim, the court set out the record evidence provided by Huafeng that supports the assertion it and HMI made before the agency that 100 percent of certain wood inputs used during the POR were from ME suppliers. *See Home Meridian*, 2013 Ct. Intl. Trade LEXIS 83, at *22–26. Although the explicit statement that 100 percent of these inputs were from market economy suppliers is first made in the case briefs before Commerce, the court found that this assertion was implicit in Huafeng’s questionnaire responses, and the inference was properly before the agency in both Huafeng’s and HMI’s case briefs.³ *Id.* at 25. Notably, neither AFMC nor Commerce characterized these statements as new factual submissions at the time case briefs were submitted to Commerce, and Commerce did not reject the briefs for presenting new factual evidence contrary to 19 C.F.R. § 351.302(d) (2013). Thus, the court did not rely on an incorrect premise in evaluating the record, but rather one that was supported by substantial evidence.

Additionally, as explained in its opinion, the court deferred to the reasonable methodology used by Commerce in evaluating which in-

³ AFMC points out that although questionnaire responses are certified by an attorney and a company official, case briefs filed before the agency are only certified by an attorney for the company and, therefore, cannot contain factual evidence. *Compare* Business Proprietary App. to Mem. of Points & Authorities in Supp. of Rule 56.2 Mot. for J. on the Agency R. by Pls.’ HMI. (“HMI App.”) Tab 15 at 4–5 with HMI App. Tab 8 at 3 (certifying that the attorney “(1) [has] read the attached submission; and (2) based on the information made available to [her] by the forgoing companies, . . . [has] no reason to believe that this submission contains any material misrepresentation or omission of fact.”). Although attorneys may not use their case briefs to submit new factual information, *see* 19 C.F.R. § 351.302(d), they certainly may use them to state explicitly what the record evidence states implicitly. Ultimately, this issue is not important to the court’s determination in this case that there was no record evidence to contradict HMI’s supported contention that Huafeng used in the subject merchandise certain wood inputs purchased from ME suppliers.

formation is the best available on the record for valuing inputs. *See Home Meridian*, 2013 Ct. Intl. Trade LEXIS 83, at *10–20 & n.6 (summarizing Commerce’s methodology and finding certain applications of it reasonable but noting that the Antidumping Methodologies policy statement is not directly applicable). The court, however, found that Commerce lacked substantial evidence for its determination that the selected surrogate values, on the unique facts of this case, were the best available information when compared to the actual market economy purchases, considering all relevant factors.

Finally, the court provided Commerce, not AFMC, with the option to exercise its discretion in seeking to reopen the record to conduct further factual investigation on Huafeng’s use of market economy inputs. *See id.* at *27 n.11, 43. Because AFMC did not challenge this factual assertion prior to Commerce’s final determination, instead focusing its case brief before the agency on legal arguments, *see* P.R. Doc. 10591, at 9–12, it does not have a right to demand that Commerce reopen the record on this issue. Commerce chose not to do so, *see* Def.’s Resp. at 3, and the court will not compel such action on this record.

For the foregoing reasons, AFMC’s motion for reconsideration or in the alternative for an order to reopen the record is DENIED.

Dated: August 7, 2013

New York, New York

/s/ Jane A. Restani

JANE A. RESTANI JUDGE