

# U.S. Court of International Trade



Slip Op. 17–70

mitsubishi polyester film, inc. and skc, inc., Plaintiffs, v. united states, Defendant, and terphane, inc. and terphane, ltda., Defendant-Intervenors.

Before: Gary S. Katzmann, Judge  
Court No. 13–00062

[Plaintiff’s motion for judgment on the agency record is granted in part and denied in part. Commerce’s determination under 19 C.F.R. § 351.225(k)(1) as to Defendant-Intervenors’ Copolymer Surface Products is remanded.]

Dated: June 8, 2017

*Jeffrey I. Kessler*, Wilmer, Cutler, Pickering, Hale and Dorr, LLP, of Washington, DC, argued for Plaintiff. With him on the brief were *Ronald I. Meltzer*, *Patrick J. McLain*, and *David M. Horn*.

*Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Jane C. Dempsey*, Trial Attorney, and *Mykhaylo Gryzlov*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, Washington, DC.

*J. Michael Taylor* and *Stephen A. Jones*, King & Spalding, LLP, of Washington, DC, argued for Defendant-Intervenors. With them on the brief was *Shannon M. Doyle*.

## **OPINION AND ORDER**

### **Katzmann, Judge:**

Polyethylene terephthalate (“PET”) is all around us. PET is a polymer with a great number of uses—for instance, PET film could be found in tamper-evident food packaging such as potato chip bags and safety seals, in frozen and refrigerated food packaging, in laminated materials such as traffic signs, in printable products used in graphical media, in the scratch-resistant coverings of smartphones, and in protective coverings that shield sensitive equipment from UV radiation, to name but a few applications. In this case the court considers whether a particular set of PET products manufactured abroad by Terphane, Ltda. and imported by Terphane Inc. (collectively “Terphane”), falls within the scope of a duly issued antidumping duty order on imports of certain PET products. The basic question is whether the Department of Commerce’s (“Commerce”) determination

that Terphane's products were not within the scope of the antidumping duty order was supported by substantial evidence and in accordance with law. The court concludes that Commerce reasonably determined that the language of the order was ambiguous with respect to whether it includes films like Terphane's. The court also concludes that Commerce's analysis in determining that Terphane's films are not dispositively in scope is deficient and unsupported by substantial evidence. Accordingly, the case is remanded for further proceedings.

Generally speaking, PET film production begins with the polymerization process, in which the combination of certain chemicals and additives, heated in multiple rounds and then cooled, forms PET pellets or "chips." The next phase is extrusion. The PET chips are melted and then squeezed through a die, cooled, heated, and manipulated to a specified length or width. "Co-extrusion" by contrast involves the simultaneous extrusion of polymer from multiple lines through a single die; in other words, extrusion involves only one stream of polymer, whereas co-extrusion involves multiple streams of polymer that may differ in their chemical makeup and physical properties. At the time of co-extrusion, these multiple outputs may be stacked or alternated to form a single, layered, co-extruded PET product. After extrusion or co-extrusion, the molten polymer substance is cooled, and then stretched to form a film. The PET product may still be altered or treated in some way, such as through the addition of another layer or coating to a side of the PET; this may occur "in-line," as part of the manufacturing process, or "off-line." Thereafter it is trimmed and bound as necessary. The many variables in these procedures permit the customizability in performance characteristics necessary to vend PET to a broad and highly diverse market.

This matter comes before the court on the Motion of Plaintiffs Mitsubishi Polyester Film, Inc. and SKC, Inc. (collectively "Mitsubishi") for Judgment on the Agency Record, pursuant to USCIT Rule 56.2, with regard to the determination by Commerce issued in the "Antidumping Duty Order on PET Film, Sheet, and Strip from Brazil: Final Scope Ruling, Terphane, Inc. and Terphane Ltda." (Jan. 7, 2013), PD 35 ("*Terphane Scope Ruling*" or "*Scope Ruling*"). Mitsubishi argues that a number of legal and factual determinations in the *Scope Ruling*, in which Commerce found that certain of Terphane's PET film products are outside of the scope of the underlying antidumping duty order, are contrary to law and, alternately, unsupported by substantial evidence on the record pursuant to Section 516A(b)(1)(B)(i) of the

Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B)(i).<sup>1</sup> Pl.’s Mot. for J. on the Agency R. and Br. in Supp., Aug. 2, 2013, ECF No. 22 (“Pl.’s Br.”); Pl.’s Reply, Feb. 3, 2014, ECF No. 38 (“Pl.’s Reply”); Pl.’s Compl., Mar. 8, 2013, ECF No. 13 ¶ 11 (“Pl.’s Compl.”). Mitsubishi thus seeks remand.<sup>2</sup> Pl.’s Compl. ¶ 28. Defendant United States (or “the Government”) and defendant-intervenors Terphane oppose plaintiffs’ motion. Def.’s Opp’n, Dec. 4, 2013, ECF No. 29 (“Def.’s Opp’n”); Def.-Inter.’s Opp’n, Dec. 4, 2013, ECF No. 31 (“Def.-Inter.’s Opp’n”).

## BACKGROUND

### I. Legal Framework

Under the antidumping statute, Commerce imposes duties on imported merchandise that “is being, or is likely to be, sold in the United States at less than fair value,” i.e. “dumped,” and harms domestic industry. 19 U.S.C. §§ 1673, 1677(34). An industry, which “means the producers as a whole of a domestic like product,”<sup>3</sup> 19 U.S.C. § 1677(4)(A), may petition Commerce to initiate a dumping investigation pursuant to § 1673a(b). A petition must be filed “by or on behalf of the industry,” and must “allege[ ] the elements necessary for the imposition of the duty . . . accompanied by information reasonably available to the petitioner supporting those allegations.” 19 U.S.C. § 1673a(b)(1), (c)(1)(A), (c)(4)(A).

If Commerce determines that a petition meets these requirements, it initiates an investigation. 19 U.S.C. § 1673a(a)(1). Commerce then collects information from foreign producers and makes a preliminary determination as to the extent of alleged dumping. 19 U.S.C. § 1673b(b). The International Trade Commission (“ITC”) meanwhile collects information from the affected domestic industry and makes a preliminary determination as to whether material injury or a threat thereof exists. 19 U.S.C. § 1673b(a). Within seventy-five days of its own preliminary determination, Commerce shall make a final determination regarding the existence and extent of dumping. 19 U.S.C. § 1673d(a). If that determination is affirmative, the ITC will make a final determination as to material injury or threat thereof to the affected domestic industry. 19 U.S.C. § 1673d(b). If the ITC’s deter-

<sup>1</sup> Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition, and all applicable amendments thereto, unless otherwise noted.

<sup>2</sup> Mitsubishi also argues that Commerce’s failure to issue the *Scope Ruling* within 45 days of the submission of the scope application renders it invalid. Pl.’s Compl. ¶ 26–27.

<sup>3</sup> Domestic like product, meanwhile, is “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle.” 19 U.S.C. § 1677(10).

mination is also affirmative, then Commerce shall publish an antidumping duty order that “includes a description of the subject merchandise, in such detail as the administering authority deems necessary.” 19 U.S.C. § 1673e(a)(2).

When a question arises as to whether a particular product is included in an antidumping duty order, an interested party may apply for a scope ruling from Commerce. 19 C.F.R. § 351.225(a), (c) (2012); *see* 19 U.S.C. § 1516a(a)(2)(B)(vi). While no specific statutory provision governs the interpretation of the scope of antidumping duty orders, Commerce has filled the statutory gap with a regulatory framework, which has been interpreted by the Federal Circuit and this Court into a three-step process. *See Meridian Prod., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) (citing *Shenyang Yuanda Aluminum Indus. Eng’g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015)); 19 C.F.R. § 351.225.

The plain language of the antidumping duty order is “paramount” in determining whether particular products are included within its scope. *Fedmet Res. Corp. v. United States*, 755 F.3d 912, 918 (Fed. Cir. 2014) (citing *King Supply Co. LLC v. United States*, 674 F.3d 1343, 1345 (Fed. Cir. 2012)). Thus “Commerce’s inquiry must begin with the order’s scope to determine whether it contains an ambiguity and, thus, is susceptible to interpretation.” *Meridian Prod.*, 851 F.3d at 1381; *see Fedmet*, 755 F.3d at 923–24 (“[T]he first step of a scope ruling proceeding is to determine whether the governing language is in fact ambiguous.” (citing *ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012))). “[B]ecause the meaning and scope of . . . orders are issues particularly within [Commerce’s] expertise and special competence,” Commerce is entitled to “substantial deference” with regard to interpretation of its own antidumping duty orders. *Meridian Prod.*, 851 F.3d at 1381–82 (citing *King Supply*, 674 F.3d at 1348). If the language of the order is unambiguous, its plain meaning governs, and the analysis ends. *ArcelorMittal*, 694 F.3d at 87.

If the language is ambiguous, Commerce must review it in light of “[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [ITC].” 19 C.F.R. § 351.225(k)(1) (“(k)(1) evidence” or “(k)(1) factors”); *Fedmet*, 755 F.3d at 918. These descriptions however “cannot substitute for language in the order itself” because “[i]t is the responsibility of [Commerce], not those who [participated in] the proceedings, to determine the scope of the final orders.” *Meridian Prod.*, 851 F.3d at 1382 (quoting

*Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002)). If these factors are dispositive, the analysis ends. To be dispositive, the (k)(1) factors must be controlling of the scope inquiry in the sense that they definitively answer the scope question. *Id.* at 1382 n.8 (citing *Sango Int'l, L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007)).

Only if Commerce's analysis under the (k)(1) factors is not dispositive may the agency consider those factors set forth in 19 C.F.R. § 351.225(k)(2): (i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed. *See Meridian Prod.*, 851 F.3d at 1382; *see generally Diversified Prod. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983) (enunciating the (k)(2) factors prior to their codification).

## II. The Antidumping Duty Order and Terphane's Scope Ruling Request

On September 28, 2007, Mitsubishi, along with Dupont Teijin Films and Toray Plastics (America), Inc., filed an antidumping dumping duty petition covering "all PET film imported into the United States from Brazil, China, Thailand and the UAE."<sup>4</sup> *Polyethylene Terephthalate Film, Sheet, and Strip From Brazil, People's Republic of China, Thailand and the United Arab Emirates, Antidumping Duty Petition* at 9 (Sept. 28, 2007) ("*Petition*"), in Terphane's Scope Ruling Request Letter at Ex. 23, PD 1–3, CD 1–4 ("*Scope Ruling Request*"); *Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from Brazil, the People's Republic of China, Thailand, and the United Arab Emirates: Initiation of Antidumping Duty Investigations*, 72 Fed. Reg. 60,801 (Dep't Commerce Oct. 26, 2007) (initiation of investigation). In proposing the domestic like product to be investigated, petitioners suggested the definition used by the ITC in its investigations into PET products from India and Taiwan:

[A]ll gauges of raw, pretreated, or primed PET film, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick.

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<sup>4</sup> The court in this opinion refers occasionally to "petitioners" to describe the parties who filed the antidumping duty petition with Commerce. Mitsubishi, whose constituents, Mitsubishi Polyester Film, Inc. and SKC, Inc., were among the petitioners, is now plaintiff in the instant litigation.

*Petition at 9; Polyethylene Terephthalate Film, Sheet and Strip From India and Taiwan*, USITC Publication No. 3518, Inv. Nos. 701-TA-415 and 731-TA-933–934 (June 2002) (Final), at 4 in *Scope Ruling Request* at Ex. 27.

The Period of Investigation was July 1, 2006 through June 30, 2007. 72 Fed. Reg. at 60,803. Petitioners identified one respondent, Terphane Ltda.,<sup>5</sup> a Brazilian producer of PET film. *Id.* Commerce issued its preliminary determination of sales at less than fair value on May 5, 2008, and its final determination on September 24, 2008, in each making an affirmative determination of dumping of PET film from Brazil. *Notice of Preliminary Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from Brazil*, 73 Fed. Reg. 24,560 (Dep’t Commerce) (preliminary determination); *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from Brazil*, 73 Fed. Reg. 55,035 (Dep’t Commerce) (final determination). Commerce assigned Terphane a weighted- average dumping margin of 44.36%. 73 Fed. Reg. at 55,036. Commerce issued the antidumping duty order on PET Film from Brazil on November 10 of that year.<sup>6</sup> *Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People’s Republic of China and the United Arab Emirates: Antidumping Duty Orders and Amended Final Determination of Sales at Less than Fair Value for the United Arab Emirates*, 73 Fed. Reg. 66,595 (Dep’t Commerce Nov. 10, 2008) (“Order”). The scope of the *Order* was identical to the scope of the investigation, both containing substantially the language proposed by petitioners. *Id.* at 66,595–96; see 19 U.S.C. § 1673e(a)(2) (directing that an antidumping duty order “includes a description of the subject merchandise, in such detail as the administering authority deems necessary”). Specifically:

The products covered by each of these orders are all gauges of raw, pre-treated, or primed PET film, whether extruded or co-extruded. Excluded are metallized films and other finished films

<sup>5</sup> Terphane, Inc., also defendant-intervenor, is a U.S. domestic producer of PET Film that imports merchandise from Terphane Ltda. Def.-Inter.’s Mot. to Interv., Feb. 12, 2013, ECF No. 6, at 2; Def.-Inter.’s Opp’n at 1.

<sup>6</sup> The ITC made a preliminary determination “that there is a reasonable indication that an industry in the United States is materially injured by reason of imports” of PET film from Brazil, China, and the United Arab Emirates. *Polyethylene Terephthalate Film, Sheet, & Strip from Brazil, China, Thailand, & the United Arab Emirates*, USITC Pub. 3962, Inv. No. 731-TA-1131–1134 (Nov. 2007) (Preliminary); see 19 U.S.C. § 1673b(a). The ITC made a final determination “that an industry in the United States is threatened with material injury by reason of” such imports. *Polyethylene Terephthalate Film, Sheet, & Strip from Brazil, China, Thailand, & the United Arab Emirates*, USITC Pub. No. 4040, Inv. No. 731-TA-1131–1134 (Oct. 2008) (Final); see 19 U.S.C. § 1673d(b).

that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick. Also excluded is roller transport cleaning film which has at least one of its surfaces modified by application of 0.5 micrometers of SBR latex. Tracing and drafting film is also excluded. PET film is classifiable under subheading 3920.62.00.90 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of these orders is dispositive.

*Order* at 66,595–96.

In February 2012, Terphane requested a scope ruling to determine whether four of the PET film products it produces in and imports from Brazil, and sells in the United States (collectively “Copolymer Surface Films”), are subject to the *Order*.<sup>7</sup> *Scope Ruling Request* at 1–2. Terphane asserted that its Copolymer Surface films are not covered by the scope of the *Order* because they all “have a performance-enhancing resinous layer that exceeds the thickness requirement listed in the scope exclusion.” *Id.* at 3. This layer is a copolymer resin which Terphane refers to publicly as COEX. *Id.* at 5. COEX possesses chemical properties different from the core PET layer or layers to which it is conjoined through co-extrusion. *Id.* at 9–14. Terphane submitted evidence supporting its assertion that the COEX layer’s physical-chemical makeup provides it with performance-enhancing properties, and, despite variations in thickness across products, is invariably of thickness greater than 0.00001 inches. *Id.* at 11–12, Ex. 10. Terphane identified its relevant products as “Equivalent PET film,” characterizing equivalent PET film as differing from PET film by the presence of a coating of sufficient thickness on the former, regardless of whether applied in-line or otherwise. *Id.* at 18 (“Equivalent PET Films, like Terphane’s Copolymer Surface Films, are outside of the scope of the antidumping duty order on PET film from Brazil.”), 20–23. Terphane mentioned the ITC’s 1991 investigation on PET film from Japan and Korea, wherein the Commission noted that “U.S. producers view all PET film (*excluding equivalent PET film*) as a continuum of PET film products . . . .” *Id.* at 20; *Polyethylene Terephthalate Film, Sheet, and Strip from Japan and the Republic of Korea*, USITC Pub. 2383, Inv. Nos. 731-TA-458 and 459 (May 1991)

<sup>7</sup> These film products are: (1) 10.21132, 10.21140, 10.21148, and 10.21192 (collectively “10.21 products”); (2) 10.81148 (“10.81 product”); (3) 10.91148 (“10.91 product”); and (4) 10.96/48 (“10.96 product”). *Scope Ruling Request* at 2; *Scope Ruling* at 1.

(Final) at 12 (“*ITC Japan and Korea PET Investigation*”), in *Scope Ruling Request* at Ex. 25. Terphane noted also the ITC’s analysis of equivalent PET film and its discussion of two equivalent PET film products, Cronar and Estar, and reiterated the similarities between them and its own Copolymer Surface films.<sup>8</sup> *Scope Ruling Request* at 20; *ITC Japan and Korea PET Investigation* at 15–16.

Petitioners commented on Terphane’s request on March 23, 2012. Petitioner’s Comments on Terphane’s Scope Ruling Request, PD 9, CD 5 (“*Pets’ Mar. 23 Comments*”).<sup>9</sup> Terphane replied on May 7. Terphane’s Reply to Petitioners’ Comments on Terphane’s Scope Ruling Request, PD 17, CD 9 (“*Terphane’s May 7 Comments*”). In April, Commerce issued questionnaires to Terphane and petitioners, the responses to which came in May. Terphane’s Questionnaire Response, PD 18, CD 10 (May 7, 2012) (“*Terphane’s QR*”); Petitioners’ Questionnaire Response, PD 21–22, CD 12–14 (May 7, 2012) (“*Pets’ QR*”). Terphane and petitioners commented on each other’s questionnaire responses the same month. Terphane’s Comments on Petitioners’ Questionnaire Responses, PD 23, CD 15 (May 17, 2012); Petitioners’ Response to Terphane’s Questionnaire Response, PD 24, CD 16 (May 17, 2012). On June 7, Terphane responded to petitioners’ May 17 comments, and on June 18, petitioners submitted rebuttal comments to Terphane’s June 7 comments. Terphane’s June 7 Response to Petitioners’ May 17 Comments, PD 29, CD 17 (“*Terphane’s June 7 Response*”); Petitioners’ June 18 Rebuttal to Terphane’s June 7 Response, PD 30, CD 18.

Commerce issued the *Terphane Scope Ruling* on January 7, 2013. *Scope Ruling* at 1. The agency did not issue its ruling within forty-five days of Terphane’s request in accordance with 19 C.F.R. § 351.225(c)(2),<sup>10</sup> but instead took 320 days from the submission of the application.

Relying on the 19 C.F.R. § 351.225(k)(1) criteria, Commerce found that “Terphane’s products are outside the scope of the order, provided

<sup>8</sup> For example, Terphane stated that “[l]ike the film discussed by the Commission, Terphane’s Copolymer Surface Films have a performance-enhancing resinous surface layer with adhesive characteristics that generally are favored for the ease with which graphics can be printed on the films.” *Scope Ruling Request* at 20.

<sup>9</sup> Petitioners therein contended inter alia that Terphane’s films fall within the order’s scope, that “equivalent PET films” only encompass films with highly specialized down-stream end uses and coatings applied through off-line or dedicated production equipment, and that primed PET co-extrusions are not “finished” such that they would be excluded from the order. *Pets’ Mar. 23 Comments* at 20–29.

<sup>10</sup> “Deadline for action on application. Within 45 days of the date of receipt of an application for a scope ruling, the Secretary will issue a final ruling under paragraph (d) of this section or will initiate a scope inquiry under paragraph (e) of this section.” 19 C.F.R. § 351.225(c)(2).

that the added performance-enhancing resinous layer is greater than 0.00001 inches thick, as determined by U.S. Customs and Border Protection (CBP).” *Scope Ruling* at 1. Of the scope language, Commerce reasoned that “even though a particular product may meet the requirements of the first sentence . . . it may also fall under one of the subsequent exclusions and be excluded from the scope of the order,” which “is consistent [sic] Department’s prior determinations.” *Scope Ruling* at 11.

Commerce also determined that “[t]he exclusion described in sentence two of the scope . . . refers to a specific category of products which the ITC identified as ‘equivalent PET film.’” *Scope Ruling* at 4. Commerce focused on the ITC’s 1991 definition, as part of the anti-dumping duty investigations of PET film from Japan and Korea, of DuPont Cronar and Kodak Estar films, along with “those products equivalent to Cronar and Estar,” as “equivalent PET film.” *Scope Ruling* at 4; *ITC Japan and Korea PET Investigation* at 15. Commerce reasoned that “the scope language should not be interpreted as to render as subject films identical to DuPont’s Cronar and Estar, which . . . are the paradigmatic examples of films covered by the so-called ‘0.00001-inch exclusion.’”<sup>11</sup> *Scope Ruling* at 12. Commerce further reasoned, because Cronar and Estar are designed for further manufacturing, per evidence provided by Terphane, the first sentence of the scope parameters “should not be interpreted so broadly as to encompass all films which are designed for further manufacturing, to be more receptive to further coating, and/or to be more adhesive, which both parties agree are characteristic of primed and certain pre-treated films.” *Id.* In addition, Commerce concluded that while the COEX layer may provide characteristics of a primer or a pre-treatment, it also provides “additional performance-enhancing capabilities similar to those of Cronar and Estar.” *Id.*

Commerce determined that the phrase “extruded or co-extruded” encompasses PET products regardless of which extrusion method is used, and “does not indicate that all extruded and/or co-extruded films are covered, regardless of the subsequent exclusions.” *Scope Ruling* at 12.

Commerce determined Terphane’s films to be “finished films,” reasoning that the phrase “other finished films” must include some films that are also “raw, pre-treated, or primed PET films,” as reading it

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<sup>11</sup> As noted below, *see infra* p. 26, Commerce now acknowledges that it erred in stating that “Terphane has provided evidence that indicates that Cronar and Estar are co-extruded.” *Terphane Scope Ruling* at 12; Def.’s Opp’n at 7.

otherwise would obviate the word “finished.” *Id.* Thus, “the term ‘finished films’ should not be interpreted so narrowly as to exclude all films covered by the first sentence of the scope or so broadly that it includes all such films.” *Id.*

Commerce considered two of its own prior scope rulings: *Garware* and *Avery Dennison*.<sup>12</sup> *Id.* In *Garware*, Commerce found that *Garware*’s tracing and drafting film had a performance-enhancing layer more than 0.00001 inches thick, thus excluding it from the underlying antidumping and countervailing duty orders on PET from India. *Garware* at 1; see 67 Fed. Reg. 44,175 (Dep’t Commerce July 1, 2002) (amended antidumping duty order); 67 Fed. Reg. 44,179 (Dep’t Commerce July 1, 2002) (countervailing duty order).<sup>13</sup> Commerce found that *Garware*, despite involving a matte lacquer layer much different than the COEX layer in *Terphane*’s case, was relevant insofar as both reviews involved performance-enhancing resinous or inorganic layers. *Scope Ruling* at 13; *Garware* at 3–4. In regards to *Avery Dennison*, which arose from Commerce’s investigation on dumping of PET from Brazil, the United Arab Emirates, and the People’s Republic of China, Commerce reaffirmed its finding therein “that the scope of the order is not limited to base PET films, or PET film prior to the application of any in-line coatings.” *Scope Ruling* at 13; *Avery Dennison* at 5–6. The products at issue in that review, however, were definitely shown not to have a layer which was over 0.00001 inches. Commerce thus disagreed with petitioners’ argument that the Department based its decision in that ruling on the in-line co-extrusion production method used to create the products at issue, and empha-

<sup>12</sup> Antidumping and Countervailing Duty Orders on Polyethylene Terephthalate Film, Sheet, and Strip from India, Final Scope Ruling—Requested by International Packaging Films, Inc. Regarding Tracing and Drafting Film (Aug. 25, 2013) (“*Garware*”) at *Scope Ruling Request* at Ex. 31; Memorandum from Michael J. Heaney to Stephen J. Claeys, Antidumping Duty Investigations on Polyethylene Terephthalate Film, Sheet, and Strip (PET film) from Brazil, the People’s Republic of China, Thailand, and the United Arab Emirates, A-351–841, A-570–924, A-549–825, A-520–803 (investigations), Apr. 25, 2008 (“*Avery Dennison*”) at *Pets’ Mar. 23 Comments* at Ex. 9; see Polyethylene Terephthalate Film, Sheet and Strip (PET Film) from Brazil, the People’s Republic of China, Thailand, and the United Arab Emirates, *Avery Dennison’s Comments on the Proposed Scope of the Investigations* (Nov. 15, 2007) at *Scope Ruling Request* at Ex. 30.

<sup>13</sup> The operative language in the first two sentences of the scope in these orders is identical to that of the instant case. In full, the scope reads:

For purposes of this order, the products covered are all gauges of raw, pretreated, or primed PET film, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer of more than 0.00001 inches thick. Imports of PET film are classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00. HTSUS subheadings are provided for convenience and Customs purposes. The written description of the scope of this order is dispositive.

67 Fed. Reg. at 44,176, 44,179.

sized that the chemical composition of the silicon layer in that ruling is not relevant vis-à-vis the chemical composition of the co-extruded COEX layer at issue in Terphane's ruling. *Scope Ruling* at 13.<sup>14</sup>

Commerce concluded that

Terphane's copolymer surface film products, as described by Terphane, are finished films which have a performance-enhancing resinous layer, and are therefore outside of the anti-dumping duty order on PET film, sheet, and strip from Brazil, provided Terphane can establish, to the satisfaction of CBP, that the performance-enhancing layer is greater than 0.00001 inches thick.

*Id.* at 14. Commerce found its consideration of the 19 C.F.R. § 351.225(k)(1) criteria to be dispositive with respect to Terphane's Copolymer Surface films, and so did not progress to consideration of the criteria under 19 C.F.R. § 351.225(k)(2). *Id.* at 2–3, 14.

### III. The Instant Litigation

Mitsubishi timely filed suit in this court on February 6, 2013. ECF No. 1. The court granted Terphane status as defendant-intervenor on February 13, 2013. ECF No. 11. Mitsubishi in its complaint alleges four counts: that the *Terphane Scope Ruling* contradicts the plain language of the *Order*, and is therefore contrary to law; that Commerce's determination that Terphane's films are not dispositively in-scope under 19 C.F.R. § 351.225(k)(1) is unsupported by substantial evidence; that Commerce's determination that Terphane's films are dispositively out-of-scope under 19 C.F.R. § 351.225(k)(1) is unsupported by substantial evidence; and that Commerce's 273-day delay in issuing the *Terphane Scope Ruling* invalidates it and renders it contrary to law. Pl.'s Compl. ¶¶ 11–27; Pl.'s Br. at 3–4.

Mitsubishi filed its Rule 56.2 motion for judgment on the agency record and accompanying memorandum in support on August 2, 2013. Pl.'s Br. The United States and Terphane filed their responses on December 4, 2013. Def.'s Opp'n; Def.-Inter.'s Opp'n. Mitsubishi filed its reply on February 3, 2014. Pl.'s Reply.

Oral argument was held before the court on June 26, 2014. ECF No. 56. The court issued a letter requesting supplemental briefing on a

<sup>14</sup> Commerce found the copolymer COEX layer applied to each of the Copolymer Surface films to be “performance-enhancing,” “resinous,” and a *bona fide* “layer,” possessing of characteristics and capabilities similar to Cronar and Estar. *Scope Ruling* at 12–13. The finding that the COEX layer itself is “performance-enhancing” for the purposes of the second sentence exclusion is not challenged in the instant litigation. Terphane maintains COEX's physiochemical properties allow customers to print, laminate, coat, or metalize the film without applying a primer or surface treatment, and allow the film to be heat sealed. *Id.* at 4, 12–13.

discrete issue highlighted by Mitsubishi toward the end of argument, specifically, how to correctly read from the scope language the phrase “have had” in conjunction with the word “modified.” Letter to Parties, Aug. 25, 2014, ECF No. 60. All parties filed their supplemental briefs on November 5, 2014. Def.’s Suppl. Br., ECF No. 66; Def.-Inter.’s Suppl. Br., ECF No. 68; Pl.’s Suppl. Br., ECF No. 69. The United States filed its response to Mitsubishi’s supplemental brief on December 11, 2014. Def.’s Suppl. Opp’n, ECF No. 77. Terphane filed its response to the same on December 12, 2014. Def.-Inter.’s Suppl. Opp’n, ECF No. 78. Mitsubishi also filed its response to The United States’ and Terphane’s Supplemental Briefs on December 12, 2014. Pl.’s Suppl. Reply, ECF No. 79.

On March 20, 2017, the case was reassigned. Order of Reassignment, ECF No. 89. Oral argument was held before the new judge on May 9, 2017. ECF No. 99.

## DISCUSSION JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) (2012), and 19 U.S.C. § 1516a(a)(2)(A)(ii).

The Court will uphold Commerce’s determination unless the *Terphane Scope Ruling* is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i); *Fedmet*, 755 F.3d at 918.

On legal issues, the Court affords significant deference to Commerce’s interpretation of its own orders, mindful that scope determinations are “highly fact-intensive and case-specific.” *Fedmet*, 755 F.3d at 918 (quoting *King Supply*, 674 F.3d at 1345). Indeed, Commerce “enjoys substantial freedom to interpret and clarify its antidumping duty orders. But while it may interpret those orders, it may not change them.” *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1300 (Fed. Cir. 2013) (quoting *Ericsson GE Mobile Commc’ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995), *as corrected on reh’g* (Sept. 1, 1995)). Put another way, “orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it.” *Id.* (quoting *Duferco Steel*, 296 F.3d at 1089). Thus, despite this Court’s deference to Commerce’s interpretation of its orders, “the question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law that we review de novo.” *Meridian Prod.*, 851 F.3d at 1382.

On factual issues, “[s]ubstantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support the conclusion reached.” *Sango*, 484 F.3d at 1378 (citing *Consol. Edison v. Nat’l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)). “The specific factual findings on which [Commerce] relies in applying its interpretation are conclusive unless unsupported by substantial evidence.” *United States v. Eurodif S.A.*, 555 U.S. 305, 316 n.6 (2009) (citing 5 U.S.C. § 706(2)(E)). However, that two different conclusions may be drawn from the same evidence does not preclude Commerce’s factual determinations from being supported by substantial evidence. *Viet I–Mei Frozen Foods Co. v. United States*, 839 F.3d 1099, 1106 (Fed. Cir. 2016) (citing *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966)). At the same time, Commerce’s analysis must reasonably demonstrate a connection between the facts in the record and the conclusions drawn. See *Motor Vehicle Mfrs. Ass’n of United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). In summary, “the substantial evidence standard requires review of the entire administrative record” and asks, in light of that evidence, whether Commerce’s determination was reasonable. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

## **I. The Scope of the Order is Ambiguous**

In interpreting the scope of an order, the language therein is paramount. *Fedmet*, 755 F.3d at 918. The court concludes that the *Order*’s scope language does not on its face demand an unambiguous reading vis-à-vis the instant matter, but rather is subject to multiple reasonable interpretations. The court thus holds that Commerce has met the requisite low threshold to warrant finding ambiguity and proceeding to an analysis under the 19 C.F.R. § 351.225(k)(1) factors. See *Meridian Prod.*, 851 F.3d at 1381 n.6.

### **A. Parties’ Arguments**

Mitsubishi argues that the *Order*’s scope language unambiguously encompasses Terphane’s Copolymer Surface Films, and thus Commerce’s subsequent analysis under 19 C.F.R. § 351.225(k)(1) was unlawful. Pl.’s Br. at 22–24. In particular, Mitsubishi emphasizes that the first sentence of the *Order* covers “all gauges of raw, pre-treated, or primed PET film, whether extruded or co-extruded,” and argues that the final clause—“whether extruded or co-extruded”—indicates that co-extrusion cannot produce the necessary performance-enhancing layer necessary to implicate the second sentence’s exclu-

sion. *Id.* Mitsubishi adds that the subsequent exclusions do not have specific “carve-outs for certain subsets of co-extruded films,” and Commerce’s determination thereby impermissibly alters the terms of the scope language. *Id.* at 22–23. Further, Mitsubishi argues that the second sentence’s mention of “performance-enhancing resinous or inorganic layer” plainly refers to post-extrusion coating, and not to co-extrusion. *Id.* at 24.

The Government counters that the first sentence “defines the universe of products that are subject to the scope,” while the subsequent three sentences “provide explicit exclusions from the universe.” Def.’s Opp’n at 10–11. The Government takes issue with Mitsubishi’s belief that the “performance-enhancing resinous or inorganic layer” of sufficient thickness to qualify for the exclusion must be applied using a process other than co-extrusion because the *Order*’s plain language specifies no particular process for application of that layer. Def.’s Opp’n at 11–12; Pl.’s Br. at 24. The Government argues that the language is at most ambiguous. Def.’s Opp’n at 12.

In reply, Mitsubishi contends that the second sentence does in fact specify a production process: the exclusion covers only “metallized films and other finished films,” which necessarily excludes co-extruded PET film lacking additional processing, because “finished” indicates that films covered by the second sentence have undergone some manufacturing process other than the first stage – i.e. extrusion/coextrusion.” Pl.’s Reply at 7. Mitsubishi argues that the phrasing must mean “finished” refers to processes, like metallization, that occur post-extrusion. *Id.* Mitsubishi also raises for the first time in its reply the argument that the language “finished” and “modified” in the scope’s second sentence introduce a temporal qualification to the exclusion, to wit, that to come under the exception a PET film must be extruded before the protective-layer of sufficient thickness is applied, rendering the scope unambiguous.<sup>15</sup> *Id.* at 5–13.

<sup>15</sup> Mitsubishi’s reply focuses on these phrases, yet at oral argument, the court pressed parties on the same point in regards to the phrase “have had.” As noted *supra*, following oral argument, the court requested supplemental briefing on this singular point, resulting in six supplemental briefs. Assuming *arguendo* that novel arguments in the supplemental briefs as to scope language are not barred for lack of administrative exhaustion by virtue of the pure legal argument exception, the court summarizes them.

The Government argues that this scope language “describe[s] products at the time of import,” rather than identifies a narrower chronological production requirement. Def.’s Suppl. Br. at 8–9; Def.’s Suppl. Opp’n at 3–6. The Government supports its reading with a grammatical analysis that, in summary, depicts “have had” and “modified” as implicating only the past tense.

Def.’s Suppl. Br. at 9–10; Def.’s Suppl. Opp’n at 4–6. Terphane expands this argument, inviting the court to engage in a lengthy and fairly technical exploration of the present perfect tense. Def.-Inter.’s Suppl. Br. at 5–14; Def.-Inter.’s Suppl. Opp’n at 2–4.

## B. Analysis

The scope language in the *Order* is ambiguous such that Commerce' decision to perform an analysis under 19 C.F.R. § 351.225(k)(1) was warranted. Accepting that a co-extruded layer may implicate the exclusion in the second sentence does not necessarily render superfluous the phrase “whether extruded or co-extruded” in the first sentence, as Mitsubishi contends. The second sentence simply does not specify the production process that must be used to provide the sort of layer that results in a product's exclusion. Indeed, “whether extruded or co-extruded” may plainly be read to indicate that the mere fact of co-extrusion does not save a PET film product from falling under the *Order*. It is not incumbent upon Commerce or this court to read the phrase as meaning that, absent a carve-out mentioning co-extrusion, a co-extruded PET film cannot possibly also qualify for the exclusion under the second sentence unless an additional protective resinous or inorganic coating or layer of sufficient thickness were applied to the extruded PET film through a manner other than co-extrusion. Nothing in the scope demands that reading.

Mitsubishi also cannot identify language that would command an unambiguous reading of the scope with the temporal restraints they identify, such that the second sentence exclusion covers only “films with post-extrusion coatings.” Pl.'s Suppl. Br. at 7. In regard to Mitsubishi's argument that Commerce's reading of the second sentence creates surplusage, the court is satisfied that Commerce and the defendant articulate plausible readings of the allegedly superfluous language such that they are useful descriptors. *See Scope Ruling* at 12; Def.'s Suppl. Opp'n at 5–8. To read the second sentence as Mitsubishi would like the court to would instill overly narrow meaning to

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In addition to its interpretation of the second sentence of the scope as imposing a temporal requirement, Mitsubishi argues that the Government's and Terphane's proposed interpretation renders much of the phraseology in the second sentence surplusage: “that have had at least one of their surfaces modified by the application of”; “finished”; and “had.” Pl. Suppl. Br. at 8; *see Polites v. United States*, 35 CIT \_\_\_, \_\_\_, 755 F. Supp. 2d 1352, 1357 (2011) (“[Commerce] may not render parts of the Order ‘mere surplusage.’” (citing *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1073 (Fed. Cir. 2001))).

The Government reiterates that the scope language is at most ambiguous, satisfying the threshold requirement for a deeper inquiry under 19 C.F.R. § 351.225(k)(1), and that the tense styling in the second sentence can be plainly read to reference a process occurring at any time prior to import. Def.'s Suppl. Opp'n at 4–5. The potentially superfluous language that Mitsubishi alleges the Government's reading would create is instead grammatically and colloquially acceptable, maintains defendant, and was reasonably interpreted by Commerce below. Def.'s Suppl. Opp'n at 5–8. Terphane argues that the scope language does not beckon for an exclusion based on a particular manufacturing process, and that Mitsubishi's construction relies on arbitrary perspectives not compelled by a plain reading. Def.-Inter.'s Suppl. Opp'n at 2–4. Terphane then argues that Mitsubishi's reading is not mandated by any of the scope language, which is instead ambiguous. Def.-Inter.'s Suppl. Opp'n at 5–11. Mitsubishi reiterates much of its plain reading and surplusage arguments in its own supplemental reply brief. Pl.'s Suppl. Reply at 1–12.

otherwise broad language. *See* 19 C.F.R. § 351.225(a) (stating that descriptions of subject merchandise “must be written in general terms”); *see also* *Mid Continent Nail*, 725 F.3d at 1305 (“Commerce enjoys considerable discretion in interpreting its own orders.”). No language in the scope commands that a “finished film” must “have had” one of its “surfaces” “modified by the application of” a protective resinous or inorganic layer of sufficient thickness in a specific chronology, other than, necessarily, prior to import.<sup>16 17</sup>

Though Mitsubishi’s construction of the plain scope language is not unreasonable, it is also not unambiguous. While “Commerce need only meet a low threshold to show that it justifiably found an ambiguity in scope language,” *Allegheny Bradford Corp. v. United States*,

<sup>16</sup> Mitsubishi’s reading of “finished films” may be plausible, but it is not unambiguous. As evidenced by the parties’ conflicting interpretations of the word in context, “finished” is ambiguous. Even if it were unambiguous, it would remain plausible to read the second sentence as meaning that films can become “metallized [or] . . . finished” *after* they have had one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer of sufficient thickness. *See* Pl.’s Suppl. Br. at 6. Further one could read “surfaces” as being “modified” at the time of co-extrusion, since there is no unambiguous language providing that a “surface” necessarily does not exist at the moment of extrusion or co-extrusion. *See id.*

<sup>17</sup> In its supplemental brief, the Government argues that Mitsubishi failed to exhaust its administrative remedies before Commerce with respect to the argument that the words “have had” in the scope language indicate that the exclusionary language does not apply to co-extruded films. Def.’s Suppl. Br. at 5–7. The Government’s argument is unpersuasive in several respects. Although “[t]he exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency’s consideration before raising these claims to the Court[.]” *Shandong Huarong Mach. Co., Ltd. v. United States*, 30 CIT 1269, 1305, 435 F. Supp. 2d 1261, 1292 (2006) (internal citations omitted), and “the court tends to take a strict stance on exhaustion, the requirement that a party exhaust its administrative remedies has been excused in trade cases ‘where . . . the issue involves a pure question of law not requiring further factual development.’” *Meridian Prod., LLC v. United States*, 39 CIT \_\_\_\_, 77 F. Supp. 3d 1307, 1312 (2015) (quoting *SeAH Steel Corp. v. United States*, 35 CIT \_\_\_\_, 764 F. Supp. 2d 1322, 1325–26 (2011)). To establish the pure question of law exception the following requirements must be met:

- (a) . . . plaintiff shall raise a new argument; (b) this argument shall be of purely legal nature; (c) the inquiry shall require neither further agency involvement nor additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce party time and resources.

*Consolidated Bearings Co. v. United States*, 25 CIT 546, 553–54, 166 F. Supp. 2d 580, 587 (2001), *rev’d on other grounds*, 348 F.3d 997 (Fed. Cir. 2003). Here, Mitsubishi’s argument regarding the “have had” language fits into its prior arguments regarding processes and how the scope language should be read. *See supra* Section I. However, even assuming arguendo that Mitsubishi’s argument did not fit within its prior arguments and that Mitsubishi had failed to exhaust its administrative remedies, the pure question of law exception applies. *See Consolidated Bearings Co.*, 25 CIT at 553–54. In the instant case, Mitsubishi raises a new argument of purely legal nature (the proper reading and interpretation of scope language); no further agency involvement, additional fact finding, or opening up the record are necessary; and the inquiry will not create undue delay nor cause expenditure of scarce party time and resources. *See id.*; *see also Meridian Prod.*, 77 F. Supp. 3d at 1313 (finding that the language of the scope itself can present a pure question of law). Thus, the pure question of law exception to exhaustion is applicable.

28 CIT 830, 843, 342 F. Supp. 2d 1172, 1184 (2004) (citing *Novosteel SA v. U.S., Bethlehem Steel Corp.*, 284 F.3d 1261, 1272 (Fed. Cir. 2002)), Mitsubishi points out that “it is not justifiable to identify an ambiguity where none exists,” as doing so would result in an interpretation that impermissibly conflicts with an order’s terms and alters its scope. Pl.’s Br. at 24 (citing *Laminated Woven Sacks Comm. v. United States*, 34 CIT 906, 914, 716 F. Supp. 2d 1316, 1325 (2010)). Here, the parties’ conflicting readings of the scope language, permeating the four initial briefs and all six supplemental briefs, indicate that the scope language is subject to reasonable interpretation.<sup>18</sup> See *Shenyang Yuanda Aluminum Indus. Eng’g Co. v. United States*, 40 CIT \_\_\_, \_\_\_, 146 F. Supp. 3d 1331, 1336 n.27 (2016) (citing *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1383 (Fed. Cir. 2005) (“[A] predicate for the interpretive process is language in the order that is subject to interpretation.”)); *Laminated Woven Sacks*, 716 F. Supp. 2d at 1326 (“All that is necessary before Commerce may consider secondary documents from the original investigation is ‘language in the order that is subject to interpretation.’” (quoting *Duferco Steel*, 296 F.3d at 1097)). The ambiguity does not plainly conflict with the *Order’s* terms. In short, Commerce therefore acted in accordance with law when it proceeded to analyze the scope under the factors provided by 19 C.F.R. § 351.225(k)(1).

## II. Commerce’s Analysis Under 19 C.F.R. § 351.225(k)(1) was Unsupported by Substantial Evidence

Having affirmed Commerce’s determination regarding ambiguity, the court must now consider Commerce’s finding that the factors in 19 C.F.R. § 351.225(k)(1) dispositively place Terphane’s Copolymer Surface Products outside of the scope of the *Order*. Ultimately the court concludes that it cannot be said with reasonable confidence that Commerce’s analysis and determination under (k)(1) was supported by substantial evidence. As mentioned *supra* an analysis under 19 C.F.R. § 351.225(k)(1) involves “the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and

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<sup>18</sup> The court recognizes that the Government might have made an argument that the scope language is unambiguous in the manner they might read it: that the language plainly means that co-extrusion can provide the “performance-enhancing resinous or inorganic layer more than 0.00001 inches thick” of the second sentence exclusion because nothing in the language explicitly decrees that co-extrusion may not provide that layer. However, the defendant did not make that argument. Compare *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (“[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”). In any event, this plausible interpretation, juxtaposed with Mitsubishi’s, supports Commerce’s determination that the language is ambiguous.

the Commission.” “Commerce’s analysis of these sources against the product in question produces factual findings reviewed for substantial evidence.” *Meridian Prod.*, 851 F.3d at 1382. Here, the agency did not come to a reasonable conclusion in consideration of the entire administrative record, specifically in regards to relevant “descriptions of the merchandise contained in the petition [and] the initial investigation” such that its findings under the other (k)(1) factors “definitively answer the scope question.” *Id.* at 1382 n.8; see *Nippon Steel*, 458 F.3d at 1351; *Universal Camera*, 340 U.S. at 488 (“The substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.”).

### A. Parties’ Arguments

Mitsubishi asserts that (k)(1) evidence could reasonably indicate only that Terphane’s films are dispositively in-scope, and thus the agency’s determination that the (k)(1) criteria do *not* indicate dispositively that Terphane’s films are in-scope is unsupported by substantial evidence.<sup>19</sup> Pl.’s Br. at 24–30. Mitsubishi argues Commerce ignored that throughout the history of the *Order* and previous antidumping duty orders on PET film, petitioners, Commerce, the ITC, and respondents “have always regarded coextruded films . . . as being in-scope,” while “[n]o interested party or government agency” has indicated that they might be out-of-scope “depending on the thickness of the coextruded layer.” *Id.* at 26. Further, Mitsubishi argues that analyses within elements of (k)(1) evidence demonstrate a pattern of association between equivalent PET films and their possible exclusion under the second sentence, but nowhere display the same in regards to co-extruded films, or suggest that co-extruded films might qualify as equivalent PET films depending on the thickness of a co-extruded layer. *Id.* at 27. Mitsubishi also takes issue with Commerce’s failure to mention, address, or engage with Terphane’s questionnaire responses from the original investigation, in which Terphane stated its belief that its co-extruded products were in-scope, and the original *Petition*, in which plaintiffs (as petitioners) “complained about lost sales due to a Terphane film that was functionally similar” to the films at issue in this case. *Id.* at 26–28. Altogether, these analytical choices strike Mitsubishi as a failure to explain how (k)(1) evidence does not show dispositively that Terphane’s films are in-scope.

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<sup>19</sup> In the alternative, Mitsubishi presents its argument in the negative: Commerce’s “further finding”—that the (k)(1) evidence indicates *dispositively* that Terphane’s films are *out-of-scope*, provided that the layer in question is sufficiently thick—is unsupported by substantial evidence, because it “has no support in the history of antidumping duty orders on PET film.” Pl.’s Br. at 30.

Mitsubishi also characterizes Commerce's determination as relying on the mistaken determination that Cronar and Estar, which are equivalent PET films, are in fact co-extruded. Pl.'s Br. at 28–29. Mitsubishi adds that besides this misclassified evidence, Commerce neither cited any potentially dispositive evidence related to the (k)(1) factors nor indicated that either *Avery Dennison* or *Garware* scope determinations are controlling in this case, as neither involved a co-extruded film. *Id.* at 29.

The Government and Terphane respond first that Mitsubishi—by identifying pieces of the record where equivalent PET is spoken of as excluded from the scope while co-extrusion is not—misunderstands the regulatory requirement, which is that Commerce under 19 C.F.R. § 351.225(k)(1) assesses “descriptions of the merchandise” contained in the enumerated sources. Def.'s Opp'n at 6, 13. Rather, the scope defined in the Petition, identical to the scope in the *Order*, was silent on the question of whether the “performance-enhancing resinous or inorganic layer” must be applied through any particular process. Def.'s Opp'n at 13. Second, the Government and Terphane argue Mitsubishi misinterprets the relevance of the original investigation and two prior scope rulings in the same manner. Def.'s Opp'n at 14. They point out that the two prior scope determinations—*Garware* and *Avery Dennison*—likewise implicate the description of merchandise, as the analyses therein considered the two critical factors identified above: the presence of a performance-enhancing layer, and the thickness of that layer.<sup>20</sup> Def.'s Opp'n at 14. As to Mitsubishi's argument that Commerce failed to address questionnaire responses, the Government reiterates that 19 C.F.R. § 351.225(k)(1) directs the agency to analyze “descriptions of the merchandise” in the original investigation. Finally, in response to Mitsubishi's characterization of Commerce's analysis as hinging on a mistaken determination that Cronar and Estar are co-extruded—a factual error now acknowledged by Commerce in its briefing to the court—the Government and Terphane emphasize once more that the relevance of those ITC determinations is in the physical description of Cronar and Estar therein.<sup>21</sup> Def.'s Opp'n at 7, 17–18; Def.-Inter.'s Opp'n at 21–24.

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<sup>20</sup> The Government and Terphane contend that *Garware* spoke to the performance-enhancing quality of the layer in question, while *Avery Dennison* spoke to thickness of the layer in question; in their view, contrary to Mitsubishi's arguments, neither the chemical composition of the layer, nor the production method used to apply it, had any bearing upon Commerce's determinations in both instances. Def.'s Opp'n at 14; Def-Inter.'s Opp'n at 24–27; *Scope Ruling* at 13.

<sup>21</sup> That these products are equivalent PET, which indisputably comes under the second sentence exception, does not detract from their relevance to Terphane's case, the Government argues, because Terphane's products share several physical characteristics with Cronar and Estar such that they all seem to fulfil the exclusion for the same reasons.

Mitsubishi replies that *Avery Dennison* and *Garware* are merely “consistent,” rather than “controlling” or “dispositive,” and asserts that “[m]uch of Defendant and Defendant-Intervenor’s arguments” are post-hoc rationalizations. Pl.’s Reply at 14–15; see *Burlington Truck Lines*, 371 U.S. at 168–69; see also *Nan Ya Plastics Corp., Ltd. v. United States*, 37 CIT \_\_\_, \_\_\_, 906 F. Supp. 2d 1348, 1354 (2013). Mitsubishi adds that the Government fails to identify any relevant discussion of “descriptions of the merchandise” in the “Analysis” section of Commerce’s determination; that defendant makes a logical error by relying on consistency of the scope language to come to a dispositive (k)(1) conclusion, yet finding that same language ambiguous at the preliminary stage of analysis; and that defendant is wrong to defend Commerce’s failure to address the aforementioned questionnaire responses, because they constitute part of the relevant (k)(1) evidence insofar as they are “descriptions of the merchandise contained in . . . the initial investigation[.]” Pl.’s Reply at 16–17.

As to Terphane’s points, Mitsubishi responds that it failed to identify how exactly the performance-enhancing characteristics of Cronar and Estar are sufficiently similar to Terphane’s Copolymer Surface Films such that the latter should be excluded for the same reasons as the former.<sup>22</sup> Pl.’s Reply at 18.

## B. Analysis

The court concludes that Commerce did not analyze the “descriptions of the merchandise contained in the petition, [and] the original investigation” on the record, including those that fairly detract from its determination, see *Universal Camera*, 340 U.S. at 488, such that its entire analysis dispositively answers the scope question in accordance with the substantial evidence standard. 19 C.F.R. § 351.225(k)(1). While the *Petition* and original antidumping investigation are cited at points during the *Terphane Scope Ruling*, it is to the purpose of summarizing parties’ arguments;<sup>23</sup> nowhere in the “Analysis and Conclusions” section do they appear. *Compare Scope Ruling* at 6 (“Petitioners argue that they intended for these films to Namely, all are designed for further manufacturing, are adhesive and receptive to further coating, and all possess performance-enhancing layers that provide them with additional capabilities not found in raw PET film or mere primed or pretreated PET film. Def.’s Opp’n at 17–18; Def.-Inter.’s Opp’n at 21–24.

<sup>22</sup> Mitsubishi further characterizes the *Scope Ruling* as a finding that Terphane’s films are equivalent PET films. Pl.’s Reply at 19. This alleged finding, Mitsubishi argues, lacks support. *Id.*

<sup>23</sup> Commerce twice cites the *Petition* at 85 to contextualize parties’ arguments before the agency. *Scope Ruling* at 6 nn.39–40.

fall within the scope of *The Order* . . . Terphane argues that, on the contrary, Petitioners never claimed during the investigation that Terphane should have included these films, despite Terphane indicating it made such films.”) with *Scope Ruling* at 11–14 (“Analysis and Conclusions”).

“In making a scope determination, Commerce must ‘utilize[ ] and abide[ ] by the statutory and regulatory provisions that authorize [it] to investigate [scope issues].’” *Shenyang Yuanda Aluminum Indus. Eng’g Co. v. United States*, 40 CIT \_\_\_, \_\_\_, 181 F. Supp. 3d 1348, 1356 n.15 (2016) (quoting *AMS Associates, Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013)). Individual pieces of (k)(1) evidence together depict the regulatory history of a type of merchandise such that Commerce may informedly determine whether the scope covers the products under review. *Mid Continent Nail*, 725 F.3d at 1302 (“If the [scope] language is ambiguous, Commerce must next consider the regulatory history, as contained in the [ ] ‘(k)(1) materials.’”) (citations omitted). This Court has held that “[t]his includes an informed and meaningful assessment of the Petition.” *Shenyang*, 181 F. Supp. 3d at 1356. Failure to meaningfully consider the (k)(1) factors makes remand appropriate. *Id.*; see *Mid Continent Nail Corp. v. United States*, 35 CIT \_\_\_, \_\_\_, 770 F. Supp. 2d 1372, 1379 (2011) (citing *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 479, 112 F. Supp. 2d 1141, 1165 (2000) (“[I]t is . . . well-established that Commerce’s total failure to consider or discuss record evidence which, on its face, provides significant support for an alternative conclusion renders the Department’s determination unsupported by substantial evidence.”)).

The Government asserts that Mitsubishi “fundamentally misunderstand[s] Commerce’s interpretive process as defined by its regulations,” which is “that ‘descriptions of the merchandise’ are the most probative and meaningful evidence to resolve scope issues under 19 C.F.R. § 351.225(k)(1).” Def.’s Opp’n at 15. The court understands this to mean that the Government perceives Mitsubishi’s argument as calling for Commerce to consider, as probative, what the parties *believed* were in scope at the time of, and as shown by, the *Petition* and original investigation. *Id.* (“Petitioners contend that Commerce failed to address certain questionnaire responses from the original investigation, in which Terphane stated its belief that its co-extruded films were in-scope and in which petitioners ‘complained about lost sales due to a Terphane film that was functionally similar’ to the films at issue . . .”). This perspective is not elucidated in the *Scope Ruling*, and so constitutes a post-hoc rationalization for a sizable gap in the agency’s analysis. See *Motor Vehicle Mfrs. Ass’n of United States*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

Regardless, Commerce nowhere justified its avoidance of the *Petition* and original investigation under its (k)(1) analysis, despite that they contain “descriptions of the merchandise” that Commerce is obligated to analyze thereunder.<sup>24</sup> *Scope Ruling*; 19 C.F.R. § 351.225(k)(1). Mitsubishi further invokes certain (k)(1) materials as expressing their intent at the time they filed the *Petition* and participated in the original investigation as petitioners. Pl.’s Br. at 26 (citing *Petition* at 10). The Government may characterize this citation as one to petitioners’ belief at the time of filing the *Petition*, but it is patently a “description[ ] of the merchandise” contained in the *Petition*. Commerce does not analyze, rebut, or otherwise consider these elements of the record under the *Scope Ruling*’s Analysis and Conclusions section. *Scope Ruling* at 11–14. In light of ambiguous scope language, Commerce should give consideration to petitioners’ intended meaning when examining a petition’s description of the subject merchandise.<sup>25</sup> *See Mid Continent Nail*, 770 F. Supp. 2d at 1379 (“Commerce failed to address the Petitioners’ Scope Letter which made clear the Petition-

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<sup>24</sup> Mitsubishi, in describing the relevant (k)(1) evidence that it argues Commerce did not sufficiently engage with, points to the *Petition*, quoting, inter alia, petitioners’ description that “PET film can be made with a single layer or can be coextruded with other polymers into a multilayer film” and that “the proposed domestic like product in this investigation excludes ‘equivalent’ PET film, i.e., PET film with a coating of more than 0.00001 inch thick.” Pl.’s Br. at 9–10 (citing *Petition* at 9–11). As to elements of the original investigation, Mitsubishi points to a letter petitioners sent to Commerce wherein they urged the agency to account for co-extruded films in its calculations of normal value, Pl.’s Br. at 10–11 (citing *Pets’ QR* at Ex. 8, pp. 2–3); Section A, B, and D questionnaire responses wherein Terphane described PET film products, *Id.* at 11–13 (citing *Pets’ QR* at Ex. 4, 6, 11); and the ITC’s report from the initial investigation, wherein the definition of “equivalent PET film” was discussed, *Id.* at 13–15 (citing *Pets’ QR* at Ex. 17). *See* Pl.’s Br. at 26–28 (describing additional citations to the *Petition* and original investigation that Mitsubishi argues are relevant). The court does not determine that Mitsubishi’s citations to the *Petition* and the original investigation comprise an authoritative or exhaustive list of relevant (k)(1) evidence that should affect Commerce’s determination, but merely that where there is a description of the merchandise in those sources that may affect the outcome, Commerce should consider it, and explain its reasoning.

<sup>25</sup> At the second oral argument, counsel for the Government stated that Commerce did in fact defer to petitioners’ intent in crafting the scope language—specifically in that petitioners intended for the scope language to be recycled from the earlier ITC proceedings described *supra*. The court notes that this articulation of petitioners’ intent does not quite capture the intent that would be more relevant to the agency’s analysis, which is what the petitioners intended the scope language would mean in context. That notwithstanding, the court is sensitive to the reality that petitioners’ subjective intent should yield to express language in the scope, to the extent they conflict. *See ArcelorMittal*, 694 F.3d at 90 (“Commerce is not at liberty to ignore the plain terms of an order in what appears to be, in retrospect, an effort to better reflect the intent of the petitioners.”); *Duferco Steel, Inc. v. United States*, 25 CIT 493, 501, 146 F. Supp. 2d 913, 922 (2001) (noting that while “this Court has previously held that Commerce must give ample deference to the petitioner’s intent when examining a petition’s description of the subject merchandise,” the Court should “avoid subjective issues of intent and, instead, look to the petition’s language to determine whether the class or kind of merchandise at issue was expressly included”), *rev’d on other grounds*, 296 F.3d 1087 (Fed. Cir. 2002).

ers' intention that their proposed scope language would include subject goods packaged with non-subject items. This failure alone renders the *Final Scope Ruling* unsupported by substantial evidence.”); see also *Fedmet*, 755 F.3d at 921 (“[T]he reason why the (k)(1) sources are afforded primacy in the scope analysis is because interpretation of the language used in the orders must be based on the meaning given to that language during the underlying investigations.”).

These materials may not be dispositive in either direction under a reasoned analysis, but they merit consideration. See *Nippon Steel*, 458 F.3d at 1351; *Universal Camera*, 340 U.S. at 488; *Nan Ya Plastics Corp., Ltd. v. United States*, 39 CIT \_\_\_, \_\_\_, 128 F. Supp. 3d 1345, 1355 (2015) (quoting *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994)). The court expresses no inclination as to the correct outcome, but concludes that Commerce must explain how its findings were “reached by ‘reasoned decision-making,’ including . . . a reasoned explanation supported by a stated connection between the facts and the choice made.” *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm’n*, 747 F.2d 1511, 1513 (D.C. Cir. 1984) (citing *Burlington Truck Lines*, 371 U.S. at 168; *Memphis Light, Gas and Water Div. v. FPC*, 504 F.2d 225, 230 (D.C. Cir. 1974)). Altogether, Commerce must provide further explanation for its decisions in regard to relevant (k)(1) materials in the record, including those in the *Petition* and original investigation which it did not analyze in the original determination, on remand.

Because the original determination will be a focus of the remand proceeding, with respect to that original determination, the court also notes that it disagrees with Mitsubishi’s contention that Commerce’s misclassification of Cronar and Estar as co-extruded products was central to the *Terphane Scope Ruling*. See e.g. Pl.’s Br. at 28–29. Instead, the court agrees with the Government that the “descriptions of the merchandise” in those ITC determinations, which share language with the *Order’s* scope, should be relevant to the analysis of products in the instant case. Def.’s Opp’n at 15–18.<sup>26</sup> Bedeviling Commerce, however, is its explanation that the second sentence exclusion “refers to a specific category of products which the ITC identified as ‘equivalent PET film,’” defined by the ITC as “including DuPont’s Cronar and Estar products, and those products equivalent

<sup>26</sup> The Government notes that Terphane actually provided evidence that Estar is produced through an in-line process. Def.’s Opp’n at 17 n.5 (citing *Terphane’s May 7 Comments* at 8–11; *Terphane’s June 7 Response* at 7). While “[c]o-extrusion is a type of in-line process . . . there is no record evidence that the in-line process used to manufacture Estar is co-extrusion.” *Id.* Counsel for the Government reiterated this point at oral argument.

to Cronar and Estar,”<sup>27</sup> in conjunction with its later statement that Cronar and Estar “are the paradigmatic examples of films” covered by the exclusion. *Scope Ruling* at 4, 12. A reasonable mind would understand these categorical statements to mean that, in order to qualify for the exclusion, Terphane’s Copolymer Surface Films must also be equivalent PET films, or “equivalent to Cronar and Estar.”<sup>28</sup> Read together with Commerce’s mistaken belief that Terphane had provided evidence “that indicates that Cronar and Estar are co-extruded,” see Def.’s Opp’n at 17, they necessitate a finding that at least some co-extruded films, namely Cronar, Estar, and Terphane’s Copolymer Products, are also equivalent PET films, and vice versa. However, in light of Commerce’s mistake, it is unclear the extent to which Commerce’s identification of the second sentence exclusion specifically with equivalent PET film influences the overall determination that Terphane’s Copolymer Surface Films are *dispositively* out of scope. The Government points to the physical similarities between Terphane’s Copolymer Products, Cronar, and Estar, and reiterates that “the specific process used to apply the performance-enhancing layer has no bearing upon whether the exclusion at issue applies.” Def.’s Opp’n at 18. But if the second sentence exclusion applies only to equivalent PET films, then Commerce would also need to determine that Terphane’s Copolymer Products are equivalent PET films in order to exclude them under the second sentence; or, if Commerce does not make that determination, then to reach the same conclusion, it would need to explain how the second sentence exclusion can apply to PET films that are not equivalent. Perhaps this is what Commerce means when it refers to those films “identical to” or “equivalent to” Cronar and Estar. *Scope Ruling* at 4, 12. However, it is unclear to the court what films would be identical to Cronar and Estar without themselves being equivalent PET, and whether there is a meaningful difference between those categories. Commerce should also clarify whether equivalent PET refers solely to those films excluded under the second sentence exclusion, or one that is a term of art in the industry.<sup>29</sup> See *ArcelorMittal*, 694 F.3d at 88 (“[A]ntidumping orders should not be interpreted in a vacuum devoid of any consideration of

<sup>27</sup> Commerce supported this statement with information submitted by parties into the administrative record. *Scope Ruling* at 4 n.25 (citing *Terphane’s Scope Ruling Request* at 5; *Pets Mar. 23 Comments* at 3).

<sup>28</sup> Terphane argued before the agency, and argues before this court, that its Copolymer Surface Films are equivalent PET. *Terphane Scope Ruling Request* at 5; Def.-Inter.’s Opp’n at 20.

<sup>29</sup> Mitsubishi points to the ITC’s report from the original investigation, which notes, inter alia, that “the Commission has defined equivalent PET film as PET film to which has been applied a coating of more than 0.0001 inch thick,” in support of its contention that “the ITC found that equivalent PET films do not compete with subject PET films . . . [t]his discussion

the way the language of the order is used in the relevant industry.”). Commerce must reconcile these inconsistencies on remand and more clearly explain its reasoning without the assistance of post-hoc explanations from counsel. See *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.” (quoting *Chenery*, 318 U.S. at 87)).

In sum, to stand, the *Scope Ruling* must demonstrate, based on substantial evidence on the record, that Commerce’s conclusion that its (k)(1) analysis was *dispositive* of the scope question. See *Meridian Prod.*, 851 F.3d at 1382 n.8. That it does not do, for the reasons laid out above. On remand, Commerce shall consider the (k)(1) evidence contained in the agency record that is derived from the *Petition* and the original investigation, per the regulation. The court reiterates that in this opinion it expresses no inclination as to the determination Commerce should make, but only instructs that Commerce must give a reasoned review to the entire record, per the dictates of its regulation, in the process. Accordingly, if Commerce determines that the (k)(1) factors are not dispositive, then it shall consider the factors listed in 19 C.F.R. § 351.225(k)(2) and make a determination thereunder. See generally *Diversified Products*, 572 F. Supp. 883.

### III. The Terphane Scope Ruling was not Invalidated by Delay

Mitsubishi argues that the Terphane *Scope Ruling* is invalidated by delay. Pl.’s Br. at 30. Mitsubishi points out that Commerce’s regulations require it to issue a scope determination within “45 days of the date of receipt of an application for a scope ruling,” unless it initiates a scope inquiry under the *Diversified Products* criteria. *Id.* at 30; 19 C.F.R. § 351.225(c)(2). In the instant matter, Commerce neither issued a scope determination within 45 days of the receipt of Terphane’s application (submitted February 22, 2012), nor did it initiate a scope inquiry under the *Diversified Products* criteria. *Terphane Scope Ruling* at 1. Rather, Commerce issued the *Scope Ruling* 320 days later on January 7, 2013. *Id.* Mitsubishi argues that Commerce “departed arbitrarily” from its policy of issuing scope determinations within 45 days, and that therefore, this departure invalidates the scope determination and renders it contrary to law and unsupported by substantial evidence. Pl.’s Br. at 31 (citing *Koyo Seiko Co., Ltd. v. United*

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of equivalent PET film did not refer to coextruded films . . . .” Pl.’s Br. at 14–15 (citing *Pets’ QR* at Ex. 17, pp. I-13–I-14). Mitsubishi also takes issue with Commerce’s association between co-extruded films and equivalent PET. Pl.’s Br. at 27 (“[N]o interested party or government agency has ever indicated that coextruded films might qualify as equivalent PET films, depending on the thickness of the coextruded layer.”).

*States*, 16 CIT 366, 372, 796 F. Supp. 517, 523 (1992)); *see also Amanda Foods (Viet.) Ltd. v. United States*, 35 CIT \_\_\_, \_\_\_, 807 F. Supp. 2d 1332, 1343 (2011) (“When an agency changes its position suddenly and without explanation or ‘does not take account of legitimate reliance on prior interpretation,’ the agency’s action may be ‘arbitrary, capricious [or] an abuse of discretion.’” (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996))). Mitsubishi contends that it was harmed by the delay in that it was “subjected to 273 additional days of unfairly traded Terphane imports.” Pl.’s Reply at 3–4.

Mitsubishi’s arguments miss the mark. Courts are “most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake.” *Brock v. Pierce County*, 476 U.S. 253, 260 (1986); *see also United States v. Great Am. Ins. Co. of NY*, 738 F.3d 1320, 1329 (Fed. Cir. 2013). Commerce may, “for good cause,” extend any time limit within Part 351 of Title 19, unless expressly precluded by statute. 19 C.F.R. § 351.302(b) (2012). In addition, it is within Commerce’s discretion “to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.” *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970). Here, Commerce received voluminous submissions (approximately 700 pages) that were highly technical and complex. Def.’s Opp’n at 4. Given the size and complexity of the submissions, Commerce had good cause to extend the time limit beyond 45 days. *See* 19 C.F.R. § 351.302(b). While the court need not reach the question of whether the delay here was reasonable, it is telling that that Mitsubishi did not object to the extension. *See* Pl.’s App. In any event, invalidation is not warranted because the time period in § 351.225(c)(2) is directory, not mandatory, as it does not specify a consequence for failure to comply with the provision. *See Canadian Fur Trappers Corp. v. United States*, 12 CIT 612, 615, 691 F. Supp. 364, 367 (1988), *aff’d*, 884 F.2d 563 (Fed. Cir. 1989). “[A] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provisions.” *United States v. Great Am. Ins. Co. of NY*, 35 CIT \_\_\_, \_\_\_, 791 F. Supp. 2d 1337, 1354 (2011) (quoting *id.*), *aff’d*, 738 F.3d 1320 (Fed. Cir. 2013). Finally, the court’s decision to remand this matter moots any issue regarding invalidation by delay, as the new deadlines set by the court will apply going forward.

## CONCLUSION

For the foregoing reasons, it is hereby

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

**ORDERED** that Commerce's determination under 19 C.F.R. § 351.225(k)(1) as to Terphane's Copolymer Surface Products is remanded for further consideration consistent with this opinion; and it is further

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

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

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

Dated: June 8, 2017

New York, New York

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

Slip Op. 17-71

TRI UNION FROZEN PRODUCTS, INC. et al., Plaintiffs and Consolidated Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Claire R. Kelly, Judge  
Consol. Court No. 14-00249

[Remanding U.S. Department of Commerce's remand determination in the eighth administrative review of the antidumping duty order covering certain frozen warm-water shrimp from the Socialist Republic of Vietnam.]

Dated: June 13, 2017

*Robert George Gosselink, Jarrod Mark Goldfeder, and Jonathan Michael Freed*, Trade Pacific, PLLC, of Washington, DC, for Plaintiffs Tri Union Frozen Products, Inc., Mazzetta Company LLC, and Ore-Cal Corporation, and for Consolidated Plaintiff Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd.

*William Henry Barringer, Matthew Paul McCullough, and Matthew Robert Nicely*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Consolidated Plaintiffs Vietnam Association of Seafood Exporters and Producers and certain of its individual member companies.

*Nathaniel Jude Maandig Rickard and Roop Kiran Bhatti*, Picard, Kentz & Rowe, LLP, of Washington, DC, for Consolidated Plaintiff and Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

*Kara Marie Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was

*James H. Ahrens II*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

## **OPINION AND ORDER**

### **Kelly, Judge:**

Before the court for review is the U.S. Department of Commerce’s (“Commerce” or “the Department”) remand determination filed pursuant to the court’s order in *Tri Union Frozen Products, Inc. v. United States*, 40 CIT \_\_\_, 163 F. Supp. 3d 1255 (2016) (“*Tri Union I*”). See Final Results of Redetermination Pursuant to Court Remand, Sept. 1, 2016, ECF No. 118–1 (“Remand Results”).

In *Tri Union I*, the court granted Defendant’s request to remand “for Commerce to reconsider [Ad Hoc Shrimp Trade Action Committee]’s arguments concerning Commerce’s reliance on Bangladeshi labor wage rate data” from the Bangladesh Bureau of Statistics (“BBS data”), a government source, to value the labor factor of production in this review. *Tri Union I*, 40 CIT at \_\_\_, 163 F. Supp. 3d at 1312–13. On remand, Commerce continued to use BBS data to value the labor factor of production (“FOP”) in this review, providing further explanation of its decision to do so in light of Ad Hoc Shrimp Trade Action Committee’s (“Ad Hoc Shrimp”) arguments that the Bangladeshi wage rate data is aberrational and unreliable due to systemic labor abuses in the Bangladeshi shrimp industry. Remand Results 5–42. For the reasons that follow, the court remands again to Commerce for further consideration of Ad Hoc Shrimp’s argument that record evidence of alleged labor abuses in the Bangladeshi shrimp industry renders the BBS data aberrational, unreliable, and not reflective of actual labor conditions in a market economy at comparable economic development to the Socialist Republic of Vietnam.

## **BACKGROUND**

On March 29, 2013, Commerce initiated the eighth administrative review of the antidumping duty (“ADD”) order covering certain frozen warmwater shrimp from the Socialist Republic of Vietnam (“Vietnam”) for the period of February 1, 2012 through January 31, 2013. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 Fed. Reg. 19,197 (Dep’t Commerce Mar. 29, 2013); see also *Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 70 Fed. Reg. 5,152 (Dep’t Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and ADD order).

Prior to publication of the preliminary results, petitioner Ad Hoc Shrimp submitted comments regarding the primary surrogate coun-

try selection. Comments on Surrogate Country Selection, PD 133–137, bar codes 3152484–01–04 (Aug. 30, 2013) (“Ad Hoc Shrimp Surrogate Country Comments”).<sup>1</sup> In this submission, Ad Hoc Shrimp argued that Commerce should not select Bangladesh as a primary surrogate country because, “as a consequence of the pervasive labor abuses in Bangladesh[,] the two countries are not economically comparable.” *Id.* at 2. Ad Hoc Shrimp placed evidence on the record documenting alleged “aberrational labor conditions – comprised of severe abuse of labor and disregard for workers’ rights – permeating the entire supply chain of the Bangladesh shrimp industry.” *Id.*

On March 24, 2014, Commerce published its preliminary results. *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 79 Fed. Reg. 15,941 (Dep’t Commerce Mar. 24, 2014) (preliminary results of ADD administrative review; 2012–2013) and accompanying Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam; 2012–2013, A-552–802, PD 191, bar code 3188821–01 (Mar. 19, 2014) (“Prelim. Decision Memo”). Despite Ad Hoc Shrimp’s comments on the surrogate country selection, Commerce selected Bangladesh as the primary surrogate country for the purpose of valuing the mandatory respondents’ FOPs for this review. Prelim. Decision Memo at 15. Regarding the labor FOP, Commerce explained its practice of valuing the labor input using industry-specific labor wage rate data from the primary surrogate country, and accordingly used the BBS data to value the labor input here. *Id.* at 23; *see* Surrogate Values for the Preliminary Results at 5–6, PD 192–198, bar codes 3188847–01–07 (Mar. 18, 2014) (“Prelim. Surrogate Value Memo”). Commerce explained that, although it considers the International Labor Organization Yearbook of Labor Statistics Chapter 6A: Labor Cost in Manufacturing (“ILO Chapter 6A data”) to be the best source of data for industry-specific labor rates, because the ILO does not include labor data for Bangladesh, the agency would use the BBS data. Prelim. Surrogate Value Memo at 5–6; *see* Prelim. Decision Memo at 23.<sup>2</sup>

<sup>1</sup> On December 8, 2014, Defendant submitted indices to the public and confidential administrative records, which identify the documents that comprise the public and confidential administrative records to Commerce’s final determination. *See* Index to Administrative Record, Dec. 8, 2014, ECF No. 27–1. All further references to the documents from the administrative record are identified by the numbers assigned by Commerce in these administrative records.

<sup>2</sup> Commerce stated in the Prelim. Decision Memo that its current preferred practice is to use ILO Chapter 5B data to value labor wage rates, Prelim. Decision Memo at 23; however, Commerce’s current practice is to use ILO Chapter 6A data to value labor wage rates. *See* Prelim. Surrogate Value Memo at 5–6; *Antidumping Methodologies in Proceedings Involving Non Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,093 (Dep’t Commerce Jun. 21, 2011). Commerce stated this practice correctly in its

Following publication of the preliminary results, Ad Hoc Shrimp placed on the record additional documentation of alleged labor abuses in the shrimp industry in Bangladesh and ILO data for five countries (Guyana, India, Indonesia, Nicaragua, and Philippines)<sup>3</sup> that Ad Hoc Shrimp contended are economically comparable to Vietnam. Post-Prelim Evidentiary Submission Regarding Surrogate Country and Value Selection at Attach. 8, PD 221–222, bar code 3198211–01 (Apr. 28, 2014) (“Ad Hoc Shrimp Post- Prelim. Comments”). Ad Hoc Shrimp subsequently submitted a case brief to Commerce continuing to challenge the use of the BBS data, again arguing that the BBS data is aberrational and unreliable and highlighting the usable ILO data already on the record for economically comparable countries. Case Br. on Behalf of the Ad Hoc Shrimp Trade Action Committee 8–25, PD 234, bar code 3204785–01 (May 28, 2014) (“Ad Hoc Shrimp Agency Case Br.”). Ad Hoc Shrimp argued to Commerce that, notwithstanding the primary surrogate country selection, the BBS data should not be used to value the labor FOP.<sup>4</sup> *Id.* at 2, 24.

On September 19, 2014, Commerce issued its final determination in the eighth administrative review of the ADD order covering certain frozen warmwater shrimp from Vietnam for the period of February 1, 2012 through January 31, 2013. *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 79 Fed. Reg. 57,047 (Dep’t Commerce Sept. 24, 2014) (final results of ADD administrative review, 2012–2013), *as amended*, 79 Fed. Reg. 65,377 (Dep’t Commerce Nov. 4, 2014) (amended final results of ADD administrative review, 2012–2013), and accompanying Issues and Decision Memorandum for the Final Results, A-552–802, (Sept. 19, 2014), ECF No. 27–4 (“Final Decision Memo”). In the final determination, Commerce continued to find that the BBS data was the best available information on the record to value labor in this review, stating that its finding is in keeping with its practice to use “industry-specific labor rates from the primary surrogate country.” Final Decision Memo at 47. Commerce again explained that it was unable to use data from its preferred source, ILO Chapter 6A data, as the ILO does not contain data from Bangladesh; therefore, Commerce used data published by Prelim. Surrogate Value Memo and the Final Decision Memo in this review. *See* Prelim. Surrogate Value Memo at 5–6; Issues and Decision Memorandum for the Final Results, A-552–802, 47, (Sept. 19, 2014), ECF No. 27–4.

<sup>3</sup> This submission included ILO Chapter 6A data for India, Guyana, Philippines, and Nicaragua, and ILO Chapter 5B data for Indonesia. *See* Ad Hoc Shrimp Post-Prelim. Comments at Attach. 8.

<sup>4</sup> In its agency case brief Ad Hoc Shrimp argued that due to the evidence it submitted to Commerce documenting labor abuses, Commerce should value the labor FOP in this review “either by using wage data from a secondary surrogate country or through averaging wage data from multiple countries.” Ad Hoc Shrimp Agency Case Br. at 2, 24.

the BBS to value the labor FOP. *Id.*

Plaintiffs Tri Union Frozen Products, Inc., Mazzetta Company LLC, Ore-Cal Corporation, Consolidated Plaintiff Quoc Viet Seaproducts Processing Trading and Import-Export Co., Consolidated Plaintiffs Vietnam Association of Seafood Exporters and Producers (including certain of its individual member companies), and Consolidated Plaintiff Ad Hoc Shrimp respectively moved for judgment on the agency record challenging various aspects of Commerce's final determination. *See* Mem. Supp. Mot. Tri Union Frozen Products, Inc. J. Agency R., Mar. 30, 2015, ECF No. 48; Mem. Supp. Mot. Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd. J. Agency R., Mar. 30, 2015, ECF No. 46; Resp't Pls. VASEP and Individual VASEP Members' Br. Supp. Mot. J. Agency R., Mar. 30, 2015, ECF No. 50; Mot. Ad Hoc Shrimp Trade Action Committee for J. Agency R. Under USCIT Rule 56.2, Mar. 30, 2015, ECF No. 49-3 ("Ad Hoc Shrimp Br.").<sup>5</sup> Ad Hoc Shrimp challenged as unsupported by substantial evidence Commerce's use of the BBS data to value the labor factor of production in this review, arguing that the BBS data is aberrational and unreliable and renders the final results of the review unsupported by substantial evidence. Ad Hoc Shrimp Br. 15-30. Additionally, Ad Hoc Shrimp argued that Commerce failed to explain why the BBS data was reliable and non-distortive. *See id.* at 23-24. In response, Defendant requested remand for Commerce to consider Ad Hoc Shrimp's arguments that the BBS wage rate data is aberrational. *See* Def.'s Resp. in Opp'n to Pls.' Mots. J. Agency R. 88-89, Sept. 10, 2015, ECF No. 73. In *Tri Union I*, the court sustained Commerce's final determination in all respects other than its use of Bangladeshi labor wage rate data to value the labor factor of production, granting Defendant's request for remand to Commerce on that issue. *Tri Union I*, 40 CIT at \_\_\_, 163 F. Supp. 3d at 1312-13.

On September 1, 2016, Commerce issued the Remand Results. *See generally* Remand Results. On remand, Commerce continued to rely on the BBS data to value the labor FOP in this review. *Id.* at 5-42. Commerce continued to find that the BBS data provided the best available information for valuing the labor FOP as it reflects the agency's "strong preference to use surrogate values from the primary surrogate country," is specific to the shrimp industry, and, while not contemporaneous, is closer to the period of review than other data on

<sup>5</sup> The challenges raised by Plaintiffs Tri Union Frozen Products, Inc., Mazzetta Company LLC, Ore-Cal Corporation, Consolidated Plaintiff Quoc Viet Seaproducts Processing Trading and Import-Export Co., and Consolidated Plaintiffs Vietnam Association of Seafood Exporters and Producers (including certain of its individual member companies) to Commerce's final determination were rejected in *Tri Union I*; the court sustained Commerce's final determination with regard to those issues. *See Tri Union I*, 40 CIT at \_\_\_, 163 F. Supp. 3d at 1256, 1267-1312, 1313.

the record. *Id.* at 8–10. Commerce also contended that Ad Hoc Shrimp did not demonstrate the data to be aberrational and unreliable because Ad Hoc Shrimp did not provide a “measurable means (*i.e.*, a benchmark)” by which to assess the data as distortive. *Id.* at 29. Commerce further emphasized that its statutory directive does not require it to consider socio-political factors that may influence industry wage rates. *See id.* at 17.

Following remand, Ad Hoc Shrimp continues to challenge the BBS data as aberrational, unreliable, and therefore not the best available information with which to value the labor factor of production in this review. *See Consolidated Pl. Ad Hoc Shrimp Trade Action Committee’s Comments on Final Results of Redetermination to Court Remand 6–30, Dec. 2, 2016, ECF No. 125 (“Ad Hoc Shrimp Remand Comments”).* Ad Hoc Shrimp also argues that Commerce has failed to explain why the data is reliable and non-aberrational in light of the record evidence. *See id.* Defendant argues that substantial evidence supports Commerce’s selection of the Bangladeshi data as the best available surrogate value data, contending that Ad Hoc Shrimp has not demonstrated the data to be aberrational or unreliable. *See Def.’s Resp. to Comments on Remand Results 7–25, Mar. 23, 2017, ECF No. 133 (“Def.’s Remand Comments”).*

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)<sup>6</sup> and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT \_\_\_, \_\_\_, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

## DISCUSSION

Ad Hoc Shrimp argues on remand, as it did before the agency and before this court prior to remand, that the BBS data is unreliable and aberrational, and that Commerce has failed to explain why the data

<sup>6</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

is reliable and non-aberrational in light of the record evidence. *See* Ad Hoc Shrimp Remand Comments 6–30; *see also* Ad Hoc Shrimp Br. 13–31; Ad Hoc Shrimp Agency Case Br. at 8–25. Defendant contends that Commerce’s selection of the BBS data is supported by substantial evidence as Commerce found that it is the best available information on the record to value the labor FOP. Def.’s Remand Comments 10–25. Defendant also contends that Commerce reasonably determined Ad Hoc Shrimp cannot undermine Commerce’s finding without demonstrating quantitatively that the BBS data are aberrational or unreliable. *Id.* at 12–25.

In antidumping cases, when the exporting country is a nonmarket economy country (“NME”),<sup>7</sup> Commerce calculates normal value for subject merchandise using FOPs based on the “best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the [agency].”<sup>8</sup> 19 U.S.C. § 1677b(c)(1); 19 C.F.R. §§ 351.408(a)–(c) (2013).<sup>9</sup> For each FOP Commerce selects data from a market economy country that is both economically comparable to the NME country and a significant producer of the merchandise in question. Remand Results 2–3; 19 U.S.C. § 1677b(c)(4)(A)–(B); 19 C.F.R. § 351.408(b). Commerce has a regulatory preference to value all FOPs using data from a single surrogate country, 19 C.F.R. § 351.408(c)(2), and determines what data constitutes the best information using criteria developed through practice.<sup>10</sup> *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (considering data quality, speci-

<sup>7</sup> A NME country is “any foreign country that . . . does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” 19 U.S.C. § 1677(18)(A). Thus, Commerce must “determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . [together with other costs and expenses].” 19 U.S.C. § 1677b(c)(1).

<sup>8</sup> For all FOPs, Commerce seeks the best available information due to its statutory directive pursuant to 19 U.S.C. § 1677b(c)(1) and as part of its mandate to determine dumping margins as accurately as possible. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (noting that “the purpose of [19 U.S.C. § 1677b(c)] is to determine antidumping margins as accurately as possible.”); *see also Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011)). The Court of Appeals has emphasized that 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.’” *Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)).

<sup>9</sup> Further citations to Title 19 of the Code of Federal Regulations are to the 2013 edition.

<sup>10</sup> To determine what constitutes the best available information, Commerce evaluates the quality of data sources from the countries offered to value respondents’ FOPs favoring data that is: (1) specific to the input in question; (2) representative of a broad market average of prices; (3) net of taxes and import duties; (4) contemporaneous with the period of review;

ficity, and contemporaneity); see Prelim. Decision Memo at 23. The objective of using surrogate values is to construct a “hypothetical market value representative of the foreign producers under investigation,” *Nation Ford v. United States*, 166 F.3d 1373, 1378, and the use of a “primary surrogate country” serves this objective by providing consistency in data and accurately representing such a hypothetical market value. See *Antidumping Methodologies in Proceedings Involving Non Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,093 (Dep’t Commerce Jun. 21, 2011) (“*Labor Methodologies*”).

Commerce endeavors to use data that is non-aberrational and reliable. See *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep’t Commerce May 19, 1997); Remand Results 18–19. Commerce considers data to be aberrational when it is an “extreme outlier,” Remand Results 11; *id.* at 23–24, 31–32 (citing prior agency practice), is distorted or misrepresentative, or is “somehow incorrect.” *Id.* at 30. Commerce has not affirmatively set forth a definition of reliable here. It implies that aberrational data, data shown to deviate from the norm, would be unreliable. See Remand Results 23 n.90, citing *Polyethylene Terephthalate Film, Sheet, and Strip From the People’s Republic of China*, 80 Fed. Reg. 33,241 (Dep’t Commerce Jun. 11, 2015) (final results of ADD administrative review and final determination of no shipments; 2012–2013). Nonetheless, Commerce has explained the need for reliable surrogate values by emphasizing that it is precisely “the unreliability of NME prices that drives [the agency] to use the special NME methodology in the first place.” See *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,366. Surrogate values serve as substitutes for what Commerce considers to be unreliable NME data.

One of the FOPs that Commerce values is labor, *i.e.*, the wage rate for the industry in which the subject merchandise is produced. See 19 U.S.C. § 1677b(c)(3). Commerce’s practice is to value labor using industry-specific data from the primary surrogate country, as published in Chapter 6A of the ILO Yearbook of Labor Statistics. See *Labor Methodologies*, 76 Fed. Reg. at 36,093; see Remand Results 3. In developing its current practice,<sup>11</sup> Commerce had initially used earnings or wages reported in the ILO Yearbook of Labor Statistics

and (5) publicly available. See generally Import Admin., U.S. Dep’t Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), available at <http://ia.ita.doc.gov/policy/bull04-1.html> (last visited June 8, 2017); see also *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014).

<sup>11</sup> Commerce’s approach to valuing labor as an FOP has recently changed. Prior to 2011, Commerce based labor surrogate value on a regression methodology, averaging wage rate data collected from multiple countries, in order to minimize the variability that exists in

“Chapter 5B: Wages and Manufacturing.” See *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 9,544, 9,544–45 (Dep’t Commerce Feb. 18, 2011). Ultimately, Commerce chose ILO Chapter 6A data over ILO Chapter 5B data for its preferred practice due to “a concern with under-counting” using Chapter 5B data, and what the agency called a “rebuttable presumption that Chapter 6A accounts for all direct and indirect costs.” *Labor Methodologies*, 76 Fed. Reg. at 36,094.

In this review, Commerce did not choose labor data from ILO Chapter 6A for the primary surrogate country, *Labor Methodologies*, 76 Fed. Reg. at 36,093, because ILO Chapter 6A data was not available for Bangladesh. Remand Results 4–5. Instead, it chose BBS data because the data was specific, closer in time to the period of review than the other data,<sup>12</sup> and from the primary surrogate country. *Id.* at 8.

On remand, Commerce fails to address record evidence of widespread labor abuses in the Bangladeshi shrimp industry that undermines Commerce’s implicit findings that the BBS data is non-aberrational, reliable, and thus the best information available. Commerce’s practice is to not use aberrational or unreliable data. See *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,366; Remand Results 34. Plaintiff submitted record evidence alleging forced labor, child labor, and systemic labor abuses specifically within the Bangladeshi shrimp industry. See *Ad Hoc Shrimp Surrogate Country Comments* at Exs. 1–5; *Ad Hoc Shrimp Post-Prelim. Comments* at Attachs. 1–7. Although Commerce acknowledges this evidence, it finds it is insufficient to demonstrate aberration or unreliability absent a quantitative analysis that (i) compares the BBS wage rate to benchmark data, or (ii) demonstrates how the alleged labor abuses impact the BBS rate. Remand Results 11–12, 16.

wages across countries, including even economically comparable countries. See *Labor Methodologies*, 76 Fed. Reg. at 36,093. However, the Court of Appeals held that the wage rate regression methodology was inconsistent with 19 U.S.C. § 1677b(c)(4), and invalidated 19 C.F.R. § 351.408(c)(3), Commerce’s regulation codifying the regression-based methodology. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372–73 (Fed. Cir. 2010). Commerce subsequently determined that the countries whose data it could average in any given case going forward would be so limited that “there would be little, if any, benefit to relying on an average of wages from multiple countries.” *Labor Methodologies*, 76 Fed. Reg. at 36,094. Accordingly, while continuing to acknowledge the variability in wage rates across economically comparable countries, *id.* at 36,093, the agency determined that it would thereafter use ILO Chapter 6A wage rate data from the primary surrogate country to value labor, which would have the benefit of “a uniform basis for FOP valuation—a single surrogate.” *Id.*

<sup>12</sup> As Commerce explains, the BBS data is not contemporaneous; however, “the BBS wage data is from 2010, which, while not contemporaneous with the [period of review], is closer to the [period of review] than the labor surrogate values proffered by Petitioner, which range from 2004 through 2008.” Remand Results 8–10.

Commerce's reasons for dismissing the record evidence put forth by the Plaintiff without further investigation and analysis are inadequate given the substantial evidence standard. Commerce's ultimate determination must be supported by substantial evidence and "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Tudor v. Dep't of Treasury*, 639 F.3d 1362, 1366 (Fed. Cir. 2011) (same). The substantial evidence standard of review essentially asks whether, given the evidence on the record as a whole, the agency's conclusion was reasonable. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006). Plaintiff's evidence leads to the reasonable inference that the data is aberrational and not reliable and therefore fairly detracts from Commerce's finding that the BBS data is the best information available. Therefore, Commerce must explain why the BBS data is nonetheless a reasonable choice for the best available information.

First, Commerce explains that, to determine whether a surrogate value is aberrational, it conducts "a quantitative, measureable analysis," Remand Results 12, and that, in "its well established practice" for determining aberration, the agency "compares a dataset to a meaningful benchmark to determine whether a particular dataset is an outlier."<sup>13</sup> *Id.* at 31–32. Plaintiff placed on the record evidence of the ILO Chapter 6A labor data from Guyana, India, Nicaragua, and Philippines, and Chapter 5B labor data from Indonesia, with which to compare the BBS data.<sup>14</sup> *See* Ad Hoc Shrimp Post-Prelim Comments at Attach. 8. Still, Commerce claims it has no specific data to serve as

<sup>13</sup> More specifically, the agency compares "the prices for an input from all countries found to be at a level of economic development comparable to the NME whose products are under review from the [period of review] and prior years," or "examines data from the same HTS number for the surrogate country whose data are allegedly aberrational over multiple years to determine if the current data appear aberrational compared to historical values." *Remand Results* 12 n.55.

<sup>14</sup> Commerce claims in its remand results the BBS data is the best information available because it is more specific than other available data. Remand Results 32. Yet at the same time it also claims that it has no specific data to serve as a benchmark with which to compare the BBS data. *Id.* at 10, 32. These seemingly conflicting statements stem from the fact that, under category 15 of ILO Chapter 6A data, rates would be determined using a category covering "Manufacture of Food Products and Beverages," while the BBS data covers only the shrimp industry. However, Commerce's own practice prefers ILO Chapter 6A data. *Labor Methodologies*, 76 Fed. Reg. at 36,093. The BBS data pertains to the shrimp industry more specifically. Commerce implies that, had ILO Chapter 6A data for Bangladesh been available, it would have used that data despite the fact that ILO data covers industries beyond the shrimp industry. Remand Results 4, quoting Final Decision Memo at 47 ("Bangladesh does not report labor data to the ILO . . . [t]hus, we are unable to use ILO's Chapter 6A data or wage data reported under ILO's Chapter 5B, as is the preference."). Commerce rejects Guyana and Indonesia as a suitable primary surrogate country as neither country was identified as a significant producer of comparable merchandise. *Id.* at 7. Commerce rejects India, Nicaragua, and Philippines as a suitable primary surrogate

a benchmark with which to compare BBS data. Although ILO Chapter 6A data may not be as specific as the BBS data, it is Commerce's preferred data source. *See Labor Methodologies*, 76 Fed. Reg. at 36,093. It is unclear to the court why this data cannot serve as a benchmark.<sup>15</sup> Further, Commerce suggests that the labor input is not well suited to a cross-country comparison to determine if the data is aberrational, noting the "many socio-economic, political and institutional factors, such as labor laws and policies unrelated to the size or strength of an economy, that cause significant variances in wage levels between countries." Remand Results 13 (also noting "the variability in labor rates that exists among otherwise economically comparable countries is a characteristic unique to the labor input"), quoting Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China, A-570-979, 23 (Oct. 9, 2012), *available at* <http://ia.ita.doc.gov/frn/summary/prc/2012-25580-1.pdf> (last visited Jun. 8, 2017). Thus, it appears that Commerce requires parties to demonstrate aberration in labor data by comparing historic wage rates within the same country. It is unclear to the court how aberration can be assessed where there is a claim of systematic labor abuses within a country and parties may only use historical wage rate data from that country.

Second, Commerce suggests that Plaintiff must not only compare the BBS data to benchmarks but also indicate how the labor abuses affected the wage rates.<sup>16</sup> Remand Results 39. It is unclear to the court what exactly Commerce wishes to *see* or how a party should endeavor to supply this information. Without more direction from Commerce, such a broad demand is unreasonable given the record evidence in this case.<sup>17</sup> It is Commerce's practice not to use unreliable data. Although here Commerce does not define "reliable" as it applies to labor data, the Oxford dictionary defines "reliable" as "consistently country either because the record lacked data for whole shrimp (India) or lacked financial statements (Nicaragua and Philippines). Yet, it does not explain why the data from these countries cannot be used as a benchmark for assessing the reliability of the BBS data. *Id.* That those countries may not have been suitable surrogate countries does not explain why the ILO Chapter 6A data on the record for those countries cannot be used as benchmarks to evaluate the claim that the BBS data is aberrational.

<sup>15</sup> Commerce does explain that Guyana and Indonesia are not significant producers of comparable merchandise and therefore ILO data for those countries was not useable. Remand Results 7. However, Commerce still had ILO Chapter 6A data from India, Nicaragua, and Philippines. *See Ad Hoc Shrimp Post-Prelim. Comments at Attach. 8.*

<sup>16</sup> Commerce states that "Petitioner has provided no measurable correlation between the evidence it placed on the record and the BBS wage data itself, but instead has merely speculated a cause and effect with no support for its allegations." Remand Results 39.

<sup>17</sup> There may be reasons to use a quantitative analysis in other cases. However, in the present case, it is not reasonable to require "measurable" evidence that the dataset is

good in quality; able to be trusted.” *Reliable*, Oxford Online Dictionary, <https://en.oxforddictionaries.com/definition/reliable> (last visited June 8, 2017). The evidence of widespread labor abuses, including forced labor and child labor, in the specific industry under consideration includes evidence that workers are either not paid, or are not fully paid, what is owed to them. *See, e.g.*, Ad Hoc Shrimp Surrogate Country Comments at Attach. 3; Ad Hoc Shrimp Agency Case Br. at 10–13, citing *Research on Indicators of Forced Labor in the Supply Chain of Shrimp in Bangladesh*, Verité (2012), available at [http://www.verite.org/wp-content/uploads/2016/11/Research-on-Indicators-of-Forced-Labor-in-the-Bangladesh-Shrimp-Sector\\_9.16.pdf](http://www.verite.org/wp-content/uploads/2016/11/Research-on-Indicators-of-Forced-Labor-in-the-Bangladesh-Shrimp-Sector_9.16.pdf) (last visited Jun. 8, 2017) (“*Research on Indicators of Forced Labor*”). Therefore, it is a fair inference that the wage rates of workers subject to systematic labor abuses cannot be trusted. That inference detracts from Commerce’s determination and therefore Commerce must address it. *See Universal Camera Corp.*, 340 U.S. at 488 (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”). Commerce needs to explain why this inference is incorrect or nonetheless should be disregarded. The absence of a quantitative analysis demonstrating how labor abuses affected wage rates does nothing to undermine this inference given this record.

Equally problematic in Commerce’s response to Plaintiff’s record evidence in this case is its failure to articulate a standard with respect to labor data. Despite stating its preference to avoid aberrational or unreliable data, *see Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,366, Commerce adequately defines neither “aberrational” nor “unreliable” as these terms relate to labor data. Throughout the Remand Results, Commerce alludes to aberrational data as data which is an extreme outlier. Remand Results 11 (“The record must contain specific evidence showing the value is aberrational, e.g., an extreme outlier”); *see also, e.g., id.* at 23, 24, 32, 34, 41. Commerce provides no other example of what would constitute aberrational labor data and it does not explain a standard for identifying when labor data is an “extreme outlier.” Although Plaintiff points to record data that shows the Bangladeshi data is the lowest value data, *see Ad Hoc Shrimp Agency Case Br.* at 7; Ad Hoc Shrimp Post-Prelim. Comments at Attach. 8, Commerce offers neither the court nor the parties any insight into how far afield labor values must be to qualify as aberrational. It may be that the BBS data is not aberrational; it is not for the court to say. It is for Commerce to say what it considers unreliable. The evidence of systemic labor abuses, including forced and child labor, indicates that the data cannot be trusted because it suggests that, at the very least, workers are not paid or are not fully paid for their labor.

aberrational and how a party can demonstrate that labor data is aberrational. The court can then assess whether that standard is reasonable and whether the record evidence supports that determination. Although Commerce refers to the need to perform a quantitative analysis, it is not clear what that entails in this case or when such analysis would lead Commerce to find labor data aberrational or unreliable.

Further, here, Commerce does not adequately explain what it means by “reliable” with respect to labor data, although it implies that aberrational data would be unreliable. *See* Remand Results 23 n.90. Even when Commerce recounts what it has found to be “not unreliable,” the agency offers no insight into how a standard might be applied in this case. *See* Remand Results 16 (discussing *Steel Wire Garment Hangers From the People’s Republic of China*, 80 Fed. Reg. 13,332 (Dep’t Commerce Mar. 13, 2015) (final results of ADD administrative review, 2012–2013), and recounting that “we determined that ‘USTR reports do not make Thai import data unreliable or inferior to Philippine data’”), 16–17 (discussing *Certain Steel Threaded Rod From the People’s Republic of China*, 79 Fed. Reg. 71,743 (Dep’t Commerce Dec. 3, 2014) (final results of ADD administrative review; 2012–2013), and noting that, in response to a claim of data unreliability based upon political upheaval in Thailand, the “interested party ‘provided no specific record evidence showing how this event had any specific distortive impact on the Thai import data in general’”). Given the record evidence of systemic labor abuses in this case, the court fails to *see* how BBS data can be reliable given the court’s understanding of “reliable.” Nonetheless the court must await Commerce’s explanation of what constitutes reliable labor data to assess whether its definition is reasonable and whether record evidence supports Commerce’s determination given that definition.

Commerce also does not explain why, given this record, it finds the data to be an appropriate proxy for Vietnam, reflective of a hypothetical Vietnamese market economy. Surrogate values are used as proxies with which to create a hypothetical market economy price. *See Nation Ford v. United States*, 166 F. 3d. at 1378. Evidence of systemic abuse, including forced and child labor, specific to the Bangladeshi shrimp industry detracts from the representativeness of the BBS data and therefore undermines the market-based approach that Congress sought by requiring that Commerce use surrogate values when calculating normal value for subject merchandise from NME

countries.<sup>18</sup> See *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,366.

Commerce's reticence to accept Ad Hoc Shrimp's arguments seems to stem from its "strong preference" to select data from the primary surrogate country.<sup>19</sup> See Remand Results 10. Commerce states that the BBS data is the only available wage rate data from Bangladesh. *Id.* at 8–10 (noting that *Labor Methodologies* indicates that the best methodology is to use "industry specific data from the primary surrogate country," and that using the BBS data "results in the use of a uniform basis for FOP valuation—the use of data from a primary surrogate country."). Understandably, the Department prefers to use surrogate value data from the primary surrogate country to minimize distortion. *Id.* at 24 (data from the primary surrogate country "provid[es] the best interplay with other factors of production that are measured based on data from the same country."). Even assuming that Commerce's preference is reasonable as a general rule, Commerce cannot, without further analysis, justify the use of unreliable data.<sup>20</sup> Indeed Commerce's own practice suggests that Commerce will depart from its normal practice of valuing FOPs from a primary surrogate country where that data is aberrational. See *Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 55,625,

<sup>18</sup> Commerce contends that considering labor practices in determining aberration is problematic because "labor practices may potentially influence" the wage rate in each country which does not "necessarily" make the wage rate aberrational. Remand Results 13. Commerce's statement mischaracterizes Petitioner's argument, which is not that labor conditions necessarily make wage rates aberrational, but rather that the labor conditions specific to Bangladesh are unique and influence the Bangladeshi wage rates and, thus, render the data unreflective of a hypothetical Vietnamese market economy. See *id.*; see generally Ad Hoc Shrimp Remand Comments.

<sup>19</sup> Commerce reiterated the reasons the agency did not select the other countries for which Ad Hoc Shrimp provided surrogate value data as the primary surrogate country. Remand Results 7–8. Ad Hoc Shrimp placed ILO Chapter 6A data on the record for India, Guyana, Philippines, Nicaragua, and Indonesia on April 24, 2014, following publication of the preliminary determination in March 2014. See Ad Hoc Shrimp Post-Prelim. Comments at Attach. 8. Commerce did not select Guyana or Indonesia as the primary surrogate country because it found that those countries were neither significant producers of comparable merchandise nor on the surrogate country list. Remand Results 7. Commerce did not select Nicaragua, Pakistan, or Philippines as the primary surrogate country due to lack of available data, stating that no interested party placed data on the record that would require it to reconsider its disqualification of these countries in the preliminary stages from the primary surrogate country selection. *Id.* Commerce "did not select India as the primary surrogate country because the record did not contain Indian source for whole shrimp surrogate values." *Id.* at 7–8.

<sup>20</sup> Although there is a regulatory preference for valuing all FOPs in a single surrogate country, the statute specifically allows for valuing FOPs with surrogate values from more than one market economy country. 19 U.S.C. § 1677b(c)(1) (instructing that surrogate values are to be taken from "a market economy country or countries."). In noting that the statute allows, but does not require, Commerce to use the same source for all factors of production, the Court of Appeals emphasized that the statute "merely requires the use of the 'best available information' with respect to the valuation of a given factor of production." *Nation Ford v. United States*, 166 F. 3d. at 1378.

55,633 (Dep't Commerce Nov. 8, 1994) (notice of final determination of sales at less than fair value).<sup>21</sup> With record evidence suggesting that factors within the Bangladeshi shrimp industry affect the reliability of the data and, therefore, its ability to reflect a hypothetical Vietnamese market economy, Commerce cannot continue to rely on the explanation that the data comes from the primary surrogate country.

Defendant contends that Commerce cannot determine whether the BBS data is aberrational or unreliable because the Plaintiff has failed in its burden to make an adequate record so that Commerce can perform the quantitative analysis it wishes to perform. Def.'s Remand Comments 16, citing *QVD Food Co. v. United States*, 658 F.3d 1,318, 1,324 (Fed. Cir. 2011); see also *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1,333, 1,337–38 (Fed. Cir. 2016). Although the burden lies with the parties to populate an adequate record, see *QVD Food Co.*, 658 F.3d at 1324, here Plaintiff has provided the record evidence that undermines the agency's determination and that must therefore be explained. *Universal Camera Corp.*, 340 U.S. at 488. Commerce's argument that the Plaintiff has not populated the record with necessary data suggests that Commerce rejects the inference that systemic labor abuses (including forced and child labor) detract from the reliability of BBS data as representative of Bangladeshi labor costs and/or labor costs in a hypothetical market economy which is economically comparable to Vietnam. Commerce therefore presumes the BBS data is reliable despite the evidence of systemic labor abuse. Such a presumption is not reasonable. The systemic labor abuses cited in the record by the Plaintiff at the very least, involve workers either not being paid for all of their labor or being underpaid for their labor. See, e.g., Ad Hoc Shrimp Post-Prelim. Comments at Attachs. 1–7. If workers are, as a result of forced or child labor practices, not compensated or not fully compensated for their work, then one cannot presume that the reported wage data represents either the actual labor costs in Bangladesh or the labor costs in a hypothetical market economy which is economically comparable to Vietnam.

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<sup>21</sup> In the Remand Results, Commerce responded to Plaintiff's citation to *Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 55,625, by stating that it was an example of "another case where the Department [selected an alternative surrogate value from a country other than the primary surrogate country to avoid using aberrant surrogate values] based on a quantitative comparison of the surrogate value data from the alternative surrogate country." Remand Results 36. However, the cited *Certain Cased Pencils* determination does not detail the "quantitative comparison of the surrogate value data from the alternative surrogate country" conducted by Commerce, stating only that Commerce "analyzed the Indian factor values for erasers, ferrules, paint, animal glue, and plastic foil. We compared these factor values with Pakistani and U.S. values based on U.S. costs taken from the petition and found the Indian factor value for erasers, ferrules and paint to be aberrational." *Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. at 55,633.

Commerce contends that is not required “to conduct an analysis of working conditions when determining whether a particular set of data, like the BBS, is aberrational.” Remand Results 12. According to Commerce, socio-political factors are inapposite to its determination under 19 U.S.C. § 1677b(c)(1)(B) and beyond its realm of expertise, as its standard practice for determining aberration is to conduct a “quantitative, measurable analysis,” either of comparable data across economically comparable countries or of historic wage rate data within the country at issue (Bangladesh). *Id.* at 12–13. However, Commerce is not being asked to analyze the working conditions of Bangladesh; Commerce is being asked to follow its practice, which instructs the agency not to rely on aberrational or unreliable surrogate value data. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,366.

Commerce also contends that the record evidence submitted by Ad Hoc Shrimp is not measurable, “specific evidence” that “the BBS data itself, as a dataset, is distorted.” Remand Results 18, citing *Camau Frozen Seafood Processing Import Export Corp. v. United States*, 35 CIT \_\_\_, \_\_\_, 929 F. Supp. 23 1352, 1356 (2013) (finding no evidence of aberration where the record demonstrated only that the Bangladeshi data was “the lowest price in a range of prices.”). The evidence submitted by Ad Hoc Shrimp details workers in the Bangladeshi shrimp industry who are not paid or are underpaid for their work. *See, e.g.*, Ad Hoc Shrimp Surrogate Country Comments at Attach. 3; Ad Hoc Shrimp Agency Case Br. at 10–13, citing *Research on Indicators of Forced Labor*. This evidence makes the wage rates unreliable, as they cannot be trusted to fully reflect compensation for the labor under market principles.

On second remand, Commerce must either reconsider its choice of the BBS data to value labor or it must address the record evidence of widespread labor abuses in the Bangladeshi shrimp industry that undermines Commerce’s implicit findings that the BBS data is non-aberrational, reliable, and thus the best information available. Further, Commerce must articulate a reasonable method by which a petitioner can demonstrate aberration or unreliability where, as here, there is a claim of widespread, systemic labor abuse.

## CONCLUSION

In accordance with the foregoing, it is hereby

**ORDERED** that Commerce’s remand determination is remanded for further consideration consistent with this opinion. Specifically, upon remand, Commerce must:

- (1) articulate a reasonable method by which a petitioner can demonstrate aberration or unreliability where, as here, there is a claim of widespread, systemic labor abuse; and
- (2) address the record evidence of widespread labor abuses in the Bangladeshi shrimp industry that undermines Commerce's implicit findings that the BBS data is non-aberrational, reliable, and thus the best information available; and
- (3) explain why the Bangladeshi wage rate data is reliable and not aberrational, in light of the record evidence of systemic labor abuses; or
- (4) if the data is aberrational and unreliable, explain why it is nonetheless the best available information; or
- (5) reconsider its determination that the Bangladeshi data is the best available information; and it is further

**ORDERED** that Commerce shall file its second remand determination with the court within 45 days of this date; and it is further

**ORDERED** that Plaintiff shall have 30 days thereafter to file comments on the second remand determination; and it is further

**ORDERED** that Defendant shall have 15 days thereafter to file a reply to comments on the second remand determination.

Dated: June 13, 2017

New York, New York

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

Slip Op. 17-72

FORMER EMPLOYEE OF MARLIN FIREARMS CO., Plaintiff, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: Jane A. Restani, Judge  
Court No. 11-00060

[Plaintiff's application for attorney fees is granted in part.]

Dated: June 14, 2017

*Ariel Stevenson, Tassity Johnson, and Muneer I. Ahmad*, Jerome N. Frank Legal Services Organization, of New Haven, CT, argued for plaintiff. With them on the brief were *Daniel Knudsen* and *Jane Chong*.

*Antonia R. Soares*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Stuart E. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*,

Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Stephen Jones*, Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, of Washington, DC.

## OPINION AND ORDER

### Restani, Judge:

This matter is before the court on plaintiff Former Employee of Marlin Firearms, Robert Maars (“Maars” or “plaintiff”)’s Form 15 Application for Fees and Other Expenses Pursuant to the Equal Access to Justice Act 28 U.S.C. § 2412(d), Title II of Public Law 96–481, 94 Stat. 2325 and Rule 54.1, ECF No. 28 (“EAJA Appl.”). *See also* Appl. for Fees & Other Expenses Pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), ECF No. 28–1 (“Pl. Br.”). For the reasons stated below, the court grants the plaintiff’s application, but reduces the award to a reasonable amount.

## BACKGROUND

Maars is a former employee of Marlin Firearms Company, Inc. (“Marlin”), a subsidiary of Remington Arms Co. (“Remington”). Compl. ¶¶ 1, 11, ECF No. 2; *The Marlin Firearms Company, Inc., a Subsidiary of Remington Arms Company Including On-Site Leased Workers from Randstat, Reitman, and Hamilton Connections, North Haven, Connecticut; Notice of Revised Determination on Remand*, 76 Fed. Reg. 58,842, 58,842 (Dep’t Labor Sept. 22, 2011) (“*Remand Determination*”). After purchasing Marlin, Remington closed Marlin’s North Haven, Connecticut plant, which manufactured lever-action and bolt-action sporting rifles. *Remand Determination*, 76 Fed. Reg. at 58,842, 58,843; Compl. ¶¶ 11, 13. The State of Connecticut Department of Labor then filed a petition with the U.S. Department of Labor (“Labor”) for Trade Adjustment Assistance (“TAA”) on behalf of Marlin’s employees, including Maars. *Id.* at 58,842; Marlin Pet. for Trade Adjustment Assistance at 1–6, PD<sup>1</sup> a (Apr. 1, 2010). TAA is a program that provides various benefits to eligible workers who lose their jobs because of trade competition.<sup>2</sup> *See* 19 U.S.C. §§ 2271–2322.

<sup>1</sup> The administrative record is cited to using the document numbers provided by Labor in the Confidential and Public Administrative Record, ECF No. 22, filed with the court. “PD” refers to public documents and “CD” refers to documents containing business confidential information.

<sup>2</sup> To be eligible for assistance, Labor must certify:

- (1) that a significant number or proportion of the workers in such workers’ firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
- (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

In its initial investigation, Labor concluded that the Marlin employees were not eligible for certification for TAA. *Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance*, 76 Fed. Reg. 2713, 2715 (Dep't Labor Jan. 14, 2011).<sup>3</sup> Labor's initial investigation was limited to an "analysis of data provided by the workers' firm, a survey of the firm's major customer [Wal-Mart], and analysis of U.S. aggregate import data." Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance at 4, PD s (Dec. 17, 2010); see Pl. Br. at 6. Maars appealed Labor's initial determination to the U.S. Court of International Trade, arguing that Labor's investigation was not extensive enough. Compl. ¶¶ 1, 31–34, 42, 45. Maars sought an order of TAA certification from the court or a remand by the court to Labor with instructions "to conduct a thorough investigation." Compl. at 11.

Rather than file an answer, Labor requested remand "to conduct more extensive customer surveys and to make a redetermination" as to the workers' eligibility. Def.'s Mot. for Voluntary Remand 1, 2, ECF No. 14. In its motion, Labor stated that "the existing customer surveys might be insufficient for purposes of determining if imports have increased or sales volume or dollar value have declined." *Id.* at 2. Maars agreed to Labor's remand request, contingent upon Labor acceding to several requirements for how to conduct its remand investigation. Pl.'s Resp. to Gov't's Mot. for Voluntary Remand 2, ECF No. 15 ("Resp. to Remand Mot.").<sup>4</sup> The parties then filed a Joint Motion for Voluntary Remand 4, ECF No. 18 ("Joint Mot."), in which Labor consented to all of Maars' requested remand requirements. The Joint Motion stated that "Labor has determined that the existing

(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

*Woodrum v. Donovan*, 4 CIT 46, 48, 544 F. Supp. 202, 204 (CIT 1982) (summarizing TAA eligibility requirements).

<sup>3</sup> Relevant here, Labor determined that the workers were not eligible because, inter alia, "imports of articles like or directly competitive with sporting rifles have not increased and there has not been a shift in production to a foreign country by the workers' firm." Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance 4–5, PD s (Dec. 17, 2010).

<sup>4</sup> Specifically, Maars stated that:

[t]o ensure that [Labor] fulfills its obligation to conduct an adequate reinvestigation, the order for remand should include language [1] requiring [Labor] to investigate Marlin's certification for TAA for Firms; [2] investigate [Marin subsidiary Harrington & Richardson 1871]'s certification for TAA for Workers; [3] interview former employees of Marlin, including Mr. Maars; and [4] conduct additional customer surveys.

Resp. to Remand Mot. at 12. In addition, Maars contended that the remand order should state that "[Labor]'s initial determination was not 'substantially justified' and that the agency committed legal error." *Id.* at 12.

customer survey may be insufficient for [the purposes noted above],” but Labor did not explicitly confess that it erred in its determination. *Id.* The court granted this motion and ordered that Labor conduct a reinvestigation of the Marlin employees’ TAA claim in compliance with Maars’ requested requirements. Order 1–2, ECF No. 19 (“Remand Order”).

On remand, Labor reversed its initial determination and found the Marlin employees to be eligible for certification for TAA benefits. *Remand Determination*, 76 Fed. Reg. 58,843. Maars commented on the *Remand Determination* by stating that he was “satisfied with the results.” Pl.’s Resp. to Def.’s Remand Results 1, ECF No. 26. The plaintiff then submitted an application for attorney fees under the Equal Access to Justice Act (“EAJA”), which application Labor opposed. Pl. Br. at 1; *see also* Def.’s Resp. to Pl.’s Appl. for Attorney Fees & Expenses Pursuant to the Equal Access to Justice Act, ECF No. 29 (“Labor Br.”). This application is presently before the court.<sup>5</sup>

The plaintiff argues that all of the prerequisites for an award under the EAJA are satisfied and that his request is for a reasonable amount. Pl. Br. at 15–38. Labor responds that the plaintiff’s application was prematurely filed, that the plaintiff was not a prevailing party, and that the award sought is unreasonable. Labor Br. at 6–21.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(d)(1) and 19 U.S.C. § 2395(a). The EAJA mandates that:

a court shall award to a *prevailing party* other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (emphasis added).<sup>6</sup>

## DISCUSSION

### I. Prematurity of Application

The plaintiff argues that his application for fees was timely because, when he filed the application, the court had “not yet issued

<sup>5</sup> During the pendency of plaintiff’s application, the court sustained Labor’s *Remand Determination*. J., ECF No. 56.

<sup>6</sup> Labor does not contend that its position was “substantially justified” or that “special circumstances make an award unjust.”

final judgment.” Pl. Br. at 33. Labor responds in its brief that the plaintiff’s application is untimely because the statute requires such application to be made “within thirty days of final judgment in the action,” and the plaintiff moved for attorney fees *before* entry of final judgment. Labor Br. at 10–11 (quoting 28 U.S.C. § 2412(d)(1)(B)). At oral argument, however, Labor stated that it is “abandoning” this prematurity argument.

Labor has waived its objection to the timing of the plaintiff’s attorney fees application. In *Scarborough v. Principi*, the Supreme Court clarified that the EAJA’s thirty-day limitation “does not concern the federal courts’ subject matter jurisdiction.’ Rather, it concerns a mode of relief . . . ancillary to the judgment of a court that has plenary ‘jurisdiction of [the civil] action’ in which the fee application is made.” 541 U.S. 401, 413 (2004) (alteration in original) (quoting 28 U.S.C. § 2412(b), (d)(1)(A)).<sup>7</sup> Accordingly, Labor may waive the EAJA’s time-of-filing requirements. *See Vasquez v. Barnhart*, 459 F. Supp. 2d 835, 836 (N.D. Iowa 2006) (“Because the Court has clarified that the requirements of section 2412(d)(1)(B) are not jurisdictional, but are ancillary to the court’s judgment . . . the requirements can be waived by the Government, as it is the Government whose interests are protected by the section’s requirements.”).

Regardless, the plaintiff did not make his application prematurely. Section 2412(d)(1)(B) requires “[a] party seeking an award of fees and other expenses” to submit its application “within thirty days of final judgment in the action.” Legislative history and the weight of case law correctly interprets this language as creating only a final deadline for filing, rather than also establishing a time before which applications are premature, i.e., the entry of final judgment. *See Equal Access to Justice Act, Extension and Amendment*, H.R. Rep. 99–120(I), at 18 n.26 (1985), *as reprinted in* 1985 U.S.C.C.A.N. 132, 146 n.26 (stating that “fee petitions [under the EAJA] may be filed *before* a ‘final judgment,’” and disavowing “the overly technical approach” of a case holding that applications filed prior to final judgment are premature) (emphasis added); *see, e.g., Haitian Refugee Ctr. v. Meese, III*, 791 F.2d 1489, 1495 (11th Cir. 1986) (“[S]ince the district court has not entered final judgment, since the thirty-day limit has not begun, and since the time to appeal has not run, the application for attorneys’ fees was timely filed.”), *vacated on other grounds*, 804

<sup>7</sup> Prior to *Scarborough*, courts had held that the EAJA’s time requirement was jurisdictional, and thus, could not be waived. *See, e.g., J.M.T. Mach. Co. v. United States*, 826 F.2d 1042, 1047 (Fed. Cir. 1987) (“The 30–day filing period is a jurisdictional prerequisite to the awarding of an attorney fee.”); *see also Diggs v. Dep’t of Hous. & Urban Dev.*, 670 F.3d 1353, 1355 (Fed. Cir. 2011) (“[S]ubject matter jurisdiction cannot be conferred by waiver.”).

F.2d 1573 (11th Cir. 1986); *Gonzalez v. United States*, 44 Fed. Cl. 764, 767 (1999) (“Congress did not intend to proscribe EAJA petitions filed prior to the start of the 30-day limitations period.”). *But see Perez v. Guardian Roofing*, No. 3:15-cv-05623-RJB, 2016 WL 898545, at \*3 (W.D. Wash. Mar. 9, 2016) (“[Defendant’s] EAJA Counterclaim is premature, because EAJA contemplates that the submission of an EAJA application follows, not precedes, final judgment. This interpretation is supported by use of the word ‘within,’ . . . versus use of words such as ‘before’ or ‘prior to[.]’”). Because the plaintiff did not file the application prematurely, and because, regardless, Labor has waived its objection to the application’s timing, the court will consider the merits of the plaintiff’s motion.

## II. Prevailing Party

The plaintiff argues that he is a prevailing party under the EAJA. Pl. Br. at 24–32. The plaintiff analogizes this case to *Former Employees of Motorola Ceramic Products v. United States*, 336 F.3d 1360 (Fed. Cir. 2003). The plaintiff contends that he is a prevailing party because, as in *Motorola*, Labor’s initial denial of TAA certification here constituted “alleged error by the agency,” 336 F.3d at 1366, the court remanded the investigation to Labor and retained jurisdiction, and the plaintiff succeeded on remand. Pl. Br. at 26–27, 29. Regarding “alleged error by the agency,” the plaintiff posits that this element of *Motorola* is satisfied because the investigation was inadequate, a fact Labor acknowledged in its Motion for Voluntary Remand, and that is further supported by Labor’s accession to Maars’s requested remand requirements. *Id.* at 26–29. The plaintiff also argues that the prohibition of the “catalyst theory,” discussed below, does not apply here because the parties’ voluntary agreement was stamped with sufficient “judicial imprimatur” by the Remand Order. *Id.* at 30–32.

Labor responds that Maars is not a prevailing party. Labor Br. at 7–17. It argues that *Motorola* does not control because Labor here did not concede that it erred in its initial investigation, and explicitly left open in its Motion for Voluntary Remand the possibility that it would affirm its initial determination. *Id.* at 11, 13–17. Labor also contends that the remand was a voluntary, unilateral decision taken by Labor, and that the catalyst theory thus applies, preventing Maars from asserting prevailing party status. *Id.* at 8–13.

A party is a prevailing party only if it “obtained a court order carrying sufficient ‘judicial imprimatur’ to materially change the legal relationship of the parties.” *Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1026 (Fed. Cir. 2005) (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 605

(2001)). Such court order may be a final judgment on the merits, a court-ordered consent decree, or “other court action ‘equivalent’” to either of these. *Rice*, 405 F.3d at 1026 (citing *Buckhannon*, 532 U.S. at 604). “A defendant’s voluntary change in conduct, [however,] . . . lacks the necessary judicial *imprimatur* on the change.” *Buckhannon*, 532 U.S. at 598–99.<sup>8</sup> In the context of remands to an agency, “[w]here the plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party . . . when successful in the remand proceedings where there has been a retention of jurisdiction [by the court].” *Motorola*, 336 F.3d at 1366.

Under *Motorola*, Maars is a prevailing party. In *Motorola*, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) found the plaintiff to be a prevailing party, and *Motorola* is indistinguishable from the present case. *Id.* at 1368. As in *Motorola*, the court here issued a remand order requiring Labor to conduct a new TAA investigation. *See id.* at 1363; Remand Order at 1. Also, as in *Motorola*, the court here retained jurisdiction of the matter during remand. *See* 336 F.3d at 1364 (concluding that the court retained jurisdiction when it remanded the case to Labor for reconsideration and set deadlines for the remand process); Remand Order at 2 (ordering Labor to conduct a new investigation and to file remand results with the court, and establishing deadlines for parties’ comments and responses). Furthermore, in both cases, the plaintiff successfully secured TAA eligibility certification on remand. *See Motorola*, 336 F.3d at 1363; *Remand Determination*, 76 Fed. Reg. at 58,843.

The only arguable distinction Labor identifies between *Motorola* and the present case is that Labor here did not explicitly concede agency error, and left open the possibility that it would reaffirm its initial negative determination.<sup>9</sup> But, Labor is likely mistaken on the facts of *Motorola*. For its premise that in *Motorola* Labor confessed error, Labor relies on a sentence stating that “[t]he parties thus agreed that [Labor] had erred in its action on the applications.” 336 F.3d at 1362. But, the court’s statement was apparently just an

<sup>8</sup> The “catalyst theory . . . posit[ed] that a plaintiff is a prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” *Buckhannon*, 532 U.S. at 601 (internal quotation marks omitted). The Court held in *Buckhannon* that the “catalyst theory” does not afford prevailing party status. *Id.* at 605.

<sup>9</sup> Labor briefly suggests that *Motorola* is also distinguishable from the present case because it was the workers in *Motorola* who sought remand, while here, Labor moved for remand. Labor Br. at 13 (“*Motorola* is distinguishable from the facts here, however, because Labor sought the voluntary remand . . .”). But, in *Motorola*, as here, it was Labor who moved for remand in response to the workers’ request for the court to certify the workers’ eligibility or remand to Labor for reconsideration. *See Motorola*, 336 F.3d at 1362; *id.* at 1369 (Rader, J., dissenting) (“[T]he Department of Labor requested the remand[.]”).

inference drawn from the fact that the parties both requested remand for a new TAA investigation, and that Labor “ha[d] concluded that a reconsideration of the negative determination [was] appropriate.” *Id.* at 1362. This is no different in substance from the present case, where the parties jointly requested remand and Labor stated that “existing customer surveys may be insufficient.” Joint Mot. at 4.<sup>10</sup> And, in fact, an enhanced investigation was undertaken with positive results for plaintiff. In addition, as here, the remand in *Motorola* did not prescribe the result, that is, the court left open the possibility that Labor would reaffirm its initial determination after conducting a proper investigation. *Id.* Because *Motorola* is indistinguishable from the present case, and because *Motorola* found the plaintiff to be a prevailing party, the plaintiff here is a prevailing party. *Cf. Kelly v. Nicholson*, 463 F.3d 1349, 1354 n.\*\*\* (Fed. Cir. 2006) (concluding that “the [Veterans Affairs]’s failure to consider all evidence and material of record before deciding a material issue on the merits” satisfied the “agency error” portion of *Motorola*).<sup>11</sup>

Nor does Labor’s argument that the catalyst theory prohibition applies succeed. Labor contends that the remand was simply a voluntary, unilateral change in position by it, and that the Remand Order thus lacked sufficient judicial imprimatur to make Maars a prevailing party. Labor relies most persuasively on *Rice*, 405 F.3d at 1026, but the present case ultimately is distinguishable from *Rice*.<sup>12</sup>

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<sup>10</sup> This case is even more compelling than *Motorola* because here Labor agreed to abide by the plaintiff’s requested remand requirements, which further suggests an “alleged error by [Labor].” 336 F.3d at 1366; Joint Mot. at 4. Furthermore, the court’s order included plaintiff’s requested requirements. Remand Order at 1–2.

<sup>11</sup> Even if Labor is correct that in *Motorola* the government explicitly confessed error, the fact is of little import because here, as discussed above, there is sufficient evidence of an “alleged error by the agency” even absent an explicit confession of error by Labor. *See Gurley v. Peake*, 528 F.3d 1322, 1327 (Fed. Cir. 2008) (stating that where a court does not retain jurisdiction, that *Motorola*’s “alleged error by the agency” prong can be satisfied if the court’s remand is “explicitly or implicitly predicated on administrative error” (emphasis added) (quoting *Davis v. Nicholson*, 475 F.3d 1360, 1364 (Fed. Cir. 2007)); *Martinez v. United States*, 94 Fed. Cl. 176, 182–83 (2010) (stating, in a case where the court retained jurisdiction over remand, that an agency’s “lack of an explicit admission of error does not change the [alleged error] analysis”).

<sup>12</sup> The other cases cited by Labor bear little resemblance to the case at bar. For instance, in *Brickwood Contractors, Inc. v. United States*, the Navy chose to resolicit bids for a project after the court made statements unfavorable to the Navy’s position at a Temporary Restraining Order hearing. 288 F.3d 1371, 1373–74 (Fed. Cir. 2002). The Federal Circuit there concluded that such statements lacked sufficient judicial imprimatur to make the plaintiff a prevailing party. *Id.* at 1380. The court’s Remand Order, however, is far different from mere statements at a hearing. Nor are Labor’s other cited opinions persuasive. *See Former Emps. of IBM Corp. v. Chao*, 292 F. App’x 902, 909–10 (Fed. Cir. 2008) (concluding that a voluntary agency remand following a change in agency policy did not constitute “success upon the merits”); *Vaughn v. Principi*, 336 F.3d 1351, 1356 (Fed. Cir. 2003) (holding that voluntary agency remands due to intervening legislation and newly discovered evidence “provide[d] only the opportunity for further adjudication” rather than “at least some relief on the merits”).

In *Rice*, the Navy took remedial action (reopening a bid solicitation) after the plaintiff filed a complaint, but prior to a court order requiring the Navy to complete its promised action. *Id.* at 1027. In addition, the Navy acted unilaterally, without initially consulting the plaintiff. *See id.* The Federal Circuit concluded that, based on these factors, the Navy had simply taken voluntary action, and that the plaintiff was not a prevailing party. Here, however, Labor did not initiate its new investigation until after the court's Remand Order. This fact is significant because *Rice* relied heavily on the timing of the Navy's actions, and the delay in investigation here until after the Remand Order means it was the court's order that ultimately caused Labor's remedial action. *See id.* ("Most notably, the court found that Rice's requested relief had already been 'substantially' and 'voluntarily' afforded by the Navy."). Additionally, Labor's new investigation was not a unilateral act, but occurred only after a back and forth discussion with Maars. *See Joint Mot.* at 4. Given these differences, *Rice* does not control, and this case is instead guided by the factually indistinguishable *Motorola*, where the Federal Circuit concluded that catalyst theory issues did not prevent plaintiff from being a prevailing party. *See Motorola*, 336 F.3d at 1365. Thus, as noted above, Maars is a prevailing party, and entitled to collect attorney fees.

### III. Reasonableness

The plaintiff argues that the full amount of attorney fees requested, \$40,792.35 for 283 hours of work, is reasonable. Pl. Br. at 33–38; EAJA Appl. Ex. B 6, ECF No. 28–3 ("Time Records").<sup>13</sup> The plaintiff contends that hours billed for preparing the EAJA application are collectible. Pl. Br. at 37–38. In addition, in his calculation, the plaintiff discounts non-contemporaneous hours by thirty percent. *Id.* at 36–37.<sup>14</sup> Labor responds that the plaintiff's fee request amount is unreasonable. Labor Br. at 17–21. First, Labor argues that the plaintiff cannot recover attorney fees for non-contemporaneous time, entailing a reduction of 40.95 hours. *Id.* at 18–19. Second, Labor contends that the number of hours the plaintiff spent drafting the EAJA application brief is excessive. *Id.* at 19–20. Lastly, Labor identifies entries it believes lack sufficient specificity—law students billing for "supervision," an entry of 10.75 hours by the supervising attorney for a "conference call" when each student entered only one hour that day

<sup>13</sup> Of the 283 hours, 227.95 hours were billed by law student interns at the Jerome N. Frank Legal Services Organization of Yale Law School, and 55.05 hours by Muneer Ahmad, the supervising attorney. Time Records at 6.

<sup>14</sup> The plaintiff also states that attorney fees may be recovered for law clinic students and that a cost of living adjustment is permitted, neither of which points Labor challenges. *See Pl. Br.* at 34–36.

for a conference call, and 0.5 hours spent for “compiling hours.” *Id.* at 21.

The EAJA allows collection only of “reasonable attorney fees.” 28 U.S.C. § 2412(d)(2)(A). Hours that are “excessive, redundant, or otherwise unnecessary” should be excluded from the fee request. *Gavette v. Office of Pers. Mgmt.*, 788 F.2d 753, 754 (Fed. Cir. 1986). The fee applicant bears the burden of establishing that the requested hours are reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

The plaintiff’s attorney fees request must be reduced. First, according to Federal Circuit precedent, attorneys may not recover fees for hours that were not contemporaneously billed. *Naporano Iron & Metal Co. v. United States*, 825 F.2d 403, 404 (Fed. Cir. 1987) (“We agree that under EAJA contemporaneous records of attorney’s time and usual billing rates, as well as a breakdown of expenses, are necessary in order to determine the reasonableness of the charges.”); *see Owen v. United States*, 861 F.2d 1273, 1275 (Fed. Cir. 1988) (stating that in *Naporano*, “[c]ontemporaneous records were held essential to support the claim”). Accordingly, plaintiff may not recover fees for the 40.95 non-contemporaneous hours, which includes the thirty-percent reduction, claimed by the plaintiff, *see* Time Records at 1–2, 3, 4–5, thus reducing the potentially recoverable hours from 283 hours to 242.05.<sup>15</sup>

Second, the plaintiff requests an excessive amount of attorney fees. The EAJA application brief is thirty-eight pages long, yet plaintiff apparently billed 226.05 of the 242.05 contemporaneous hours<sup>16</sup> in preparing this brief.<sup>17</sup> *See* Time Records at 1, 2–4, 5–6. The legal issues involved in the application are not so complex or novel to warrant such an extraordinary amount of time in preparing the

<sup>15</sup> The plaintiff stated at oral argument that the non-contemporaneous records were nonetheless reliable because the students constructed the hours from time stamps on the documents, which recorded when the relevant documents were opened and closed. Such time stamps, however, do not provide sufficient guarantees that work was actually done for the particular amount of time, only that the documents were opened and closed at the time-stamped time.

<sup>16</sup> Some of the plaintiff’s time entries are ambiguous as to whether or not the time claimed relates to work on the EAJA application brief. *Compare* Time Records at 1 (law student intern’s November 3, 2011 entry for “Drafting EAJA Application”), *with id.* (law student intern’s October 31, 2011 entry for “T.C. with A. Soares, T. Johnson, Ahmad, J. Chong; team meeting”). The court considers these entries to be related to the EAJA application brief, however, given that they were recorded before the EAJA application brief was filed on April 6, 2012, and after the plaintiff’s last filing prior to the brief, made on October 12, 2011. *See* Pl.’s Resp. to Def.’s Remand Results at 1.

<sup>17</sup> The court reduces these 226.05 hours, 43.8 of which were billed by the supervising attorney, and 182.25 by the law student interns, by 27 hours. First, the plaintiff cannot collect for the 0.5 hours spent “compiling hours,” as this is a “clerical” task. *See Nadarajah v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009) (omitting hours billed for clerical tasks such as document organization from an EAJA attorney fees request); Time Records at 3. Second, the supervising attorney billed 10.75 hours for “conference call with students re draft” on

application. See *Former Emps. of Tyco Elecs., Fiber Optics Div. v. U.S. Dep't of Labor*, 28 CIT 1571, 1595–97, 350 F. Supp. 2d 1075, 1095–98 (2004) (reducing attorney fee award for hours spent drafting a twenty-five page EAJA brief from 100.1 hours to 77.47 hours, a final ratio of approximately three hours per page). Accordingly, the court will reduce the award by one-half, apportioning the reduction equally between the supervising attorney and law students. This reduction results in 17.03 hours billed by the supervising attorney in preparing the EAJA application, and 82.5 hours billed by the law students. See *supra* p. 13 n.17.

In addition to the resulting 99.53 hours for preparing the EAJA application brief, the supervising attorney billed 11.25 hours in non-EAJA application work, and the law students billed 2.75 hours for such work,<sup>18</sup> resulting in a total of 113.53 hours. See Time Records at 1, 5–6. Applying the relevant rates,<sup>19</sup> a total award of \$ 16,655.71 is yielded.

## CONCLUSION

For the reasons stated above, the court concludes that attorney fees may be recovered from the United States in the amount of \$16,655.71. The Jerome N. Frank Legal Services Organization asserts that the fees should be paid to Mr. Maars. See Pl. Br. at 34 (“*Mr. Maars* is entitled to attorney’s fees for all work conducted by law students enrolled in a legal clinic under licensed attorney supervision.”) (em-December 20, 2011, whereas each student intern billed only one hour for a “team conference call” on that day. Time Records at 1, 3, 4, 6. Accordingly, the supervising attorney overbilled his entry by 9.75 hours, which amount the court omits from the award. See *Gavette*, 788 F.2d at 754 (stating that hours that are “excessive, redundant, or otherwise unnecessary” should be excluded from the fee request). Lastly, the 16.75 hours the law student interns billed for “supervision” is also subtracted out. Time Records at 1, 2–3, 4. The plaintiff clarified at oral argument that these entries refer to time spent by the clinic team discussing the case. Even this description, however, is not sufficiently specific to conclude that an award for these hours is proper. See *Hensley*, 461 U.S. at 434 (“Hours that are not properly billed to one’s *client* also are not properly billed to one’s *adversary* pursuant to statutory authority.”) (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc)); *Former Emps. of Tyco Elecs., Fiber Optics Div. v. U.S. Dep't of Labor*, 28 CIT 1571, 1593, 350 F. Supp. 2d 1075, 1095 (2004) (“An applicant must itemize fees and expenses with sufficient specificity to allow the court to determine what work is being claimed.”) (quoting *Traveler Trading Co. v. United States*, 13 CIT 380, 386, 713 F. Supp. 409, 415 (1989)). In sum, the 43.8 hours billed by the supervising attorney are reduced to 34.05 hours, and the 182.25 law student intern hours are reduced to 165 hours, for a total of 199.05 contemporaneous hours spent on the EAJA application.

<sup>18</sup> Labor states in its brief that law students spent 4.75 contemporaneous hours on non-EAJA application work. Labor Br. at 20. But, two of these hours are for “supervision,” and thus are omitted. Time Records at 1.

<sup>19</sup> The plaintiff requests a rate of \$135 per hour for the law student interns, and \$182 per hour for the supervising attorney. Time Records at 6. Labor does not contest these rates.

phasis added). The parties shall nonetheless advise the court within 30 days hereof what form of judgment is required, including to whom the fees should be paid.

Dated: June 14, 2017  
New York, New York

*/s/ Jane A. Restani*

JANE A. RESTANI

JUDGE