

# U.S. Court of International Trade

Slip Op. 18–47

JACOBI CARBONS AB and JACOBI CARBONS, INC., Plaintiffs, and NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CALGON CARBON CORP. and CABOT NORIT AM., INC, Defendant-Intervenors.

Before: Mark A. Barnett, Judge  
Consol. Court No. 16–00185

**PUBLIC VERSION**

[Sustaining Commerce’s determination with respect to economic comparability. Remanding Commerce’s determinations with respect to significant production of comparable merchandise, surrogate value selections, and the irrecoverable value added tax adjustment.]

Dated: April 19, 2018

*Daniel L. Porter* and *Tung A. Nguyen*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, argued for Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc.

*Gregory S. Menegaz* and *Alexandra H. Salzman*, DeKieffer & Horgan PLLC, of Washington, DC, argued for Plaintiff-Intervenors Carbon Activated Corporation, Ningxia Mineral and Chemical Ltd., Shanxi DMD Corp., Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co. Ltd., and Tianjin Maijin Industries Co., Ltd. With them on the brief was *J. Kevin Horgan*.

*Lizbeth R. Levinson* and *Ronald M. Wisla*, Fox Rothschild, LLP, of Washington, DC, for Plaintiff-Intervenor Ningxia Huahui Activated Carbon Co., Ltd.

*Francis J. Sailer*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for Plaintiff-Intervenors Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd, Beijing Pacific Activated Carbon Products Co., Ltd., and Datong Municipal Yunguang Activated Carbon Co., Ltd.

*William E. Perry*, *Emily Lawson*, and *Adams C. Lee*, Harris Bricken McVay, LLP, of Seattle, WA, for Plaintiff-Intervenors M.L. Ball Company, Ltd., and Jilin Bright Future Chemical Company, Ltd.

*Mollie L. Finnan*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant.<sup>1</sup> With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance U.S. Department of Commerce, of Washington, DC.

*R. Alan Luberd* and *Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, DC, argued for Defendant-Intervenors Calgon Carbon Corp. and Cabot Norit Americas, Inc. With them on the brief were *John M. Herrmann* and *David A. Hartquist*.

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<sup>1</sup> *Antonia R. Soares*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant on the issue of irrecoverable value added tax. Ms. Soares is counsel of record for Defendant in *Jacobi Carbons AB v. United States*, Consol. Ct. No. 15–00286.

## OPINION AND ORDER

### Barnett, Judge:

Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc. (together, “Jacobi”) and Plaintiff-Intervenors<sup>2</sup> (collectively, “Plaintiffs”) challenge the United States Department of Commerce’s (“Commerce” or the “agency”) final results in the eighth administrative review (“AR8”) of the antidumping duty order (“AD Order”) on certain activated carbon from the People’s Republic of China (“PRC” or “China”). *See Certain Activated Carbon from the People’s Republic of China*, 81 Fed. Reg. 62,088 (Dep’t of Commerce Sept. 8, 2016) (final results of antidumping duty admin. review; 2014–2015) (“*Final Results*”), ECF No. 44–4, and accompanying Issues and Decision Mem., A-570904 (Aug. 31, 2016) (“I&D Mem.”), ECF No. 44–5, as amended by the Final Results of Redetermination Pursuant to Court Order (Sept. 1, 2017) (“Remand Results”), ECF No. 78–1.<sup>3</sup>

Plaintiffs challenge Commerce’s selection of Thailand as the primary surrogate country and Thai surrogate values for carbonized material, hydrochloric acid, coal tar, and financial ratios; and Commerce’s adjustment to Jacobi’s constructed export price (“CEP”) to account for irrecoverable value added tax (“VAT”). *See Confidential Consol. Pls. Jacobi Carbons AB and Jacobi Carbons, Inc.’s Mot. for J. Upon the Agency R. and Br. in Supp. of Mot. for J. on the Agency R. (“Jacobi Rule 56.2 Mem.”)*, ECF No. 48; *Consol. Pls. Carbon Activated Corporation, Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co., Ltd., and Tianjin Maijin Industries Co., Ltd. Mot. for J. on the Agency R.*, ECF

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<sup>2</sup> Plaintiff Intervenors include Carbon Activated Corporation, Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co., Ltd., and Tianjin Maijin Industries Co., Ltd. (collectively, “CAC”); Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Beijing Pacific Activated Carbon Products Co., Ltd., and Datong Municipal Yunguang Activated Carbon Co., Ltd (collectively, “Cherishmet”); Ningxia Huahui Activated Carbon Co., Ltd. (“Huahui”); and M.L. Ball Co., Ltd., and Jilin Bright Future Chemical Company, Ltd. (together, “M.L. Ball”).

<sup>3</sup> The administrative record is divided into a Public Administrative Record (“PR”), ECF No. 44–3, and a Confidential Administrative Record (“CR”), ECF No. 44–2. The administrative record associated with the Remand Results is contained in a Public Remand Record, ECF No. 79–2. Parties submitted joint appendices containing record documents cited in their briefs. *See Public Joint App. (“PJA”),* ECF No. 92; *Confidential Joint App. (“CJA”),* ECF No. 91; *Remand Joint App. (“RJA”),* ECF No. 95. Parties also submitted supplemental appendices upon the court’s request. *See Confidential Submission of Admin. R. Docs. (“Suppl. CJA”),* ECF No. 103; *Evidence Presented at Oral Arg. (“Suppl. PJA”),* ECF No. 104; *Confidential Def.’s Filing of Admin. R. Evidence Discussed at Oral Arg.,* ECF No. 105. The court references the confidential versions of the relevant record documents, if applicable, throughout this opinion, unless otherwise specified.

No. 51, and Mem. in Supp. of Mot. for J. on the Agency R. (“CAC Rule 56.2 Mem.”), ECF No. 53; Pl.-Ints.’ Ningxia Guanghai Cherishmet Activated Carbon Co., Ltd., Beijing Pacific Activated Carbon Products Co., Ltd., and Datong Municipal Yunguang Activated Carbon Co., Ltd Mot. for J. on the Agency R. and Br. in Supp. of Mot. for J. on the Agency R. (“Cherishmet Rule 56.2 Mem.”), ECF No. 55;<sup>4</sup> Pl.-Int. Ningxia Huahui Activated Carbon Co., Ltd.’s Mot. for J. on the Agency R. (“Huahui Rule 56.2 Mot.”), ECF No. 56;<sup>5</sup> Pl.-Ints.’ M. L. Ball Co., Ltd., and Jilin Bright Future Chemical Company, Ltd. Mot. for J. on the Agency R. and Br. in Supp. (“M.L. Ball Rule 56.2 Mem.”), ECF No. 57. For the following reasons, Commerce’s *Final Results*, as amended by the Remand Results, will be sustained with respect to economic comparability, but remanded in all other respects.

### BACKGROUND

In May 2015, Commerce initiated this eighth administrative review of the AD Order on certain activated carbon<sup>6</sup> from the PRC. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 30,041 (Dep’t Commerce May 26, 2015), CJA Tab. 30, PR 18, ECF No. 92–4. The period of review (“POR”) ran from April 1, 2014 to March 31, 2015. *Id.* at 30,043. Commerce selected Jacobi and Datong Juqiang Activated Carbon Co., Ltd. (“DJAC”) as mandatory respondents in the review. Prelim. Mem. at 2–3.

In March 2016, Commerce issued its preliminary results. *Certain Activated Carbon From the People’s Republic of China*, 81 Fed. Reg. 11,513 (Dep’t Commerce Mar. 4, 2016) (preliminary results of antidumping duty administrative review; 2014–2015) (“*Prelim. Results*”), PJA Tab 38, PR 377, ECF No. 92–6. Commerce preliminarily determined that Mexico, Romania, Bulgaria, South Africa, Ecuador, and Thailand were at the same level of economic development as the PRC and, pursuant to its practice, treated each country as equally economically comparable. Prelim. Mem. at 13; Req. for Economic Development, Surrogate Country and Surrogate Value Comments and Information (Aug. 7, 2015) (“*Surrogate Country Ltr*”), Attach. 1, PJA

<sup>4</sup> Cherishmet adopted Jacobi’s arguments concerning surrogate values and presented additional arguments concerning the VAT deduction. See Cherishmet Rule 56.2 Mem. at ii-v.

<sup>5</sup> Huahui adopted Jacobi’s arguments as to all issues. See Huahui Rule 56.2 Mem. at 2.

<sup>6</sup> Generally speaking, certain activated carbon consists of “a powdered, granular, or pelletized carbon product obtained by ‘activating’ with heat and steam various materials containing carbon, including but not limited to coal (including bituminous, lignite, and anthracite), wood, coconut shells, olive stones, and peat.” See Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review: Certain Activated Carbon from the People’s Republic of China; 2014–2015 (“*Prelim. Mem.*”) at 3, PJA Tab 27, PR 365, ECF No. 92–4; see also *id.* at 3–4 (describing the scope of the merchandise subject to the AD Order).

Tab 20, PR 104, ECF No. 92–3. Commerce also determined that two proposed countries—Malaysia and the Philippines—were not at the same level of economic development as the PRC. *Id.* at 15. Commerce further determined that Ecuador, Mexico, Romania, South Africa, and Thailand had “significant exports” of the subject merchandise based on data published by the Global Trade Atlas (“GTA”) and were, therefore, “significant producers of comparable merchandise” pursuant to 19 U.S.C. § 1677b(c)(4)(B). *Id.* at 14–15. Because data considerations favored Thailand, Commerce preliminarily selected Thailand as the primary surrogate country. *Id.* at 15–16. Commerce subsequently relied on Thai data to supply surrogate values for all factors of production, except anthracite coal.<sup>7</sup> *Id.* at 15–16, 23–26; Surrogate Values for the Prelim. Results (Feb. 26, 2016) (“Prelim. Surrogate Value Mem.”) at 4–11, PJA Tab 9, PR 367, 369, ECF No. 92–2. Commerce also reduced Jacobi’s and DJAC’s constructed export price and DJAC’s export price by 17 percent pursuant to the agency’s irrecoverable VAT adjustment. Prelim. Mem. at 21–22. Commerce preliminarily assigned Jacobi and DJAC weighted-average dumping margins of \$2.80/kilogram (“kg”) and \$0.29/kg, respectively, and assigned those companies demonstrating eligibility for a separate rate<sup>8</sup> a weighted-average dumping margin of \$2.22/kg.<sup>9</sup> *Prelim. Results* at 11,514.

Commerce issued its final results in September 2016. *Final Results*, 81 Fed. Reg. 62,088. Commerce continued to rely on Thailand as the primary surrogate country, but made several changes to its surrogate value selections. I&D Mem. at 4–5, 14. Relevant here, with respect to Commerce’s surrogate value for Jacobi’s carbonized material, Commerce removed “French imports reported in the Thai GTA data under HS [“Harmonized Schedule”] code 4402.90.10000 because the French imports [were] not coconut shell charcoal, but a charcoal used in animal feeds.” Surrogate Values for the Final Results (Aug. 31, 2016) (“Final Surrogate Value Mem.”) at 2, PJA Tab 16, PR 427, 428, ECF No. 92–3; *see also* I&D Mem. at 30, 32–33. That change yielded a reduced surrogate value for carbonized material in the amount of

<sup>7</sup> Commerce preliminarily relied on Mexican data to value anthracite coal because the Thai data reflected “significant volatility” over a four-year period when compared with surrogate value data from other countries on its surrogate country list. Prelim. Mem. at 25–26.

<sup>8</sup> Commerce has a “rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single antidumping duty rate.” Prelim. Mem. at 5. Companies that “affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to [their] exports,” are eligible for a separate rate. *Id.*

<sup>9</sup> Unless otherwise stated, all references to monetary amounts are in U.S. dollars.

17.3483 Thai Baht (“Baht”)/kg. *Compare* Final Results Analysis Mem. for Jacobi Carbons AB (Aug. 31, 2016) (“Jacobi Final Results Mem.”) at Attach. 1, CJA Tab 3, CR 333–334, PJA Tab 17, PR 432–433, ECF No. 91 *with* Jacobi Prelim. Analysis Mem., Attach. 1 (reflecting a preliminary value of 37.3127 Baht/kg), PJA Tab 10, PR 373, ECF No. 92–2. Commerce further selected (1) Thai HS code 2706 (“Mineral Tars, Including Reconstituted Tars”) to value Jacobi’s coal tar input, which yielded a surrogate value of 60.9572 Baht/kg; (2) Thai HS code 2806.10.00102 (“Hydrochloric Acid 15% W/W To 36% W/W”) to value Jacobi’s hydrochloric acid (“HCL”) input, which yielded a surrogate value of 77.4643 Baht/kg; and (3) the 2011 financial statement of Thai producer Carbokarn Co., Ltd. (“Carbokarn”) to value Jacobi’s financial ratios. *See* I&D Mem. at 34, 39, 47; Jacobi Final Results Mem. at Attach. 1. Commerce maintained its irrecoverable VAT adjustment, I&D Mem. at 7, and assigned Jacobi and DJAC respective weighted-average dumping margins of \$1.7526/kg and \$0.20/kg, *Final Results* at 62,089. Commerce assigned the separate rate companies a weighted average dumping margin of \$1.357/kg. *Final Results* at 62,089.

On April 7, 2017, the court issued an opinion resolving challenges to Commerce’s determination regarding the seventh administrative review (“AR7”) of the AD Order on certain activated carbon. *See Jacobi Carbons AB v. United States (“Jacobi (AR7) I”)*, 41 CIT \_\_\_, 222 F. Supp. 3d 1159 (2017). The court remanded Commerce’s determinations regarding economic comparability and significant production of comparable merchandise, as well as its irrecoverable VAT calculation, for reconsideration or further explanation. *Id.* at 1165. The court “defer[red] ruling on Plaintiffs’ challenges to Commerce’s surrogate value selections pending the results of the redetermination.” *Id.*

In response to the court’s decision, Commerce requested a remand of the instant determination so that it may clarify or reconsider its findings regarding economic comparability and Thailand’s status as a significant producer of comparable merchandise. Def.’s Mot. for a Voluntary Remand at 2–3, 4, ECF No. 72. The court granted Commerce’s request. Order (June 20, 2017) (“Remand Order”), ECF No. 77.

On September 5, 2017, Commerce issued its redetermination. *See generally* Remand Results. Commerce further explained its determinations regarding economic comparability and significant production, and continued to rely on Thailand as the primary surrogate country. Remand Results at 1–2. CAC and Huahui oppose the Remand Results. Consol. Pls. Carbon Activated Corporation, Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry

Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co., Ltd., and Tianjin Maijin Industries Co., Ltd. Comments in Opp'n to Remand ("CAC Remand Cmths"), ECF No. 82; Notice of Pl.-Int.'s Statement of Supp. of Consol. Pls.' Comments in Opp'n to the Remand Results, ECF No. 83.<sup>10</sup> The Government and Defendant-Intervenors support the Remand Results. Def.'s Reply to Comments on the Remand Results ("Gov. Remand Reply"), ECF No. 93; Def.-Ints.' Comments in Supp. of U.S. Dep't of Commerce's Remand Redetermination ("Def.-Ints. Remand Reply"), ECF No. 94.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii)(2012),<sup>11</sup> and 28 U.S.C. § 1581(c)(2012).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB.*, 305 U.S. 197, 229 (1938)). It "requires more than a mere scintilla," but "less than the weight of the evidence." *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). The court may not "reweigh the evidence or . . . reconsider questions of fact anew." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (citation omitted).

## DISCUSSION

### I. Relevant Legal Framework for Non-Market Economy Proceedings

An antidumping duty is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. When an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production<sup>12</sup> in a surrogate

<sup>10</sup> CAC continues to oppose the court having remanded the case. CAC Remand Cmths at 1–4. In granting the voluntary remand, however, the court has resolved this argument in the Government's favor, and will not further address it. See Remand Order.

<sup>11</sup> All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the United States Code are to the 2012 edition, unless otherwise stated.

<sup>12</sup> The factors of production include, but are not limited to: "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

country, *see* 19 U.S.C. § 1677b(c)(1), and those values are referred to as “surrogate values.” In selecting surrogate values, Commerce must use “the best available information” that is, “to the extent possible,” from a market economy country or countries that are economically comparable to the nonmarket economy country and “significant producers of comparable merchandise.” *Id.* § 1677b(c)(1), (4).<sup>13</sup> In selecting its surrogate values, Commerce generally prefers publicly-available and “nonproprietary information from producers of identical or comparable merchandise in the surrogate country.” 19 C.F.R. § 351.408(c)(1),(4). Commerce’s practice “is to select [surrogate values] which, to the extent practicable, are product-specific, representative of a broad-market average, publicly available, contemporaneous with the POR, and exclusive of taxes and duties.” I&D Mem. at 24.

Commerce generally values all factors of production in a single surrogate country.<sup>14</sup> Commerce has adopted a four-step approach to selecting a primary surrogate country. *See* Import Admin., U.S. Dep’t of Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), <http://enforcement.trade.gov/policy/bull04-1.html> (last visited Apr. 10, 2018) (hereinafter “Policy Bulletin 04.1”). Pursuant to Policy Bulletin 04.1,

(1) the Office of Policy (“OP”) assembles a list of potential surrogate countries that are at a comparable level of economic development to the [non-market economy] country; (2) Commerce identifies countries from the list with producers of comparable merchandise; (3) Commerce determines whether any of the countries which produce comparable merchandise are significant producers of that comparable merchandise; and (4) if more than one country satisfies steps (1)–(3), Commerce will select the country with the best factors data.

*Jiaxing Brother Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1293 (Fed. Cir. 2016) (citation omitted); Policy Bulletin 04.1.

When calculating export price and constructed export price, Commerce may deduct “the amount, if included in such price, of any

<sup>13</sup> Because “best available information” is not statutorily defined, Commerce has “broad discretion” to determine what constitutes the “best available information.” *Qingdao Sea-Line Trading Co., Ltd. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014). In other words, the court is “not to evaluate whether the information Commerce used was the best available, but” to determine “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) (citation omitted).

<sup>14</sup> *See* 19 C.F.R. § 351.408(c)(2) (excepting labor). *But see Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 (Dep’t Commerce June 21, 2011) (expressing a preference to value labor based on industry-specific labor rates from the primary surrogate country).

export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.”<sup>15</sup> 19 U.S.C. § 1677a(c)(2)(B). Such price adjustments must be “reasonably attributable to the subject merchandise.” 19 C.F.R. § 351.401(c).

In 2012, Commerce reconsidered its unwillingness to apply § 1677a(c)(2)(B) to certain non-market economy countries, including China,<sup>16</sup> and, henceforth, considers whether the PRC “has imposed an export tax, duty, or other charge upon export of the subject merchandise during the period of investigation or the period of review,” including, for example, “an export tax or VAT that is not fully refunded upon exportation.” *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings*, 77 Fed. Reg. 36,481, 36,482 (Dep’t Commerce June 19, 2012) (“*Methodological Change*”) (internal quotation marks omitted). If it has, Commerce will “reduce the respondent’s export price and constructed export price accordingly, by the amount of the tax, duty or charge paid, but not rebated.” *Id.* at 36,483. When the VAT is “a fixed percentage of the price,” Commerce “will adjust the export price or constructed export price downward by the same percentage.” *Id.* “[B]ecause these are taxes affirmatively imposed by the Chinese . . . government[],” Commerce “presume[s] that they are also collected.” *Id.*

## II. Surrogate Country Selection

In briefing the *Final Results*, CAC argued that Commerce should select the Philippines as the primary surrogate country based on an evaluation of its economic comparability, significant production, and data quality relative to Thailand’s. CAC Rule 56.2 Mem. at 8–18.<sup>17</sup> CAC challenged Commerce’s surrogate country selection methodology, *id.* at 8–12, its specific finding that Thailand is a significant producer of comparable merchandise, *id.* at 11, 12–14, and the superiority of Thai surrogate value data for financial ratios and carbonized material, *id.* at 14–18.<sup>18</sup> CAC’s argument for the Philippines as the primary surrogate country rested on its assertion that Commerce

<sup>15</sup> Section 1677(6)(C), which concerns “export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received,” is not relevant here.

<sup>16</sup> For a more detailed overview of Commerce’s policy change with respect to nonmarket economies, see *Jacobi (AR7) I*, 222 F. Supp. 3d at 1184–85.

<sup>17</sup> No other plaintiffs challenged Commerce’s primary surrogate country selection.

<sup>18</sup> The court addresses CAC’s specific challenges to the reliability of Thai surrogate values *infra* Section III.

should have weighed the country's relative fulfilment of the surrogate country criteria—economic comparability, significant production of comparable merchandise, and data quality—rather than excluding it from consideration on the basis of economic comparability. *Id.* at 10–12.

The court has previously found that Commerce's sequential methodology is a reasonable means of implementing its surrogate country selection criteria, *see Jacobi (AR7) I*, 222 F. Supp. 3d at 1171–75, and CAC offers nothing new to merit a different outcome here. That being said, however, Commerce's particular determinations vis-à-vis economic comparability, significant production of comparable merchandise, and surrogate value data must be supported by reasoned analysis and substantial evidence. *See Jiaxing Brother Fastener Co., Ltd.*, 822 F.3d at 1298. Commerce's redetermination concerning economic comparability meets those requirements; however, Commerce's redetermination concerning significant production requires further consideration.<sup>19</sup>

#### A. Economic Comparability

Section 1677b(c)(4)(A) does not define what is a comparable level of economic development or require a particular methodology to determine which countries are economically comparable. *Jiaxing Brother Fastener Co., Ltd. v. United States*, 38 CIT \_\_\_, \_\_\_, 961 F. Supp. 2d 1323, 1328 (2014), *aff'd*, 822 F.3d 1289. Thus, "Commerce may perform its duties in the way it believes most suitable," provided, as noted above, its determinations are supported by reasoned analysis and substantial evidence. *Jiaxing Brother Fastener Co., Ltd.*, 822 F.3d at 1298 (internal quotation marks and citation omitted). Commerce's redetermination meets those requirements.

On remand, Commerce explained its formulation of the GNI range generally, and in this proceeding specifically. *See* Remand Results at 3–18. Commerce relies on *per capita* gross national income ("GNI") data supplied by the World Bank's annual *World Development Report* to measure economic development. *Id.* at 3. Although the statute only requires Commerce to seek a surrogate market economy country whose economic development is "comparable" to the subject nonmarket economy ("NME"), when possible, the agency "selects a surrogate

<sup>19</sup> Because the court will also remand Commerce's surrogate value determinations, *see infra* Section III, Commerce's primary surrogate country selection remains an open question. On remand, therefore, Commerce is not foreclosed from considering the Philippines in the event that none of the countries on Commerce's surrogate country list, including Thailand, are determined to be significant producers of comparable merchandise or provide suitable surrogate value data. *See* Remand Results at 7; *id.* at 17–18 (noting that the Philippines is not "beyond consideration" as a surrogate country but is an inappropriate choice when Thailand meets Commerce's surrogate country criteria).

country at the *same* level of economic development as the NME country.” Remand Results at 4; *id.* at 7 (explaining Commerce’s “general rule” to select a primary surrogate country that is at the same level of economic development as the subject NME, unless none are significant producers of comparable merchandise or provide suitable surrogate value data or they are all unsuitable for other reasons). Commerce considers those countries that occupy a “relatively narrow *per capita* GNI range that is *centered* on the *per capita* GNI of the NME country” to have attained the same level of economic development. *Id.* at 4.<sup>20</sup> Commerce’s surrogate country selection process has developed in response to China’s “rapid economic growth,” proceeding-specific issues and arguments, “the quality and availability of [surrogate value] data,” and judicial guidance. *Id.* at 8.

The annual release of the *World Development Report* triggers Commerce’s reconsideration of potential surrogate countries. *Id.* at 10. Commerce compares changes to China’s *per capita* GNI to changes in the *per capita* GNI of its “existing set of surrogate countries” and, in light of “the PRC’s rapid GNI growth rate,” usually must re-center the list. *Id.* For example, in the 12 years before this administrative proceeding, China’s *per capita* GNI grew almost 8 times, from \$940 to \$7,380. *Id.* at 10 & n.29 (citation omitted). Each year, Commerce has, therefore, “reevaluated the [*per capita*] GNI range and expanded it at roughly the same rate.” *Id.* at 10; *see also id.* at 11, Table 1 (noting changes to China’s *per capita* GNI from 2002 to 2014 and corresponding changes to the *per capita* GNI range reflected on each year’s surrogate country list). Once Commerce determines the range, it “searches for countries within that range [that] are suitable candidates for inclusion on the list.” *Id.* at 13.<sup>21</sup> Commerce emphasizes “achieving a degree of ‘balance’ in the [*per capita*] GNI range represented by the list” and aims to select three countries with *per capita* GNIs above and below China’s *per capita* GNI, for a total of six

<sup>20</sup> Commerce likens *per capita* GNI ranges to a flight of stairs. Remand Results at 5. “[E]ach (flat) step . . . is associated with a [relatively narrow] range of *per capita* GNI,” whereas “the staircase itself . . . is associated with a relatively broad range of *per capita* GNI.” Remand Results at 5; *see also id.* at 6 (noting that Commerce defines each step for each subject NME country “using a relatively narrow range of *per capita* GNI [that is] centered on the country at issue”). The staircase metaphor demonstrates that a country’s level of economic development determines its location on a particular step, and that “different countries can be at the same level of economic development, even if their *per capita* GNIs differ, so long as those differences are small enough that one stays on the same step.” *Id.* at 5.

<sup>21</sup> Commerce considers several factors, including “[surrogate value] requirements . . . , the data quality and availability of alternative surrogate countries, economic diversity of the manufacturing sector in the alternative countries [under consideration], and the degree of specificity in the import data relied on to value the [factors of production].” Remand Results at 14. Commerce rejected certain countries on the basis of 2014 data because they consisted of “smaller and less diversified economies” that were unlikely to represent “viable surrogate countries.” *Id.*

countries. *Id.* The list is non-exhaustive,<sup>22</sup> and is intended to provide interested parties with a “manageable set of potential surrogate countries” on which to focus. *Id.* at 15.

In the instant review, China’s *per capita* GNI of \$7,380 was roughly centered between the highest *per capita* GNI on the surrogate country list (\$9,980) and the lowest *per capita* GNI on the list (\$5,410). *Id.* at 11, Table 1. In contrast, in 2014, the Philippines’ *per capita* GNI was \$3,440, \$3,940 less than China’s *per capita* GNI, and \$1,470 less than the lowest *per capita* GNI on the surrogate country list. *See* Remand Results at 16 & n.44 (citation omitted); Jacobi’s Comments on Economic Comparability (July 20, 2015), Attachs. A, C, PJA Tab 18, RJA Tab REM-1, ECF Nos. 92–3, 95 (containing 2014 *per capita* GNI data). Although China’s *per capita* GNI grew almost eight times from 2002 to 2014, the Philippines’ *per capita* GNI grew about 3.4 times in the same period. *See* Remand Results at 16, Table 2. As Commerce explained, “[t]he effect of this growing disparity . . . is that more [market economy] countries’ *per capita* GNI fell between the PRC and the Philippines.” *Id.* at 16.

Based on the foregoing, Commerce has provided a reasoned explanation for its generation of the surrogate country list and its exclusion of the Philippines, which is supported by substantial evidence demonstrating China’s rising *per capita* GNI and the widening disparity between China’s and the Philippines’ respective *per capita* GNIs. CAC’s contrary arguments are unavailing.

CAC asserts that Commerce “has not explained a reasonable or predictable measure of economic comparability” because the agency’s “surrogate country list changes from year to year” in a manner that is inconsistent, unpredictable, and lacking explanation. CAC Remand Cmts at 4. CAC further asserts that Commerce has not, as it averred, expanded the *per capita* GNI range of the countries on the list at roughly the same rate as China’s expanding economy. *Id.* at 5. The court rejected similar arguments when it sustained Commerce’s re-determination on the matter of economic comparability issued pursuant to *Jacobi (AR7) I*. *See Jacobi Carbons AB v. United States (“Jacobi (AR7) II”)*, 42 CIT \_\_\_, Slip Op. 18–46 at 18–19 (Apr. 19, 2018). Therein, the court explained that “Commerce’s expansion of its GNI range need not exactly mirror China’s economic growth; math-

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<sup>22</sup> When an interested party proposes an alternative country with a *per capita* GNI within the range of the countries on the list, Commerce affords that country the same consideration as others on the list. Remand Results at 15. When an interested party proposes a country with a *per capita* GNI outside the selected range, Commerce will consider the country only if its data quality and availability, and significant producer status, outweigh its deficient economic comparability, *id.* at 14–15, and only when none of the countries at the same level of economic development are viable surrogate country options, *id.* at 7.

ematical precision is not required.” *Id.* at 15–16 (quoting *Dorbest*, 755 F. Supp. 2d at 1298 (“Commerce does not have to achieve mathematical perfection in its choice of countries to act as bookends for its initial selection [of the GNI range].”). Further, “it would be inappropriate for this court to impose [a] bright-line requirement” that Commerce’s expansion of the *per capita* GNI range match China’s changing *per capita* GNI because “[t]he GNI data on which the surrogate country list is based is a fluid measurement that can change from year to year.” *Id.* at 19 (citation omitted). So too here, Commerce’s re-centering of the *per capita* GNI range is responsive to annual changes in both China’s *per capita* GNI and the GNI of economically proximate countries. *See* Gov. Remand Reply at 10–11.

CAC also asserts that Commerce stated it considers data availability and quality before selecting countries to include on the list, but failed to provide this data to interested parties. CAC Remand Cmts at 5 (citing Surrogate Country Ltr, Attach. 1). Commerce stated, however, that the listed countries “are *likely* to have good data availability and quality.” Surrogate Country Ltr, Attach. 1 at 2 (emphasis added). Although “there were several [market economy] countries in close proximity to the PRC,” such as the Maldives and Botswana, those “smaller and less diversified economies” are not viable surrogates in light of “the data quality and availability of alternative surrogate countries, and [the] economic diversity of the manufacturing sector in the alternative countries.” Remand Results at 14. Thus, Commerce did not purport to assess specific data sources before compiling the list; rather, the agency considers the size and diversity of the economy and its implications for data availability and quality when selecting countries for inclusion. Commerce’s redetermination as to economic comparability is supported by substantial evidence.

### **B. Significant Producer of Comparable Merchandise**

Neither the statute nor Commerce’s regulations define “significant producer.” *See* 19 U.S.C. § 1677b; 19 C.F.R. § 351.408; Policy Bulletin 04.1. Because the term is undefined and ambiguous, the court must assess whether Commerce’s interpretation of significant producer “is based on a permissible construction of the statute.” *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1344 (Fed. Cir. 2017) (quoting *Chevron, U.S.A., Inc. v. Nat’l Res. Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

For the *Final Results*, Commerce relied on “export quantities” to find that Thailand is a significant producer of comparable merchandise. I&D Mem. at 16. On remand, Commerce instead determined that Thailand is a significant producer based on evidence of domestic

production of identical merchandise as contained in Carbokarn's 2011 financial statement. Remand Results at 20, 38, 39.<sup>23</sup> CAC asserts that evidence of "some production" fails to support a finding of "significant production," and Commerce failed to adhere to Policy Bulletin 04.1's tier-based method of measuring significant production. *Id.* at 7–8. CAC further characterizes Carbokarn's 2011 financial statement as "extremely weak support" for the agency's finding that Thailand is a significant producer because it "gives no measure of the amount of its production of comparable or identical merchandise," and is outdated. *Id.* at 6–7 (noting the absence of record evidence regarding whether "Carbokarn still produces comparable merchandise or even continues to operate at all"). For the following reasons, Commerce's redetermination is unsupported by substantial evidence.<sup>24</sup>

On remand, Commerce explained that "if comparable merchandise is produced, a country qualifies as a producer of comparable merchandise." Remand Results at 19 & n.56 (citing *Sebacic Acid from the People's Republic of China*, 62 Fed. Reg. 65,674, 65,676 (Dep't Commerce Dec. 15, 1997) (final results of antidumping admin. review; 1995–1996) ("*Sebacic Acid*"). Commerce further explained that record evidence of domestic production, including financial statements, "directly addresses the requirement of significant production of comparable merchandise." *Id.* at 19–20 & n.57 (citing *Dorbest Ltd. v. United States*, 30 CIT 1671, 1683–84, 462 F. Supp. 2d 1262, 1274 (2006) (upholding Commerce's selection of India as a significant producer on the basis of several financial statements of Indian companies), *rev'd on other grounds*, 604 F.3d 1363 (Fed. Cir. 2010)). "Accordingly," Commerce concluded, Carbokarn's 2011 financial statement "demonstrates that there is significant production of comparable merchandise in Thailand," and, "in and of itself, establishes

<sup>23</sup> Commerce also discussed Thailand's export quantities in the redetermination, but was unclear whether it continued to rely on that measure. *See* Remand Results at 21 ("While we are not relying on export quantity . . . , the record demonstrates that Thailand is a significant exporter . . . , a metric that the Department may rely on . . ."). At oral argument, the Government confirmed that Commerce did *not* rely on export quantities in its redetermination. Oral Arg. at 10:30–10:56 (reflecting the time stamp from the recording). Accordingly, the court will not address Commerce's discussion of exports or CAC's challenge thereto. *See* Remand Results at 21; CAC Remand Cmts at 8–9.

<sup>24</sup> At oral argument, the Government sought to downplay the degree to which Thailand's status as a significant producer is in controversy, contending that CAC's argument that Thailand is not the *most* significant producer should be understood as a concession that Thailand is, in fact, a significant producer. Oral Arg. at 4:25–5:03, 18:25–18:54, 19:13–19:41. CAC opposed the remand, *see, e.g.*, CAC Remand Cmts at 1–4, and raised several substantive arguments regarding the merits of Commerce's redetermination as to Thailand's status as a significant producer, *see id.* at 6–9. Accordingly, the issue is properly before the court.

that Thailand is a significant producer.” *Id.* at 20; *see also id.* at 21 & n.67 (citation omitted).

The court rejected identical reasoning in *Jacobi (AR7) II*, and does so here. Therein, the court explained that “*Sebacic Acid* is an example of Commerce exercising broad discretion to determine what constitutes comparable merchandise for purposes of selecting its primary surrogate country.” *Jacobi (AR7) II*, Slip Op. 18–46 at 26 (citation omitted). Moreover, although “evidence of domestic production of comparable merchandise may directly *address* [] the requirement of significant production, . . . nothing in Commerce’s *Sebacic Acid* ruling suggests that it *fulfills* the requirement without more.” *Id.* (internal quotation marks and citation omitted) (alteration original). The court further distinguished *Dorbest* on the basis of evidence in that case that Commerce had relied on “nine Indian surrogate financial statements *in addition to* directories of hundreds of Indian furniture producers and information on the value of Indian furniture output.” *Id.* (citing *Dorbest*, 30 CIT at 1683, 462 F. Supp. 2d at 1274). Accordingly, *Dorbest* does not support Commerce’s conclusory reliance on a single financial statement.

At oral argument, the court pressed the Government to explain the meaning that Commerce gives the term “significant producer” and identify the agency’s application of that standard. The Government pointed to Commerce’s discretion to define significant production by way of reference to domestic production, and relied on the agency’s expertise to support its determination that Carbokarn’s production was significant. Oral Arg. at 3:08–4:25. The court is not persuaded.

Although Commerce’s “experience and expertise . . . presumably enable the agency to provide the required explanation, [it does] not substitute for the explanation.” *CS Wind Vietnam Co., Ltd. v. United States*, 832 F.3d 1367, 1377 (Fed. Cir. 2016). Commerce’s Policy Bulletin 04.1 recognizes the comparative aspect of the phrase “significant production.” Policy Bulletin 04.1 at 3 (Commerce’s significant producer determination “should be made consistent with the characteristics of world production of, and trade in, comparable merchandise”);<sup>25</sup> *see also Fresh Garlic Prod. Ass’n v. United States*, 39

<sup>25</sup> By way of example,

if there are just three producers of comparable merchandise in the world, then arguably any commercially meaningful production is significant. Intermittent production, however, would not be significant. If there are ten large producers and a variety of small producers, “significant producer” could be interpreted to mean one of the top ten. If, in the example above, there is also a middle-size group of producers, then “significant producer” could be interpreted as one of the top ten or middle group.

Policy Bulletin 04.1.

CIT \_\_\_, \_\_\_, 121 F. Supp. 3d 1313, 1338–39 (2015).<sup>26</sup> Policy Bulletin 04.1 implements the well settled rule “that a statute must, if possible, be construed in such a fashion that every word has some operative effect.” See *United States v. Nordic Village Inc.*, 503 U.S. 30, 36 (1992). Here, however, Commerce’s analysis fails to give meaning to the term “significant” or otherwise explain its conclusion that Carbokarn’s production is “significant.”<sup>27</sup> Without that explanation, the court lacks the means to ensure that Commerce’s redetermination is not arbitrary. See *Apex Frozen Foods*, 862 F.3d at 1346. Accordingly, Commerce’s redetermination is unsupported by substantial evidence and must be remanded.

### III. Surrogate Values

Plaintiffs challenge Commerce’s selection of Thai surrogate values for carbonized material, hydrochloric acid, coal tar, and financial ratios. Each will be discussed, in turn.

<sup>26</sup> In *Fresh Garlic*, the court opined that an interpretation of “significant producer” countries as those whose domestic production could influence or affect world trade would be a permissible construction of the statute. This follows from the plain meaning of the word “significant” as something “having or likely to have influence or effect.” This definition, however, necessarily requires comparing potential surrogate countries’ production to world production of the subject merchandise.

121 F. Supp. 3d at 1338–39 (citations omitted); see also *Jacobi (AR7) I*, 222 F. Supp. 3d at 1180 (noting that Policy Bulletin 04.1 is consistent with *Fresh Garlic*).

<sup>27</sup> Commerce’s reference to Carbokarn’s revenue does not render its determination sufficiently “discernible.” See *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Commerce appears to assume that all of Carbokarn’s 2011 revenue is derived from sales of activated carbon. See Remand Results at 21 n.67 (“In 2011, [Carbokarn] had activated carbon sales of 358,392,992.16 Baht.”) (citing DJAC Second Surrogate Value Submission (Jan. 4, 2016) (“DJAC Jan. 4, 2016 Surrogate Value Submission”), Ex. 8B (“2011 Carbokarn Financial Statement”), PJA Tab 7, PR 317, 319, ECF No. 92–2). That figure represents Carbokarn’s total sales revenue, which is derived from “[m]anufacture, export and import [of] charcoal water filter, Charcoal, and chemical products.” 2011 Carbokarn Financial Statement (Carbokarn’s sales revenue represents 96.57 percent of its total revenue). Accordingly, the production Commerce relied upon to support its determination derives from revenue from an unidentified mix of sales of comparable and non-comparable merchandise and import/export activities. See *id.* At oral argument, in responding to the court’s question regarding the basis for Commerce’s assumption, the Government sought to cast the burden on CAC to supply evidence disproving the significance of Carbokarn’s production. Oral Arg. at 30:59–31:20. Although an interested party has “the responsibility to make the case for the set of data that it favors,” *Taian Ziyang Food Co., Ltd. v. United States*, 35 CIT \_\_\_, 783 F. Supp. 2d 1292, 1331 (2011), CAC is not advocating for Commerce’s use of Thai data. Additionally, while the general rule allocates “the burden of creating an adequate record” to interested parties, *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011), it does not relieve Commerce of its burden of ensuring that its determinations are supported by substantial evidence, see 19 U.S.C. § 1516a(b)(1)(B)(i). Cf. *Taian Ziyang Food Co., Ltd.*, 783 F. Supp. 2d at 1331 (Commerce must “obtain adequate evidence” for its surrogate values, which may not be selected “by default”). The lack of clarity regarding Carbokarn’s production, to which CAC pointed, see CAC Remand Cmts at 6–7, supports the need for a second remand for Commerce to explain further or reconsider its significant producer determination.

## A. Carbonized Material

For the *Final Results*, Commerce selected Thai HS code 4402.90.10000, exclusive of French imports, to value Jacobi's carbonized material. I&D Mem. at 30–33. Commerce concluded that without the French imports there “remain[ed] a significant volume of imports . . . to calculate a [surrogate value].” *Id.* at 32–33.

### 1. Parties' Contentions

Jacobi contends that Commerce's selection of Thai import data contradicts its reliance on Philippine *Cocommunity* data in prior reviews; Commerce should have considered Philippine data for surrogate value or benchmarking purposes; and the imports that remained after Commerce removed those from France represented a commercially insignificant quantity that Commerce unreasonably assumed constituted the type of carbonized material Jacobi consumed. Jacobi Rule 56.2 Mem. at 15–20; *see also* Rule 56.2 Reply Br. of Pls. Jacobi Carbons AB Jacobi and Jacobi Carbons, Inc., (“Jacobi Rule 56.2 Reply”) at 3–8, ECF No. 84; M. L. Ball Rule 56.2 Mem. at 7, 10–11 (advancing similar arguments). CAC likewise contends that Commerce erred in relying on Thai import data derived from a commercially insignificant quantity. CAC Rule 56.2 Mem. at 26–32; *id.* at 27 (asserting that the respondents' consumption of carbonized material “dwarf[s]” the roughly 122 metric tons underlying the Thai import data);<sup>28</sup> *see also* Consol. Pls. Carbon Activated Corp., Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi industry Technology Trading co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co., Ltd., and Tianjin Maijin Industries Co., Ltd. Reply Br. (“CAC Rule 56.2 Reply”) at 13–14, ECF No. 86.

<sup>28</sup> According to CAC, “Jacobi consumed over 7,000 metric tons of carbonized material” and “DJAC purchased, sold, and produced many times more carbonized material than imported into Thailand” during the relevant period of review. CAC Rule 56.2 Mem. at 27 (citing Jacobi § D Resp. (Aug. 14, 2015) (“Jacobi § D QR”), Ex. NXGH D-12 (factors of production summary for Jacobi's unaffiliated supplier Huahui), PJA Tab 21, PR 122, Suppl. CJA Tab 1, CR 72, 73–75, ECF No. 103–1; Jacobi § D Resp. Part II (Aug. 19, 2015) (“Jacobi § D QR, Part II”), PJA Tab 4, PR 135, Suppl. CJA Tab 2, CR 153–160, 162, 174–176, 178, 188, ECF Nos. 103–2-103–5; DJAC 1st Suppl. Resp. (Oct. 21, 2016) (“DJAC Suppl. QR”) at 16, PJA Tab 25, PR 248, Suppl. CJA Tab 3, CR 228–229, ECF No. 103–6). The cited exhibits demonstrate that Huahui consumed [ ] metric tons of carbonized material during the period of review, Jacobi § D QR, Ex. NXGH D-12, and, in one POR-month, DJAC used [ ] metric tons of carbonized material, DJAC Suppl. QR at 16. Part II to Jacobi's § D QR contains FOP data for Jacobi's unaffiliated activated carbon supplier Ningxia Huahui Activated Carbon Co., Ltd. (“NXHH”). Jacobi § D QR, Part II at 2. The relevant narrative and exhibits are unclear, however, regarding the extent to which NXHH's carbonized material consumption is imputable to Jacobi for the purpose of fully substantiating CAC's assertion. *See id.*, Ex. C (containing NXHH's § D questionnaire response and exhibits).

The Government contends that Jacobi's argument regarding the specificity of Thai import data is speculative; Commerce appropriately found that Thai import quantities were not commercially insignificant as compared to the respondents' production experiences; and Commerce properly declined to consider data from non-economically comparable countries. Gov. 56.2 Resp. at 39–45.

## **2. Commerce's Determination Lacks Substantial Evidence Regarding the Commercial Significance of the Import Quantity Underlying Commerce's Surrogate Value**

As an initial matter, “each administrative review is a separate exercise of Commerce’s authority that allows for different conclusions based on different facts in the record.” *Jiaxing Brother Fastener Co., Ltd.*, 822 F.3d at 1299 (quoting *Qingdao*, 766 F.3d at 1387). Commerce’s past reliance on Philippine *Cocommunity* data to value carbonized material, without more, does not undermine Commerce’s selection of Thai data in this segment of the proceeding. Unlike in prior reviews, here, Commerce concluded that the Philippines is not at the same level of economic development as the PRC. *See, e.g.*, Remand Results at 15–18. Accordingly, this is not a situation where Commerce has failed to articulate sufficient reasons for treating similar situations in a dissimilar manner. *See, e.g.*, *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (“[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.”) (first alteration added) (citation omitted).<sup>29</sup>

Further, Jacobi has failed to substantiate its arguments that the Thai import data is aberrant and non-specific. In the underlying administrative proceeding, Jacobi argued that the Thai value— inclusive of French imports consisting of wood-based charcoal—was aberrantly high. *See* Jacobi Case Br. (May 13, 2016) at 35–37, PJA 13, PR 416, ECF No. 92–3. After removing French imports, the Thai import value decreased from 37.31 Baht/kg to 17.3483 Baht/kg. *Compare id.* at 32, *with* Jacobi Final Results Mem. at Attach. 1. In the instant matter, Jacobi does not contend that the subsequent value is aberrant; it merely contends that Commerce impermissibly ignored Philippine data for benchmarking purposes. Jacobi Rule 56.2 Mem. at

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<sup>29</sup> On remand, however, Commerce may reconsider its position with respect to Philippine *Cocommunity* data in the event it concludes that the Thai import data derives from a commercially insignificant quantity. *See, e.g.*, I&D Mem. at 31 (declining to consider Philippine data because it is from a non-listed country *and* because Commerce determined that it had data from a listed country).

20;<sup>30</sup> Jacobi Rule 56.2 Reply at 5; *see also* M. L. Ball Rule 56.2 Mem. at 11. Jacobi also fails to identify evidence showing that the imports from countries other than France constitute wood-based charcoal rather than coconut shell charcoal. Jacobi Rule 56.2 Mem. at 18 (contending “it was unreasonable for Commerce to *assume* [the nature of the imports]”). Because it is not the court’s role to “develop its own theory of why the selected [value] may be [aberrantly high or non-specific], effectively litigating the issue for [Plaintiffs],” *Essar Steel Ltd. v. United States*, 36 CIT , 880 F. Supp. 2d 1327, 1332 (2012) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990) (“[I]ssues adverted to in a perfunctory manner . . . are deemed waived.”)), these arguments lack merit and will not be afforded further consideration.

Plaintiffs persuade the court, however, that a remand is required with respect to Commerce’s conclusory analysis regarding commercial significance. Although “Commerce need not duplicate the exact production experience of the Chinese manufacturers at the expense of choosing a surrogate value that most accurately represents the fair market value of [the respective input] in a hypothetical market-economy [],” *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (internal quotation marks, alterations, and citation omitted), “a surrogate value must be as representative of the situation in the NME country as is feasible,” *id.* Representativeness is important if Commerce is to fulfill its statutory mandate of calculating dumping margins as accurately as possible. *Juancheng Kangtai Chem. Co., Ltd. v. United States*, Slip Op. 15–93, 2015 WL 4999476, at \*25 (CIT Aug. 21, 2015) (citation omitted); *see also Shake-proof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (noting Commerce’s obligation to “establish[] antidumping margins as accurately as possible.”). For this reason, the court has remanded agency determinations that failed to adequately address the commercial significance of the quantities underlying its selected surrogate values. *See Juancheng Kangtai*, 2015 WL 4999476, at \*25; *Xinjiamei Furniture (Zhangzhou) Co., Ltd. v. United States*, Slip Op. 13–30, 2013 WL 920276, at \*5 (CIT Mar. 11, 2013); *Shanghai Foreign Trade Enters.*

<sup>30</sup> Jacobi appears to contend that Commerce must always benchmark its chosen surrogate value. *See* Jacobi Rule 56.2 Mem. at 12 (summarizing its views on how Commerce must select its surrogate values). However, the cases it cites do not support this interpretation of Commerce’s surrogate value selection methodology. Instead, Commerce examines benchmarking data “[w]hen presented with sufficient evidence to demonstrate a particular [surrogate value] is aberrational.” I&D Mem. at 31.

*Co., Ltd. v. United States*, 28 CIT 480, 318 F. Supp. 2d 1339, 1352–53 (2004).<sup>31</sup>

The Government asserts generally that “Commerce was within its discretion to conclude, as it did, that Thai import quantities were not too small to be representative of respondents’ production price.” Gov. Rule 56.2 Resp. at 40–41. Commerce indeed has “wide discretion in the valuation of factors of production,” *Nation Ford*, 166 F.3d at 1377, but that discretion does not absolve the agency of its responsibility to articulate a “rational connection between the facts found and the choice made,” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Commerce’s conclusory assertion regarding the significance of the imports into Thailand fails to apprise the court why 122 metric tons is sufficiently significant to yield a representative price in light of respondents’ production experience. *See supra* note 28.

The Government also asserts that Commerce need not rely on the dataset that is derived from the highest import volume. Gov. Rule 56.2 Resp. at 42 (citing, *inter alia*, *Trust Chem Co. Ltd. v. United States*, 35 CIT , 791 F. Supp. 2d 1257, 1264–65 (2011)). While *Trust Chem* is distinguishable,<sup>32</sup> in this case, there is some indication that a Thai producer of activated carbon would source carbonized material domestically rather than from imports. *See* Jacobi Pre-Prelim. Surrogate Value Comments (Jan. 4, 2016) (“Jacobi Jan. 4, 2016 Surrogate Value Cmts”), Ex. SV2–17, PJA Tab 6, PR 281282, 297–299, 325, ECF No. 6 (noting that Thailand’s coconut shell charcoal industry is based on its substantial coconut production (1,380,980 metric tons in 2009), which supports a POR Thai domestic price for coconut shell charcoal in the range of 10.0–10.5 Baht/kg). *Cf. Juancheng Kangtai*, 2015 WL 4999476, at \*21 (2015) (noting the Government’s argument that “the price the producer in the surrogate country pays for the input in the production of subject merchandise is determinative” in its calculation

<sup>31</sup> Jacobi relies on the U.S. Court of International Trade’s (“CIT”) opinion addressing challenges to the sixth administrative review of the AD Order on certain activated carbon. Jacobi Rule 56.2 Mem. at 18–19 (citing *Calgon Carbon Corp. v. United States*, 41 CIT , 145 F. Supp. 3d 1312, 1327–29 (2016)); *see also* M.L. Ball Rule 56.2 Mem. at 10 (citing same). Therein, the court noted that the 160 metric tons of imports underlying the non-contemporaneous surrogate value for anthracite coal upon which Commerce relied may not be as reliable as more contemporaneous values that were based on higher quantities; however, it remanded Commerce’s surrogate value selection because the agency had failed to articulate reasons beyond its preference for using values from the primary surrogate country to support its selection. *Calgon Carbon*, 145 F. Supp. 3d at 1327–28.

<sup>32</sup> Therein, the plaintiff argued that the import volume underlying Commerce’s surrogate value selection was “infinitesimally small,” aberrant, and unrepresentative. *Trust Chem*, 791 F. Supp. 2d at 1264. The court noted that the “question is whether the *relative* quantity of imports is distortive,” and the record lacked evidence regarding any disparity between the import volume and India’s domestic consumption. *Id.* at 1265.

of normal value) (citation omitted); *Longkou Haimeng Mach. Co., Ltd. v. United States*, 33 CIT 603, 613, 617 F. Supp. 2d 1363, 1373 (2009) (affirming Commerce’s reliance on Indian import data because it “represent[s] the types and prices of pig iron available to Indian producers of gray iron brake rotors”).<sup>33</sup> Accordingly, this issue is remanded for Commerce to reconsider its selection of Thai import data to value carbonized material or further explain the commercial significance thereof.

## B. Hydrochloric Acid

Commerce selected Thai HS code 2806.10.00102 in the amount of 77.4643 Baht/kg to value Jacobi’s hydrochloric acid consumption. Jacobi Final Results Mem., Attach. 1. Commerce explained that, because Thailand is the primary surrogate country, its “regulatory preference for valuing all surrogate values from one surrogate” meant that its “first preference in selecting surrogate value data . . . is to utilize publicly available prices within Thailand.” I&D Mem. at 34. Commerce, therefore, declined DJAC’s invitation to select Bulgarian or Romanian import data. *See id.* at 33–34.

In response to arguments regarding possible aberrancy in the Thai import data, Commerce explained:

[w]hen considering benchmark data, the [agency] examines historical import data for the potential surrogate countries for a given case, to the extent such import data is available, and/or examines data from the same HS category for the primary surrogate country over multiple years to determine if the current data appear aberrational compared to historical values. Merely

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<sup>33</sup> The Government’s reliance on two additional CIT cases is misplaced. *See* Gov. Resp. at 42 (quoting *Laizou Auto Brake Equip. Co. v. United States*, 32 CIT 711, 717 (2008) (“[A] larger data set, in and of itself, is not necessarily better in valuing factors of production than a smaller one); *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1481, 1501, 460 F. Supp. 2d 1338, 1356 (2006) (“Commerce [does] not ha[ve] a longstanding practice of omitting import values merely because they were the product of a small quantity of imported goods”). In *Laizou*, the court affirmed Commerce’s reliance on Indian import data rather than domestic data when it was more specific to the relevant input, pig iron, “broadly collected from imports into all of India as opposed to from a few companies,” and the underlying volume “significantly exceed[ed] the volume of pig iron consumed by several of the respondents.” 32 CIT at 717–18. In contrast, here, the volume of carbonized material consumed by the respondents far exceeds the amount imported into Thailand. *See supra* note 28. In *Sichuan*, the plaintiff challenged Commerce’s failure to exclude from Indian import data imports from countries in small quantities because the prices were aberrantly high. 30 CIT at 1500, 460 F. Supp. 2d at 1355. Commerce explained that the agency does not have a practice of excluding small quantity imports, but rather “only data that is deemed distortive.” 30 CIT at 1500, 460 F. Supp. 2d at 1356. Plaintiffs here do not contend that Commerce failed to exclude *particular* imports into Thailand because they were small quantity, but that Commerce erred in relying on a value based on an *overall* commercially insignificant quantity.

appearing on the low or high end of a range of values is not enough to make data aberrational.

*Id.* at 34–35 (footnotes omitted). Interested parties had proposed several sources of benchmarking data. However, Commerce rejected (1) data from the United States, Germany, Belgium, and France because those countries are not at the same level of economic development as the PRC; (2) Thai and Mexican export data on the basis of its practice not to use export values as benchmarks; and (3) HCL surrogate values from prior administrative reviews of this order. *Id.* at 34–35. Commerce explained that it was unable to test the Thai import data for aberrancy because the record lacked historical data for the relevant HS code from countries at the same level of economic development as the PRC or for the Thai HS code it relied upon. *Id.* at 35.

### 1. Parties' Contentions

Jacobi contends that Commerce's HCL surrogate value is aberrational and Commerce erroneously ignored benchmarking data on the record. Jacobi Rule 56.2 Mem. at 28–29; *see also* M. L. Ball Rule 56.2 Mem. at 13–14 (advancing the same argument). The Government responds that Jacobi “proffer[ed] inappropriate benchmarks.” Gov. Rule 56.2 Resp. at 49. The Government further contends that data from countries on Commerce's surrogate country list did not demonstrate that the Thai data was aberrant. *Id.* at 50.

### 2. Commerce's Selection of Thai Import Data to Value Jacobi's Hydrochloric Acid Input Lacks Substantial Evidence

As noted above, Commerce has wide discretion in fulfilling its statutory mandate to select the best available information for purposes of surrogate value selection. *Qingdao*, 766 F.3d at 1386; 19 U.S.C. § 1677b(c)(1)(B). Nevertheless, Commerce's determinations must be accompanied by reasoned explanation and supported by substantial evidence. *Xiamen Int'l Trade & Indus. Co. v. United States*, 37 CIT \_\_\_, 953 F. Supp. 2d 1307, 1312–13 (2013). Commerce's preference for using data from the primary surrogate country, relied upon here, serves that statutory mandate when it “support[s] a choice of data as the best available information” when “the other available data[,] upon a fair comparison, are otherwise seen to be fairly equal.” *Calgon Carbon*, 145 F. Supp. 3d at 1326–27 (internal quotation marks and citation omitted) (emphasis added). Commerce's preference, therefore, does not substitute for an examination of the record data from which it is to choose the “best available.” *See id.*

In addition to Thai import data, the record contained Bulgarian import data based upon 22,037 metric tons of HCL imports reflecting an average price of \$77.95/metric ton (“MT”), and Romanian import data based upon 8,935 metric tons HCL imports and reflecting an average price of \$57.90/MT. DJAC Case Br. (Apr. 29, 2016) at 42, PJA Tab 12, PR 400, ECF No. 92–3. In contrast, Thai import data derived from just 61.5 metric tons of HCL imports and yielded an average price of \$2,347/MT. *Id.* Commerce did not address adequately these data points, either as potential surrogate values or as benchmarks for the Thai value. *See* I&D Mem. at 34.<sup>34</sup> Commerce’s failure to address the stark differences in import quantities and average prices renders the court unable to conclude that its surrogate value selection is supported by substantial evidence and reasoned explanation. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (the court’s review must take into account “the record as a whole, including evidence that . . . ‘fairly detracts from the substantiality of the evidence.’”) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

Commerce’s reasons for dismissing proffered benchmark data also lack merit. Commerce limited its benchmarking inquiry to (1) historical data from (2) countries that presently occupy the same level of economic development as the PRC. *See* I&D Mem. at 35. In so doing, Commerce failed to address several sources of evidence suggesting aberrancy within the Thai import data. Those sources included (1) current import data from other countries on Commerce’s surrogate country list;<sup>35</sup> (2) current import and domestic data from countries not on Commerce’s surrogate country list;<sup>36</sup> (3) surrogate value data from prior reviews;<sup>37</sup> and (4) export data.<sup>38</sup>

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<sup>34</sup> Bulgaria and Romania each met Commerce’s economic comparability criterion. *See* Surrogate Country Ltr. Attach. 1. At oral argument, the Government explained that Commerce’s rationale for rejecting Bulgarian import data to value anthracite coal—that Bulgaria is not a significant producer of comparable merchandise—applies equally to its selection of a surrogate value for hydrochloric acid. Oral Arg. at 59:53–1:00:53; *see also* I&D Mem. at 24. Assuming *arguendo* that the Government’s assertion does not constitute impermissible *post hoc* reasoning, there remains the Romanian import data that Commerce ignored. To that end, the Government argued that Commerce will rely on its preference for data from the primary surrogate country. Oral Arg. at 1:01:06–1:01:25. As discussed herein, however, the potential for aberrancy within the Thai data suggests a reason to look elsewhere.

<sup>35</sup> The record shows that the Thai value is 30 times higher than the POR-current Bulgarian value and 40 times higher than the POR-current Romanian value. *See* DJAC Case Br. at 42.

<sup>36</sup> Including, for example, import data from the United States reflecting an average price of \$129.22/metric ton based on 417,608 metric tons of imports. *See* DJAC Case Br. at 42–43.

<sup>37</sup> Jacobi proffered Philippine data from the fourth through sixth periods of review for comparison purposes. *See* Jacobi Case Br. at 45 & n.103 (citations omitted); Jacobi’s Surrogate Value Comments (Sept. 24, 2015) (“Jacobi Sept. 24, 2015 Surrogate Value Cmts”),

Commerce's refrain that "merely appearing" at the "high end of a range of values is not enough to make data aberrational" and concomitant refusal to address concerns arising from the stark differences in prices reflected in the first category of information, I&D Mem. at 35, "is of dubious merit when applied in this circumstance, which is the enormous disparity between the value shown in the [Thai] data and the [Bulgarian and Romanian] data," *Peer Bearing Co.-Changshan v. United States*, 35 CIT \_\_\_, 752 F. Supp. 2d 1353, 1371 (2011) (remanding for Commerce to address price disparities when its surrogate value was about three times higher than other values on the record from economically comparable countries). As to the second and third categories of information, the court has regularly rejected Commerce's conclusory dismissal of benchmarking data for lack of economic comparability. *See Jacobi (AR7) II*, Slip Op. 18–46, at 46–47 (collecting cases); *id.* at 48 (noting that "economic comparability and, thus, the usefulness of proffered benchmarks, is a matter of degree") (citing *Calgon Carbon*, 190 F. Supp. 3d at 1234; *Blue Field (Sichuan)*, 949 F. Supp. 2d at 1317).<sup>39</sup> Accordingly, this issue is remanded for Commerce to reconsider or further explain its selection of Thai import data in light of the alternatives, and to reconsider or further explain its position with respect to the proposed benchmarks and, if appropriate, reconsider its surrogate value selection in light of the proposed benchmark data.

### C. Coal Tar

Ex. SV-4, PJA Tab 5, PR 164, 188, 190–195, ECF No. 92–1 (surrogate value summaries for PORs one to six). The average HCL surrogate value Commerce relied upon for the fourth through sixth periods of review was \$490.26/metric ton. *See Jacobi Case Br.* at 45.

<sup>38</sup> Commerce rejected DJAC's Thai and Mexican POR export data for benchmarking purposes. I&D Mem. at 35 & n.183 (citation omitted). Although *Jacobi* notes Commerce's dismissal of this evidence, *see Jacobi Rule 56.2 Mem.* at 29 (summarizing proffered benchmark values), *Jacobi* does not argue that Commerce should have considered export values for purposes of benchmarking its HCL surrogate value selection, *see Jacobi Rule 56.2 Mem.* at 28–30. *Cf. id.* at 26–28 (presenting substantive arguments regarding Commerce's dismissal of export data for purposes of testing the aberrancy of Commerce's surrogate value for coal tar). Accordingly, any argument that Commerce should have relied on export values for purposes of benchmarking Commerce's HCL surrogate value is waived. *See Essar Steel*, 880 F. Supp. 2d at 1332; *Zannino*, 895 F.2d 1, 17.

<sup>39</sup> In *Jacobi (AR7) II*, the court explained that changes to Commerce's surrogate country list stemming from changes in China's GNI mean that

historical data from a current potential surrogate country may derive from a time when that country was *not* at the same level of economic development as the PRC. Commerce provides no explanation why such data might be a useful benchmark, while historical data from a country that Commerce then considered to be at the same level of economic development as the PRC may not be considered for benchmarking purposes if the country is, at present, no longer at the same level of economic development.

*Jacobi (AR7) II*, Slip Op. 18–46, at 47–48. The same rationale applies equally here.

Commerce selected Thai HS code 2706 (“Mineral Tars, Including Reconstituted Tars”) to value Jacobi’s coal tar. I&D Mem. at 39. Commerce rejected Jacobi’s arguments that Thai import data was aberrant. Reiterating its benchmarking practice discussed above, Commerce stated that the record lacked historical data from Thailand or other countries on its surrogate country list, and declined to consider coal tar values from prior reviews or export values to examine aberrancy. *Id.* at 39–40. Commerce further stated that because the Thai import value of \$1,877.59/MT was less than the Mexican import value of \$2,270.49/MT, it “is not outside the coal tar prices of other countries identified on the surrogate country list.” *Id.* at 40.<sup>40</sup> Commerce also rejected Jacobi’s argument that the Thai import data was non-specific, reasoning that Commerce has relied on HS code 2706 in past reviews and alternate surrogate values were equally specific. *Id.* at 40 & n.215 (citation omitted).

## 1. Parties’ Contentions

Jacobi contends that aberrancy within the Thai import data is demonstrated by the significant increase in price in this review as compared to surrogate values selected in the first six administrative reviews of this proceeding,<sup>41</sup> and Commerce incorrectly dismissed export data for benchmarking purposes. Jacobi Rule 56.2 Mem. at 22, 25–28. Jacobi further contends that the aberrancy is explained by the lack of specificity of imports into Thailand under the selected four-digit HS code. *Id.* at 23; *id.* at 25 (noting that all imports into Thailand pursuant to HS code 2706 were under the “other” category and did not include coal tar) (citing Jacobi Jan. 4, 2016 Surrogate Value Cmts, Ex. SV218); *see also* CAC Rule 56.2 Mem. at 33–37 (advancing similar arguments, including that aberrancy is demonstrated by evi-

<sup>40</sup> Within its discussion of benchmarking, Commerce also relied on *Clearon Corp. v. United States*, Slip Op. 15–91, 2015 WL 4978995, at \*4 (CIT Aug. 20, 2015) for the proposition that that the agency need not examine “data from non-economically comparable countries when making its surrogate value selections unless the parties provide information showing that quality data is unavailable from all of the economically comparable countries.” I&D Mem. at 39–40 & n.209 (citing *Clearon*, 2015 WL 4978995, at \*4). That particular quotation, however, is taken from the court’s discussion of Commerce’s review of potential surrogate values, not potential benchmarking values. Further in, the court opined that data from countries not on Commerce’s surrogate country list may provide useful benchmarks. *Clearon*, 2015 WL 4978995, at \*7. Commerce’s reliance on *Clearon* is, thus, misplaced.

<sup>41</sup> To support this contention, Jacobi asserts that the Federal Circuit “has explicitly recognized that past [surrogate value] decisions by Commerce are a useful tool for analyzing whether a particular [surrogate value] choice is aberrational.” Jacobi Rule 56.2 Mem. at 22 n.9 (citing *Jacobi Carbons AB v. United States*, 619 F. App’x. 992, 1005 (Fed. Cir. 2015)). The portion of the Federal Circuit opinion that Jacobi seeks to rely upon, however, is the dissenting opinion. *See id.* at 1005 (Bryson, J., dissenting). While the majority opinion contains similar language, it is dicta. The CAFC declined to address the argument because plaintiffs had not presented it to the agency. *See id.* at 1000–01.

dence that the Thai import value selected for this review is three times the Thai import value selected in the seventh administrative review); M. L. Ball Rule 56.2 Mem. at 11–13.<sup>42</sup> Jacobi asserts that Commerce should instead have selected the Philippine HS Code 270600 (“Tar Distilled from Coal . . .”) from the fifth period of review as the surrogate value. Jacobi Rule 56.2 Mem. at 25.

CAC contends that Commerce’s reliance on Mexican import data to dismiss aberrancy concerns within the Thai import data is flawed because the Mexican data is based on a small import quantity. CAC Rule 56.2 Mem. at 38. CAC further contends that Commerce failed to address the South African data on the record. *Id.* at 38; *see also* CAC Rule 56.2 Reply at 15–16.<sup>43</sup> CAC asserts that Commerce should rely upon Philippine data generally or, alternatively, South African import data to value coal tar. CAC Rule 56.2 Mem. at 38.

The Government contends that Commerce correctly rejected export values as benchmarks because “it would require an apples-to-oranges comparison of values that only include freight (i.e. the export values) with values that include cost, insurance, and freight (i.e. the Thai import statistics)” Gov. Rule 56.2 Resp. at 47. The Government further contends that Jacobi’s assertion regarding non-specificity of the Thai HS code is unsupported by citations to record evidence. *Id.* at 48.<sup>44</sup>

## 2. Commerce’s Coal Tar Surrogate Value Selection Lacks Substantial Evidence

Contrary to the Government’s assertion, Jacobi proffered evidence demonstrating that all imports into Thailand under HS code 2706

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<sup>42</sup> Jacobi and M.L. Ball also contend that Commerce ignored data from the Ukraine, a country on the agency’s surrogate country list, for benchmarking purposes. Jacobi Rule 56.2 Mem. at 27; M.L. Ball Rule 56.2 Mem. at 12–13. Commerce’s final surrogate country list omitted the Ukraine, however, in favor of Mexico. Gov. Resp. at 4, 47–48; *see also* Surrogate Country Ltr, Attach. 1.

<sup>43</sup> CAC asserts that Commerce has stated that it “will consider all relevant price information” for benchmarking purposes, and, thus, erred when it faulted Jacobi for not providing historical information from Thailand or other countries on its surrogate country list. CAC Rule 56.2 Mem. at 34. However, Commerce explained that “when presented with sufficient evidence to demonstrate a particular [surrogate value] is aberrational, and therefore unreliable, the [agency] will examine *all relevant price information* on the record, *including any appropriate benchmark data*, in order to *accurately value* the input in question.” I&D Mem. at 39 (emphasis added). Commerce’s statement regarding its consideration of “all relevant price information,” thus, pertained to its surrogate value selection. Commerce did not state that it will consider “all relevant price information” as benchmarks. *See id.*

<sup>44</sup> The Government further asserts that Jacobi failed to support its contention that Commerce relied upon “the broadest possible category.” Gov. Rule 56.2 Resp. at 48 (quoting Jacobi Rule 56.2 Mem. at 24). There is no dispute, however, that Commerce utilized a four-digit HS code, rather than a six-or eight-digit subcategory. *See* I&D Mem. at 39; Jacobi Final Results Mem., Attach. 1.

entered pursuant to HS code 2706.00.000.90 (“Other”), which did not include tar distilled from coal. Jacobi Rule 56.2 Mem. at 25 (citing Jacobi Jan. 4, 2016 Surrogate Value Cmts, Ex. SV2–18); *see also* Jacobi Jan. 4, 2016 Surrogate Value Cmts, Ex. SV2–18 at ECF pp. 116–121 (showing \$231,981<sup>45</sup> worth of POR imports into Thailand under the “other” category, and no imports into Thailand under HS codes covering tar distilled from coal).

Commerce dismissed this evidence by pointing to its reliance on HS code 2706 in past reviews when it “found it specific to [Jacobi’s] coal tar.” I&D Mem. at 40 & n.214 (citing *Certain Activated Carbon from the People’s Republic of China*, 80 Fed. Reg. 61,172 (Dep’t Commerce Oct. 9, 2015) (final results of antidumping duty admin. review; 2013–2014), and accompanying Issues and Decision Mem., A-570–904 (Oct. 2, 2015) (“AR7 I&D Mem.”), at Cmt 7); Jacobi Sept. 24, 2015 Surrogate Value Cmts, Ex. SV-4). For periods of review one through seven, however, Commerce relied upon six- or eight-digit HS codes. *See* AR7 I&D Mem. at Cmt 7 (selecting a six-digit Thai HS code); Jacobi Sept. 24, 2015 Surrogate Value Cmts, Ex. SV-4 (showing that, for the first six periods of review, Commerce selected six- or eight-digit Indian or Philippine HS codes). Moreover, prior reliance on subcategories of HS code 2706 lacks persuasive force when, as the Government recognizes, “each administrative review is a separate exercise of Commerce’s authority that allows for different conclusions based on different facts in the record.” *Jiaxing Brother Fastener Co., Ltd.*, 822 F.3d at 1299; *see also* Gov. Rule 56.2 Resp. at 48 (responding to Jacobi’s preference for Philippine data from a prior review). Although the Thai HS code 2706 ostensibly includes subheadings covering tar distilled from coal, *the record of this review* demonstrates the absence of imports pursuant to those subheadings.<sup>46</sup>

Commerce, therefore, failed to substantiate the specificity of its chosen value. *See* I&D Mem. at 39–40; Prelim. Results Surrogate Value Mem. (Feb. 29, 2016) at 4–5, PJA Tab 9, PR 367, 369, ECF No. 92–2 (establishing the coal tar surrogate value). *Cf. Jacobi Carbons AB*, 619 F. App’x. at 997 (“To determine whether a data source is product specific, Commerce compares the products covered by the

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<sup>45</sup> The court observes that the final surrogate value of \$1,877.59/MT suggests an import value based on less than 124 metric tons of coal tar (i.e., \$1,877.59 per metric ton multiplied by 123.55 metric tons equals \$231,981). Plaintiffs, however, do not argue that the Thai import value is aberrant on the basis that it is derived from a commercially insignificant quantity.

<sup>46</sup> Commerce also dismissed Jacobi’s argument on the basis that alternative surrogate values were equally specific. I&D Mem. at 40 & n.215 (citing Jacobi Sept. 24, 2015 Surrogate Value Cmts, Ex. SV-6). The cited exhibit contains South African import data for the six-digit HS code 270600, *see* Jacobi Sept. 24, 2015 Surrogate Value Cmts, Ex. SV-6, calling into question the accuracy of Commerce’s conclusion.

data source with the material input in question.”). “If a set of data is not sufficiently product specific, it is of no relevance whether or not the data satisfy the other criteria set forth in Policy Bulletin 04.1.” *Taian Ziyang Food Co., Ltd.*, 783 F. Supp. 2d at 1330 (internal quotation marks and citation omitted).

The apparent non-specificity of the Thai import value supports Plaintiffs’ assertions of aberrancy. As with Jacobi’s hydrochloric acid input, Commerce declined to benchmark the Thai value on the basis that the record lacked historical data from Thailand or other countries on the surrogate country list. I&D Mem. at 39. For the reasons discussed above, Commerce’s conclusory dismissal of proposed benchmarking data lacks merit. *See supra* Section III.B.2. Moreover, the Thai value Commerce relied upon in the instant review (\$1,877.59/MT) is almost three times the Thai value Commerce relied upon in the seventh administrative review (\$678.08/MT). *See Jacobi Case Br.* at 43. Commerce did not address this sudden and significant increase in the Thai value. *See I&D Mem.* at 40.

Additionally, the average of the surrogate values Commerce selected for the first seven administrative reviews is \$469.02/MT, with a median surrogate value of \$477.94/MT corresponding to the fifth administrative review. *See Jacobi Case Br.* at 43; CAC Rule 56.2 Mem. at 35.<sup>47</sup> The relative stability of the world market price for coal tar is further corroborated by South African data on the record, which reflects an import value of \$381.91/MT derived from more than 500 metric tons of imports. *See Jacobi Sept. 24, 2015 Surrogate Value Cmts, Exs. SV-5, SV-6.*

Commerce also declined to compare the Thai value to export values from the world’s largest coal tar exporters. I&D Mem. at 40. Export data from Poland, the Russian Federation, France, and the Ukraine reflect an average export value of \$260.57. *See Jacobi Jan. 4, 2016 Surrogate Value Cmts, Ex. SV2-1* at ECF p. 10 (POR export statistics for the world’s largest exporters of coal tar under HS code 270600); *id.*, Ex. SV2-2 at ECF pp. 97–104 (country-specific statistics). Commerce dismissed export data for benchmarking purposes on the basis that it would require a comparison of free on board export values with import values inclusive of cost, insurance, and freight. I&D Mem. at

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<sup>47</sup> Jacobi points to an average surrogate value of \$434 derived from the first six reviews. *See Jacobi Rule 56.2 Mem.* at 22; *Jacobi Case Br.* at 43. Jacobi omitted the surrogate value for the seventh administrative review on the basis that it was also derived solely from entries under the basket category that excluded tar distilled from coal. *See Jacobi Case Br.* at 43 & n.100, 44 & n.102; *Jacobi Jan. 4, 2016 Surrogate Value Cmts, Ex. SV2-18* at ECF pp.122–125 (import data corresponding to the seventh administrative review period showing that the total imports (\$5,779,617) into Thailand under HS code 2706 correspond to imports under the “other” subcategory). The relatively minor difference in averages is immaterial to the court’s discussion herein.

40. As Jacobi contends, however, the record contains market prices for ocean freight and insurance, thereby enabling Commerce to make a more “apples to apples” comparison. *See* Jacobi Rule 56.2 Mem. at 26–27; Jacobi Rule 56.2 Reply at 9; Jacobi Final Results Mem., Attach. 1; Jacobi Prelim. Analysis Mem., Attach. 1. Regardless of the exclusion of these expenses, the proffered export values corroborate the relative stability of global coal tar prices as compared to the spike in the Thai value, undermining Commerce’s refusal to undertake any benchmarking inquiry.

The only evidence Commerce cites to support the reliability of the Thai value is the even higher Mexican value of \$2,270.49/MT. I&D Mem. at 40 & n.211 (citation omitted). As CAC points out, the Mexican value is derived from a small quantity of imports, CAC Rule 56.2 Mem. at 38 (citing Pet’rs’ Submission of Mexican Surrogate Values (Sept. 24, 2015) (“Pet’rs’ Mexican Submission”) at Ex. MEX-1-A, PJA Tab 23, PR 203, ECF 92–4),<sup>48</sup> suggesting that the Mexican value may itself be unreliable. Taking into account the entirety of the record, the court cannot conclude that Commerce’s determinations that the Thai import value is reliable, specific, and, therefore, the “best available” to value Jacobi’s coal tar are supported by substantial evidence. *See Nippon Steel*, 337 F.3d at 1379 (the court’s review must consider “the record as a whole”). This issue is remanded for reconsideration or further explanation.<sup>49</sup>

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<sup>48</sup> CAC asserts that the Mexican value is based upon 33,662 kilograms of imports. CAC Rule 56.2 Mem. at 38. The cited exhibit states that the Mexican value is based upon 33,662 liters of imports, not kilograms. Pet’rs’ Mexican Submission, Ex. MEX-1-A. In any case, using the conversion supplied in the exhibit, 33,662 liters corresponds to 40,074 kilograms, or roughly 40 metric tons, and is a relatively small quantity. *See id.*

<sup>49</sup> One additional point bears addressing. CAC and M.L. Ball contend that Thai import data are unreliable on the basis of concerns expressed by the U.S. Trade Representative and U.S. companies and exporters in several reports about possible upward manipulation of Thai customs values by Thai Customs officials. CAC Rule 56.2 Mem. at 18–25; M.L. Ball Rule 56.2 Mem. at 8–10. At the administrative level, Commerce responded to these arguments saying that, although the reports speak to “the general state of Thai Customs practices, CAC has pointed to no evidence on the record which demonstrates that the specific [surrogate values] relied on . . . are the result of the alleged Thai Customs practices.” I&D Mem. at 18. The court has, in several cases, recognized the relevance of the reports to the reliability of Thai import values, though none remanded Commerce’s surrogate value or surrogate country determination on the basis of the reports. *See Jacobi (AR7) II*, Slip Op. 18–46, at 42–43 (collecting cases expressing the proposition that the reports, without more, do not sufficiently detract from Commerce’s selection of a particular surrogate value (or Thailand as the primary surrogate country) so as to find it unsupported by substantial evidence). As in *Jacobi (AR7) II*, however, “that ‘something more’ appears to exist in this case—at least so much so as to require further inquiry by Commerce than occurred here.” *Id.* at 43. That “something more” is the collection of high Thai surrogate values Commerce has selected in this case that presently lack reasoned explanation and substantial evidence in the record. Thus, “[a]lthough the concerns expressed in the trade reports do not form the sole basis of the court’s remand of this issue, they support the need for a remand for

## D. Financial Ratios

The record contained five sources of potential surrogate financial ratios: (1) 2013 statements from the Philippines; (2) 2014 statements from Malaysia; (3) a 2011 statement from Thai producer Carbokarn; (4) 2014 statements from Mexican chemical company Mexichem S.A.B. de C.V. (“Mexichem”); and (5) a 2013 statement from Romanian producer Romcarbon SA (“Romcarbon”). I&D Mem. at 45. Commerce ultimately selected Carbokarn’s statement over Jacobi’s objection that it contains evidence of countervailable subsidies. *Id.* at 46–47.<sup>50</sup>

### 1. Parties’ Contentions

Plaintiffs contend that Commerce wrongly selected Carbokarn’s financial statement to value financial ratios because it contains evidence of countervailable subsidies in the form of tax coupons, and is three years out of date. Jacobi Rule 56.2 Mem. at 31–34; Jacobi Rule 56.2 Reply at 13–15; M. L. Ball Rule 56.2 Mem. at 14–15; CAC Rule 56.2 Mem. at 39–40; CAC Rule 56.2 Reply at 11–12.<sup>51</sup> Jacobi and M. L. Ball assert that Commerce should instead select Romcarbon’s statement. Jacobi Rule 56.2 Mem. at 35; ML Ball Rule 56.2 Mem. at 15. CAC asserts that Commerce should use the Philippine financial statements. CAC Rule 56.2 Mem. at 40; CAC Rule 56.2 Reply at 12–13.

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Commerce to further explain its benchmarking methodology or reconsider its refusal to use [proffered benchmarking] data to test for aberrancy in light of indications that the Thai value[s are] unusually high.” *Id.*

<sup>50</sup> Commerce rejected the Philippine and Malaysian statements because those countries are not at the same level of economic development as China, and it had suitable surrogate financial data from the primary surrogate country, Thailand. I&D Mem. at 45. Commerce rejected Mexichem’s statement because the company does not produce identical or comparable merchandise. *Id.* at 46. With regard to Romcarbon, Commerce noted that although the company produces some subject merchandise, its principal activities involve non-comparable merchandise. *Id.* at 47. In contrast, Carbokarn produces comparable merchandise. *Id.* Although the Romcarbon statement is more contemporaneous with the period of review than the Carbokarn statement, Commerce concluded that the Carbokarn statement’s fulfillment of other criteria favored its selection. *Id.* (noting that the statement is from the primary surrogate country, publically available, and complete).

<sup>51</sup> CAC cites to *Certain Frozen Warmwater Shrimp from Thailand*, 78 Fed. Reg. 50,379 (Dep’t Commerce Aug. 19, 2013) (final neg. countervailing duty determination), and accompanying Issues and Decision Mem., C-549–828 (Aug. 12, 2013) (“*Frozen Warmwater Shrimp from Thailand*, I&D Mem.”) at 6. CAC Rule 56.2 Mem. at 40. Jacobi cites, in pertinent part, to Commerce’s Final Results Of Redetermination Pursuant To Court Remand, Court No. 10–00371, Slip Op. 15–37 (July 10, 2015) available at <http://enforcement.trade.gov/remands/15–37.pdf> (last visited April 10, 2018) (“Commerce’s Third *Gold East* Redetermination”). See Jacobi Rule 56.2 Reply at 13. The *Gold East* redetermination was conducted pursuant to the CIT’s opinion in *Gold East Paper (Jiangsu) Co. v. United States*, 39 CIT \_\_\_, 61 F. Supp. 3d 1289 (2015). See Commerce’s Third *Gold East* Redetermination at 1. It cites to *Frozen Warmwater Shrimp from Thailand* as evidence of Commerce’s determinations regarding Thailand’s tax coupon program. See *id.* at 4 & n.17.

The Government contends that Commerce correctly rejected the Philippine, Malaysian, and Romanian statements. Gov. Rule 56.2 Resp. at 53–55. The Government further contends that the record lacks evidence that Carbokarn benefitted “from a specific export program previously found to be countervailable,” or that the tax coupons referenced in Carbokarn’s statement relate to a countervailable program. *Id.* at 57.

## 2. Commerce’s Selection of Thai Surrogate Financial Ratios Lacks Substantial Evidence

Commerce has discretion to accept or reject financial statements based on evidence of countervailable subsidies. *See* I&D Mem. at 46 & n.252 (citation omitted); 19 U.S.C. § 1677b(c)(5)(2015) (affording Commerce discretion to reject surrogate values “without further investigation if [it] has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those [surrogate values]”).<sup>52</sup> *Cf. DuPont Teijin Films v. United States*, 37 CIT \_\_\_, \_\_\_, 896 F. Supp. 2d 1302, 1311–12 (2013) (sustaining Commerce’s decision to reject financial statements when specific line items reflected receipt of countervailable subsidies). However, “[t]he Supreme Court has ‘frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner . . . .’” *Allied Pac. Food (Dalian) Co. Ltd. v. United States*, 30 CIT 735, 758, 435 F. Supp. 2d 1295, 1314 (2006) (quoting *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983)). Commerce has not done so here.

In the Issues and Decision Memorandum, Commerce explained that it “it is our practice not to reject financial statements based on the grounds that the company received export subsidies unless we have previously found the specific export subsidy program to be countervailable.” I&D Mem. at 46 & n.253 (citations omitted). Commerce further concluded that the record lacked evidence that the “tax coupon receivables” identified in Carbokarn’s statement “are related to a Thai program previously found countervailable by the [agency].” I&D Mem. at 46. In *Frozen Warmwater Shrimp from Thailand*, however, Commerce “found that the receipt of tax coupons is . . .

<sup>52</sup> Section 1677b(c)(5) came into effect during the pendency of the underlying administrative proceeding. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,795 (Dep’t Commerce Aug. 6, 2015) (clarifying that § 1677b(c)(5) applies “to determinations made on or after August 6, 2015”). The codification of Commerce’s discretion to reject subsidy-tainted financial statements is not determinative, however, because the provision simply “clarifies [Commerce’s] authority for its existing practice, and does not impose any new requirements on the parties to [antidumping] proceedings.” *Id.*

countervailable,” *Frozen Warmwater Shrimp from Thailand*, I&D Mem. at 6, and, here, Carbokarn’s 2011 statement contains an entry for “[t]ax coupon receivables” in 2010 and 2011, DJAC Jan. 4, 2016 Surrogate Value Submission, Ex. 8B at ECF p. 370. Commerce’s conclusory assertion regarding the absence of evidence that the entry “relate[s] to a Thai program previously found countervailable” fails to apprise the court of the agency’s reasons for concluding that the entry bears no relation to the similarly named countervailable program. See *NMB Singapore Ltd.*, 557 F.3d at 1319. Because the court is, therefore, unable to ascertain whether Commerce reasonably exercised its discretion in this area, the issue is remanded for reconsideration or further explanation. See 19 U.S.C. § 1677b(c)(5)(2015); *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 48.<sup>53</sup>

#### IV. Irrecoverable VAT

In the Issues and Decision Memorandum, Commerce stated that, [i]n a typical VAT system, companies do not incur VAT expense for exports. Instead, they receive on export a full rebate of the VAT they pay on purchases of inputs used in the production of exports (“input VAT”) and, in the case of domestic sales, the company can credit the VAT it pays on input purchases for those sales against the VAT they collect from customers.

I&D Mem. at 7. In China, however, “some portion of the input VAT that a company pays on purchases of inputs used in the production of exports is not refunded,” which “amounts to a tax, duty or other charge imposed on exports that is not imposed on domestic sales.” *Id.* Commerce referred to this unrefunded input VAT as “irrecoverable VAT.” See *id.* Commerce further explained that its adjustment for irrecoverable VAT consists of two steps: “(1) determining the irrecoverable VAT on subject merchandise, and (2) reducing U.S. price by the amount determined in step one.” *Id.* at 8. Step one consists of applying “(1) the FOB [free on board] value of the exported good . . . to the difference between (2) the standard VAT levy rate and (3) the VAT rebate rate applicable to exported goods.” *Id.* “The first variable, export value, is unique to each respondent while the rates in (2) and (3), as well as the formula for determining irrecoverable VAT, are each explicitly set forth in Chinese law and regulations.” *Id.*

<sup>53</sup> Because the suitability of the 2011 Carbokarn statement remains an open question due to the potential presence of countervailable subsidies and Thailand’s unresolved status as a significant producer, the court cannot assess whether Commerce reasonably selected the Thai statement in favor of the alternatives. On remand, Commerce may choose to reevaluate the relative merits of each proposed source of financial ratios.

In step one, Commerce determined that “VAT is levied on inputs at a rate of 17 percent and for activated carbon there is no VAT rebate.” I&D Mem. at 8 & n.48 (citation omitted). Thus, Commerce concluded, “the irrecoverable rate is equal to the full VAT percentage.” *Id.* at 8. Additionally, Commerce determined that “a significant percentage” of Jacobi’s entered values were not a reliable proxy for the FOB value of the exported good to which it applies the irrecoverable VAT rate. *Id.* at 9–10 & n.55 (citation omitted). In those instances, Commerce applied the irrecoverable VAT adjustment to an “estimated customs value,” which Commerce defined as “ex-factory net U.S. price plus foreign movement expenses.” *Id.* at 9.

### A. Parties’ Contentions

Jacobi contends that Commerce’s VAT adjustment should be remanded for the same reasons the court remanded the matter in *Jacobi (AR7) I*. Jacobi Rule 56.2 Reply at 16–17. Jacobi further contends that Commerce’s reliance on an estimated customs value lacks any factual basis or reasoned explanation as to why an estimated customs value more accurately reflects a FOB value. Jacobi Rule 56.2 Mem. at 41–44;<sup>54</sup> see also M.L. Ball Rule 56.2 Mem. at 16–18 (advancing the same arguments). Cherishmet contends that Commerce’s VAT calculation lacks substantial evidence because the standard VAT levy rate is applied to the cost of inputs, whereas the rebate rate is applied to the cost of the finished goods. Cherishmet Rule 56.2 Mem. at iii-iv. The Government contends that Commerce’s VAT adjustment is supported by substantial evidence. Gov. Rule 56.2 Resp. at 62–67.

### B. Commerce’s VAT Adjustment Lacks Substantial Evidence

On two occasions the court has addressed Commerce’s irrecoverable VAT adjustment; each time, the court has remanded the adjustment for reconsideration or further explanation. The same result is merited here.

In *Jacobi (AR7) I*, the court found that Commerce properly may adjust for irrecoverable VAT. 222 F. Supp. 3d at 1186–88. The court, however, remanded Commerce’s VAT calculation as lacking in substantial evidence. *Id.* at 1192–94. The court pointed to Commerce’s identification of the irrecoverable VAT as unrefunded “VAT paid on

<sup>54</sup> Jacobi and M.L. Ball also challenged Commerce’s legal authority to deduct irrecoverable VAT. Jacobi Rule 56.2 Mem. at 36–40; M.L. Ball Rule 56.2 Mem. at 16. Citing the court’s opinion in *Jacobi (AR7) I*, Jacobi abandoned that challenge in its reply. Jacobi Rule 56.2 Reply at 16–17. M. L. Ball did not file a reply; however, its arguments do not persuade the court to revisit the issue.

inputs and raw materials (used in the production of exports),” *id.* at 1193 (citing I&D Mem. at 16–17, 20), and reasoned that Commerce’s calculation of irrecoverable VAT on the basis of the price of the finished good potentially overstated the adjustment, *id.* at 1193–94. On remand, Commerce again defined irrecoverable VAT as “VAT paid on *inputs* used in the production of exports that is non-refundable.” *Jacobi (AR7) II*, Slip Op. 18–46, at 54 (citation omitted) (emphasis added). That definition notwithstanding, the agency calculated the adjustment on the basis of the 17 percent *output* VAT *Jacobi* collects from its foreign customers. *Id.* at 55–56. The court remanded the issue for Commerce “to reconcile its calculation methodology with the theory underlying the irrecoverable VAT adjustment.” *Id.* at 56–57 (reasoning that “Commerce’s reliance on *Jacobi*’s output VAT rate applied to U.S. price [failed to] constitute[] substantial evidence supporting an adjustment perhaps based upon unrefunded input VAT as Commerce explained”).

Evidence submitted on the record of this segment of the proceeding persuades the court that Commerce’s adjustment suffers from the same concerns the court identified in *Jacobi (AR7) I*. Indeed, at oral argument, the Government stated that there are no material differences regarding its VAT calculations between the seventh and eighth administrative reviews. Oral Arg. at 1:56:37–1:56:51. Accordingly, the issue is remanded for Commerce to reconsider or further explain its irrecoverable VAT adjustment in accordance with *Jacobi (AR7) I* and *Jacobi (AR7) II*.<sup>55</sup>

## CONCLUSION

In accordance with the foregoing, it is hereby

**ORDERED** that Commerce’s *Final Results* are sustained with respect to the issue of economic comparability, as set forth in Discussion Section II.A above; it is further

**ORDERED** that Commerce’s *Final Results* are remanded to further address the issue of significant production, as set forth in Discussion Section II.B above; it is further

**ORDERED** that Commerce’s *Final Results* are remanded with respect to its surrogate value selections, as set forth in Discussion Section III above; it is further

**ORDERED** that Commerce’s *Final Results* are remanded to further address the issue of irrecoverable VAT, as set forth in Discussion Section IV above; it is further

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<sup>55</sup> The court defers ruling on *Jacobi*’s challenge to Commerce’s reliance on an estimated customs value as a FOB proxy pending Commerce’s redetermination.

**ORDERED** that, in the event Commerce amends the antidumping margin assigned to Jacobi, Commerce reconsider the separate rate assigned to non-mandatory respondents; it is further

**ORDERED** that Commerce shall file its second remand results on or before July 18, 2018; it is further

**ORDERED** that the deadlines provided in USCIT Rule 56.2(h) shall govern thereafter; and it is further

**ORDERED** that any opposition or supportive comments must not exceed 6,000 words.

Dated: April 19, 2018

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, JUDGE

## Slip Op. 18–48

DURUM GIDA SANYI VE TICARET A.S., Plaintiff, v. UNITED STATES,  
Defendant.

**PUBLIC VERSION**

Before: Leo M. Gordon, Judge

Court No. 16–00266

[Commerce’s *Rescission* of new shipper review sustained.]

Dated: April 24, 2018

*Mark B. Lehnardt*, Baker & Hostetler, LP, of Washington, DC, argued for the Plaintiff Durum Gida Sanyi Ve Ticaret A.Ş.

*Elizabeth A. Speck*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel were *Lydia C. Pardini*, on the brief, and *Natan P.L. Tubman*, Attorneys, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Joshua R. Morey*, Kelley Drye & Warren, LLP, of Washington, DC, argued for Defendant-Intervenors American Italian Pasta Company, New World Pasta Company, and Dakota Growers Pasta Company. With him on the brief were *Paul C. Rosenthal* and *David C. Smith*.

**OPINION****Gordon, Judge:**

This action involves the final determination of the U.S. Department of Commerce (“Commerce”) rescinding the new shipper review (“NSR”) of Plaintiff Durum Gida Sanyi Ve Ticaret A.Ş (“Plaintiff” or “Durum”) for the period of July 1, 2014 to June 30, 2015. *See Certain Pasta from Turkey*, 81 Fed. Reg. 86,701 (Dep’t of Commerce Dec. 1, 2016) (final rescission of new shipper review) (“*Rescission*”), and the accompanying Issues and Decision Memorandum, A-489–805 (Nov. 25, 2016), available at <https://enforcement.trade.gov/frn/summary/turkey/2016–28856–1.pdf> (“*Decision Memorandum*”) (last visited this date); *see also* Confidential Joint Appendix, ECF No. 38, Tab 13, CD 166<sup>1</sup> (Memorandum from Fred Baker through Erin Kearney to Scot Fullerton, Re: *Certain Pasta from the Republic of Turkey: Final Rescission of New Shipper Review*, A-489–805 (Nov. 25, 2016)) (“*Confidential Decision Memorandum*”). Before the court is Plaintiff’s

<sup>1</sup> “CD \_\_\_” refers to a document contained in the confidential administrative record.

USCIT Rule 56.2 motion for judgment on the agency record. *See* Pl.’s Rule 56.2 Mot. J. Agency R., ECF No. 27 (“Pl.’s Br.”); *see also* Def.’s Resp. to Pl.’s Rule 56.2 Mot. for J. on the Agency R., ECF No. 28 (“Def.’s Resp.”); Def.-Intervenors’ Resp. in Opp’n to Pl.’s Rule 56.2 Mot. for J. on the Agency R., ECF No. 31 (“Def.-Intervenor’s Resp.”); Pl.’s Reply in Supp. of its Rule 56.2 Mot. for J. on the Agency R., ECF No. 36 (“Pl.’s Reply Br.”).<sup>2</sup> The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),<sup>3</sup> and 28 U.S.C. § 1581(c) (2012).

### I. Standard of Review

The court sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966). Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. *Administrative Law and Practice* § 9.24[1] (3d ed. 2018). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the whole record.” 8A *West’s Fed. Forms, National Courts* § 3.6 (5th ed. 2017).

<sup>2</sup> All citations to the agency record and the parties’ briefs are to their confidential versions.

<sup>3</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.

## II. Discussion

Durum is a Turkish pasta producer who sells “certain non-egg dry pasta in packages of five pounds (2.27 kilograms) or less” that is subject to Commerce’s antidumping duty order covering certain pasta from Turkey. See Pl.’s Br. at 2 (citing *Notice of Antidumping Duty Order and Amended Final Determinations of Sales at Less Than Fair Value: Certain Pasta from Turkey*, 61 Fed. Reg. 38,545 (Dep’t of Commerce July 24, 1996)). In August 2015, Commerce accepted Durum’s request for a new shipper review predicated on an October 16, 2014 sale of pasta from Durum to a U.S. importer (the “2014 sale”). *Id.* In the course of the administrative proceeding, Commerce placed on the record certain entry documents received in response to a U.S. Customs and Border Protection (“CBP”) data query regarding a sale by Durum to a U.S.-based consignee<sup>4</sup> (the “non-POR sale”) <sup>5</sup>. See *Confidential Decision Memorandum* at 2 (citing Memorandum from Fred Baker to the File, Re: *U.S. Entry Documents – Certain Pasta from Turkey*, (July 19, 2016) (“July 19th Memo”). Petitioners American Italian Pasta Company, New World Pasta Company, and Dakota Growers Pasta Company opposed Durum’s request arguing that “Durum does not qualify for a new shipper review because CBP documents in the [July 19th Memo] show that” Durum had a non-POR sale. *Id.*

Commerce’s regulations establish the procedures that govern new shipper reviews. Pursuant to these regulations, an exporter or producer seeking an NSR must include in its initial request documentation establishing, among other things, the date on which subject merchandise of the exporter or producer making the request was first entered, or withdrawn from warehouse, for consumption, or, if the exporter or producer cannot establish the date of first entry, the date on which the exporter or producer first shipped the subject merchandise for export to the United States. 19 C.F.R. § 351.214(b)(2)(iv). New shippers must request a review within one year of the date of first entry or first shipment. 19 C.F.R. § 351.214(c).

Commerce rescinded Durum’s NSR after finding that Durum had not filed its request within one year of its first United States sale. Specifically, Commerce found that: (1) Durum had invoiced a sale of subject merchandise to a U.S.-based consignee in November 2011; (2) Durum knew that, at minimum, this non-POR sale was destined for

<sup>4</sup> Durum’s U.S.-based consignee is [ ]].

<sup>5</sup> Durum invoiced a sale of subject merchandise in November 2011, which entered the United States on [ ]]. See *Confidential Decision Memorandum* at 2.

the United States; (3) Durum had reported the non-POR sale to the U.S. Government as a consumption entry; and (4) record evidence did not substantiate Durum's claim of an agreement with its U.S.-based consignee, that Durum's shipments, including the non-POR sale, would not enter U.S. customs territory. See *Confidential Decision Memorandum* at 8–10. Because Durum did not request an NSR within one year of the non-POR sale, Commerce determined that Durum had failed to comply with 19 C.F.R. § 351.214(b)(2)(iv)(A) and 19 C.F.R. § 351.214(c). *Id.*

Durum does not challenge Commerce's methodology, but instead argues that Commerce wrongly considered Durum as the exporter of the non-POR sale. Durum contends that because Durum did not know that the non-POR sale would enter U.S. customs territory, it was not the "price discriminator" under Commerce's "knowledge test" and thus was not the exporter of the non-POR sale under Commerce's regulations. See Pl.'s Br. at 4–7. In addressing Durum's arguments, Commerce accepted that some form of the "knowledge test" could aid it in determining whether Durum was the exporter for the non-POR sale. See *Confidential Decision Memorandum* at 8. While Commerce traditionally uses the "knowledge test" to determine whether certain sales are attributable to a respondent for calculating that respondent's margins in antidumping duty proceedings, Commerce here looked to that test for guidance in evaluating Durum's claim that it was not the exporter of the non-POR sale for the purposes of 19 C.F.R. § 351.214(b)(2)(iv)(A) and 19 C.F.R. § 351.214(c). *Id.* at 8–9; see also Def.'s Resp. at 5–6. Commerce explained that under the "'knowledge test,' the basis for export price is the price at which the first party in the chain of distribution who has knowledge of the U.S. destination of the merchandise sells the subject merchandise, either directly to a U.S. purchaser or to an intermediary such as a trading company. The party making such a sale, with knowledge of the destination, is viewed as the [price discriminator and therefore the] appropriate party to be examined." *Confidential Decision Memorandum* at 4, 8.

As to Durum's knowledge of the ultimate destination of the non-POR sale, Durum relied heavily on the declaration of its Assistant General Manager Derya Akyel ("Akyel Declaration"). Commerce found that the Akyel Declaration failed to provide the support for Durum's purported lack of knowledge of the destination of that sale. Specifically, Commerce found that the declaration lacked (1) credibility in that Ms. Akyel did not appear to have been personally involved

with the non-POR sale and her name did not appear on any of the sales documentation on the record for that sale, (2) contemporaneity in that the declaration was made several years after the non-POR sale, and (3) any accompanying supporting documentation contemporaneous with or prior to the non-POR sale. *See Confidential Decision Memorandum* at 10.

Before the court, Plaintiff challenges Commerce's determination that Durum had knowledge of the nature and ultimate destination of the non-POR sale (i.e., that the pasta shipment would enter U.S. customs territory). Pl.'s Br. at 18–25. Specifically, Durum contends that Commerce improperly discounted the Akyel Declaration, maintaining that the declaration is “the only record evidence that specifically addresses Durum's knowledge of where the sales were ultimately destined.” *Id.* at 21. Contrary to Commerce's findings about Ms. Akyel's involvement in the non-POR sale, Durum contends that the record shows that her signature does appear on several of the non-POR sale documents, “albeit faint in some places.” *Id.* at 21. Durum argues that given these signatures and the declarant's statement that she had “personal knowledge” of the non-POR sale, the *Rescission* determination must be remanded so that Commerce can reconsider the Akyel Declaration and attribute to it significant evidentiary weight. *Id.* at 22.

The court disagrees. Commerce reasonably explained that it had concerns regarding the credibility and contemporaneity of the Akyel Declaration. *See Confidential Decision Memorandum* at 10. Commerce explained that “it is the Department's practice to attach more weight to documentary evidence than to statements such as declarations,” and that Durum failed to provide contemporaneous documentary evidence that would support Ms. Akyel's assertions with respect to Durum's knowledge at the time of the non-POR sale. *Id.* (explaining that Commerce discounts post-hoc declarations in favor of contemporaneous documentary evidence because the latter is “more probative, reliable and verifiable” (quoting *Grain-Oriented Electrical Steel From the Czech Republic: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 79 Fed. Reg. 58324 (Sept. 29, 2014))). Durum fails to establish how Commerce's stated practice of attaching “more weight to documentary evidence than to statements such as declarations” was unreasonable in light of the record. *Id.*

Moreover, despite Durum's contentions that the signatures on the documents in the July 19th Memo were “easily-readable,” the record supports Commerce's finding to the contrary. Any appearance of Ms.

Akyel's signature on those documents is "faint" and arguably illegible. *See Confidential Joint Appendix, ECF No. 38, Tab 3, CD 144–47 (July 19th Memo)*. Durum has failed to demonstrate that the record leads to one and only one conclusion, namely that Ms. Akyel signed and was personally connected to the non-POR sale and its documentation. Accordingly, the court holds that Commerce's consideration of the Akyel Declaration and the entry documents in the July 19th Memo was reasonable.

Durum also contends that Commerce disregarded other information in the record indicating that the non-POR sale was intended for consumption on cruise ships via bonded transfer through a Foreign Trade Zone and that Durum did not know that its product would enter U.S. customs territory. Pl.'s Br. at 22–23. Specifically, Durum argues that Commerce overlooked "obvious" information in the record when it suggested that the destination port for the non-POR sale was either Port A or Port B.<sup>6</sup> *Id.* (citing *Confidential Decision Memorandum* at 9). Durum's claim is misplaced as not only was Commerce's reading of the record correct (i.e., at least one non-POR sale document did in fact indicate Port B, as a potential port of destination), but also, Commerce accepted Durum's argument that the port of destination was Port A and evaluated the record evidence in light of that fact. *See Confidential Decision Memorandum* at 9.

Commerce explained that it assigned significant evidentiary weight to the entry documents from CBP and as well as an FDA entry notice associated with the non-POR sale, and found that "Durum made a shipment of subject merchandise that entered the United States on [[ ]], and that it knew the shipment was destined for a customer located in the United States." *Id.* at 10. The record additionally confirmed that the non-POR sale entered the United States as a consumption entry. *Id.*

Durum contends that Commerce failed to consider that portion of the record that fairly detracts from Commerce's finding that Durum knew the non-POR sale would enter U.S. customs territory. *See Pl.'s Br.* at 23–25. Specifically, Durum argues that its communications and pattern of sales with the parties involved in the non-POR sale support Durum's position that sales with these parties were intended to avoid U.S. customs territory by entering a Foreign Trade Zone ("FTZ") for subsequent loading onto cruise ships. *Id.* at 10, 23–25. Even though the non-POR sale was processed and entered as a consumption entry, Durum nevertheless suggests that the court should recognize the

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<sup>6</sup> Port A is [[

]], and Port B is [[

]].

consumption entry as a “mistake” given that subsequent sales to the same parties did not appear in CBP data searches. *Id.* at 24. The court declines Durum’s invitation. Durum’s arguments all depend on documentation that Commerce found was not contemporaneous with the non-POR sale. In fact, all of Durum’s documentation and pattern of trade evidence post-dates the non-POR sale at issue. *See Confidential Decision Memorandum* at 9–10. While Durum may have *speculated* that the non-POR sale would not enter U.S. customs territory, Durum’s proffered information fails to establish that Durum “had no knowledge that the [non-POR sale] would enter U.S. customs territory.” *Id.*

Durum’s position is weakened by a document from Durum’s own evidentiary submissions that directly support Commerce’s finding that Durum knew its non-POR sale would enter the U.S. as a “consumption entry.” *See Confidential Joint Appendix*, ECF No. 38, Tab 6, Att. 2, CD 152–153 (Durum’s administrative rebuttal brief and attachment of an FDA Prior Notice Entry Confirmation (“FDA Notice”). Specifically, Durum placed on the record an FDA Prior Notice Entry Confirmation, submitted to the FDA in connection with the non-POR sale, which directs the holder to “print this Web Entry Summary Confirmation and present it to U.S. Customs and Border Protection (CBP) or the Food and Drug Administration (FDA) at the Port of Arrival.” *Id.* The FDA Notice identifies the “Submitter” as Durum and identifies the “Entry Type” as “Consumption.” *Id.* Accordingly, the record provides support for Commerce’s conclusion that Durum knew the non-POR sale would enter U.S. customs territory because Durum affirmatively represented to the U.S. Government that the non-POR sale was a consumption entry. *See Confidential Decision Memorandum* at 9 & n.27 (citing the FDA Notice and determining that “record facts support a conclusion that Durum had knowledge of the U.S. destination of its [non-POR] sale and being the appropriate party to be examined in this NSR”).<sup>7</sup>

Durum next contends that the Government in its response brief improperly relies on the FDA Notice, arguing that the Government is attempting to use the FDA Notice in a post-hoc fashion to indicate Durum’s state of mind, despite Commerce only having cited the FDA

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<sup>7</sup> Durum’s counsel suggested at oral argument that there was no evidence that Durum ever actually submitted this FDA Notice to the Government. *See Oral Argument* at 27:20–29:22, ECF No. 45 (Apr. 5, 2018). This argument fails given that the totality of the document indicates on its face that it was submitted to the FDA in December 2011, lists Durum as the “Submitter,” and identifies the entry type as “Consumption.” *See FDA Notice*; *Oral Arg.* at 36:55–38:00.



Durum asserts that despite the information in the CBP entry documents and the FDA Notice supporting Commerce's knowledge finding, Commerce nevertheless lacked adequate record information to support a finding that Durum knew of the destination of the non-POR sale under the "knowledge test." See Pl.'s Br. at 19–22. In particular, Durum relies on *Hiep Thanh Seafood Joint Stock Co. v. United States*, 35 CIT \_\_\_, 781 F. Supp. 2d 1366 (2011) ("*Hiep Thanh II*"), for the proposition that Commerce's "knowledge test" demands more than circumstantial evidence for a finding of knowledge. Pl.'s Br. at 19. Plaintiff's reliance on *Hiep Thanh II* is misplaced, as Plaintiff ignores key factual distinctions between the decision in *Hiep Thanh II* and this case.

In *Hiep Thanh II*, the court was not presented with an untimely request for a new shipper review. Rather, in that case, Commerce analyzed whether certain sales should have been included in the respondent's margin calculation as part of the respondent's U.S. sales database. *Hiep Thanh II*, 35 CIT at \_\_\_, 781 F. Supp. 2d at 1369. In considering Commerce's analysis, the court concluded that Commerce failed to consider all of the record evidence when evaluating whether the respondent had knowledge of the destination of those sales. *Id.* at \_\_\_, 781 F. Supp. 2d at 1372–73.

In this matter, unlike in *Hiep Thanh II*, Durum knew that its customer was a U.S. company. See *Confidential Decision Memorandum* at 9–10. Furthermore, in *Hiep Thanh II*, commercial invoices and packing lists on that record "name[d] the Mexican customer and specify[ed] the ultimate destination of the product as 'Mexico via [a port within the United States].'" *Hiep Thanh II*, 35 CIT at \_\_\_, 781 F. Supp. 2d at 1370. Here, the circumstances are different. Durum's commercial invoices, bills of lading, packing lists, and other associated documents for the non-POR sale indicated delivery to the U.S. based consignee at Port A, with no further indication regarding the ultimate destination of the shipment. An additional distinction is Durum's own representation, to the FDA, that the non-POR sale would arrive at Port Everglades and be a consumption entry. See FDA Notice. Furthermore, unlike *Hiep Thanh II*, Commerce considered all of the record evidence and reasonably concluded that: (1) contemporaneous documentary evidence, such as Durum's statement to the FDA, supported a finding that Durum knew the non-POR sale would enter the United States as a consumption entry; and (2) the record evidence did not support Durum's claim that it expected the merchandise to never "technically" enter U.S. customs territory.

Finally, Durum's reliance on *Hiep Thanh II* ignores the subsequent history of that case in which the court sustained Commerce's determination, noting that the respondent had "shipped merchandise covered by an antidumping duty order to a U.S. port ... without any qualification or limitation against U.S. entry." See *Hiep Thanh Seafood Joint Stock v. United States*, 36 CIT \_\_\_, \_\_\_, 821 F. Supp. 2d 1335, 1340 (2012) ("*Hiep Thanh III*"). Here, as in *Hiep Thanh III*, Durum failed to establish on the record that the non-POR sale was never intended to enter U.S. customs territory. Moreover, Commerce's determination in this matter, as in *Hiep Thanh III*, reflects a simple but clear policy objective to discourage respondents who deliver subject merchandise directly to the United States from bypassing Commerce's regulatory limitations on obtaining a new shipper review by pleading ignorance of previous consumption entries. Cf. *Hiep Thanh III*, 36 CIT at \_\_\_, 821 F. Supp. 2d at 1341.

Ultimately, the court observes that Durum's position—that it understood the non-POR sale would travel through an FTZ before delivery to cruise ships technically outside of U.S. customs territory—is *one reasonable conclusion* that could be drawn from this record. However, for Durum to prevail the record must lead a reasonable mind to draw one and only one conclusion: Durum had no knowledge that the non-POR sale would enter U.S. customs territory. That conclusion, in turn, depends upon inferences to be drawn from the available record evidence—inferences that must compete with direct record evidence and other inferences (having perhaps an equal or better claim) that Durum knew at the time of the non-POR sale that the sale would enter the U.S. as a consumption entry. See, e.g., *Hiep Thanh III*, 36 CIT at \_\_\_, 821 F. Supp. 2d at 1340; see also *Tianjin Wanhua Co. v. United States*, 41 CIT \_\_\_, \_\_\_, 253 F. Supp. 3d 1318, 1328 (2017) (emphasizing that claimants challenging Commerce's determinations must demonstrate that their position is the "one and only reasonable" option on the record); *Mitsubishi Heavy Indus. Ltd. v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (quoting *Consolidated Edison, Co. v. NLRB*, 305 U.S. 197, 229 (1938))). Here, Commerce reasonably concluded that the CBP entry documents, together with the FDA Notice, supported the finding that Durum made the non-POR sale with knowledge that the sale would enter U.S. customs territory, despite the Akyel Declaration and Durum's other evidence supporting a contrary conclusion. See *Confidential Decision Memorandum* at 9–10. Accordingly, the court sustains the *Rescission*.

### III. Conclusion

Based on the foregoing, the court sustains Commerce's *Rescission*.  
Judgment will enter accordingly.

Dated: April 24, 2018  
New York, New York

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