

# U.S. Court of International Trade

Slip Op. 20–3

UNITED STATES, Plaintiff, v. HARVIC INTERNATIONAL, LTD., Defendant.

Before: Leo M. Gordon, Judge  
Court No. 16–00273

[Denying the parties' cross-motions for summary judgment.]

Dated: January 3, 2020

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*Michael T. Cone* and *Richard B. Cohen*, FisherBroyles, LLP of New York, NY for Defendant Harvic International, Ltd.

## OPINION and ORDER

### Gordon, Judge:

In this action, Plaintiff United States (“the Government”) seeks to recover the maximum allowable civil penalty for a non-revenue-loss violation of Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012),<sup>1</sup> stemming from entries of wearing apparel (the “subject merchandise”), allegedly transshipped from the People’s Republic of China (“China”) through Bangladesh, the Philippines, or Korea, which Defendant Harvic International, Ltd. (“Harvic”) entered into the commerce of the United States in 2006 and 2007. *See* Compl. ¶¶ 5–9, ECF No. 2. Before the court are the parties’ cross-motions for summary judgment. *See* Harvic’s Mot. for Summ. J., ECF No. 57 (“Def.’s MSJ”); Pl.’s Resp. in Opp’n to Harvic’s Mot. for Summ. J. and Cross-Mot. for Summ. J., ECF No. 64 (“Pl.’s XMSJ”); *see also* Harvic’s Combined Reply in Supp. of its Mot. for Summ. J. and Resp. in Opp’n to Pl.’s Cross-Mot. for Summ. J., ECF No. 75 (“Def.’s Reply”); Pl.’s Reply in Supp. of its Mot. for Summ. J., ECF No. 85 (“Pl.’s Reply”). The court has jurisdiction pursuant to 28 U.S.C. § 1582(1). For the reasons set forth below, the court denies the parties’ cross-motions for summary judgment.

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<sup>1</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.

## I. Undisputed Facts

The parties submitted separate statements of undisputed material facts pursuant to USCIT Rules 56(c)(1)(A) and 56.3(a). *See* Def. Harvic's Statement of Mat. Facts not in Dispute Pursuant to USCIT Rule 56.3 ("DSOF"), ECF No. 57–8; Pl.'s Resp. to Def.'s Rule 56.3 Statement ("Pl.'s Resp. to DSOF"), ECF No. 72; Pl.'s Statement of Mat. Facts not in Dispute Pursuant to USCIT Rule 56.3 ("PSOF"), ECF No. 65; Def. Harvic's Resp. to Pl.'s Rule 56.3 Statement ("Def.'s Resp. to PSOF"), ECF No. 76. Pursuant to USCIT Rule 56(e)(2) "[i]f a party fails to properly . . . address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion." The following material facts are not genuinely in dispute.

In November 2005, the United States and China executed a Memorandum of Understanding ("MOU") regarding trade in textile and apparel products. PSOF ¶ 36; Def.'s Resp. to PSOF ¶ 36. That MOU established quotas for certain cotton, wool, man-made fiber, silk blend, and other vegetable fiber textiles and textile products produced or manufactured in China and exported to the United States from January 1, 2006 through December 31, 2008. PSOF ¶ 36; Def.'s Resp. to PSOF ¶ 36. As to imports during that period, U.S. Customs and Border Protection ("Customs" or "CBP") knew that there were illegal transshipments of Chinese textiles and textile apparel into the United States and developed a methodology to identify and "back-track" those illegal shipments. PSOF ¶¶ 37, 43; Def.'s Resp. to PSOF ¶¶ 37, 43. Because of concerns over violations of the MOU, CBP investigated these illegal transshipments. PSOF ¶ 38; Def.'s Resp. to PSOF ¶ 38.

Between January 2006 and September 2007, Harvic made 57 entries of the subject merchandise valued at \$4,050,429.00 (the "subject entries"). PSOF ¶¶ 23–24, 35; Def.'s Resp. to PSOF ¶¶ 23–24, 35. The subject entries were transported to the United States by shipping companies Hanjin Shipping Company ("Hanjin") and Hyundai Merchant Marine Co. Ltd. ("Hyundai"). PSOF ¶ 61; Def.'s Resp. to PSOF ¶ 61. Harvic filed entry documentation indicating that the subject merchandise originated in Bangladesh, the Philippines, or Korea. DSOF ¶¶ 3–4; Pl.'s Resp. to DSOF ¶¶ 3–4. Specifically, Harvic declared the Philippines as the country of origin for 38 of the 57 subject entries, Bangladesh for 18 entries, and Korea for one entry. PSOF ¶ 24; Def.'s Resp. to PSOF ¶ 24.

As part of its investigation, CBP requested bills of lading and other documents from numerous shipping companies, including Hanjin and Hyundai, for thousands of shipments of textile goods that entered the

United States between 2006 and 2010. PSOF ¶¶ 46, 47; Def.'s Resp. to PSOF ¶¶ 46, 47. Among the many documents obtained, CBP received bills of lading from Hanjin and Hyundai (the "Hanjin/Hyundai bills of lading") that appear to correspond to the subject entries. PSOF ¶ 61; Def.'s Resp. to PSOF ¶ 61. The Hanjin/Hyundai bills of lading reflect the movement of sealed containers of subject merchandise that were loaded onto vessels in ports in China, shipped to ports in third countries, loaded onto other vessels in those third countries, and then shipped to the United States.<sup>2</sup> PSOF ¶ 58; Def.'s Resp. to PSOF ¶ 58; *see also* CBP Oct. 9, 2009 Transshipment Memorandum, ECF Nos. 66–2 & 66–3.

During its investigation, Customs also sought information from Harvic regarding the subject entries. PSOF ¶ 59; Def.'s Resp. to PSOF ¶ 59. In response, Harvic produced an entry summary, a bill of lading, and a multi-country declaration for each entry (the "Harvic entry documents"). PSOF ¶ 60; Def.'s Resp. to PSOF ¶ 60; *see also* Harvic International, Ltd. Jan. 26, 2010 Response to Requests for Information, ECF Nos. 66–7, 66–8 & 66–9. These documents identify the subject entries as being produced by various manufacturers in Bangladesh, the Philippines, or Korea. PSOF ¶ 25; Def.'s Resp. to PSOF ¶ 25.

CBP reviewed the Harvic entry documents and compared them to the Hanjin/Hyundai bills of lading. PSOF ¶ 61; Def.'s Resp. to PSOF ¶ 61. The comparison showed that Harvic's documentation did not substantiate its country of origin declarations. PSOF ¶ 62; Def.'s Resp. to PSOF ¶ 62. Consequently, Customs issued a pre-penalty notice advising Harvic that CBP was contemplating a penalty in the amount of \$1,620,171.60, an amount that represented 40 percent of the dutiable value of the subject merchandise, based upon a culpability level of gross negligence. PSOF ¶ 68; Def.'s Resp. to PSOF ¶ 68. Harvic responded to the pre-penalty notice. PSOF ¶ 69; Def.'s Resp. to PSOF ¶ 69. CBP then issued a notice of penalty to Harvic for violations of 19 U.S.C. § 1592, alleging a culpability level of negligence and assessing a penalty in the amount of \$405,042.90, which represented 10 percent of the dutiable value of the subject merchandise. PSOF ¶ 70; Def.'s Resp. to PSOF ¶ 70.

Harvic submitted a petition in response to the penalty notice, but Customs declined to mitigate the penalty. PSOF ¶¶ 71, 72; Def.'s Resp. to PSOF ¶¶ 71, 72. Subsequently, CBP sent several demands to Harvic for payment of the \$405,042.90 penalty. PSOF ¶¶ 73–74; Def.'s Resp. to PSOF ¶¶ 73–74. To date, Harvic has not paid any of the

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<sup>2</sup> Notwithstanding Harvic's evidentiary objections, the contents of the Hanjin/Hyundai bills of lading are not genuinely in dispute. *See* USCIT R. 56(e).

penalty demanded by CBP. PSOF ¶ 75; Def.'s Resp. to PSOF ¶ 75. In December 2016, the Government commenced this enforcement action, seeking a civil penalty of \$405,042.90, plus interest and costs. Compl. ¶¶ 28–29.

## II. Standard of Review

The U.S. Court of International Trade reviews all issues in actions brought for the recovery of a monetary penalty under 19 U.S.C. § 1592 de novo, including the amount of any penalty. 19 U.S.C. § 1592(e)(1); *see also United States v. ITT Indus., Inc.*, 28 CIT 1028, 1034–35, 343 F. Supp. 2d 1322, 1329 (2004), *aff'd*, 168 F. App'x 942 (Fed. Cir. 2006). USCIT Rule 56 permits summary judgment when “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). In considering whether material facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Anderson*, 477 U.S. at 261 n.2; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). On materiality, “the substantive law will identify which facts are material.” *Anderson*, 477 U.S. at 248. “Where, as here, parties cross-move for summary judgment, each party carries the burden on its own motion to show entitlement to judgment as a matter of law after demonstrating the absence of any genuine disputes over material facts.” *Suntec Indus. Co. v. United States*, 40 CIT \_\_\_, 2016 WL 1621088, at \*2 (Apr. 21, 2016) (internal quotation marks and citations omitted), *aff'd*, 857 F.3d 1363 (Fed. Cir. 2017).

## III. Discussion

### A. Harvic's Motion for Summary Judgment

Under 19 U.S.C. § 1592(a), “no person, by ... negligence[,] ... may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of ... any document or electronically transmitted data or information, written or oral statement, or act which is material and false.” 19 U.S.C. § 1592(a)(1). A document, statement, or act is material if it has the potential to interfere with the administration of a quantitative limitation, *i.e.*, a quota. *United States v. Inner Beauty Int'l (USA) Ltd.*, 35 CIT 1693, 1697 (2011) (citing *United States v. Rockwell Int'l Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986) (holding false statement of country of origin to be material); 19 C.F.R. Part 171, App. B § (B) (“A document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing agency action including ...

[d]etermination of the classification, appraisal, or admissibility of merchandise....”). In an enforcement action where the monetary penalty is based on negligence, “the United States [has] the burden of proof to establish the act or omission constituting the violation [of § 1592(a)], and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.” 19 U.S.C. § 1592(e)(4).

Harvic contends that the Government has not and cannot meet its statutory burden of proof under 19 U.S.C. § 1592(a). *See* Def.’s MSJ at 8. Harvic maintains that the Government has no admissible evidence to show that the subject entries originated in China. *See* Def.’s MSJ at 2, 8–10. Although Harvic acknowledges that the disputed Hanjin/Hyundai bills of lading constitute “evidence . . . to support the specific allegation that the 57 specific entries of wearing apparel originated in China[,]” Harvic argues that the Hanjin/Hyundai bills of lading are inadmissible hearsay and that the Government has no other evidence to support its claim. Def.’s MSJ at 9.

Hearsay is an out of court statement offered “to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801(c). Hearsay generally cannot be considered on a motion for summary judgment, unless a federal statute, the Federal Rules of Evidence, or other rule prescribed by the Supreme Court provides otherwise. *See* Fed. R. Evid. 802. “[F]or summary judgment purposes, the inquiry is whether the cited evidence may be reduced to admissible form, not whether it is admissible in the form submitted at the summary judgment stage.” *United States v. Univar USA Inc.*, 42 CIT \_\_\_, 355 F. Supp. 3d 1225, 1236 (2018) (internal citation and quotation marks omitted).

The Government does not dispute Harvic’s contention that the Hanjin/Hyundai bills of lading are hearsay, *i.e.*, they contain out of court statements submitted as evidence to establish that the subject entries originated in China. *See* Def.’s MSJ at 19–20. However, the Government maintains that the Hanjin/Hyundai bills of lading fall under a hearsay exception for “records of a regularly conducted business activity.” *Id.* at 21–22 (citing Fed. R. Evid. 803(6) (“Rule 803(6)”). Rule 803(6) provides:

**(6) Records of Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

**(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge;

**(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6). “It is well-established that the business records exception has been construed generously in favor of admissibility.” *Home Depot, U.S.A., Inc. v. United States*, 30 CIT 445, 454, 427 F. Supp. 2d 1278, 1288 (2006) (citation omitted), *aff’d*, 491 F.3d 1334 (Fed. Cir. 2007).

The Government argues that “although [the Hanjin/Hyundai] bills of lading are third-party documents, and the shipping companies are not parties to this action, such documents are CBP business records and fall within the business records exception to the prohibition against hearsay.” Pl.’s XMSJ at 13. Specifically, the Government maintains that it has laid the foundation for the Hanjin/Hyundai bills of lading pursuant to Rule 803(6) and the incorporation doctrine. *See id.* at 22–27 (arguing that Hanjin/Hyundai bills of lading are admissible hearsay pursuant to Rule 803(6) and incorporation doctrine of *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1343 (Fed. Cir. 1999)). Harvic disputes the Government’s reliance on *Air Land Forwarders*, contending that the incorporation doctrine does not apply to law enforcement files or law enforcement investigations that lead to civil penalties, and that the Government has failed to obtain a certification from a qualifying witness pursuant to Rule 803(6)(D). *See Def.’s Reply* at 11–19.

The incorporation doctrine allows documents generated by a third-party to be admitted if: (a) the proffering entity incorporated the records of another entity into its own; (b) the proffering entity relied upon those records in its day-to-day operations; (c) there are other circumstances indicating the trustworthiness of the document; (d) the sponsoring witness from the proffering entity is familiar with the relevant procedures used by the entity that prepared the records in question; and (e) other requirements of the business records exception are satisfied, *i.e.*, Rule 803(6)(A)–(C). *Air Land Forwarders*, 172 F.3d at 1343–44.

To demonstrate that the Hanjin/Hyundai bills of lading meet the *Air Land Forwarders* test, the Government relies on two declarations

attached to its cross-motion for summary judgment. *See* Decl. of Brian F. Fennessy, ECF No. 66–1 (“Fennessy Decl.”); Decl. of Judy Linh Staudt, ECF No. 66–4 (“Staudt Decl.”).<sup>3</sup> Mr. Fennessy, as the Branch Chief of the Textile Enforcement and Operations Division of CBP from 2004–2010, describes how CBP requested, obtained, and relied upon information from shipping companies, including Hanjin and Hyundai, in its efforts to combat illegal transshipments of Chinese textiles and textile apparel. *See generally* Fennessy Decl. Ms. Staudt, a Supervisory Import Specialist at CBP responsible for textiles and textile apparel from 2006–2011, also details how CBP regularly gathers, maintains, and reviews entry records and documents including bills of lading. *See generally* Staudt Decl. Notably, Harvic does not provide any argument as to why the Hanjin/Hyundai bills of lading would not qualify for the business records hearsay exception of Rule 803(6) and the incorporation doctrine under *Air Land Forwarders*. *See generally* Def.’s Reply.

Addressing the incorporation factor of *Air Land Forwarders*, the Government demonstrates that Customs received information and documents from shipping companies that assisted Customs in combating illegal transshipments of Chinese textiles and textile apparel. Fennessy Decl. ¶¶ 12,14. The Government also shows that Customs routinely obtains bills of lading from private shipping companies, such as Hanjin and Hyundai. Staudt Decl. ¶¶ 30–31. These private shipping companies transmit manifest data, including bills of lading numbers, to Customs prior to entry, which Customs incorporates into its records. *Id.* at ¶¶ 30–32.

As to the reliance factor, the Government submits that Customs relied on the information, including bills of lading, obtained from shipping companies in its regular operations. *See* Fennessy Decl. ¶¶ 10–16, 22–26. Additionally, the Government confirms that Customs routinely examined records, such as shipping company bills of lading, in its administration of trade laws and that the accuracy of this information is important because it can impact revenue and trade policy. *See* Staudt Decl. ¶¶ 26–27.

<sup>3</sup> In its opening brief, Harvic argues that “the business records exception cannot save the Government here” because “the Government has not disclosed any person who” can lay a sufficient foundation for the admission of the bills of lading, and “it is far too late” for the Government to now identify such a person. Def.’s MSJ at 9–10. Harvic’s contention is at odds with the applicable burden that the Government must meet to survive a motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (“We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.... Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c)....”). USCIT Rule 56 specifically permits the non-moving party to produce certain evidence in order to avoid summary judgment. Harvic fails to identify any authority to support its argument to the contrary. *See generally* Def.’s MSJ; Def.’s Reply.

Regarding the trustworthiness factor, Hanjin and Hyundai provided Customs with access to their electronic databases from which Customs obtained the Hanjin/Hyundai bills of lading. Fennessy Decl. ¶¶ 31–37. The Hanjin/Hyundai bills of lading contained information corresponding to the subject entries, including substantially the same information regarding the cargo count, weight, measurement, and description as that provided in Harvic’s entry documents. *Id.* Additionally, by law, carriers and shipping companies are required to maintain their CBP records and entry documents for five years from the entry, and these records must be capable of being retrieved upon lawful request or demand by CBP. *See* Staudt Decl. ¶¶ 17–26; *see also Lewis v. Baker*, 526 F.2d 470, 473–74 (2d Cir. 1975) (noting fact that monthly accident reports were prepared pursuant to federal regulatory requirement provided indicia of reliability and supported admissibility, stating, “[i]t would ill become a court to say that the regular making of reports required by law is not in the regular course of business.” (internal citation and quotation marks omitted)).

As to the sponsoring witness factor, “[c]ourts have made clear...that the ‘custodian or other qualified witness’ who must authenticate business records need not be the person who prepared or maintained the records, or even an employee of the record-keeping entity, as long as the witness understands the system used to prepare the records.” *Conoco Inc. v. Dep’t of Energy*, 99 F.3d 387, 391 (Fed. Cir. 1996), *as amended on reh’g in part* (Jan. 2, 1997) (aggregating cases). Furthermore, under Rule 803(6) a government employee may provide a foundation for a third-party document when that employee is familiar with the underlying record-keeping system. *See Air Land Forwarders*, 172 F.3d at 1344; *see also United States v. Collado*, 439 F. App’x. 845, 848 (11th Cir. 2011) (“Nor is it required that the records be prepared by the business which has custody of them.” (internal citation and quotation marks omitted)).

Mr. Fennessy is a Customs supervisory field operations specialist with approximately 31 years of experience working with trade and import laws. *See* Fennessy Decl. ¶¶ 1–7. Mr. Fennessy declares that in his work as CBP’s Branch Chief for Textile Policy in the Textile Enforcement and Operations Division from 2004–2010, it was his “regular practice in the Textile Policy branch to obtain, review, and rely upon information and documents from foreign governments, industry advisors, freight forwarders, shipping companies, and others to determine whether shipments of textiles and apparel had been or were being entered into the United States in contravention of quotas and other customs laws.” *Id.* at ¶ 10. Specifically, Mr. Fennessy states that he requested thousands of bills of lading and other re-

ords, including the Hanjin/Hyundai bills of lading, as part of his office's "systematic examinations and research related to illegal transshipments of textiles and apparel." *Id.* at ¶¶ 10, 31–42. Mr. Fennessy details his extensive experience and training that demonstrates that he is able to evaluate the veracity of questionable entry documents, including bills of lading. *See id.* at ¶¶ 14–25; *cf. Air Land Forwarders*, 172 F.3d at 1344–45 (finding that government witness provided adequate foundation for admission of third-party repair estimates by testifying that "Military Claims Office personnel were responsible for becoming familiar with the competency of estimators in the local area and the estimating process in general, thus enabling them to reject questionable estimates.").

As to the final factor, it is undisputed that the Hanjin/Hyundai bills of lading satisfy the requirements of Rule 803(6)(A)–(C). Hanjin and Hyundai created the Hanjin/Hyundai bills of lading to facilitate the shipment of the subject entries from abroad to the United States. PSOF ¶ 61; Def.'s Resp. to PSOF ¶ 61; Staudt Decl. ¶ 32; Fennessy Decl. ¶¶ 31–38; *see* Fed. R. Evid. 803(6)(A). Further, as shippers of goods to the United States, Hanjin and Hyundai kept the Hanjin/Hyundai bills of lading in the course of their regular business. *See* Fennessy Decl. ¶¶ 23, 31–38; Staudt Decl. ¶¶ 17–26. It was the regular practice of Hyundai and Hanjin to make bills of lading, including the Hanjin/Hyundai bills of lading. *See* Staudt Decl. ¶¶ 9–27, 32; *see also* Fennessy Decl. ¶ 23.

The court notes that Harvic failed to rebut the Fennessy and Staudt declarations. The court therefore concludes that the Government has shown that Customs incorporated entry documents, including the Hanjin/Hyundai bills of lading, into its own records and relied on those records in its day-to-day administration of customs laws and policies. The Fennessy and Staudt declarations further show that Hanjin/Hyundai bills of lading have indicia of reliability and trustworthiness and otherwise satisfy the requirements of Rule 803(6)(A)–(C). Accordingly, the court agrees that the Hanjin/Hyundai bills of lading may be reduced to admissible form pursuant to Rule 803(6) and *Air Land Forwarders*.

Rather than respond to Plaintiff's arguments on the *Air Land Forwarders* test, Harvic contends that the incorporation doctrine is wholly inapplicable here. Harvic maintains that "*Air Land Forwarders* is not so broad as to permit the Government to admit as CBP business records documents collected in a law enforcement investigation." Def.'s Reply at 11–14. Harvic argues that in *Air Land Forwarders* the U.S. Court of Appeals for the Federal Circuit explained that "its holding did not support a broad theory that information and

documents collected by a law enforcement agency in an investigation were somehow admissible as business records of the law enforcement agency.” See Def.’s Reply at 13.

Harvic misconstrues the holding in *Air Land Forwarders*. The Federal Circuit did *not* hold that documents collected by a law enforcement agency investigating illegal activity fall can never qualify for admissibility under the incorporation doctrine of the business records exception. See *Air Land Forwarders*, 172 F.3d at 1344 (explaining why incorporation doctrine would not broadly apply to all law enforcement records used in criminal prosecutions because law enforcement records prepared “for the purpose of prosecuting a criminal defendant ... lack the other assurances of credibility and trustworthiness that our holding requires for admissibility of incorporated documents prepared by third parties.”). Rather, as explained above, the court in *Air Land Forwarders* held that records prepared by a third-party may be introduced as excepted hearsay under Rule 803(6) “where an organization incorporated the records of another entity into its own, relied upon those records in its day-to-day operations, and where there are other strong indicia of reliability.” *Id.*

Here, the Hanjin/Hyundai bills of lading were created by private shipping companies that transported the subject entries to the United States. Therefore, like the third-party records in *Air Land Forwarders*, the bills of lading were created by disinterested private third-parties in the routine course of their business—*not* by unidentified sources or law enforcement agents in furtherance of a criminal investigation. See PSOF ¶ 61; Def.’s Resp. to PSOF ¶ 61; *cf.* *Air Land Forwarders*, 172 F.3d at 1344 (rejecting hypothetical admissibility of documents from unidentified sources collected in course of criminal investigation).

Harvic also argues that the Hanjin/Hyundai bills of lading are inadmissible because they are “documents collected by a law enforcement agency[, which] are collected for the purposes of prosecution or litigation.” Def.’s Reply at 13. Harvic’s “undue focus on the law enforcement purpose of the records has little to do with whether they are business records under the Federal Rules of Evidence. What matters is that they were kept in the ordinary course of business.” *United States v. Towns*, 718 F.3d 404, 408 (5th Cir. 2013). Significantly, Harvic does not dispute that Hanjin and Hyundai regularly maintained the records at issue, as required by applicable customs laws, nor does Harvic identify any specific facts that indicate that the Hanjin/Hyundai bills of lading are not trustworthy. See *generally* Def.’s Reply.

It is undisputed that the Hanjin/Hyundai bills of lading were created by Hanjin and Hyundai in a routine, non-adversarial setting, and were requested by Customs as part of its investigation into the circumvention of the MOU. It is also clear that the bills of lading were not prepared for the purpose of litigation. Customs did not request that Hanjin and Hyundai prepare the bills of lading in furtherance of a targeted investigation into Harvic or the subject entries. To the contrary, Customs requested various records from numerous sources, including shipping companies, as part of its overall examinations and research related to illegal transshipments of textiles and apparel. See Fennessy Decl. ¶ 10. Harvic's argument fails to appreciate the distinction between documents created by law enforcement for the purpose of prosecuting a specific defendant, and third-party documents integrated into law enforcement records as part of that agency's routine practice and administration of the law. Compare *United States v. Bohrer*, 807 F.2d 159, 162–63 (10th Cir.1986) (Internal Revenue Service ("IRS") contact card, which contained IRS agent's version of alleged telephone conversation with defendant, deemed inadmissible as business record of IRS in prosecution for failure to file income tax returns because card was maintained for purpose of prosecuting defendant), with *United States v. Veytia-Bravo*, 603 F.2d 1187 (5th Cir. 1979) (finding that trial court properly admitted records of defunct firearm dealer authenticated by agent of Bureau of Alcohol, Tobacco, and Firearms ("ATF") given that government regulations provide that when firearms dealer goes out of business, all records are to be forwarded to ATF for storage).

Nevertheless, Harvic maintains that the bills of lading should be excluded because Customs' collection of these documents "presents a situation dripping with 'motivations to misrepresent.'" Def.'s Reply at 15 (quoting *Air Land Forwarders*, 172 F.3d at 1344). This phrase, which originated in *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942), is not applicable to the Hanjin/Hyundai bills of lading. In affirming the Second Circuit, the Supreme Court stated that certain accident reports, prepared by a railroad locomotive engineer for the purpose of litigation, did not fall within the business records exception because they were not kept in the course of regularly conducted business. *Palmer v. Hoffman*, 318 U.S. 109, 113–14 (1943). The Supreme Court, evaluating a predecessor to Rule 803(6), explained that "[u]nlike payrolls, accounts receivable, accounts payable, *bills of lading* and the like, these [accident] reports are calculated for use essentially in the court, not in the business. Their primary utility is in

litigating, not in railroading.” *Id.* at 114 (emphasis added). Contrary to Harvic’s argument, the Supreme Court expressly recognized bills of lading as documents that are inherent to the nature of the business of shipping, not litigation. *Id.* at 114–15. Accordingly, Harvic’s contention that incorporation of the bills of lading into CBP’s records involves “motivations to misrepresent” is meritless.

Next, Harvic relies on *United States v. Modes, Inc.*, 16 CIT 189, 787 F. Supp. 1466 (1992), for the proposition that *Air Land Forwarders* does not apply to law enforcement investigations that lead to civil penalties. *See* Def.’s Reply at 15–16. In *Modes*, the court found that a § 1592 civil penalty case was “quasi-criminal” in nature, and thus, subject to the exclusionary rule. *See Modes*, 16 CIT at 191–94, 787 F. Supp. at 1469–72 (adjudicating motion to suppress evidence seized from defendants’ attorney’s briefcase by customs agents during a border search at an international airport). *Modes* did not address the business records exception, and this action does not involve any Fourth Amendment or exclusionary rule issues. Here, unlike the unconstitutional briefcase seizure in *Modes*, Customs obtained the bills of lading from cooperative third-party shipping companies pursuant to its unchallenged statutory authority. *See* PSOF ¶¶ 40, 43; Def.’s Resp. to PSOF ¶¶ 40, 43; *see also* Staudt Decl. ¶¶ 17–26. Accordingly, Harvic’s reliance on *Modes* is misplaced.

Finally, Harvic contends that the Government did not present a certification from a qualified witness “needed for a true business record” to be admissible under Rule 803(6). Def.’s Reply at 15–16. Aside from referencing Rule 803(6) generally, Harvic does not cite any authority for its proposed admissibility requirement. *Id.* Courts have made clear ... that the ‘custodian or other qualified witness’ who must authenticate business records need not be the person who prepared or maintained the records, or even an employee of the record-keeping entity, as long as the witness understands the system used to prepare the records.” *Conoco Inc.*, 99 F.3d at 391. At summary judgment, a declaration from such an “other qualified witness” will suffice. *See* USCIT R. 56(c)(4); Fed. R. Evid. 902(11) advisory committee’s note. Harvic’s argument ignores the fundamental premise of the incorporation doctrine—“[e]ven if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity.” *Air Land Forwarders*, 172 F.3d at 1343 (quoting *United States v. Jakobetz*, 955 F.2d 786, 801 (2d Cir.1992)). As discussed above, the Government’s submissions, including the Fennessy and Staudt dec-

larations, satisfy the *Air Land Forwarders* test and the remaining requirements of Rule 803(6) for purposes of evaluating Harvic's cross-motion for summary judgment. Therefore, Harvic's argument is unpersuasive.

In sum, Harvic does not provide any argument as to why the bills of lading would not qualify for the business records hearsay exception of Rule 803(6) or satisfy the incorporation doctrine of *Air Land Forwarders*. See generally Def.'s Reply. Instead, Harvic maintains that *Air Land Forwarders* does not apply in the context of law enforcement and penalty actions and therefore cannot aid the Government in establishing the admissibility of the bills of lading in this matter. The court agrees with the Government that the Hanjin/Hyundai bills of lading "may be reduced to admissible form" by the time of trial pursuant to Rule 803(6) and the incorporation doctrine. Pl.'s XMSJ at 20. As a result, the court concludes that Harvic cannot prevail on its motion for summary judgment and that Defendant's motion must be denied.

### **B. Plaintiff's Motion for Summary Judgment**

The Government seeks a civil penalty for a non-revenue-loss violation of § 1592(c)(3)(B) because Harvic allegedly misidentified the subject entries' respective countries of origin as Bangladesh, the Philippines, or Korea, instead of the "true" country of origin, China. See Pl.'s XMSJ at 28–30; see also Compl. ¶ 7. As the moving party, the Government bears the burden of demonstrating the absence of any genuine issue of material fact. See *Celotex*, 477 U.S. at 322–23.

Unfortunately for the Government there is conflicting evidence on the record about the origin of the subject entries that precludes entry of summary judgment in favor of the Government. To explain further, on the one hand, Harvic argues that the entry information and documents it submitted to CBP identifies either Bangladesh, the Philippines, or Korea as the subject entries' respective countries of origin. See Def.'s Reply at 20, 24–26. On the other hand, the Government contends that the Hanjin/Hyundai bills of lading reveal that the true country of origin of the subject entries was China. See Pl.'s XMSJ at 29. The court therefore must resolve the discrepancy between the country of origin as identified in Harvic's import documentation and the country of origin as identified in the Hanjin/Hyundai bills of lading.

In making such a determination the court would need "to weigh evidence, make credibility determinations, and draw inferences from the facts, functions strictly delegated to a fact-finder or jury." *United States v. ITT Indus., Inc.*, 28 CIT 1028, 343 F. Supp. 2d 1322, 1344

(2004), *aff'd*, 168 F. App'x 942 (Fed. Cir. 2006). As the court cannot properly perform these functions on summary judgment, the Government's motion for summary judgment is denied.

#### **IV. Conclusion**

For the foregoing reasons, it is hereby

**ORDERED** that Defendant's motion for summary judgment and Plaintiff's cross-motion are denied; and it is further

**ORDERED** that the parties shall submit a proposed scheduling order that includes (1) a date for submission of the order governing preparation for trial, (2) a date for the submission of the pretrial order, (3) a date for the pretrial conference, and (4) a proposed trial date on or before January 17, 2020.

Dated: January 3, 2020

New York, New York

*/s/ Leo M. Gordon*

JUDGE LEO M. GORDON

## Slip Op. 20–4

BORUSAN MANNESMANN BORU SANAYI ve TICARET A.Ş., Plaintiff, AMERICAN CAST IRON PIPE COMPANY, et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, AMERICAN CAST IRON PIPE COMPANY, et al., Defendant-Intervenors, and BORUSAN MANNESMANN BORU SANAYI ve TICARET A.Ş. Consolidated Defendant-Intervenor.

Before: Jane A. Restani, Judge  
 Consol. Court No. 19–00056  
 PUBLIC VERSION

[In an action challenging certain of Commerce’s administrative determinations in an antidumping duty investigation, Commerce’s *Amended Final Results* pertaining to Large Diameter Welded Pipe from the Republic of Turkey are sustained in part and remanded in part for reconsideration consistent with this opinion].

Dated: January 07, 2020

*Julie C. Mendoza, Donald B. Cameron, R. Will Planert, Brady W. Mills, Mary S. Hodgins, Eugene Degnan, Sabahat Chaudhary, and Ragan W. Updegraff, Morris, Manning & Martin L.L.P., of Washington, D.C., for Plaintiff and Consolidated Defendant-Intervenor Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş.*

*Timothy C. Brightbill, Adam M. Teslik, Elizabeth S. Lee, Enbar Toledano, Maureen E. Thorzon, Laura El-Sabaawi, and Tessa V. Capeloto, Wiley Rein L.L.P., of Washington, D.C., for Consolidated Plaintiffs and Defendant-Intervenors American Cast Iron Pipe Company, Berg Steel Pipe Corporation, Berg Spiral Pipe Corporation, Dura-Bond Industries, Strupp Corporation, Greens Bayou Pipe Mill LP, JSW Steel (USA) Inc., Skyline Steel, Trinity Products LLC, and Welspun Tubular LLC.*

*Eric J. Singley, Trial Attorney, and L. Misha Preheim, Assistant Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., for Defendant United States of America. With them on the brief were Joseph H. Hunt, Assistant Attorney General, and Jeanne E. Davidson, Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C. Of counsel on the brief was Reza Karamloo, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.*

### OPINION AND ORDER

#### Restani, Judge:

Before the court are motions for judgment on the agency record pursuant to USCIT Rule 56.2, in a consolidated action challenging a final determination of the United States Department of Commerce (“Commerce”). The final determination at issue results from Commerce’s investigation into allegations that domestic sales of certain Large Diameter Welded Pipe (“LDWP”) from the Republic of Turkey were made at less-than-fair-market-value (“LTFV”) between January 1, 2017 and December 31, 2017. *See Large Diameter Welded Pipe from Canada, Greece, India, the People’s Republic of China, the Republic of Korea, and the Republic of Turkey: Initiation of Less-Than-Fair-Value Investigations*, 83 Fed. Reg. 7,154 (Feb. 20, 2018) (“*Initiation of In-*

vestigation”); *Large Diameter Welded Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 84 Fed. Reg. 6,362, 6,362 (Feb. 27, 2019) (the “*Final Results*”); *Large Diameter Welded Pipe from the Republic of Turkey: Amended Final Affirmative Antidumping Duty Determination & Antidumping Duty Order*, 84 Fed. Reg. 18,799, 18,799–800 (May 2, 2019) (the “*Antidumping Order*”).

Plaintiff, Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. (“BMB”), and Consolidated Plaintiffs American Cast Iron Pipe Company (“American Cast Iron”), Berg Steel Pipe Corporation (“Berg Steel”), Berg Spiral Pipe Corporation (“Berg Spiral”), Dura-Bond Industries (“Dura-Bond”), Stupp Corporation (“Stupp”), Greens Bayou Pipe Mill LP, JSW Steel (USA) Inc. (“Greens Bayou”), Skyline Steel (“Skyline”), Trinity Products LLC (“Trinity”), and Welspun Tubular LLC (“Welspun”)<sup>1</sup> (collectively, the “Domestic Producers”), challenge certain aspects of the *Final Determination* and the *Antidumping Order* as unsupported by substantial evidence or otherwise not in accordance with law. Defendant, the United States of America (the “government”), asks the court to sustain the *Final Determination* and resulting *Antidumping Order*.

### GENERAL BACKGROUND

On January 17, 2018, the Domestic Producers filed antidumping duty (“AD”) and countervailing duty (“CVD”) petitions with Commerce and the International Trade Commission (the “Commission”), alleging, *inter alia*, that “imports of welded pipe from . . . Turkey are being, or are likely to be, sold in the United States at less than fair value,” and that “such imports are materially injuring or threatening material injury to, the domestic industry producing welded pipe in the United States.” *Initiation of Investigation*, 83 Fed. Reg. at 7,155. Commerce initiated an AD investigation of welded pipe from Turkey for the period January 1, 2017 through December 31, 2017 (the “POI”). *Id.* After Commerce published its *Final Results*, the Commission informed Commerce that the LTFV imports of LDWP materially injure a United States industry resulting in an antidumping duty order. *See Antidumping Order*, 84 Fed. Reg. at 18,799 (setting the BMB duty deposit rate at 5.11%).

<sup>1</sup> American Cast Iron Pipe Company, Berg Steel Pipe Corporation, Berg Spiral Pipe Corporation, Dura-Bond Industries, and Stupp Corporation appear individually and as members of the American Line Pipe Producers Association. *See* Consol. Pls.’ Mem. in Supp. of [their] Rule 56.2 Mot. for J. upon the Agency R. at 1, ECF No. 36 (July 15, 2019) (“Dom. Prod. Br.”).

On May 2, 2019, BMB commenced the instant action against the United States pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(II). Summons, ECF No. 1 (May 2, 2019). In its Complaint, BMB claims that the *Antidumping Order* is unsupported by substantial evidence or is otherwise contrary to law because Commerce determined incorrectly: (1) the dates of BMB’s U.S. sales, (2) BMB’s post-sale price adjustment, (3) the applicability of and the existence of a particular market situation (“PMS”) in the Republic of Turkey, and (4) that BMB purchased its freight and related services from an affiliate company in a non-arm’s-length transaction. Compl. ¶¶ 42–51, ECF No. 7 (May 3, 2019).

On May 29, 2019, the Domestic Producers commenced a related action against the United States pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(II). *See Am. Cast Iron Pipe Co. v. United States*, Ct. No. 19–80, Summons, ECF No. 1 (May 29, 2019). In their Complaint, the Domestic Producers allege that the *Antidumping Order* is unsupported by substantial evidence or is otherwise contrary to law because Commerce determined incorrectly: (1) the proper methodology to adjust BMB’s reported costs due to PMS, (2) BMB’s post-sale price adjustment, and (3) a reduction to BMB’s freight and warehousing services upward adjustment for U.S. sales transactions. *Am. Cast Iron Pipe Co. v. United States*, Ct. No. 19–80, Compl. ¶¶ 21–28, ECF No. 11, (June 19, 2019). The actions were consolidated, and BMB and the Domestic Producers now move for judgment on the agency record on each of the foregoing issues. *See Mot. Brief in Supp. of Pl. Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş.’s (“BMB”) in support of its Mot. for J. on the Agency R. at 2*, ECF No. 38 (July 15, 2019) (“BMB Br.”); *Dom. Prod. Br. at 2–3*. The government opposes both motions. *See Def.’s Resp. to Pls.’ Mots. For J. upon the Agency R., ECF No. 48* (Sept. 25, 2019) (“Gov. Br.”).

For the reasons that follow, the court will sustain (1) Commerce’s determinations that BMB is entitled to a post-sale price adjustment for certain of its home-market sales, but not the manner of calculation, and (2) Commerce’s determination as to BMB’s freight and related expenses for all of its sales. The court will remand this matter to Commerce for reconsideration (1) of the date of U.S. sales and (2) the amount of the post-sale price adjustment and to eliminate any adjustment to the calculation of sales below cost of production on account of a PMS.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and section 516A of the Tariff Act of 1930 (the “Act”), *codified as amended*, 19 U.S.C. § 1516a(a)(2) (2012).<sup>2</sup> The court sustains Commerce’s results in an AD investigation 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). *See also Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

## STATUTORY FRAMEWORK

In an AD investigation, Commerce must determine whether the subject merchandise is being sold, or is likely to be sold, at a price that is less than its fair value in the United States. 19 U.S.C. § 1675(a)(2)(A). Where Commerce uses export price methodology for sales to the United States, as it did here, *see Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Large Diameter Welded Pipe from the Republic of Turkey*, A-489–833, POI 1/1/2017–12/31/2017 at 5–7 (Dep’t Commerce Aug. 20, 2018) (“*Prelim. I&D Memo*”); *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Large Diameter Welded Pipe from the Republic of Turkey*, A-489–833, POI 1/1/2017–12/31/2017 at 3 (Dep’t Commerce Feb. 19, 2019) (“*I&D Memo*”), Commerce must make a “fair comparison” between “the export price” (*i.e.*, the price at which the subject merchandise is first sold in the United States) and “normal value” (*i.e.*, the price at which the subject merchandise is sold in the exporting country, or the “home market”) to ascertain whether an importer is dumping its goods in the United States. 19 U.S.C. §§ 1677a and 1677b. This results in the Less Than Fair Value (“LTFV”) margin used in duty assessment. Commerce may use sales to third countries or constructed value if the pool of usable home market sales is insufficient for comparison purposes. 19 U.S.C. § 1677b(a). For home-market sales, which Commerce used here to calculate normal value (“NV”), the price used is the price “for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price[.]” 19 U.S.C. § 1677b(a)(1)(B)(i).

The “normal value” of such merchandise equals the price “at a time reasonably corresponding to the time of the sale” that Commerce uses “to determine the export price.” 19 U.S.C. § 1677b(a)(1)(A). Nevertheless, where Commerce “has reasonable grounds to believe or suspect”

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<sup>2</sup> Further citations to the United States Code are to the 2012 edition unless otherwise indicated.

that the home market price used to calculate normal value “represent[s] less than the cost of production of that product,” Commerce must determine whether the sales are “made at less than the cost of production” and remove such sales from the pool of home market sales. 19 U.S.C. § 1677b(b)(1). It did so as to some home market sales, but only after adjusting them downward for a PMS. This created one point of contention here, along with the choice of sales date for U.S. destined sales to be compared to NV sales. The date of sale is important because it establishes which sales are within the POI and the date of currency conversion for home-market sales. Thus, if the date of sale for exports to the United States is incorrect, there will not be a proper timeframe comparison with NV.

The final issues concern statutory adjustments up or down to NV pursuant to 19 U.S.C. § 1677b(a)(6).

## DISCUSSION

### I. Determination of the Dates of BMB’s U.S. Sales

#### a. Background

Commerce used the dates of invoice to determine the dates of sale for two of BMB’s sales to U.S. customers and not the dates of the final purchase orders for those sales. *See Prelim I&D Memo* at 20; *I&D Memo* at 16. BMB’s challenge to Commerce’s determination is two-fold. First, BMB contends that Commerce acted contrary to law because Commerce did not consider that the two sales contracts at issue are long-term supply contracts involving custom goods. BMB Br. at 14–15. Second, BMB claims that Commerce’s determination is unsupported by substantial evidence because all of the material terms of the sales contracts were established as of the date of the respective final purchase orders, both of which pre-date their invoice dates. *Id.* at 15–22. The Domestic Producers and the government respond that Commerce’s use of the invoice date is both supported by substantial evidence and otherwise in accordance with law. *See* Def.-Intervenors’ Resp. to Pl.’s Mot. for J. on the Agency R. at 2–11, ECF No. 50 (Sept. 26, 2019) (“Dom. Prod. Resp. Br.”); Gov. Br. at 5–8. They aver that Commerce applied the applicable regulation appropriately and that BMB failed to meet its burden to show that the purchase order dates were the better dates to apply under the circumstances. Dom. Prod. Resp. Br. at 2–11; Gov. Br. at 5–8. For the reasons that follow, the court concludes that Commerce’s decision to use the invoice date as the date of sale for BMB’s U.S. sales is unsupported by substantial evidence or otherwise contrary to law, and will remand this issue to Commerce for proper application of the law and reconsideration.

b. Dates of U.S. Sales were not properly determined

The governing statute does not specify the method by which Commerce must determine the date of sale for the purposes of determining the normal value of the merchandise subject to a LTFV investigation. Nevertheless, the Statement of Administrative Action (“SAA”) accompanying the Uruguay Round Agreements Act defines “date of sale” as “a date when the material terms of sale are established.” See Uruguay Round Agreements Act, Statement of Administrative Action, (“SAA”) H.R. Rep. No. 103–316, vol. 1, at 810 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4153. Further, Commerce’s regulations provide that

In identifying the date of sale of the subject merchandise or foreign like product, [Commerce] normally will use the date of invoice, as recorded in the exporter or producer’s records kept in the ordinary course of business. However, [Commerce] may use a date other than the date of invoice if [Commerce] is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

19 C.F.R. § 351.401(i) (2018).<sup>3</sup> Thus, under ordinary circumstances, the date-of-sale regulation “establishes a ‘rebuttable presumption’ in favor of the invoice date unless the proponent of a different date produces satisfactory evidence that the material terms of sale were established on that alternate date.” *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 308 F. Supp. 3d 1297, 1306 (CIT 2018) (citations omitted).

During the investigation, BMB pointed Commerce to specific provisions within Commerce’s 1997 rule promulgation, wherein Commerce explained that the “date of invoice” presumption would not apply to long-term contracts. See *Case Br. of Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş.* at 6, C.R. Doc. 498, P.R. Doc. 281,<sup>4</sup> (Nov. 19, 2018) (“*BMB Case Br.*”) (citing *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,350 (Dep’t Commerce May 19, 1997) (the “*Preamble*”)).<sup>5</sup> Further, the *Preamble* provides that, absent certain exceptions, Commerce “will use a date other than the date of invoice” for open-ended sales involving custom-made goods. *Pre-*

<sup>3</sup> Further citations to the Code of Federal Regulations are to the 2018 edition unless otherwise indicated.

<sup>4</sup> “P.R.” refers to a document contained in the public administrative record. “C.R.” refers to a document contained in the confidential administrative record.

<sup>5</sup> Before 1997, Section 351.401(i) did not exist. See 19 C.F.R. § 353.2(t) (1996) (providing no definition for “date of sale,” but defining “sale” to include “a contract to sell and a lease that is equivalent to a sale” and defining a “likely sale” as “a person’s irrevocable offer to sell”).

*amble*, 62 Fed. Reg. at 27,349. In a separate section of the *Preamble*, Commerce explained as follows:

Because of the unusual nature of long-term contracts, whereby merchandise may not enter the United States until long after the date of contract, the Department will continue to review these situations carefully on a case-by-case basis. [The] date of invoice normally would not be an appropriate date of sale for such contracts. The date on which the material terms of sale are finally set would be the appropriate date of sale for such contracts.

*Preamble*, 62 Fed. Reg. at 27,350.<sup>6</sup>

During the investigation, BMB explained, and presented Commerce with evidence demonstrating that, the final purchase orders at issue involved specialized products and spanned multiple years, and thus BMB claimed that they were long-term contracts involving custom goods. *BMB Case Br.* at 7–9 (citing BMB’s Suppl. Sections A & C Questionnaire Resp., C.R. 155–160, P.R. 135–138, at A-36–38 (May 7, 2018)). BMB argued that the final purchase orders were binding as of the date of execution, the parties performed their mutual obligations in accordance with the purchase orders’ terms, and there were “no changes to the essential terms of sale after the date of the final purchase order.” *Id.* at 9. BMB further explained that although BMB and its customers amended the purchase orders over the course of several years, “the contracting parties had the expectation at the time of signing the purchase order/contract that the essential terms of sale were fixed[.]” *Id.* BMB explained that none of the material terms could change after the initial purchase order was executed without all parties’ consent, and that the purchase orders were “long term contract[s] where shipments entered long after the conclusion of the contract[s].” *Id.* at 2. The parties agree that BMB and its U.S. customers amended their purchase orders frequently, but they dispute whether the interim changes to the purchase orders affected material terms, what presumptions as to date of sale apply, and when the contracts were no longer subject to change. *See BMB Br.* at 14–15; *Dom. Prod. Br.* at 2–5; *Gov. Br.* at 8–12.

In the *Final Determination*, Commerce concluded that BMB failed to produce satisfactory evidence that the *final* purchase orders were not subject to change, and so instead used the invoice date as the date

<sup>6</sup> Commerce saw no “need for a separate provision addressing long-term contracts,” because it believed that 19 C.F.R. § 351.401(i) was “sufficiently flexible.” *Preamble*, 62 Fed. Reg. at 27,350.

of sale. *I&D Memo* at 13–14. Commerce found that BMB’s evidence showed that “revisions to the purchase orders involved the prices, quantities, and delivery terms, all of which constitute changes to the material terms of sale.” *Id.* at 14. Commerce concluded that BMB necessarily failed to show that “the material terms of the purchase order were fixed and established . . . until [BMB] either shipped the product or issued an invoice with the final terms to the customer.” *Id.* at 14.

The omission on Commerce’s part is that it did not truly grapple with the issues of whether the contracts were long term or involved additional proprietary specifications beyond ordinary pipe specifications and thus whether they were custom goods. It appears that under Commerce’s regulations either situation, long-term contract or custom goods, will avoid the presumption in favor of invoice date. In either circumstance, Commerce must focus on when all of the circumstances that indicate no further change was likely and the material terms essentially were set.

For the two projects in the United States for which BMB sold pipe, no changes to the asserted final purchase order were made during the POI and for at least one of the projects the fabrication of the merchandise was complete, and the merchandise was delivered to the port, awaiting loading into a vessel, all in the year before the POI. *See* BMB Br. at 4–5. Further, the invoice was required to be delayed. *See id.* at 4. It would appear that the actual fact of no further changes, between the claimed date of sale or shipment and invoice would be one consideration, but whether that should be determinative or not is for Commerce to explain. But the date at which no further changes were realistically possible would seem to be determinative. Here, one contract specified no changes after certain events. *See* BMB Br. at 16. Whether completed manufacture and/or delivery to the port would cause the relevant clauses to be invoked is not for the court to determine in the first instance. Thus, Commerce shall determine if the regulatory presumption in favor of invoice date governs and shall apply presumptions and burdens accordingly. It shall further address if the material terms of the contact were essentially fixed before invoice date so that a proper LTFV comparison can be made.

## **II. Determination of BMB’s Post-Sale Downward Price Adjustment to Home-Market Sales**

### **a. Background**

In its *Preliminary Determination*, Commerce explained that it re-allocated certain late penalty fees that BMB paid to a Turkish cus-

tomers within its home market “to reflect the allocation stated in an agreement that pre-dates the investigation” in accordance with Commerce’s “practice for post-sale price adjustments.” *Prelim I&D Memo* at 20. In its *Final Determination*, Commerce stated that BMB shared equally in the liability for the reported late payment penalty fee pursuant to a “2014 contract” with two other Turkish steel merchandise producers, with whom BMB did not reach a final agreement as to the final allocation of penalties until the Summer of 2018, five months after the initiation of the investigation. *See I&D Memo* at 19–20. Accordingly, although Commerce adjusted BMB’s post-sale price, according to Commerce the adjustment was limited to BMB’s share of the late delivery penalty attributable to BMB and its affiliates, “as set forth in the contract with the [Customer].” *Id.* at 21. Commerce determined the total penalty fee [[ ]], and Commerce limited BMB’s allowed liability to one-third of this amount, presumably because there were three members of the consortium. *Id.* at 20 (citing BMB’s *Prelim. Sales Calculation Mem.*, C.R. 333, P.R. 248 (Dep’t Commerce Aug. 20, 2018)) (“*Prelim. Sales Calculation Mem.*”). BMB challenges Commerce’s determination as unsupported by substantial evidence and as otherwise contrary to law, claiming that Commerce incorrectly calculated the total penalty amount and the amount BMB is obligated to pay. BMB Br. at 28, 32. The Domestic Producers likewise challenge Commerce’s determination as unsupported by substantial evidence and as otherwise contrary to law but claim that BMB is not entitled to any post-sale price adjustment. Dom. Prod. Br. at 25. In their view, Commerce should have applied an “adverse-facts-available” (“AFA”) inference<sup>7</sup> in making its calculations because BMB was not forthcoming about its liabilities during the investigation. Dom. Prod. Br. at 25. The government asks the court to sustain Commerce’s decision to grant BMB a post-sale price adjustment and calculation of that adjustment. Gov. Br. at 33.

<sup>7</sup> In AD/CVD investigations, if Commerce determines that there is a gap in the record, it may use facts otherwise available to render its decision. *See* 19 U.S.C. § 1677e(a). If a party fails to cooperate “to the best of its ability,” then Commerce “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b). This is known as applying “adverse facts available,” or “AFA.” The decision to apply AFA is within Commerce’s discretion and Domestic Producers have not shown an abuse of discretion, as reflected in the text. *See, e.g., Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1317 (CIT 2017). Accordingly, the court rejects the Domestic Producers’ request to require Commerce to apply AFA to BMB in this case.

In Autumn 2013, BMB and two other Turkish LDWP producers (the “Consortium Members”)<sup>8</sup> entered into an agreement wherein each agreed to submit a bid on a pipeline project of a Turkish enterprise.<sup>9</sup> See BMB’s Resp. to Commerce’s Suppl. Sections A–C Questionnaire, C.R. 200–225, P.R. 173–174, Ex. A-41 (June 15, 2018), (the “*Joint Venture Agreement*”). The *Joint Venture Agreement* recognized joint and several liability among all of the Consortium Members. *Id.* It also provided:

[[

]].

*Id.* (emphases added). The Consortium Members entered into a subsequent agreement wherein they agreed to share equally in the “[a]ward” of the project and in its “responsibilities and requirements.” See Submission of Field No. 38.0 (Direct Selling Expenses) Documentation from BMB’s Second Suppl. Resp. to Sections A–C Questionnaire, C.R. 280–288, P.R. 180, Ex. B-32 (“BMB Ex. B-32”) at Consortium Agreement (July 6, 2018) (the “*Consortium Agreement*”).

In Autumn 2014, the Consortium Members, as Vendors, entered into a contract with the Client that specified liquidated damages for delay. See BMB Ex. B-32 at “Procurement Contract relating to the Supply of Line Pipes and Hot Bends for [Project]” (Oct. 14, 2014) (the “*Sales Contract*”). The relevant provisions of the Sales Contract provide that

[[

]].

*Sales Contract* §§ 8.2.1–2. In early Spring 2016, BMB began to incur a delay penalty for late deliveries pursuant to the Sales Contract. *BMB Case Br.* at 20. Two years later, the Client sent the Consortium Members a Notice of Penalty, wherein it demanded a substantial sum [[ ]] for delay penalties pursuant to the *Sales Contract*. See BMB’s Resp. to Commerce’s Suppl. Sections A–C Questionnaire, C.R. 220–225, P.R. 173–174 Exhibit B-28 at “May 28, 2018 Resp. to 48” and 56” Line Pipe Delay Liquidated Damages” (May 28, 2018)

<sup>8</sup> The Consortium Members are (1) BMB, (2) [[ ]], (3) and [[ ]], all of which are Turkish companies.

<sup>9</sup> [[ ]], is referred to as client, customer, or employer. See *Joint Venture Agreement*.

(“*Notice of Penalty*”). Fewer than two weeks later, the Consortium Members tendered a counter-offer [[ ] in full and final satisfaction of the Client’s claim for penalty delay liquidated damages. *See id.* at “Consortium June 11, 2018 Resp. to Line Pipe Delay Liquidated Damages Confirming Total Penalty” (June 11, 2018) (“*Consortium Counter-Offer*”). The parties agree that in the Summer of 2018, the Consortium Members and the Client agreed to the counterclaim amount [[ ]], of which BMB was liable for the largest part [[ ]]. *See* BMB Br. at 6 (citing *Consortium Agreement*; BMB Ex. B-32. at “Protocol” (Nov. 11, 2018) (“*Settlement Agreement*”)); Gov. Br. at 6–7; Dom. Prod. Br. at 22–23.<sup>10</sup>

BMB claims that it disclosed the total penalty amount to Commerce in its “home market sales database” during the investigation and insists that Commerce should have used its actual share of the full penalty amount to calculate the adjustment. *See* BMB Br. at 25–28. The record shows that BMB disclosed the existence and nature of these expenses. *See* BMB’s Resp. to Sections B-D of Initial Antidumping Duty Questionnaire, C.R. 58–94, P.R. 100–105, at B-47 (Apr. 23, 2018) (“BMB’s B-D Resp.”). Specifically, BMB reported the total amount owed the Client per the *Settlement Agreement*, pursuant to a “disputed penalty for late delivery on sales to [that customer]” during 2016 and 2017. *Id.* at B-48. Further, BMB claims that the agreements setting forth the allocation of the late penalty fee “were executed well before the investigation.” BMB Br. at 6, *see also* *BMB’s Case Br.* at 16–17. Before Commerce, BMB explained that “individual [C]onsortium [M]embers were jointly and severally liable as to [the Customer] but also liable to each other” pursuant to the indemnification clause in the *Joint Venture Agreement*. *BMB Case Br.* at 19 (citing *Joint Venture Agreement* § 6 ¶ 2). Nonetheless, Commerce ultimately explained that “[t]he changing terms of the late penalty fee after the initiation of the investigation casts significant doubt on the legitimacy of the allocation of this expense among the consortium members.” *I&D Memo* at 19.

For their part, the Domestic Producers contend that “the record fails to make the necessary connection between [BMB]’s [home market] sales and the penalty to warrant an adjustment.” Dom. Prod. Br. at 24. In particular, they argue that BMB “failed to demonstrate how it was responsible for [ ] of the penalties that the Consortium assigned to BMB or how [the penalties applied to its subject mer-

<sup>10</sup> The government and the Domestic Producers aver that the *Joint Venture Agreement* is merely a separate agreement of which [[ ] had no knowledge at the time of sale. Gov. Br. at 37; Dom. Prod. Br. at 24. These positions are untenable in the light of the express language of the *Sales Contract*, which expressly incorporates the *Joint Venture Agreement* by reference. *Sales Contract* § 25.9.

chandise].” *Id.* According to the Domestic Producers, BMB was not forthcoming about its status as a Consortium Member and its submissions to Commerce lacked any factual support, so that “Commerce should have applied ‘partial adverse facts available (“AFA”)” to BMB to deny any post-sales cost adjustment. *Id.* at 25. In the alternative they support Commerce’s allocation. *Id.* at 27–29.

- b. Commerce’s decision to grant BMB a post-sales price adjustment is supported by substantial record evidence and is not contrary to law.

The governing Regulations provide that a “price adjustment” is “a change in the price charged for subject merchandise . . . such as a discount, rebate, or other adjustment, including, *under certain circumstances*, a change that is made after the time of sale, that is reflected in the purchaser’s net outlay.” 19 C.F.R. § 351.102(b)(38) (emphasis added).<sup>11</sup> A party “seeking a post-sale price adjustment to normal value bears the burden of establishing its entitlement to such adjustment.” *Jindal Poly Films Ltd. of India v. United States*, 365 F. Supp. 3d 1379, 1387 (CIT 2019) (citing *Fujitsu Gen. Ltd.*, 88 F.3d at 1040).

To ascertain whether a party has met its burden to show entitlement to a post-sale price adjustment, Commerce may consider “any one or a combination of” certain factors, and in all cases, Commerce will make its determination “on a case-by-case basis and in [the] light

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<sup>11</sup> In 2014, the Court of International Trade concluded that Commerce’s “decision not to recognize as ‘price adjustments’ the payments made to home market customers on a monthly basis was contrary to the Department’s regulations, which are controlling on the issue presented and are binding on the court as well as the Department.” *Papierfabrik August Koehler AG v. United States*, 971 F. Supp. 2d 1246, 1258 (CIT 2014). At the time, 19 C.F.R. § 351.102(b)(38) (2014) defined “price adjustment” as “any change in the price charged for subject merchandise . . . such as discounts, rebates and post-sale price adjustments, that are reflected in the purchaser’s net outlay.” Additionally, section 351.401(c) provided that Commerce “*will* use a price that is net of any price adjustment . . . that is reasonably attributable to the subject merchandise[.]” *Id.* § 351.401(c) (2014) (emphasis added).

In response to *Koehler*, Commerce published a final rule modification of sections 351.102(b)(38) and 351.401(c) to clarify “that the Department generally will not consider a price adjustment that reduces or eliminates a dumping margin unless the party claiming such price adjustment demonstrates that the terms and conditions of the adjustment were established and known to the customer at the time of sale.” *Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings*, 81 Fed. Reg. 15,641, 15,642 (Dep’t Commerce Mar. 24, 2016) (“*Final Modification*”). Section 351.102(b)(38) now provides that “under certain circumstances,” a “price adjustment” may include “a change that is made after the time of sale, that is reflected in the purchaser’s net outlay.” 19 C.F.R. § 351.102(b)(38) (2018). Additionally, section 351.401(c) now explains that Commerce “*normally* will use a price that is net of [certain] price adjustments . . . that are reasonably attributable to the subject merchandise,” and provides that Commerce “*will not* accept a price adjustment that is made after the time of sale unless the interested party demonstrates, to the satisfaction of [Commerce], its entitlement to such an adjustment.” 19 C.F.R. § 351.401(c) (emphasis added).

of the evidence and arguments on each record.” *Final Modification*, 81 Fed. Reg. at 15,645. These factors, set forth in the *Preamble*, include:

- (1) Knowledge (*i.e.*, whether the customer had knowledge of the terms and conditions of the adjustment at the time of sale, and whether this knowledge is documented in a writing),
- (2) Commonality (*i.e.*, whether the requested post-sale price adjustments are common for the respondent company, its industry, or both),
- (3) Timing (*i.e.*, whether the timing of the requested price adjustment is reasonable in view of all pertinent circumstances of record),
- (4) Numerosity (*i.e.*, whether the number of requested post-sale price adjustments is reasonable in view of all pertinent circumstances of record), and
- (5) Other (*i.e.*, “any other factors tending to reflect on the legitimacy of the claimed adjustment.”).

*Id.* at 15,644–45. While the party seeking the adjustment bears the burden of production, Commerce likewise must ensure that the party “has sufficient notice of what information is considered necessary to allow it to meet that burden.” *Jindal Poly*, 365 F. Supp. 3d at 1387. Commerce “may not fail to engage with a respondent attempting to address the [*Final Modification*] factors in good faith.” *Id.* The court addresses each relevant factor in turn.<sup>12</sup>

### 1. Knowledge

Commerce determined that although a late penalty liability was contracted for, neither the *Joint Venture Agreement* nor the *Sales Contract* demonstrate sufficiently that the Turkish customer had knowledge of the method by which the Consortium Members would divide any late penalty fee among themselves at the time of sale, “because the parties negotiated their shares of the fee after the fee was imposed.” *I&D Memo* at 19. At verification, Commerce received evidence that the Consortium Members did not finally apportion their respective shares of the late penalty fee until after the fee was imposed in June 2018. *Id.* This is not disputed.

BMB argues whatever happened in June 2018, the *Joint Venture Agreement* and the *Sales Contract* set forth the terms and conditions of the post-sale price adjustment, which were known to the parties at

<sup>12</sup> Numerosity was not discussed by the parties.

the time of sale. Reply Br. of Pl. Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. in Supp. of its Mot. for J. on the Agency R., ECF No. 58, at 15 (Oct. 16, 2019) (“BMB Reply”). According to BMB, these terms and conditions “were set before the investigation,” so that “Commerce’s failure to make a post-sale price adjustment for the full amount of the liquidated damages penalty actually paid by BMB on these home market sales is contrary to law.” BMB Br. at 24. The record contains a significant amount of documentation that supports BMB’s position. First, BMB points to the *Sales Contract*, to which the Consortium Members and [the Turkish Customer] are parties. BMB Br. at 25. The *Sales Contract* expressly incorporates the *Joint Venture Agreement* by reference, see *Sales Contract* § 25.9. Second, BMB points to the *Joint Venture Agreement* which, by its text, apportions joint and several liability to the Customer, and also seems to provide that a breaching Member shall compensate the other Members for the portion of the penalties for which it is responsible. BMB Br. at 25–28.

Thus, while the government and Domestic Producers are correct that the *Settlement Agreement* dated in the Summer of 2018 is the first document to set forth the precise sums due the Client from each Consortium Member, that is not necessarily determinative, because even Commerce’s own explanation of the Final Modification merely requires a claimant to prove that a customer had knowledge of the terms and conditions governing the adjustment at the time of sale. *Final Modification*, 81 Fed. Reg. at 15,644–45. There is no specific requirement that the final quantity of that adjustment be known in advance. *Id.* Accordingly, Commerce’s conclusion that BMB failed to demonstrate the Client’s knowledge of the relevant “terms and conditions” is incorrect.

## 2. Timing

Commerce explained that BMB did not address any of the “other factors that Commerce may consider in deciding whether a respondent is entitled to a post-sale price adjustment,” including “the timing of the allocation of the penalty among the [C]onsortium [M]embers.” *I&D Memo* at 19. This explanation is also incorrect, because BMB addressed each of the relevant factors in its Case Brief. See *BMB Case Br.* at 23–26. The problem here is that the Consortium Members did not finally agree on their respective liabilities for the penalty until months after Commerce initiated its investigation. *I&D Memo* at 19. Commerce found this timing to be dubious. *Id.* at 20. The government submits that Commerce has “consistently applied a practice of denying post-sale price adjustments where the terms and conditions” of an

otherwise deductible adjustment “were not established and known to the customers at the time of sale,” citing Commerce’s concern that foreign producers might manipulate dumping margins by claiming *post hoc* price adjustments. Gov. Br. at 34 (citations omitted). As the court has explained, however, the *Sales Contract* (*i.e.*, the document upon which Commerce purported to rely in its calculation) pre-dates the investigation by four years, as does the Joint Venture Agreement. Thus, the issue is whether the allocation itself is dubious, not the penalty liability.

### 3. Commonality

BMB presented Commerce with evidence demonstrating that long-term contracts between suppliers and purchasers are common practice in the Turkish steel industry. *See BMB Case Br.* at 24–25. Rejecting these exhibits, Commerce explained that in the *Final Modification*, it “explicitly declined to accept post-sale price adjustments merely because a company can demonstrate that the adjustment is part of its standard business practices that existed” before the investigation. *I&D Memo* at 20 (citing *Final Modification*, 81 Fed. Reg. at 15,645). It is unclear what effect this denial had and Commerce did accept that a substantial post-sale penalty was incurred.

### 4. Other

Notwithstanding the foregoing, Commerce may consider “any one or a combination of” the foregoing factors, in addition to “any other factors tending to reflect on the legitimacy of the claimed adjustment.” *Final Modification*, 81 Fed. Reg. at 15,645.

In this case, the government avers that BMB “changed its story repeatedly throughout the [investigation]; at times significantly with little or no explanation.” Gov. Br. at 37–38. The government points to BMB’s initial questionnaire responses from April 2018, wherein BMB generally reported several direct selling expenses on its home-market sales, “including a disputed penalty for late delivery on sales to” the Client. *Id.* at 38 (citing BMB’s B-D Resp. at B-47–48). Therein, BMB reported that it agreed to pay the Client the full amount of the penalty (*i.e.*, [[ ]]). *See* BMB’s B-D Resp. at B-47–48. Two months later, BMB disclosed that it was a member of a Consortium and disclosed the *Joint Venture Agreement*, the *Consortium Agreement*, the *Sales Contract*, and the *Settlement Agreement*. *Id.* (citing BMB’s Suppl. Questionnaire Resp. Sections A–C at 17–20, Exhibits B-28–29). The government explains that Commerce apportioned BMB’s liability at one-third of the total penalty, pursuant to

“the 2014 contract” with the Client (*i.e.*, the *Consortium Agreement*) because, in Commerce’s view, the terms of the late penalty fee kept changing “after the initiation of the investigat[ion].” Gov. Br. at 38. Yet, the government concedes that Commerce independently verified BMB’s post-sale price adjustment based upon information that BMB placed on the record. *Id.* at 41.

The government also contends that BMB failed to exhaust its administrative remedies because BMB did not request a “full post-sale price adjustment” before Commerce. *Id.* at 39 (emphasis omitted). This contention is meritless. It is clear that BMB sought a direct selling expense deduction for “the entire penalty amount paid by BMB” as a post-sale price adjustment. *BMB Case Br.* at 18. As to the Domestic Producers’ arguments that application of AFA was required, the government responds that “Commerce reasonably determined that there was no factual basis to conclude that [BMB] failed to cooperate to the best of its ability as required to apply AFA.” Gov. Br. at 41. According to the government, Commerce determined that BMB responded to Commerce’s requests for information, placed the information on the record, and Commerce thereafter verified the information. *Id.* The government further contends that Commerce did not err in granting BMB a partial post-sale price adjustment because the “adjustment was consistent with the terms of the 2014 contract, which indicated that the total amount owed the customer was subject to negotiation.” *Id.* at 42. Furthermore, according to the government, Commerce verified the total amount of the penalties and found no discrepancies. Thus, the manner in which all information finally reaches Commerce adds nothing to the resolution of the allocation problem.

The Domestic Producers’ other argument to disallow an adjustment for the penalties paid also fails. Their claim that “the record fails to make the necessary connection between [BMB]’s [home market] sales and the penalty to warrant an adjustment” is without merit. Dom. Prod. Br. at 24. Plainly, BMB, a Turkish company, in a joint venture with two other Turkish companies, sold LDWP in Turkey to a third-party Turkish client in 2016 and 2017. It is also clear from the record that BMB timely complied with Commerce’s requests for additional information. Indeed, Commerce explains that it “verified the total amount of penalties associated with sales to [the Customer] during the” period of investigation “and noted no discrepancies.” *I&D Memo* at 21. Accordingly, the court agrees with Commerce and BMB that a post-sale adjustment is proper. The court understands Commerce’s reluctance to except a final allocation that wasn’t known until the investigation commenced. Had BMB not been involved in a joint

venture, however, it appears that Commerce would have accepted the full penalty adjustment. It is always an uncertainty for this kind of adjustment that cannot be finally known until after a sale is completed, and that uncertainty is exacerbated by the ability of the Consortium Members to control the final outcome. Nonetheless, Commerce points to nothing that suggests an improper manipulation of the adjustment. Further, an equal allocation among Consortium Members is not supported by the contract documents. Had BMB incurred less than one-third of the total penalty liability one cannot imagine Commerce adopting this allocation.

The court leaves it to Commerce to review the penalty documents and to allow a post-sale adjustment for whatever amount BMB established it was liable for and actually paid or was credited, as authorized by the pre-investigation contract obligations, unless Commerce has evidence not previously cited that shows an improper allocation occurred.

### **III. Costs of Production may not be adjusted for a Particular Market Situation under 19 U.S.C. § 1677b(b), sales below Cost of Production**

- a. BMB's failure to raise this issue before Commerce does not constitute a failure to exhaust its administrative remedies because the issue is a pure question of law.

In an action challenging Commerce's final results in an unfair trade matter, the court "shall, *where appropriate*, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (emphasis added). In this context, whether a party is required to exhaust its administrative remedies is within the court's sound discretion. *See, e.g., Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1332 (Fed. Cir. 2017); *Agro Dutch Indus., Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007). Although "[r]equiring exhaustion can protect administrative agency authority and promote judicial efficiency," *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013) (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)), the Federal Circuit has recognized a "pure legal question" exception to the exhaustion doctrine. *See, e.g., Agro Dutch Indus.*, 508 F.3d at 1029 (citations omitted). Thus, "where the issue for the court is a 'pure legal question of law that can be addressed without further factual development or further agency exercise of discretion,'" as here, "requiring exhaustion may serve no agency or judicial interest, may cause harm from delay," and is often inappropriate. *Itochu Bldg. Prods.*, 733 F.3d at 1146. Requiring the exhaustion of remedies is

particularly inappropriate where the question presented is one of statutory construction that requires no resort to the agency record for resolution. *See, e.g., Soc Trang Seafood Joint Stock Co. v. United States*, 321 F. Supp. 3d 1329, 1341 n.18 (CIT 2018); *GGB Bearing Tech. (Suzhou) Co., v. United States*, 279 F. Supp. 3d 1233, 1250 (CIT 2017).

BMB concedes that it failed to raise the issue of the proper interpretation of 19 U.S.C. § 1677b(b) before Commerce. BMB Br. at 35 n.13. The government contends that the issue “is not purely legal, but instead involves Commerce’s selection of an appropriate methodology in administering the statute when a particular market situation exists.” Gov. Br. at 25. The government misapprehends BMB’s position. For this challenge BMB does not allege that for this issue Commerce’s decision is unsupported by substantial evidence on this record; instead, BMB’s argument is that the express terms of the statute prohibit Commerce from making any PMS adjustment to an importer’s cost of production (“COP”) for purposes of the sales below COP test, so that Commerce acted contrary to the statute, and thus contrary to law. *See* BMB Br. at 32–35. The “pure legal question” exception applies because no further factual development is required, so that requiring exhaustion would be futile. *See Agro Dutch Indus.*, 508 F.3d at 1029. Accordingly, the court concludes that BMB’s failure to raise this issue before Commerce does not preclude the court’s review under these circumstances.

b. Commerce’s decision to adjust BMB’s costs of production is contrary to law.

The court will not discuss this matter in great detail as in recent and thorough opinions the court has explained that no adjustment for a PMS is permitted for the sales below cost test. *See Husteel Co. v. United States*, Slip Op. 20–2 (CIT Jan. 3, 2020); *Saha Thai Steel Pipe Public Co. v. United States*, Slip Op. 19–165, 2019 WL 6997904 (CIT Dec. 18, 2019) Briefly, in determining that the Turkish HRC subsidies and otherwise low steel prices distorted BMB’s reported production costs, Commerce cited to Section 504 of the Trade Preferences Extension Act of 2015 (the “TPEA”) for the proposition that Congress “added the concept of the term ‘particular market situation’ to the definition of ‘ordinary course of trade.’” *I&D Memo* at 13; *see also* 19

U.S.C. § 1677(15).<sup>13</sup> Commerce then stated that the definition of “particular market situation” likewise “applies to COP under” 19 U.S.C. § 1677b(b)(3), “through” 19 U.S.C. § 1677b(e) (calculation of constructed value). *Id.* The government maintains that, in the light of the TPEA, the statutory definition of normal value in 19 U.S.C. § 1677b(a)(1)(B)(i) (describing normal value price to *inter alia* be based on sales in the ordinary course) “carries through to the subsection (b) normal value provisions concerning sales below cost.” Gov. Br. at 25 (citing 19 U.S.C. § 1677b(b)(1), (3)). The Domestic Producers agree with the government as to Commerce’s authority to make PMS adjustments to COP under § 1677b(b) but contend that Commerce erred when it did not use their proposed calculation methodology. Dom. Prod. Br. at 10–19. BMB responds that the plain language of Section 504 “only authorizes Commerce to make adjustments to costs” when determining normal value using a constructed value methodology, not when determining whether to disregard sales below the cost of production under 19 U.S.C. § 1677b(b) for purposes of determining the home market sales pool. BMB Br. at 34.

The TPEA amended specific subsections of the Act, and left others intact. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015). As applicable here, Section 504 expands the discretion afforded Commerce to calculate COP when calculating a constructed value. TPEA § 504, 129 Stat. at 382, *codified as amended*, 19 U.S.C. § 1677b(e). In the TPEA, Congress chose not to amend 19 U.S.C. § 1677b(b).

[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

*Thomas v. Nicholson*, 423 F.3d 1279, 1284 (Fed. Cir. 2005) (citations and quotations omitted). Because Commerce’s adjustments to BMB’s COP were only for the purpose of the sales below cost of production test, Commerce’s adjustments on account of a PMS in this case are

<sup>13</sup> The section defines ordinary course of trade in relevant part:

the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade:

...  
(C) Situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price.

19 U.S.C. § 1677(15).

contrary to law. There are also claims, now mooted, by the Defendant-Intervenor that the Government's methodology did not adequately adjust for the PMS and for its part plaintiff argues there was no PMS, at all. The court will not address plaintiff's claim that a PMS does not exist because the two statutory provisions that permit consideration of a PMS were not utilized here by Commerce. First, Commerce did not employ the definition of ordinary course of trade in 19 U.S.C. § 1677(15) to exclude from the pool of home market sales, sales that would distort the LTFV comparison because of the presence of a PMS.<sup>14</sup> Second, Commerce did not find the pool of home market sales insufficient for LTFV comparison purposes. This is the situation in which Commerce may adjust COP on account of a PMS in calculating constructed value under 19 U.S.C § 1677b(a)(4) and (e) to obtain a substitute NV. The adjustment on account of the alleged PMS in this case was not made in either of these situations. That ends the analysis.

#### **IV. Commerce properly calculated BMB's Freight and Related Services Adjustments.**

##### **a. Background**

To determine the normal value of BMB's costs of production, Commerce explained that it compared the prices that BMB was charged by unaffiliated parties with those charged by Borusan Lojistik ("BL"), an affiliated home-market supplier of freight and related services. *Prelim. I&D Memo* at 20; *I&D Memo* at 23. Commerce "made deductions, where appropriate, from the starting price for billing adjustments" and "for moving expenses, including inland freight and handling charges." *Id.* (citing 19 U.S.C. § 1677b(a)(6)(B)(ii); 19 C.F.R. § 351.401(c)). Commerce also made the required upward adjustment to NV for service on sales to the United States as required by 19 U.S.C. § 1677b(b)(A). *Id.* In practical terms, the expenses are offset against each other so that the LTFV comparison is not skewed.

In its *Final Determination*, Commerce refined its adjustment and explained that to determine "whether to use transactions between affiliated parties, [its] practice is to compare the transfer price either to prices charged to other unaffiliated parties who[se] contract is for the same service or prices for the same service paid by the respondent

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<sup>14</sup> How factors such as domestic subsidies or a world-wide steel glut would distort the LTFV comparison was not explained in this record. On their face these factors would seem to affect all Turkish pipe production, whether for the home market or export. Further, what makes these factors "particular" was not explained. Moreover, government control of steel production and governmental subsidies are generally addressed through CVD, not AD, investigations.

to unaffiliated parties.” *I&D Memo* at 23 (citing *Certain Tapered Roller Bearings from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 83 Fed. Reg. 29,092 (Dep’t Commerce June 22, 2018)). Commerce concluded that for its home market sales, BMB “failed to demonstrate that its freight services from Borusan Lojistik were provided at arm’s length.” *Id.* at 23. Accordingly, in some cases, it used charges from an unaffiliated entity rather than the affiliated party’s charges. *Id.* at 24.

During the investigation, BMB reported that its “home market sales are made on a delivered basis or FOB basis.” BMB’s B-D Resp. at B-38. BMB claimed that “[f]reight is provided by Borusan Lojistik . . . or by unaffiliated freight companies” and that its reported freight charge “is based on the freight invoice from the freight company to BMB.” *Id.* BMB explained that it could not correlate its freight invoices to specific sales invoices, so that it was unable to “calculate an invoice specific freight expense for sales” to certain customers. *Id.* Thus, BMB “reported an average freight expense by customer and delivery location.” *Id.* BMB claims that Commerce’s approach to this inquiry historically has been “to investigate BMB’s course of dealings with [BL]” to ascertain whether, in fact, the parties engaged in a non-arm’s length transaction. BMB Br. at 40. BMB contends that Commerce applied an “entirely new test” to determine whether its transactions with BL were at arm’s-length. *Id.* (citing *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69,186 (Nov. 15, 2002) (“AP Rulemaking”))).

According to BMB, “Commerce has never used this ‘test’ before in any of BMB’s past cases” to ascertain whether a sale with its affiliate, BL, is an arm’s-length transaction. *Id.* Accordingly, BMB challenges Commerce’s determination that its freight and related services transactions with BL were not at arm’s-length is unsupported by substantial evidence and is otherwise contrary to law. BMB Br. at 39–42. The Domestic Producers agree that Commerce’s determination of the downward adjustment for home market sale was correct but object to the lowering of the upward adjustment for U.S. sales. *See Dom. Prod. Br.* at 30–32.

- b. Commerce did not act contrary to law when it applied its “arm’s-length test” to ascertain whether certain of BMB’s home-market transactions with BL were not at arm’s-length.

Commerce may disregard any home-market transaction that is “directly or indirectly between affiliated persons” if any element of

value that Commerce considers “does not fairly reflect the amount usually reflected in sales of merchandise under consideration” in the home market. 19 U.S.C. § 1677b(f)(2). As stated in *Mid Continent Steel & Wire, Inc. v. United States*, 219 F. Supp. 3d 1326, 1349 (CIT 2017), “[t]he statute does not define what it means for affiliated party transactions to not fairly reflect an arm’s-length transaction.” While a non-arm’s-length transaction is likely always an affiliated transaction, the converse is not necessarily true.<sup>15</sup> The applicable Regulation is clear that a transaction between affiliated parties is outside the “ordinary course of trade” only if the “merchandise is sold to an affiliated party at a non-arm’s length price.” 19 C.F.R. § 351.102(b)(35) (emphasis added). After determining that BMB and BL are “affiliated persons,” Commerce was required to ascertain whether the transactions at issue were made outside the “ordinary course of trade,” and, only if so, whether the transactions were consummated at a non-arm’s-length price. See *Mid Continent Steel*, 219 F. Supp. 3d at 1349.

In its final determination, Commerce determined that certain transactions between BMB and BL were not at arm’s-length because “the prices at issue differ significantly from the prices charged to an unaffiliated company (*i.e.*, they are not within 98 to 102 percent of the price charged for or by an unaffiliated party),” so that Commerce concluded “that these prices are affected by the relationship between [BMB] and [BL].” *I&D Memo* at 23–24. Thus, Commerce adjusted BMB’s freight and related expenses involving BL “to state them on an arm’s-length basis.” *Id.* at 24. According to the government, “Commerce provided notice to the parties involved in antidumping proceedings that there would be a prospective change in its arm’s length methodology regarding sales between affiliated parties,” and that Commerce applied this methodology to the transactions at issue. Gov. Br. at 16.

In 2002, Commerce issued an interpretive rule wherein it established a “new test” to determine whether to include affiliated-party sales in the NV calculation. See *AP Rulemaking*, 67 Fed. Reg. at 69,187.<sup>16</sup> Under this test, sales between an exporter or producer and

<sup>15</sup> See, e.g., *Atar, S.r.l. v. United States*, 637 F. Supp. 2d 1068, 1091 (CIT 2009) (sustaining Commerce’s determination that exporter’s payment of a salary to a minority shareholder of an affiliated party was “an arm’s-length transaction between affiliated parties.”); *Jinxiang Chengda Imp. & Exp. Co. v. United States*, Ct No. 11–144, Slip Op. 13–40, 2013 WL 1490723, at \*8–\*9 (CIT Mar. 25, 2013) (sustaining Commerce’s determination that certain of an exporter’s home market sales to affiliated parties were arm’s-length transactions).

<sup>16</sup> Commerce explained that this “new test is consistent with the view, expressed by the WTO Appellate Body, that rules aimed at preventing the distortion of normal value through sales between affiliates should reflect, ‘even-handedly,’ that ‘both high and low-priced sales between affiliates might not be ‘in the ordinary course of trade.’” *AP Rulemaking*, 67 Fed. Reg. at 69,187 (quotation omitted).

its affiliate are included in the NV calculation only if Commerce determines “that the overall ratio” calculated for affiliated-party sales is “between 98 percent and 102 percent, inclusive, of prices to unaffiliated customers.” *Id.* According to Commerce, sales between affiliated parties that fall without this range are *per se* outside the “ordinary course of trade.” *Id.* During the investigation, BMB submitted evidence to demonstrate that BMB’s transactions with BL were at arm’s-length. *See* BMB’s Case Br. at 36. In the *Final Determination*, Commerce accepted these submissions to find that certain of BMB’s service transactions were at arm’s length and others were not. *See I&D Memo* at 23–24.

The issue here is whether Commerce may apply its 98–102 range test to determine if ordinary course prices are fairly reflected between the affiliated parties. Whether or not Commerce previously had only applied the test to sales and not services, there seems to be no reason it cannot do so. This matter involved a new investigation, not merely a review. Thus, the reliance that BMB claims is attenuated. Perhaps the 98–102 test is a flawed one where services are concerned, but this record here doesn’t show that to be so. Neither party here produced evidence or viable arguments to reject Commerce’s choice.

Thus, for home market sales, the unaffiliated party’s charges could be substituted for those charged by BL. For the U.S. sales, where there were no unaffiliated party transactions to provide a measure for the upward adjustment to NV, Commerce used BL’s costs, i.e. it removed profit, which Commerce asserts is its normal practice in such a situation. *I&D Memo* at 27–28. Having rejected BL’s charges as a measure on one side of the equation, Commerce seems to have acted fairly in not relying on them on the other side. Without an unaffiliated company measure there was no best measure. Commerce’s answer seems as good as the next imperfect measure. Despite Defendant-Intervenor’s objection to the adjustment, it did not provide evidence to undermine Commerce’s choice or to demonstrate that this was not its ordinary practice. Thus, this adjustment is also sustained.

## CONCLUSION

For the foregoing reasons, it is

**ORDERED** that Commerce may not adjust costs based on a PMS for purposes of the sales below cost of production test of NV;

**ORDERED** that Commerce’s recognition of an adjustment for a post-sale price reduction for certain home-market sales is sustained but is remanded for reconsideration as to amount;

**ORDERED** that Commerce shall reconsider the date of U.S. sales; and it is further

**ORDERED** that Commerce's methodology for calculating freight and warehousing services adjustments is sustained.

Remand results are to be filed by March 9, 2020. Objections are due April 8, 2020 and Responses to Objections are due April 22, 2020.

Dated: January 07, 2020

New York, New York

*/s/ Jane A. Restani*

JANE A. RESTANI, JUDGE