

# U.S. Customs and Border Protection



## **PROPOSED REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FOOTWEAR**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of proposed revocation of one ruling letter and revocation of treatment relating to the tariff classification of footwear.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of footwear under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

**DATE:** Comments must be received on or before November 20, 2020.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Ms. Cammy Canedo at (202) 325–0439.

**FOR FURTHER INFORMATION CONTACT:** Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0062.

**SUPPLEMENTARY INFORMATION:****BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. §1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of footwear. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N279073, dated September 30, 2016 (Attachment A), this notice also covers any rulings on this merchandise, which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N279073, CBP classified certain footwear in heading 6404, HTSUS, specifically in subheading 6404.19.20, HTSUS, which provides for "Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Other: Footwear with open toes or open heels; footwear of the slip-on type, that is held to the foot

without the use of laces or buckles or other fasteners, the foregoing except footwear of subheading 6404.19.20 and except footwear having a foxing or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper: Other: Other.” CBP has reviewed NY N279073 and has determined the ruling letter to be in error. It is now CBP’s position that footwear is properly classified, in heading 6404, HTSUS, specifically in subheading 6404.11.90, HTSUS, which provides for “Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like: Other: Valued over \$12/pair.”

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to revoke NY N279073 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H285615, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

Attachments

N279073

September 30, 2016

CLA-2-64:OT:RR:NC:N3:447

CATEGORY: Classification

TARIFF NO.: 6404.19.3960

Ms. PAT McKELDIN  
UNDER ARMOUR  
1020 HULL STREET  
BALTIMORE, MD 21230

RE: The tariff classification of footwear from China

DEAR Ms. McKeldin.

In your letter dated August 23, 2016, you requested a tariff classification ruling. The sample will be returned.

The submitted sample, identified as style number/name 1288065 UA W Drift RN Mineral, is a woman's, light-weight, closed-toe/closed-heel, below-the-ankle shoe, with a flexible outer sole of rubber or plastics. The external surface area of the upper is predominantly textile material. It is a slip-on shoe that does not have a separately attached tongue. The mostly unsecured leather overlay, which incorporates the eye stays and threaded laces, is stitched to the upper with a few stitches on the medial and lateral sides. It is lasted at the sole, extends toward the heel of the shoe, and is stitched near the back of the heel. This semi-attached overlay constitutes an accessory or reinforcement and not considered in the external surface area measurements. The shoe features a rubber/plastic toe cap, a leather heel patch, and a pull tab. The shoe does not have a foxing-like band. The rubber or plastics outer sole accounts for more than 10 percent of the total weight of the shoe. You provided an F.O.B. value of \$21.41 per pair.

The applicable subheading for style number/name 1288065 UA W Drift RN Mineral will be 6404.19.3960, Harmonized Tariff Schedule of the United States (HTSUS), which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: not sports footwear; footwear not designed to be a protection against cold or inclement weather; footwear of the slip-on type; footwear that is not less than 10 percent by weight of rubber or plastics; other: other: for women. The rate of duty will be 37.5 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <https://hts.usitc.gov/current>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the above, contact National Import Specialist Stacey Kalkines at [stacey.kalkines@cbp.dhs.gov](mailto:stacey.kalkines@cbp.dhs.gov).

*Sincerely,*

STEVEN A. MACK

*Director*

*National Commodity Specialist Division*

HQ H285615  
OT:RR:CTF:FTM H285615 TJS  
CATEGORY: Classification  
TARIFF NO.: 6404.11.90

MR. SEAN CONNOR  
UNDER ARMOUR, INC.  
1020 HULL STREET  
BALTIMORE, MD 21230

RE: Reconsideration of NY N279073; Tariff Classification of footwear from China

DEAR MR. CONNOR:

This letter is in response to your request of February 28, 2017, for reconsideration of New York Ruling Letter (“NY”) N279073, dated September 30, 2016, issued to Under Armour, Inc., as it pertains to the tariff classification of certain footwear under the Harmonized Tariff Schedule of the United States (“HTSUS”). In that ruling, U.S. Customs & Border Protection (“CBP”) classified the subject footwear in heading 6404, HTSUS, and subheading 6404.19.20, HTSUS, which provides for: “[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Other: Footwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners, the foregoing except footwear of subheading 6404.19.20 and except footwear having a foxing or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper: Other: Other.” For the reasons stated below, we are revoking NY N279073. In reaching this decision, we have also considered arguments presented in a supplemental submission submitted by your legal counsel on August 16, 2017. This decision is also based on our inspection of samples included with your original ruling request and with your reconsideration request.

**FACTS:**

In NY N279073, the merchandise was described as follows:

[T]he submitted sample, identified as style number/name 1288065 UA W Drift RN Mineral, is a woman’s, light-weight, closed-toe/closed-heel, below-the-ankle shoe, with a flexible outer sole of rubber or plastics. The external surface area of the upper is predominantly textile material. It is a slip-on shoe that does not have a separately attached tongue. The mostly unsecured leather overlay, which incorporates the eye stays and threaded laces, is stitched to the upper with a few stitches on the medial and lateral sides. It is lasted at the sole, extends toward the heel of the shoe, and is stitched near the back of the heel. This semi-attached overlay constitutes an accessory or reinforcement and not considered in the external surface area measurements. The shoe features a rubber/plastic toe cap, a leather heel patch, and a pull tab. The shoe does not have a foxing-like band. The rubber or plastics outer sole accounts for more than 10 percent of the total weight of the shoe. You provided an F.O.B. value of \$21.41 per pair.

In addition to the features described above, the samples contain a cushioned collar and a midsole made of ethylene-vinyl acetate (EVA), a light-

weight and soft foam. The outsole is made of durable rubber material and incorporates rubber pods and four rows of flex grooves. In your supplemental submission, you state that the shoes are designed and marketed as running shoes.

**ISSUE:**

What is the tariff classification of the subject footwear?

**LAW AND ANALYSIS:**

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

6404: Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials:

Footwear with outer soles of rubber or plastics:

6404.11: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like:

Other:

6404.11.90: Valued over \$12/pair:

For women:

6404.11.9050: Other.

\* \* \* \* \*

6404.19: Other:

Footwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners, the foregoing except footwear of subheading 6404.19.20 and except footwear having a foxing or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper:

Other:

6404.19.39: Other:

Other:

6404.19.3960: For women.

\* \* \* \* \*

Additional U.S. Note 2 to Chapter 64, HTSUS, provides as follows:

For the purposes of this chapter, the term “tennis shoes, basketball shoes, gym shoes, training shoes and the like” covers athletic footwear other than sports footwear (as defined in subheading note 1 above), whether or not principally used for such athletic games or purposes.

\* \* \* \* \*

Treasury Decision (“T.D.”) 93–88, which provides “Footwear Definitions,” states, in pertinent part, that “athletic” footwear includes:

“Athletic” footwear (sports footwear included in this context) includes:

1. Shoes usable only in the serious pursuit of a particular sport, which have or have provision for attachment of spikes, cleats, clips or the like.
2. Ski, wrestling & boxing boots; cycling shoes; and skating boots w/o skates attached.
3. Tennis shoes, basketball shoes, gym shoes (sneakers), training shoes (joggers) and the like whether or not principally used for such athletic games or purposes.

It does not include:

1. Shoes that resemble sport shoes but clearly could not be used at all in that sporting activity. Examples include sneakers with a sequined or extensively embroidered uppers.
2. A “slip-on”, except gymnastic slippers.
3. Skate boots with ice or roller skates attached.

*Footwear Definitions*, Treas. Dec. 93–88, 27 Cust. B. & Dec. No. 46 (Oct. 25, 1993).

T.D. 93–88 further provides that a “slip-on” includes:

1. A boot which must be pulled on.
2. Footwear with elastic gores which must be stretched to get it on or with elastic sewn into the top edge of the fabric of the upper.
3. Footwear with a shoe lace around the top of the upper which is clearly not functional, i.e., the lace will not be tied and untied when putting it on or taking it off.

It does not include any boot or shoe with any laces, buckles, straps, snaps, or other closure, which are probably closed, i.e. tied, buckled, snapped, etc., after the wearer puts it on.

*Id.*

\* \* \* \* \*

In your request for reconsideration, you state that while you agree with the majority of the assessment in NY N279073, you assert that the shoe is not a “slip-on.” You state that while the shoe is not designed with a separate tongue, the shoelaces are an essential element to the function of the shoe. You further state that the shoe is designed to be used as a running shoe and the shoelaces serve as a tightening mechanism, which are necessary to secure the foot and prevent the runner from injuring his or her ankle. You assert that the shoe is properly classified in subheading 6404.11.90, HTSUS, which provides for “[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like: Other: Valued over \$12/pair.”

The dispute is at the six-digit level of classification. The footwear is described by the terms of heading 6404, HTSUS, which provides for “[f]ootwear

with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials.” At issue here is whether the footwear under consideration is “athletic” footwear within the meaning of Additional U.S. Note 2 to Chapter 64, HTSUS, and classified in subheading 6404.11, HTSUS, as “tennis shoes, basketball shoes, gym shoes, training shoes and the like,” or whether the footwear is classified in subheading 6404.19, HTSUS, as “other” footwear.

Subheading 6404.11, HTSUS, provides for “tennis shoes, basketball shoes, gym shoes, training shoes and the like.” The principle of *ejusdem generis* applies to provisions containing the phrase “and the like.” In an *ejusdem generis* analysis, “where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified.” *Deckers Corp. v. United States*, 752 F.3d 949, 952 n.3 (Fed. Cir. 2014) (“*Deckers II*”) (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994)). In *Deckers Corp. v. United States* (“*Deckers I*”), 532 F.3d 1312 (Fed. Cir. 2008), *aff’d*, *Deckers II*, 752 F.3d 949, on the issue of whether Teva Sport Sandals were classified in subheading 6404.11 as “athletic footwear,” the Court of Appeals for the Federal Circuit stated that to determine the essential characteristic of the specified enumerated articles, “courts may consider attributes such as the purpose, character, material, design, and texture.” *Deckers I*, 532 F.3d at 1316. In regard to the particular exemplars of heading 6404.11, HTSUS, the court determined that “the fundamental feature that the exemplars share is the design, specifically the enclosed upper, which contains features that stabilize the foot, and protect against abrasion and impact.” *Id.* at 1317.

Additional U.S. Note 2 to Chapter 64 states that athletic footwear is classified in subheading 6404.11, HTSUS, “whether or not principally used for such athletic games or purposes.” CBP has interpreted this Note to mean that shoes need not be used solely for athletic purposes, but also those shoes that share appearance, qualities, and character with the named exemplars are classified there. *See* Headquarters Ruling Letter (“HQ”) H236274 (Sept. 17, 2015) (classifying “athleisure” shoes as athletic); *and* HQ 953882 (Sept. 24, 1993) (holding that hiking boots were not “like” the exemplars). Still, it has been CBP’s position that in order for footwear to be classified as athletic footwear under subheading 6404.11, HTSUS, it must be constructed for an activity that requires fast footwork or extensive running. *See* HQ 964625 (Sept. 10, 2001) (“All the exemplars are used in sports which require fast footwork or extensive running.”); *and* NY N154085 (Apr. 4, 2011). Thus, when determining whether footwear is classified as athletic footwear under subheading 6404.11, HTSUS, CBP looks at various features and characteristics including, but not limited to, overall appearance, materials, and construction of the upper and outer sole. Some of the features or characteristics of athletic footwear CBP has consistently included are: a lightweight upper, a lightweight, flexible outer sole that provides traction, lace-up, or some other type of secure closure, underfoot cushioning, collar (padded or not), tongue (padded or not), toe bumpers, heel counters/stabilizers, and ventilation holes. *See* HQ H265479 (Mar. 28, 2016); NY N310350 (Mar. 26, 2020); NY N020906 (Jan. 9, 2008); *and* NY M82301 (May 26, 2006). However, athletic footwear need not exhibit all of these features. *See* NY N218203 (June 6, 2012); *and* NY N154085 (Apr. 4, 2011).

T.D. 93–88 excludes “slip-ons” from the definition of athletic footwear. It also states that shoes with laces, which are probably tied after the wearer

puts them on, are not considered “slip-ons.” In *Deckers Outdoor Corp. v. United States*, 844 F. Supp. 2d 1324 (CIT 2012), concerning the classification of UGG boots, the Court of International Trade (“CIT”) determined that “[t]he lack of laces or fasteners is the essential characteristic uniting each dictionary definition for “slip-on” and “[t]he definitions, as a whole, indicate that it is this lack of any kind of fasteners that allows for the characteristic ease with which slip-ons can be put on and taken off.” *Deckers Outdoor Corp. v. United States*, 844 F. Supp. 2d 1324, 1332 (CIT 2012), *aff’d*, 714 F.3d 1363 (2013). The CIT further found that the definition of “slip-on” in T.D. 93–88 is persuasive and warrants deference, and is “centered around the characterization of slip-ons as footwear that lacks functional fasteners.” *Id.* Therefore, whether the shoes under consideration are “slip-ons” depends on the functionality of the shoelaces such that the shoes can be put on and taken off with ease regardless of whether the shoelaces are tied. Pursuant to T.D. 93–88, CBP considers shoelaces that do not need to be tied or untied in order to put on or remove the shoe as non-functional. See NY N285586 (May 30, 2017); NY N284080 (Apr. 4, 2017); and NY N283616 (Mar. 15, 2017) (determining that laces were non-functional because the wearer needed only to spread apart the upper to put on or remove the shoe). However, shoelaces that are tied after the shoe is put on are considered functional, as they impede the wearer’s ability to easily slip-on and off the shoe.

While the absence of a separately attached tongue is often a feature of a slip-on shoe, it does not preclude classification as “athletic” footwear. For example, in NY N281527, dated January 20, 2017, CBP classified a man’s shoe, identified as style # 54358, and a women’s shoe, identified as style # 14811, in subheading 6404.11.90, HTSUS. Style # 54358 was a man’s closed toe/closed heel, below-the-ankle shoe with a foxing-like band and an outer sole of rubber/plastics. The style had a general athletic appearance. The external surface area of the upper was predominantly textile (approximately 72%) and had a lace-up closure with five pairs of textile eyelet stays. The shoe had no separately defined tongue, rather, the extra material under the functional laces formed a type of gusseted tongue when tied. CBP determined that the extra material forming the gusseted tongue rendered a loose fit if worn without tightening the laces. Style #14811 was a woman’s, closed toe/closed heel, below-the-ankle, athletic shoe with a foxing-like band and an outer sole of rubber or plastics. This shoe also featured a gusseted tongue under a functional lace-up closure. Because the laces needed tightened for both styles to be used properly, the shoes were not considered slip-ons.

Like the shoes in NY N281527, the subject footwear can be slipped on and off while the laces remain untied. Although a gusseted tongue does not form when the shoelaces of the subject footwear are tied, we find that the shoelaces are functional because they are tightened after the wearer puts on the shoe. The shoelaces must be untied to put the shoe on the foot because the shoe does not easily slip on and off while the shoelaces are tightened. This is due to the leather overlay, which incorporates the eye stays and threaded laces, and is stitched to the upper on the medial and lateral sides. Importantly, the leather overlays do not stretch such that when the laces are tied, the overlays are taut and secure. Furthermore, the shoelaces are not futile. When tightened, they provide functionality by further securing the shoe to the wearer’s foot so that the user has sufficient support and can engage in activities requiring extensive running or fast footwork without worrying about the shoe

slipping off the foot. In light of the forgoing, we do not consider these shoes “slip-ons” and, as such, they are not precluded from classification as athletic footwear.

Upon review and examination of the footwear at issue in NY N279073, we conclude that it has the general appearance and many of the construction features present in athletic footwear. In particular, the shoe has a breathable textile upper and a lightweight, flexible outer sole that is treaded to provide traction. It also has foot cushioning with the EVA midsole, padding at the collar, a rubber/plastic toe cap, and a plastic heel counter. In addition to the lace closure system that secures the footwear to the foot, the upper with the leather overlays help keep the foot in place when the shoelaces are tightened to enable the wearer to engage in athletic activity. The footwear is also marketed as running shoes. We find that the footwear at issue is indeed *ejusdem generis* with the named exemplars in subheading 6404.11, HTSUS.

In view of the foregoing, we find that the subject footwear, 1288065 UA W Drift RN Mineral, is athletic footwear of subheading 6404.11, HTSUS. Specifically, the subject footwear is classified under subheading 6404.11.9050, HTSUS, which provides for “[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like: Other: Valued over \$12/pair: For women: Other.” Therefore, we revoke NY N279073.

#### **HOLDING:**

By application of GRI 1 and Additional U.S. Note 2 to Chapter 64, HTSUS, we find that the subject footwear is classified under subheading 6404.11.9050, HTSUS, which provides for “[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like: Other: Valued over \$12/pair: For women: Other.” The column one, general rate of duty is 20% *ad valorem*.

#### **EFFECT ON OTHER RULINGS:**

NY N279073, dated September 30, 2016, is hereby **REVOKED**.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

*Sincerely,*

CRAIG T. CLARK,  
*Director*

*Commercial Trade Facilitation Division*

## 19 CFR PART 177

### REVOCATION OF 7 RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF HAND SANITIZER

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of revocation of seven ruling letters, and of revocation of treatment relating to the tariff classification of hand sanitizer.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking seven ruling letters concerning tariff classification of hand sanitizer under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 30, on August 5, 2020. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 20, 2020.

**FOR FURTHER INFORMATION CONTACT:** William Wittwer, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0357.

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 30, on August 5, 2020, proposing to revoke seven ruling letters pertaining to the tariff classification of hand sanitizer. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In N311037, N304365, N303248, N242763, N233860, N032988, and L89057, CBP classified hand sanitizer in heading 3824, HTSUS, specifically in subheading 3824.99.92, HTSUS, which provides for "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Other: Other: Other: Other." CBP has reviewed N311037, N304365, N303248, N242763, N233860, N032988, and L89057 and has determined the ruling letters to be in error. It is now CBP's position that hand sanitizer is properly classified, in heading 3808, HTSUS, specifically in subheading 3808.94.50, HTSUS, which provides for "Insecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packing for retail sale or as preparations or articles (for example, sulfur-treated bands, wicks and candles, and flypapers): Other: Disinfectants: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking N311037, N304365, N303248, N242763, N233860, N032988, and L89057 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H310592, set forth as attachments to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: October 7, 2020

*for*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Divisi*

*Attachment*

HQ H310592

October 7, 2020

CLA-2 OT:RR:CTF:TCM H310592 WMW

CATEGORY: Classification

TARIFF NO: 3808.94.50

MR. ROBERT B. BACK  
FOCUS BEVERAGES B.V.  
INDUSTRIESTRAAT 9  
'S HEERENBERG, 7041 GD  
NETHERLANDS

RE: Revocation of N311037, N304365, N303248, N242763, N233860, N302988 and L89057; classification of hand sanitizer

DEAR MR. BACK:

This letter is to inform you that U.S. Customs and Border Protection (“CBP”) has Reconsidered New York Ruling Letters (“NY”) N311037 dated April 7, 2020 NY N304365, dated May 21, 2019, NY N303248 dated March 16, 2019, NY N242763 dated July 3, 2013, NY N233860 dated November 6, 2012, NY N032988 dated August, 8, 2008, and NY L89057 dated January 2, 2006 regarding the classification of hand sanitizer under the Harmonized Tariff Schedule of the United States (HTSUS).

In those rulings, we classified hand sanitizer in heading 3824, HTSUS, which provides for “Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified.” We have reviewed N311037, N304365, N303248, N242763, N233860, N302988, and L89057 and found them to be incorrect with respect to the classification of hand sanitizer. For the reasons set forth below, we are revoking these rulings.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice proposing to revoke NY N311037, NY N304365, NY N303248, NY N242763, NY N233860, NY N032988, and NY L89057 was published on August 5, 2020, in Volume 54, Number 30, of the Customs Bulletin. No comments were received in response to this Notice.

**FACTS:**

The subject merchandise was described as follows in the relevant rulings; all are individually packaged for retail sale:

N311037: The hand sanitizer will be made of Alcohol from Rum Distilled 70% v/v. It is to be used in antimicrobial applications such as hand sanitizing. It will also contain distilled water, hydrogen peroxide, and glycerin and isopropyl myristate.

N304365: ethyl alcohol (CAS number 64–17–5) which is 62% of the total product. The remainder of the hand sanitizer is comprised of water, isopropyl alcohol, glycerin, fragrance, propylene glycol, and aloe barbadensis leaf juice.

N303248: ethyl alcohol (CAS number 64–17–5) which is 62% of the total product. The remainder of this hand sanitizer is comprised of water, isopropyl alcohol, glycerin, fragrance, propylene glycol, acrylates, ami-

nomethyl propanol, isopropyl myristate, tocopheryl acetate, and caprylyl glycol. (Aromatic ingredient but not an aromatic disinfectant.)

N242763: ethanol and biphenyl-2-ol. It is to be used for hygienic hand disinfection. (Aromatic preservative and antifungal.) Data sheet in file shows the product is geared toward bacterial, antiviral and antifungal. It is unclear if the biphenyl-2-ol is present as a disinfectant or as a preservative and shelf extender. However, due to the low levels present it is assumed to function as a preservative in the final solution. It is unclear what other ingredients are present. Documents show 100 gram solution contains 78.2 grams ethanol and 0.1 grams biphenyl-2-ol. Balance of ingredients are not known at this time and are assumed to be water or other inactive ingredients. We note that product literature indicates it is geared toward elimination of Norovirus.

N233860: alcohol, water, and minimal amounts of carbomer, PEG-12 dimethicone, triethanolamine, tocopheryl acetate, acid blue 9, acid yellow 23, and a fragrance.

N032988: 62% ethyl alcohol, 35.6% deionized water, and minimal amounts of glycerin, propylene glycol, aloe barbadensis gel, carbomer, Vitamin E, triethanolamine and a fragrance.

L89057: ethyl alcohol, water, glycerin, isopropyl myristate, propylene glycol, tocopheryl acetate (less than 2%), aminomethyl propanol, and carbomer.

**ISSUE:**

Whether the subject merchandise is classified in heading 3824, HTSUS, as a chemical preparation not elsewhere specified or included; or in heading 3808, HTSUS, as disinfectants and similar products.

**LAW AND ANALYSIS:**

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS headings at issue are as follows:

3808: Insecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packing for retail sale or as preparations or articles (for example, sulfur-treated bands, wicks and candles, and flypapers):

3824: Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included:

\* \* \* \* \*

Section VI note 2 provides that:

Subject to note 1 above, goods classifiable in heading 3004, 3005, 3006, 3212, 3303, 3304, 3305, 3306, 3307, 3506, 3707 or 3808 by reason of being

put up in measured doses or for retail sale are to be classified in those headings and in no other heading of the tariff schedule.

\* \* \* \* \*

The Harmonized Commodity Description and Coding System (HS) Explanatory Notes (“ENs”) constitute the official interpretation of the HS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HS at the international level, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

EN 38.08 provides, in pertinent part, as follows:

(IV) Disinfectants

Disinfectants are agents which destroy or irreversibly inactivate undesirable bacteria, viruses or other micro-organisms, generally on inanimate objects.

Disinfectants are used, for example, in hospitals for cleaning walls, etc., or sterilizing instruments. They are also used in agriculture for disinfecting seeds and in the manufacture of animal feeds to control undesirable micro-organisms.

The group includes sanitisers, bacteriostats and sterilisers.

\* \* \* \* \*

Heading 3824 specifically notes that it only describes articles that are not elsewhere specified or included. Therefore, if the above described articles are classified in heading 3808, HTSUS, they cannot be classified in heading 3824, HTSUS.

Heading 3808 specifically provides for the instant products as a disinfectant. Alcohol in sufficient concentration destroys or irreversibly inactivates undesirable bacteria, viruses or other micro-organisms. All of the hand sanitizers contain significant amounts of alcohol, usually ethyl alcohol. Additionally, in accordance with Section VI note 2, disinfectants put up for retail sale are to only be classified in heading 3808 and in no other heading of the tariff schedule. The ENs do not persuade us otherwise. While the EN notes disinfectants are used “generally for” disinfecting hard surfaces such as table tops or operating tables, this guidance does not exclude disinfectants formulated for use on the hands. This EN also includes “sanitisers.”

Pursuant to the above analysis, the subject hand sanitizer is classifiable in heading 3808, HTSUS, as a disinfectant or similar product put up in forms or packing for retail sale.

**HOLDING:**

By application of GRI 1, the subject hand sanitizer is classified in heading 3808, HTSUS, specifically subheading 3808.94.50, HTSUS, which provides for “Insecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packing for retail sale or as preparations or articles (for example, sulfur-treated bands, wicks and candles, and flypapers): Other: Disinfectants: Other.” The 2020 column one, general rate of duty is 5% *ad valorem*.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at [www.usitc.gov](http://www.usitc.gov).

**EFFECT ON OTHER RULINGS:**

NY N311037, dated April 7, 2020, NY N304365, dated May 21, 2019, NY N303248, dated March 16, 2019, NY N242763, dated July 3, 2013, NY N233860, dated November 6, 2012, NY N032988, dated August 8, 2008, and NY L89057, dated January 2, 2006, are hereby revoked.

*Sincerely,  
for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

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Jericho, NY 11753

**COPYRIGHT, TRADEMARK, AND TRADE NAME  
RECORDATIONS****(No. 9 2020)**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**SUMMARY:** The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in September 2020. A total of 201 recordation applications were approved, consisting of 11 copyrights and 190 trademarks. The last notice was published in the Customs Bulletin Vol. 54, No. 38, September 30, 2020.

Corrections or updates may be sent to: Intellectual Property Rights Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229–1177, or via email at *iprrquestions@cbp.dhs.gov*.

**FOR FURTHER INFORMATION CONTACT:** LaVerne Watkins, Paralegal Specialist, Intellectual Property Rights Branch, Regulations and Rulings, Office of Trade at (202) 325–0095.

ALAINA VAN HORN

*Chief,*

*Intellectual Property Rights Branch  
Regulations and Rulings, Office of Trade*

## CBP IPR RECORDATION — SEPTEMBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 01-00264	09/28/2020	10/03/2020	ETIENNE AIGNER	ETIENNE AIGNER, INC.	No
TMK 01-00356	09/18/2020	10/24/2030	Stylized Tree Design	TBL LICENSING LLC	No
TMK 01-00357	09/17/2020	10/24/2030	Timberland (Stylized)	TBL LICENSING LLC	No
TMK 02-00524	09/09/2020	05/22/2030	HUGS & KISSES	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 02-00928	09/21/2020	09/27/2030	DOLBY DIGITAL & DD DESIGN	DOLBY LABORATORIES LICENSING CORPORATION	No
TMK 02-00990	09/23/2020	08/20/2030	DUNHILL	ALFRED DUNHILL LIMITED	No
TMK 06-00856	09/15/2020	09/13/2030	CHRYSLER and Design (CHRYSLER WINGED BADGE)	FCA US LLC	No
TMK 07-00562	09/30/2020	01/11/2029	WAVE RUNNER	YAMAHA HATSUDOKI KABUSHIKI KAISHA	No
TMK 07-00568	09/30/2020	07/07/2021	YAMAHA	YAMAHA CORPORATION	No
TMK 07-00573	09/13/2020	11/04/2030	Crossed Tuning Forks Logo	YAMAHA HATSUDOKI KABUSHIKI KAISHA	No
TMK 07-01005	09/03/2020	10/03/2027	FREESCALE	NXP USA, INC.	No
TMK 07-01241	09/09/2020	09/27/2030	CASA GRANDE	AGENCIA MADERO, S.A.	No
TMK 07-01247	09/18/2020	05/28/2030	Teddy bear Design	S. TOUS, S.L.	No
TMK 08-00374	09/28/2020	10/14/2030	VIRGINIA SLIMS	Philip Morris USA Inc.	No
TMK 09-00903	09/09/2020	05/22/2030	Configuration of latch	KASON INDUSTRIES, INC.	No
TMK 10-00606	09/11/2020	09/15/2030	GARRETT METAL DETECTORS	Garrett Electronics, Inc.	No
TMK 10-00711	09/29/2020	09/29/2030	GARRETT	Garrett Electronics, Inc.	No
TMK 10-00862	09/22/2020	10/06/2030	SIGMA (STYLIZED)	Sigma Enterprises LLC	No
TMK 10-01003	09/16/2020	10/13/2030	FLUKE	Fluke Corporation	No

## CBP IPR RECORDATION — SEPTEMBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 10-01052	09/02/2020	04/02/2030	LEXUS	TOYOTA JIDOSHA KABUSHIKI KAISHA YA TOYOTA MOTOR CORPORATION	No
TMK 10-01057	09/11/2020	08/09/2030	CHEVROLET	GENERAL MOTORS LLC	No
TMK 10-01059	09/13/2020	09/13/2030	CAMARO	GENERAL MOTORS LLC	No
TMK 10-01065	09/02/2020	07/03/2030	TOYOTA	TOYOTA JIDOSHA KABUSHIKI KAISHA AKA TOYOTA MOTOR CORPORATION	No
TMK 10-01074	09/17/2020	09/15/2030	DD DOLBY & DESIGN	Dolby Laboratories Licensing Corporation	No
TMK 10-01077	09/23/2020	09/15/2030	DD and Design	Dolby Laboratories Licensing Corporation	No
TMK 10-01086	09/13/2020	09/28/2028	CHEVY	GENERAL MOTORS LLC	No
TMK 10-01265	09/16/2020	10/27/2030	MARIO & LUIGI	Nintendo of America Inc.	No
TMK 11-00338	09/17/2020	06/09/2030	CISCO AND DESIGN	Cisco Technology, Inc.	No
TMK 11-00406	09/29/2020	10/13/2030	CANDYSHELL	SAMSONITE IP HOLDINGS S.A.R.L.	No
TMK 11-00477	09/11/2020	11/01/2030	PIKACHU	Nintendo of America Inc.	No
TMK 11-00868	09/29/2020	10/27/2030	NEODENT	JJGC INDUSTRIA E COMERCIO DE MATERIAIS DENTARIOS S.A.	No
TMK 11-00930	09/29/2020	10/27/2030	NEODENT and Design	JJGC INDUSTRIA E COMERCIO DE MATERIAIS DENTARIOS S.A.	No
TMK 11-01124	09/02/2020	09/08/2030	UNITED STATES POSTAL SERVICE U.S. MAIL and Design	UNITED STATES POSTAL SERVICE	No
TMK 11-01454	09/28/2020	12/07/2030	OZERI	COMMONPATH, LLC	No
TMK 12-00003	09/03/2020	07/06/2030	KLEENEX (Stylized)	KIMBERLY-CLARK WORLDWIDE, INC.	No

## CBP IPR RECORDATION — SEPTEMBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 12-00167	09/11/2020	02/09/2021	BOUDREAU'S	(REGISTRANT) McLaughlin, Dan INDIVIDUAL UNITED STATES 4409 McIntosh Park Drive Sarasota FLORIDA 34232(LAST LISTED OWNER) GULF MARINE PRODUCTS CO., INC. CORPORATION LOUISIANAWESTWEGO LOUISIANA 70094	No
TMK 13-01141	09/02/2020	10/20/2030	REVO	ADJ PRODUCTS, LLC	No
TMK 14-00192	09/01/2020	01/18/2029	SONATA	HYUNDAI MOTOR COMPANY	No
TMK 14-00196	09/02/2020	10/05/2028	ELANTRA	HYUNDAI MOTOR AMERICA	No
TMK 14-00198	09/02/2020	02/11/2029	GENESIS	HYUNDAI MOTOR AMERICA	No
TMK 14-00199	09/02/2020	04/02/2030	ACCENT	HYUNDAI MOTOR AMERICA	No
TMK 14-00200	09/02/2020	04/03/2026	AZERA	HYUNDAI MOTOR AMERICA	No
TMK 14-00433	09/17/2020	12/29/2030	GRANNY GOOSE	SNAK KING CORP.	No
TMK 14-00581	09/04/2020	10/17/2030	KINDER	Ferrero S.p.A.	No
TMK 14-00792	09/09/2020	09/08/2030	PRIMAVERANO	Sobel Westex	No
TMK 14-00903	09/13/2020	09/13/2030	CHEVY	GENERAL MOTORS LLC	No
TMK 14-01224	09/09/2020	07/25/2030	ROGER DUBUIS	RICHEMONT INTERNATIONAL SA	No
TMK 15-00118	09/28/2020	06/23/2030	COCOON	COCOON INNOVATIONS, LLC	No
TMK 15-00120	09/28/2020	06/30/2030	GRID IT	COCOON INNOVATIONS, LLC	No
TMK 15-00447	09/02/2020	03/02/2029	TAU	HYUNDAI MOTOR AMERICA	No
TMK 16-00553	09/30/2020	10/25/2030	RAM LOGO	National Products, Inc.	No
TMK 17-01291	09/01/2020	11/09/2026	AMIRI	ATELIER LUXURY GROUP, LLC	No
TMK 17-01317	09/18/2020	08/09/2029	WISC	NCS PEARSON, INC.	No
TMK 18-00446	09/01/2020	04/29/2030	JEEP	FCA US LLC	No

## CBP IPR RECORDATION — SEPTEMBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Tm	Owner Name	GM Restricted
TMK 18-00553	09/08/2020	07/19/2030	ENFAMIL	MEAD JOHNSON & COMPANY, LLC	No
TMK 18-00597	09/08/2020	06/09/2030	NUTRAMIGEN & DESIGN	MEAD JOHNSON & COMPANY, LLC	No
TMK 18-00838	09/30/2020	01/12/2031	BIC & HUMAN FIGURE DESIGN	Societe BIC société anonyme (sa)	No
TMK 20-00734	09/01/2020	11/13/2029	SKAZKA EGG	Grant, Irina	No
TMK 20-00735	09/01/2020	08/28/2029	Chihuahua Dog with a Trash Can Design	Chihuahua Brewing Company, LLC	No
TMK 20-00736	09/01/2020	08/28/2029	Chihuahua Dog with a Trash Can Design	Chihuahua Brewing Company, LLC	No
TMK 20-00737	09/01/2020	01/08/2030	MICHEUAHUAS	Chihuahua Brewing Company, LLC	No
TMK 20-00738	09/01/2020	08/28/2029	CHIHUAHUA BREWING CO.	Chihuahua Brewing Company, LLC	No
TMK 20-00739	09/01/2020	08/28/2029	CHIHUAHUA CERVEZA	Chihuahua Brewing Company, LLC	No
TMK 20-00740	09/01/2020	09/19/2021	SEQUOIA	Toyota Jidosha Kabushiki Kaisha TA Toyota Motor Corporation	No
TMK 20-00741	09/01/2020	12/04/2021	PRIUS	Toyota Jidosha Kabushiki Kaisha AKA Toyota Motor Corporation	No
TMK 20-00742	09/02/2020	10/06/2025	MESABI	L & M RADIATOR, INC.	No
TMK 20-00743	09/02/2020	05/25/2023	I-FORCE	Toyota Jidosha Kabushiki Kaisha TA Toyota Motor Corporation	No
TMK 20-00744	09/02/2020	03/10/2023	VETO PRO PAC	VETO PRO PAC, LLC	No
TMK 20-00745	09/02/2020	11/25/2030	CHLOR2DOOR	Chlor2door	No
TMK 20-00746	09/02/2020	01/31/2026	VOLCANIC HILL	DIAMOND MOUNTAIN VINEYARD COMPANY, INC.	No
TMK 20-00747	09/02/2020	01/17/2026	DIAMOND CREEK	DIAMOND MOUNTAIN VINEYARD COMPANY, INC.	No
TMK 20-00748	09/02/2020	12/06/2021	OUTLAW HELMETS	NANAL, INC.	No
TMK 20-00749	09/02/2020	10/11/2027	Genesis & Design	HYUNDAI MOTOR COMPANY	No

## CBP IPR RECORDATION — SEPTEMBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 20-00750	09/02/2020	03/04/2023	NXP (STYLIZED)	NXP B.V. Private Limited Company	No
TMK 20-00751	09/02/2020	05/13/2026	MIFARE	NXP B.V.	No
TMK 20-00752	09/02/2020	03/30/2025	MIFARE AND DESIGN	NXP B.V.	No
TMK 20-00753	09/02/2020	08/22/2028	POWERED BY MIFARE (AND DESIGN)	NXP B.V.	No
TMK 20-00754	09/02/2020	02/28/2026	DESFIRE	NXP B.V.	No
TMK 20-00755	09/02/2020	11/11/2030	MF1	NXP B.V.	No
TMK 20-00756	09/02/2020	09/07/2026	NTAG (Stylized)	NXP B.V.	No
TMK 20-00757	09/02/2020	08/30/2025	HITAG	NXP B.V.	No
TMK 20-00758	09/02/2020	09/13/2026	UCODE	NXP B.V.	No
TMK 20-00759	09/02/2020	11/25/2030	DUCKY	Duckychannel International Co., Ltd.	No
TMK 20-00760	09/03/2020	06/10/2030	K & DESIGN	Kaloud, Inc	No
TMK 20-00761	09/03/2020	07/28/2030	Kaloud Star and Design	Kaloud, Inc	No
TMK 20-00762	09/03/2020	11/24/2030	ICODE	NXP B.V.	No
TMK 20-00763	09/03/2020	05/21/2027	UCODE DNA (AND DESIGN)	NXP B.V.	No
TMK 20-00764	09/03/2020	12/01/2030	N and Design	NFL Properties LLC	No
TMK 20-00765	09/03/2020	11/30/2021	GREENCHIP	NXP B.V.	No
TMK 20-00766	09/03/2020	09/02/2030	CHIHUAHUA	Chihuahua Brewing Company, LLC	No
TMK 20-00767	09/03/2020	09/02/2030	Chihuahua Dog within Circle Black White	Chihuahua Brewing Company, LLC	No
TMK 20-00768	09/03/2020	11/11/2030	DERMALLURA	Kalahly Pty Ltd	No
TMK 20-00769	09/03/2020	05/28/2022	GREENCHIP (AND DESIGN)	NXP B.V.	No
TMK 20-00770	09/03/2020	09/04/2029	CHIHUAHUA CERVEZA & DESIGN	Chihuahua Brewing Company, LLC	No
TMK 20-00771	09/03/2020	01/29/2030	CHIHUAHUA CERVEZA	Chihuahua Brewing Company, LLC	No
TMK 20-00772	09/03/2020	06/11/2024	ROADLINK	NXP B.V.	No

## CBP IPR RECORDATION — SEPTEMBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 20-00773	09/03/2020	01/29/2030	CHIHUAHUA CERVEZA (Stylized) and Design	Chihuahua Brewing Company, LLC	No
TMK 20-00774	09/03/2020	10/16/2029	CHIHUAHUA CERVEZA & DESIGN	Chihuahua Brewing Company, LLC	No
TMK 20-00775	09/03/2020	09/10/2028	CODEWARRIOR	NXP USA, INC.	No
TMK 20-00776	09/03/2020	02/01/2022	KINETIS	NXP USA, INC.	No
TMK 20-00777	09/03/2020	11/27/2023	MAGNIV	NXP USA, INC.	No
TMK 20-00778	09/03/2020	01/31/2026	GRAVELLY MEADOW	DIAMOND MOUNTAIN VINEYARD COMPANY, INC.	No
TMK 20-00779	09/04/2020	09/23/2025	LAKE	DIAMOND MOUNTAIN VINEYARD COMPANY, INC.	No
TMK 20-00780	09/04/2020	06/12/2026	RED ROCK TERRACE	DIAMOND MOUNTAIN VINEYARD COMPANY, INC.	No
TMK 20-00781	09/08/2020	08/12/2030	AIRWALL & DESIGN	Zeppelin LLC	No
TMK 20-00782	09/09/2020	03/23/2024	CREATIVE GRIDS	CREATIVE GRIDS USA, INC.	No
TMK 20-00783	09/09/2020	07/28/2030	DRZ	DRZ AMMUNITION MANUFACTURING COMPANY LLC	No
TMK 20-00784	09/10/2020	05/12/2029	Magik Egg and Design	GRANT IRINA	No
TMK 20-00785	09/11/2020	01/06/2023	Ty in Heart Design	TY INC.	No
TMK 20-00786	09/11/2020	03/02/2028	TY	Ty, Inc.	No
TMK 20-00787	09/11/2020	05/06/2028	BEANIE BOOS	Ty Inc.	No
TMK 20-00788	09/11/2020	09/29/2030	SEXIEST FANTASIES	Parfums de Coeur, Ltd.	No
TMK 20-00789	09/13/2020	11/05/2028	NANOWAVE	Hollingsworth & Vose Company	No
TMK 20-00790	09/13/2020	04/01/2023	GRANGE	National Grange of the Order of Patrons of Husbandry	No

## CBP IPR RECORDATION — SEPTEMBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 20-00791	09/13/2020	06/18/2029	YAMAHA	YAMAHA HATSUDOKI KABUSHIKI KAISHA	No
TMK 20-00792	09/13/2020	02/17/2030	YAMAHA	YAMAHA HATSUDOKI KABUSHIKI KAISHA	No
TMK 20-00793	09/13/2020	03/14/2021	YAMAHA (Stylized)	Yamaha Motor Co., Ltd.	No
TMK 20-00794	09/13/2020	03/14/2021	Crossed Tuning Forks Logo	Yamaha Motor Co., Ltd.	No
TMK 20-00795	09/13/2020	09/09/2025	YAMALUBE (STYLIZED)	Yamaha Hatsudoki Kabushiki Kaisha	No
TMK 20-00796	09/13/2020	06/27/2027	Racing Strobe Design	YAMAHA HATSUDOKI KABUSHIKI KAISHA	No
TMK 20-00797	09/15/2020	12/05/2027	SYSTEM BLUE	BD Performing Arts	No
TMK 20-00798	09/15/2020	01/23/2029	System Blue Logo	BD Performing Arts	No
TMK 20-00799	09/15/2020	12/08/2030	Supreme Logo	Chapter 4 Corp. DBA Supreme	No
TMK 20-00800	09/15/2020	04/22/2028	GYTR	Yamaha Motor Corporation, U.S.A.	No
TMK 20-00801	09/15/2020	10/22/2023	YZ	Yamaha Hatsudoki Kabushiki Kaisha	No
TMK 20-00802	09/16/2020	12/01/2028	MIKUNI Logo	MIKUNI CORPORATION	No
TMK 20-00803	09/16/2020	10/29/2028	Ladder Design	Yamaha Motor Corporation, U.S.A.	No
TMK 20-00804	09/16/2020	03/30/2026	MIKUNI	MIKUNI CORPORATION	No
TMK 20-00805	09/16/2020	11/04/2029	RAPTOR	YAMAHA MOTOR CO., LTD.	No
TMK 20-00806	09/16/2020	08/18/2024	YFZ	Yamaha Hatsudoki Kabushiki Kaisha	No
TMK 20-00807	09/16/2020	02/24/2029	GRIZZLY	Yamaha Hatsudoki Kabushiki Kaisha	No
TMK 20-00808	09/16/2020	03/22/2026	YXZ	Yamaha Hatsudoki Kabushiki Kaisha	No
TMK 20-00809	09/16/2020	01/27/2026	KODIAK	Yamaha Hatsudoki Kabushiki Kaisha	No
TMK 20-00810	09/16/2020	08/26/2025	WOLVERINE	Yamaha Hatsudoki Kabushiki Kaisha	No
TMK 20-00811	09/16/2020	06/07/2030	R1	Yamaha Hatsudoki Kabushiki Kaisha	No

## CBP IPR RECORDATION — SEPTEMBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 20-00812	09/16/2020	10/21/2030	ROBIN	Robin Golf, Inc.	No
TMK 20-00813	09/16/2020	12/08/2030	Football Helmet Design	Cleveland Browns Football Company LLC	No
TMK 20-00814	09/17/2020	12/08/2030	WITECH	FCA US LLC	No
TMK 20-00815	09/17/2020	10/16/2029	COROLLA	TOYOTA JIDOSHA KABUSHIKI KAISHA TA TOYOTA MOTOR CORPORATION	No
TMK 20-00816	09/17/2020	11/14/2030	SASSICAIA	SOCIETA' AGRICOLA C.I.T.A.I. COMPANYIA ITALIANA TERRENI ALLEVAMENTO E IMPIANTI S.P.A.	No
TMK 20-00817	09/17/2020	12/06/2028	SASSICAIA TENUTA SAN GUIDO BOLGHERI and Design	SOCIETA' AGRICOLA C.I.T.A.I. COMPANYIA ITALIANA TERRENI ALLEVAMENTO E IMPIANTI S.P.A.	No
TMK 20-00818	09/17/2020	04/02/2027	GUIDALBERTO TENUTA SAN GUIDO and Design	SOCIETA' AGRICOLA C.I.T.A.I. COMPANYIA ITALIANA TERRENI ALLEVAMENTO E IMPIANTI S.P.A.	No
TMK 20-00819	09/17/2020	03/16/2025	LE DIFESE	SOCIETA' AGRICOLA C.I.T.A.I. COMPANYIA ITALIANA TERRENI ALLEVAMENTO E IMPIANTI S.p.A.	No
TMK 20-00820	09/18/2020	08/13/2024	GUIDALBERTO	SOCIETA' AGRICOLA C.I.T.A.I. COMPANYIA ITALIANA TERRENI ALLEVAMENTO E IMPIANTI S.p.A.	No
TMK 20-00821	09/18/2020	10/08/2024	2002 TOSCANA INDICAZIONE GEOGRAFICA TIPICA IMBOTTIGLIATO DA TENUTA SAN GUIDO BOLGHERI - ITALIA L.078-03 ITALIA LE DIFESE 750ML & DESIGN	SOCIETA' AGRICOLA C.I.T.A.I. COMPANYIA ITALIANA TERRENI ALLEVAMENTO E IMPIANTI S.p.A.	No
TMK 20-00822	09/21/2020	05/11/2030	TOSYMRA	UPSHER-SMITH LABORATORIES, LLC	No
TMK 20-00823	09/21/2020	06/06/2028	PAIGELAUREN	PAIGELAUREN Enterprises, LLC	No

## CBP IPR RECORDATION — SEPTEMBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 20-00824	09/21/2020	09/03/2024	QUEORK (Stylized) and Fleur-de-lis Design	Dailey, Amanda	No
TMK 20-00825	09/22/2020	10/12/2021	Hyundai (STYLIZED)	Hyundai Motor Company	No
TMK 20-00826	09/22/2020	07/18/2027	ZEMBRACE	UPSHER-SMITH LABORATORIES, LLC	No
TMK 20-00827	09/22/2020	06/11/2028	NO BAD DAYS	NO BAD DAYS ENTERPRISES, INCORPORATED	No
TMK 20-00828	09/22/2020	04/03/2024	CAMRY	Toyota Jidosha Kabushiki Kaisha (Toyota Motor Corporation)	No
TMK 20-00829	09/23/2020	11/11/2030	MB Healthcare Consultants LLC and Design	MB Healthcare Consultants LLC	No
TMK 20-00830	09/23/2020	05/17/2025	DENSAH	HUWAIS IP HOLDING LLC	No
TMK 20-00831	09/24/2020	07/24/2028	STRECK (Stylized)	Streck, Inc.	No
TMK 20-00832	09/24/2020	10/19/2026	TFN	NEXT GENERATION LABS, LLC	No
TMK 20-00833	09/24/2020	03/06/2022	H Design - HMC Owned	HYUNDAI MOTOR COMPANY	No
TMK 20-00834	09/24/2020	11/25/2030	HEARTBREAK SOCIETY H-CREST LOGO	The Heartbreak Society Clothing, LLC	No
TMK 20-00835	09/24/2020	12/08/2027	LONGHORN SILHOUETTE LOGO DESIGN	BOARD OF REGENTS, THE UNIVERSITY OF TEXAS SYSTEM	No
TMK 20-00836	09/24/2020	06/03/2025	VERSAH	HUWAIS IP HOLDING LLC	No
TMK 20-00837	09/24/2020	12/01/2030	TORQ LOK	Air Comm Corporation LLC	No
TMK 20-00838	09/24/2020	10/19/2026	"tfr" within ellipse design	PHARMANIC LLC	No
TMK 20-00839	09/24/2020	10/07/2030	H (Stylized) and Design LOGO	The Heartbreak Society Clothing, LLC	No
TMK 20-00840	09/28/2020	10/07/2030	HEARTBREAK SOCIETY	The Heartbreak Society Clothing, LLC	No
TMK 20-00841	09/28/2020	12/15/2030	TOOL MASTER	CBB Group Inc.	No
TMK 20-00842	09/28/2020	08/29/2028	BUBS NATURALS	SLAYER FOREVER, LLC	No

## CBP IPR RECORDATION — SEPTEMBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 20-00843	09/28/2020	03/24/2030	SURGICEL	Johnson & Johnson	No
TMK 20-00844	09/28/2020	08/09/2030	R6	Yamaha Hatsudoki Kabushiki Kaisha	No
TMK 20-00845	09/28/2020	03/16/2027	ROGAINE	JOHNSON & JOHNSON	No
TMK 20-00846	09/28/2020	04/01/2023	ROGAINE (Stylized)	JOHNSON & JOHNSON	No
TMK 20-00847	09/28/2020	01/01/2030	DELICIOUS ENJOYABLE	Grant, Irma	No
TMK 20-00848	09/28/2020	12/08/2030	TENAX and Design	TENAX S.p.A.	No
TMK 20-00849	09/28/2020	10/04/2027	EasyDo (Stylized)	KUNLUN TECHNOLOGY INC.	No
TMK 20-00850	09/28/2020	01/22/2030	Z and Design	ZWUITS INC.	No
TMK 20-00851	09/28/2020	02/15/2027	TRUMP	D/TTM OPERATIONS LLC	No
TMK 20-00852	09/29/2020	07/28/2030	SPECK	Samsonte IP Holdings S.à.r.l.	No
TMK 20-00853	09/29/2020	07/28/2030	Asterisk in Parentheses Design	Samsonte IP Holdings S.à.r.l.	No
TMK 20-00854	09/29/2020	08/19/2030	SPECK TRAVEL	Samsonte IP Holdings S.à.r.l.	No
TMK 20-00855	09/29/2020	07/28/2030	SPECK and Design	Samsonte IP Holdings S.à.r.l.	No
TMK 20-00856	09/29/2020	08/14/2029	PRECIOUS VODKA (STYLIZED)	JEWEL LINES PRECIOUS VODKA LLC	No
TMK 20-00857	09/29/2020	02/26/2030	SBA3	NST Global, LLC DBA SB Tactical	No
TMK 20-00858	09/29/2020	02/26/2030	SBPDW	NST Global, LLC DBA SB Tactical	No
TMK 20-00859	09/29/2020	06/26/2029	SB & DESIGN	NST Global, LLC DBA SB Tactical	No
TMK 20-00860	09/30/2020	12/29/2030	Stylized flame design	TBNR, LLC	No
TMK 20-00861	09/30/2020	01/01/2030	STABILIZING BRACE	NST Global, LLC DBA SB Tactical	No
TMK 20-00862	09/30/2020	04/21/2030	ONUREG	Celgene Corporation	No
TMK 20-00863	09/30/2020	04/07/2029	B PRORSUM and Design	BURBERRY LIMITED	No
TMK 20-00864	09/30/2020	12/10/2023	Converse Midsole Design	Converse Inc.	No
TMK 20-00865	09/30/2020	08/29/2028	ENGLAND and Design	The Football Association Limited	No

## CBP IPR RECORDATION — SEPTEMBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 20-00866	09/30/2020	12/01/2030	CK PRODUCTS	CK Products	No
COP 20-00048	09/02/2020	03/13/2039	LEO 3D MALE HEAD	Pivot Point International, Inc.	No
COP 20-00049	09/02/2020	08/10/2040	Xanadu Falls	Artistic Tile, Inc.	No
COP 20-00050	09/10/2020	09/09/2040	Happy Egg	Irina Grant	No
COP 20-00051	09/11/2020	09/11/2040	Unicorn Beanie Boo - Heather	Ty Inc.	No
COP 20-00052	09/15/2020	06/19/2038	Happy Egg "Joy"	Irina Grant	No
COP 20-00053	09/16/2020	09/15/2040	Happy Egg "Hani"	Irina Grant	No
COP 20-00054	09/23/2020	09/23/2040	LANG PHONE CASE ARTWORK 1.0	Open Mind Developments Corporation	No
COP 20-00055	09/23/2020	09/23/2040	WKSS30GF-GelMem_PILLOW	CVB INC.	No
COP 20-00056	09/23/2020	09/23/2040	MITCHELL HONEYCOMB-BEE PHONE CASE ARTWORK 1.0.	Open Mind Developments Corporation	No
COP 20-00057	09/23/2020	09/23/2040	ZZ_SCOMPASZC_Chamomile_Lifestyle-WB1500588341_original.jpg.	CVB INC.	No
COP 20-00058	09/23/2020	09/23/2040	BUR SILHOUETTE WITH DEPTH MARKINGS	Versah, LLC	No



# U.S. Court of International Trade

Slip Op. 20–139

DONG-A STEEL COMPANY, Plaintiff, and KUKJE STEEL CO., LTD., Consolidated Plaintiff, v. UNITED STATES, Defendant, and INDEPENDENCE TUBE CORPORATION, SOUTHLAND TUBE, INCORPORATED, ATLAS TUBE, AND SEARING INDUSTRIES, Defendant-Intervenors.

Before: Gary S. Katzmman, Judge  
Consol. Court No. 19–00104  
PUBLIC VERSION

[Plaintiffs’ motion for judgment on the agency record is granted in part, and Commerce’s *Final Determination* is remanded consistent with this opinion.]

Dated: September 29, 2020

*Jarrod M. Goldfeder*, Trade Pacific, LLP, of Washington, DC, argued for plaintiff and consolidated plaintiff. With him on the brief was *Robert G. Gosselink*.

*Robert R. Kiepura*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director and *Tara K. Hogan*, Assistant Director. Of counsel was *Vania Y. Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC. With them on the supplemental brief was *Ethan P. Davis*, Acting Assistant Attorney General

*Robert E. DeFrancesco, III*, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenors, Independence Tube Corporation and Southland Tube, *Incorporated*. With him on the brief were *Alan H. Price*, and *Jake R. Frischknecht*; and supplemental brief *Elizabeth V. Baltzan*.

*Roger B. Schagrin*, Wiley Rein LLP, of Washington, DC, for defendant-intervenors, *Atlas Tube* and *Searing Industries*.

## OPINION

### Katzmann, Judge:

Did the Trade Preferences Extension Act of 2015 (“TPEA”) provide the United States Department of Commerce (“Commerce”) statutory authority to make a contested adjustment to the cost of production in an antidumping (“AD”) proceeding? Were the application of various adjustments and the denial of others unsupported by substantial evidence? These are among the issues presented by this case, involving a challenge to Commerce’s determination that Korean producers of heavy walled rectangular welded carbon steel pipes and tubes<sup>1</sup> (“HWR”) sold their product in the United States at below normal

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<sup>1</sup> Heavy walled rectangular welded carbon steel pipes and tubes (“HWR”) are pipes and tubes that are suitable, among other purposes, for the construction of offshore structures, owing to the carbon steel’s high strength and its ability to take various structural shapes.

value in their home market, resulting in the imposition of AD duties. Under this determination, Commerce imposed AD duty rates of 20.79 and 12.81 percent on Korean HWR manufacturers Dong-A Steel Company (“DOSCO”) and Kukje Steel Company (“Kukje”) (collectively, “Plaintiffs”), respectively. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments 2016–2017*, 84 Fed. Reg. 24,471 (Dep’t Commerce May 28, 2019), P.R. 244 (“*Final Results*”) and accompanying Mem. from G. Taverman to J. Kessler, re: Issues and Decision Mem. for the Final Results of the 2016–2017 Administrative Review of the Anti-dumping Duty Order on Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea (Dep’t Commerce May 20, 2019), P.R. 237 (“IDM”).

CARBON STEEL PIPE AND CARBON STEEL TUBE, [https://www.alro.com/divsteel/metals\\_comp\\_type.aspx?Mat=CARBON%20STEEL&Type=Pipe%20/%20Tube&mc=CS](https://www.alro.com/divsteel/metals_comp_type.aspx?Mat=CARBON%20STEEL&Type=Pipe%20/%20Tube&mc=CS) (last visited Sept. 25, 2020); Jung Suk-Yee, *United States Imposes High Tariff on South Korean Pipes and Tubes*, BUSINESSKOREA (Nov. 22, 2019, 8:57 AM), <http://www.businesskorea.co.kr/news/articleView.html?idxno=38348> (last visited Sept. 25, 2020). As to the product’s specifications, Commerce provides:

The merchandise subject to the order is certain heavy walled rectangular welded steel pipes and tubes of rectangular (including square) cross section, having a nominal wall thickness of not less than 4 mm. The merchandise includes, but is not limited to, the American Society for Testing and Materials (ASTM) A-500, grade B specifications, or comparable domestic or foreign specifications. Included products are those in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements below exceeds the quantity, by weight, respectively indicated:

- 2.50 percent of manganese, or
- 3.50 percent of silicon, or
- 1.50 percent of copper, or
- 1.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 2.0 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.80 percent of molybdenum, or
- 0.10 percent of niobium (also called columbium), or
- 0.30 percent of vanadium, or
- 0.30 percent of zirconium.

The product is currently classified under following Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7306.61.1000. Subject merchandise may also be classified under 7306.61.3000. Although the HTSUS numbers and ASTM specification are provided for convenience and customs purposes, the written description remains dispositive.

*Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2016–2017*, 83 Fed. Reg. 50,892 (Dep’t Commerce Oct. 10, 2018), P.R. 211 and accompanying Mem. from J. Maeder to G. Taverman, re: Decision Mem. for the Prelim. Results at 3–4 (Dep’t Commerce Oct. 3, 2018), P.R. 203.

Plaintiffs bring this action against the United States (the “Government”) to challenge Commerce’s dumping margin determinations and move for judgment on the agency record pursuant to Rule 56.2 of the U.S. Court of International Trade. DOSCO’s Mem. in Supp. of the R. 56.2 Mot. of Pl., DOSCO, for J. on Agency R., ECF No. 37 (“Pl.’s Br.”); Mem. in Support of the R. 56.2 Mot. of Consol. Pl., Kukje, for J. Upon the Agency Rec., ECF No. 38 (“Consol. Pl.’s Br.”). Specifically, Plaintiffs argue that Commerce erred by (1) finding the existence of a particular market situation<sup>2</sup> (“PMS”) in Korea for hot rolled steel coil (“HRC”), an input used to produce HWR; and (2) applying a cost-based PMS adjustment to Plaintiffs’ margin calculations—under the auspices of TPEA—outside the scope of a constructed value-to-price comparison. Pl.’s Br. at 1–2. *See* Consol. Pl.’s Br. at 3. Plaintiffs additionally argues that Commerce improperly: (1) used DOSCO’s theoretical rather than actual product weights; (2) determined that DOSCO was not entitled to a constructed export price (“CEP”) offset; and (3) adjusted DOSCO’s reported raw costs to capture physical differences across product units. Pl.’s Br. at 2–4. *See* Consol. Pl.’s Br. at 3. The court grants, in part, Plaintiffs’ motion for judgment on the agency record and remands to Commerce its PMS determination and adjustment. The court sustains Commerce’s determinations on the remaining issues.

## BACKGROUND

### *I. Legal and Regulatory Framework*

Dumping occurs when a foreign company sells goods into the United States at a lower price than the company charges for the same product in its home market. *Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1047 (Fed. Cir. 2012). To address the economic distortions arising from such conduct, Congress enacted the Tariff Act of 1930,<sup>3</sup> which empowers Commerce to investigate potential dumping activity and, if necessary, to issue orders imposing duties on

<sup>2</sup> A particular market situation is any circumstance that “prevents a proper comparison” between a product’s normal value and its export price. *See* 19 U.S.C. 1677b(a)(1)(B)(ii)(III). Under such circumstances, Commerce is authorized to use different methodologies to estimate normal value other than looking only at the exporting country’s sales price, as is the normal method. For instance, Commerce may turn to the product’s third country sales or constructed value instead. *See* Background *infra* Sec. I. B.

<sup>3</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. §§ 1677(15), 1677b, and 1677m, however, are not to the U.S. Code 2012 edition, but to the unofficial U.S. Code Annotated 2018 edition. The current U.S.C.A. reflects the amendments made to 19 U.S.C. §§ 1677(15), 1677b, 1677m (2012) by the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015). The TPEA amendments are applicable to all determinations made on or after August 6, 2015, and therefore, are applicable to this

subject merchandise. *Id.* When Commerce concludes that AD duties are appropriate, the agency is required to determine margins as accurately as possible. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Pursuant to 19 U.S.C. § 1673, Commerce imposes AD duties on foreign goods if it determines that the goods are being, or are likely to be, sold at less than fair value, and if the United States International Trade Commission concludes that the sale of the merchandise below fair value “materially injures, threatens, or impedes the establishment of an industry in the United States.” *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017). Merchandise is sold at less than fair value when the product’s normal value is greater than the price charged for the product in the United States (represented by the product’s export price or the product’s CEP). *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013). The AD duty is calculated by determining the difference between the normal value and the export or CEP for the merchandise. 19 U.S.C. § 1673.

### ***A. Standard Normal Value Calculation Methodology***

Normal value is ordinarily computed by looking at the sales price of the subject merchandise in the exporting country. 19 U.S.C. § 1677b(a)(1)(B)(i). However, Congress authorized Commerce to disregard the exporting country’s sales price and to instead base the calculation of normal value on third country sales if Commerce determines that a PMS exists in the exporter’s home market. 19 U.S.C. § 1677b(a)(1)(C)(iii).<sup>4</sup> Alternatively, should Commerce find that normal value cannot be reliably determined from the exporting country’s sales price, Commerce may also use the product’s constructed value<sup>5</sup>

proceeding. See *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,794 (Dep’t Commerce Aug. 6, 2015).

<sup>4</sup> In AD duty investigations, Commerce is directed to make a fair comparison between normal value and export price, pursuant to 19 U.S.C. § 1677b(a)(1)(B)(i), which provides:

In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or [CEP] and normal value. In order to achieve a fair comparison with the export price or [CEP], normal value shall be determined [as] . . . the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country.

However, 19 U.S.C. § 1677b(a)(1)(C)(iii), spells out an exception when “[t]he particular market situation in the exporting country does not permit a proper comparison with the export price or [CEP].” In such cases Commerce is directed to use “third country sales” as the basis for estimating the product’s normal value. 19 U.S.C. § 1677b(a)(1)(B)(ii).

<sup>5</sup> As specified in 19 U.S.C. § 1677b(e), constructed value represents: (1) “the cost of materials and fabrication or other processing of any kind [used] in producing the merchandise;” (2) “the actual amounts incurred and realized” for “selling, general, and administrative ex-

(“CV”), calculated pursuant to 19 U.S.C. § 1677b(e), in lieu of normal value. 19 U.S.C. § 1677b(a)(4). This approach, however, is similarly subject to a prior determination that the constructed value calculation would not be adversely distorted by the existence of an underlying PMS. *Id.*

### ***B. Particular Market Situation Determinations and Adjustments under the TPEA.***

Broadly, a PMS exists when a market possesses a unique set of circumstances that “prevents a proper comparison” between a product’s normal value and its export price or CEP. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III). However, previous versions of the Tariff Act fell short of providing an explicit definition for a PMS. *See* Tariff Act, Pub. L. 103–465, § 773 (1994) (amended 2015). In 2015, Congress passed the TPEA, which, among other objectives, amended existing AD and countervailing duty statutes. Trade Preferences Extension Act of 2015 § 504, 19 U.S.C. §§ 1677(15), 1677b(e). Section 504 of the TPEA in particular provided greater color to the meaning and scope of particular market situations and clarified the circumstances under which Commerce may apply adjustments on the basis of a PMS determination. Specifically, section 504(a) incorporated PMS determinations as a circumstance existing outside of a country’s ordinary course of trade.<sup>6</sup> *See* 19 U.S.C. § 1677(15)(C). Concurrently, section 504(c) of the TPEA amended the calculation of constructed value to allow for PMS-specific adjustments. *See* 19 U.S.C. § 1677b(e). Here, the TPEA stipulates that a PMS exists when “the costs of materials penses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country[;j]” and (3) the cost of packing the subject merchandise.

Further, 19 U.S.C. § 1677b(e) provides that:

[I]f a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this part or any other calculation methodology.

The meaning of “ordinary course of trade” is in turn drawn from 19 U.S.C. § 1677(15).

<sup>6</sup> Section 1677(15) provides:

The term “ordinary course of trade” means 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:

- (A) Sales disregarded under section 773(b)(1) [regarding sales at less than cost of production].
- (B) Transactions disregarded under section 773(f)(2) [regarding special rules].
- (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.

and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade,” impeding Commerce’s ability to accurately estimate a product’s CV. *See* 19 U.S.C. § 1677b(e)(3). Under such a determination, the TPEA authorizes Commerce to use “any other calculation methodology” to determine the cost of production in the exporting country for the purposes of calculating CV. *Id.*

### **C. CEP Offset Determination**

Beyond correcting for the distortive effects of a PMS, part of Commerce’s statutory mandate to conduct a “fair comparison” of normal value and export price also involves making:

[T]wo types of adjustments to normal value based on differences in the level of trade. The first type is a level of trade adjustment, 19 U.S.C. § 1677b(a)(7)(A), and the second type is a [CEP] offset, 19 U.S.C. § 1677b(a)(7)(B). Commerce will grant a [CEP] offset when “normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the [CEP], but the data available do not provide an appropriate basis to determine . . . a level of trade adjustment.” *Id.* When these two conditions are present, Commerce must lower the normal value “by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made.” *Id.*

*Dong-A Steel Co. v. United States*, 42 CIT \_\_, \_\_, 337 F. Supp. 3d 1356, 1374 (2018). In sum, Commerce may grant a CEP offset when it determines that an exporter’s home market is at a “more advanced stage” than its foreign markets, based in large part on the quantity and intensity of sales activities occurring at each market. 19 C.F.R. §§ 351.412(c)(2), 351.412(f)(1)(ii) (2020). Upon such a determination, Commerce is instructed to reduce its calculation of normal value to account for the difference in expenses that went towards the product’s sales. Simply put, when the home market level of trade (“LOT”) is more advanced than the CEP LOT, but Commerce lacks the data to determine whether the difference will adversely impact price comparability, Commerce is instructed to grant a CEP offset. *See* 19 U.S.C. § 1677b(7)(B); 19 C.F.R. § 351.412(f). “The party seeking a CEP offset bears the burden of establishing that the differences in selling functions performed in the home and US markets are ‘substantial.’” *Hyundai Steel Co. v. United States*, 43 CIT \_\_, \_\_, 365 F. Supp. 3d

1294, 1300 (2019) (citations omitted) (“Hyundai I”); *see also* 19 C.F.R. § 351.401(b)(1) (providing that the burden of establishing entitlement to a particular adjustment rests with the party in possession of the relevant information); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT 533, 556, 616 F. Supp. 2d 1354, 1374, (2009) (“While it is Commerce’s responsibility to determine if a petitioner qualifies for a CEP offset, it is the responsibility of the respondent requesting the CEP offset to procure and present the relevant evidence to Commerce.”).

## ***II. Factual and Procedural History of the Case***

### ***A. Commerce’s Administrative Review of HWR***

On August 17, 2015, Commerce initiated an investigation into HWR. *See Initiation of Less-Than-Fair-Value Investigations*, 80 Fed. Reg. 49,202, 49,203 (Dep’t Commerce Aug. 17, 2015). The investigation culminated in 2016 with an AD order on HWR pipe and tube from Korea. *See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea, Mexico, and the Republic of Turkey: Antidumping Duty Orders*, 81 Fed. Reg. 62,865, 62,866 (Dep’t Commerce Sept. 13, 2016) (“the Order”).

This action arises from Commerce’s September 2017 publication of a notice of opportunity to request review of the *Order* for the period covering March 1, 2016, to August 31, 2017. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 82 Fed. Reg. 41,595, 41,596 (Dep’t Commerce Sept. 1, 2017), P.R. 3. Following requests from domestic producers of HWR (including Independence Tube Corp. and Southland Tube, Inc., Nucor companies; Atlas Tube, a division of Zekelman Industries; and Searing Industries) (collectively, “Petitioners”), as well as from DOSCO and HiSteel, another Korean HWR manufacturer and exporter, Commerce commenced its 2016–2017 administrative review of the *Order* on November 13, 2017. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 52,268 (Dep’t Commerce Nov. 13, 2017), P.R. 5; Mem. from J. Maeder to G. Taverman, re: Decision Mem. for the Prelim. Results at 2 n.3 (Dep’t Commerce Oct. 3, 2018), P.R. 203 (“PDM”). For this review, Commerce selected DOSCO and HiSteel as mandatory respondents.<sup>7</sup> *See* Mem. from A. Wood to M. Skinner, re: Selection of Resp’t for Individual Review (Jan. 12, 2018), P.R. 16.

<sup>7</sup> In AD duty investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

As part of their submissions, Petitioners argued that there existed a PMS in Korea that distorted the COP of Korean HWR. Letter from Wiley Rein LLP to Sec’y Commerce, re: Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Particular Market Situation Allegation and Supporting Information (Aug. 31, 2018), P.R. 160 (“Petitioners’ PMS Allegation”). Petitioners cited four factors in support of their PMS allegation: (1) government subsidization of Korean hot-rolled steel products; (2) the distortive pricing of unfairly traded HRC from China; (3) strategic alliances between Korean HRC suppliers and Korean HWR pipes and tubes producers; and (4) distortive government control over electricity prices in Korea. *Id.* at 23–24. Petitioners claimed that earlier administrative reviews determined the existence of a PMS in Korea for products similar to HWR—including oil country tubular goods (“OCTG”), welded line pipe (“WLP”), and circular welded pipe (“CWP”)—based on the same four factors. *Id.* at 11.<sup>8</sup>

Petitioners further alleged that Plaintiffs’ home markets should be considered not viable due to the PMS allegation, and that Commerce should therefore use constructed value as the basis for the product’s normal value calculation. IDM at 27 n.96 (citing Petitioners’ Letter, re: Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Market Viability Allegations as to DOSCO and HiSteel (Feb. 22, 2018)).

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If it is not practicable to make individual weighted average dumping margin determinations [in investigations or administrative reviews] because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to-

(A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or

(B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

<sup>8</sup> See, e.g., *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014–2015*, 82 Fed. Reg. 18,105 (Dep’t Commerce Apr. 17, 2017) and accompanying Issues and Decision Mem.; *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015–2016*, 83 Fed. Reg. 17,146 (Dep’t Commerce April 18, 2018) and accompanying Issues and Decision Mem.; *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015–2016*, 83 Fed. Reg. 27,541 (Dep’t Commerce June 13, 2018) and accompanying Issues and Decision Mem.; *Welded Line Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015–2016*, 83 Fed. Reg. 33,919 (Dep’t Commerce July 18, 2018) and accompanying Issues and Decision Mem.; and *Large Diameter Welded Pipe from the Republic of Korea: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 83 Fed. Reg. 43,651 (Dep’t Commerce Aug. 27, 2018) and accompanying Prelim. Decision Mem.

### ***B. Preliminary Results***

On October 10, 2018, Commerce published its preliminary results. *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2016–2017*, 83 Fed. Reg. 50,892 (Dep’t Commerce Oct. 10, 2018), P.R. 211 (“*Preliminary Results*”) and accompanying PDM. Commerce preliminarily determined that the sale of Korean HWR in the U.S. had been made at prices below normal value. PDM at 1. Commerce also determined that a PMS in Korea distorted the cost of producing HWR, in line with Petitioners’ earlier allegations. *Id.* at 13. In reaching this conclusion, Commerce, as it had done in its previous determinations that found the existence of a PMS in Korea, analyzed the four factors raised by Petitioners based “on a totality of the circumstances,” rather than relying on any one factor. *Id.* Though Commerce determined that the PMS for Korean HWR resulted from the “collective impact” of the four factors, Commerce also determined that only the first factor—government subsidization of HRC inputs—could be properly quantified and therefore properly adjusted for. *Id.* Thus, Commerce applied a PMS adjustment based only on estimated subsidy rates obtained from prior studies of the Korean government’s subsidization of HRC calculated in a previous countervailing duty determination. *Id.* (citing *Certain Hot-Rolled Steel Flat Products from Brazil and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders*, 81 Fed. Reg. 67,960 (Dep’t Commerce Oct. 3, 2016)). In so doing, Commerce adjusted DOSCO’s reported input costs in proportion to the company’s HRC purchases from subsidized suppliers. *Id.* at 20. However, Commerce disagreed with Petitioners that the PMS determination necessarily demonstrated a lack of market viability, and therefore Commerce used home market sales, rather than CV, as the basis for the normal value calculations.<sup>9</sup> *See id.* at 14. In its *Preliminary Results*, Commerce also calculated DOSCO’s AD margin based on its

<sup>9</sup> As noted by Commerce, the agency’s “viability regulation is found at 19 C.F.R. § 351.404.” IDM at 29. Subsection (b) of the regulation in particular states:

- (1) The Secretary will consider the exporting country or a third country as constituting a viable market if the Secretary is satisfied that sales of the foreign like product in that country are of sufficient quantity to form the basis of normal value.
- (2) “Sufficient quantity” normally means that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by an exporter or producer in a country is 5 percent or more of the aggregate quantity (or value) of its sales of the subject merchandise to the United States.

19 C.F.R. § 351.404(b)(1)–(2). And, “absent a reason to do otherwise, Commerce’s normal practice would be to use home market sales as the basis for [normal value].” IDM at 29.

reported theoretical weights of sales of subject merchandise, rather than using DOSCO's preferred "theoretical actual" (henceforth, actual) weights of sales.<sup>10</sup> See PDM at 9; see also IDM at 34. Additionally, Commerce preliminarily determined that DOSCO was not entitled to a CEP offset on the basis of alleged differences in sophistication of the LOTs between its home and export markets. PDM at 17–18.

### C. Final Results

In response to the *Preliminary Results*, Petitioners, DOSCO, and HiSteel filed case briefs with Commerce in November 2018. See IDM at 2; Letter from DOSCO to Sec'y of Commerce, re: Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea – Case Brief (Nov. 28, 2018), P.R. 218 (“DOSCO’s Case Brief”). Commerce received rebuttal briefs from the same parties one month later. IDM at 2; Letter from DOSCO to Sec'y of Commerce, re: Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea – Rebuttal Brief (Dec. 3, 2018), P.R. 221 (“DOSCO’s Rebuttal Brief”). Commerce issued its *Final Results* in May 2019. Final Results; IDM. In it, Commerce sustained its earlier determination that a PMS existed with respect to the cost of HRC inputs for HWR from Korea. *Id.* Commerce also reaffirmed its view that a PMS adjustment to Plaintiffs’ cost of production was quantifiable and statutorily valid, but in a change from the *Preliminary Results*, reduced the PMS adjustment to more accurately reflect the net subsidy rate. IDM at 3. As part of the final PMS determination, Commerce affirmed its view that Korea did not lack home market viability. *Id.*

In its case brief, DOSCO challenged Commerce’s PMS determination. DOSCO contended that the TPEA would allow Commerce to apply a PMS adjustment only when using a price-to-constructed value comparison, but not to the calculation of COP as Commerce had done in its *Preliminary Results*. DOSCO’s Case Br. at 5–7. DOSCO further argued that Commerce’s PMS determination was unsupported by the record because Commerce reached this conclusion only after relying heavily on findings from prior cases involving different

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<sup>10</sup> Both theoretical and “theoretical actual” weights are calculated by scaling the product’s dimensions by its density, using the same “standard industry formula,” with the only difference being the value used for the “thickness” component. IDM at 34. “Theoretical weight . . . is based on the thickness of the final HWR product and ‘theoretical actual’ weight uses the thickness of the input steel coil used to produce HWR.” *Id.* Neither metric captures the “actual measured weight” of the final HWR product itself, since “DOSCO does not weigh its products either after production or prior to shipment.” *Id.* Rather, both serve as approximations for actual measured weight.

products. *Id.* at 7–13. DOSCO finally asserted that any PMS adjustment applied, should be drawn from the contemporaneous countervailing duty administrative review of *Hot Rolled Steel from Korea* to capture the most contemporaneous net subsidy rate data. *Id.* at 15–18. Petitioners by contrast argued that Commerce’s PMS adjustment, by only capturing the effect of the government subsidy, in fact failed to address the full extent of the distortions created by the PMS. IDM at 8–9 (summarizing Petitioners’ comments on PMS in Korea). Petitioners instead suggested alternative methodologies for calculating a more fulsome PMS adjustment value. *See id.* at 9. DOSCO responded that Petitioners’ proposed alternatives for estimating the appropriate PMS adjustment were untenable as a matter of law. DOSCO’s Rebuttal Br. at 9–11.

Commerce likewise affirmed its use of theoretical rather than actual weights to estimate DOSCO’s dumping margin and restated its decision that a CEP offset was not warranted. *Id.* at 304–35; 38–41. In its case brief, DOSCO contended that Commerce introduced distortions into its AD margin calculations when it relied on the theoretical, rather than actual, weight of DOSCO’s finished products, DOSCO’s Case Brief at 29–33, to which Petitioners responded that DOSCO’s claim of such distortion was unsupported by compelling evidence, IDM at 33 (summarizing Petitioners’ rebuttal comments). Finally, DOSCO argued that it was entitled to a CEP offset as a result of a more advanced home market LOT than its CEP LOT, which DOSCO argued was evidenced by the different quantity, authority, and functions of its sales personnel in the home and U.S. markets. DOSCO’s Case Brief at 33–39. Petitioners responded by pointing to the “subjective” nature of DOSCO’s own assessments regarding the intensity of sales activity conducted for home market versus CEP LOTs. IDM at 37 (summarizing Petitioners’ comments on CEP offset).

In a change from its *Preliminary Results*, Commerce altered Plaintiffs’ reported raw material costs in the *Final Results*, following Petitioners’ comments regarding the differences in DOSCO’s reported COP figures for similar CONNUMs. *Id.* at 42. Petitioners noted that DOSCO reported different costs for products with similar control numbers (“CONNUMs”).<sup>11</sup> IDM at 42 (summarizing Petitioners’ comments regarding DOSCO’s reported CONNUMs). For this reason, Petitioners argued that Commerce should apply an additional adjustment to the adjustments provided in the *Preliminary Results*. *Id.* DOSCO responded that no further adjustment was required, since

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<sup>11</sup> Sales of individual products are denominated by product control numbers denoted as “CONNUM” entries.

the cost differences were either so small as to be negligible, or else could be explained by differences in the manufacturing process. DOSCO's Rebuttal Brief at 18.

#### ***D. Procedural History***

DOSCO initiated this litigation on June 25, 2019, challenging the portions of Commerce's *Final Results* pertaining to the calculation and adjustments of Plaintiffs' AD margins. Summons, ECF No. 1; Compl. at 6, ECF No. 6. Kukje commenced a separate action against the Government to challenge Commerce's final determination, filing a summons and complaint on June 25, 2019. Kukje's Summons, *Kukje v. United States*, No. 19–105 (CIT filed June 25, 2019), ECF No. 1; Kukje's Compl., *Kukje*, No. 19–105, ECF No. 6. On August 5, 2019, the court granted consent motions to allow Defendant-Intervenors Atlas Tube, Searing Industries, and Nucor Tubular Products Inc. ("Nucor") to intervene in both cases. *Kukje*, No. 19–105, ECF Nos. 28, 29; Ct. Orders Granting Consent Mot. to Intervene as Def.-Inter., ECF Nos. 23, 24. On August 6, 2019, the parties filed a motion to consolidate Kukje's action (No. 19–105) with the lead case brought by DOSCO. Joint Mot. to Consol. Cases, ECF No. 25. The court granted the motion on August 13, 2019. ECF No. 26.

On November 6, 2019, Plaintiffs filed a Rule 56.2 motion for judgment on the agency record to challenge the *Final Results*. Pl.'s Br.; Consol. Pl.'s Br. The Government and Defendant-Intervenor Nucor responded in opposition to Plaintiff's motion. Def.'s Resp. to Pls.' Mot. for J. Upon the Agency R., Mar. 3, 2020, ECF No. 43 ("Def.'s Br."); Def.-Inter. Nucor's Resp. Br., Mar. 3, 2020, ECF No. 44 ("Def.-Inter.'s Br."). Plaintiffs subsequently replied. Reply of Pl., DOSCO, to Def.'s and Def.-Inter.'s Mem. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R., Mar. 26, 2020, ECF No. 46 ("Pl.'s Reply"); Reply of Consol. Pl. Kukje, Mar 26, 2020, ECF No. 47 ("Consol. Pl.'s Reply"). In advance of oral argument, the court presented questions to which the parties responded in writing. See Ct.'s Letter Regarding Questions for Oral Arg., July 8, 2020, ECF No. 53; Pls.' Resp. to Questions for Oral Arg., July 14, 2020, ECF No. 55; Def.'s Resp. to the Ct.'s Questions for Oral Arg., July 14, 2020, ECF No. 58 ("Def.'s Resp. to the Ct.'s Questions"); Def.-Inter. Nucor's Resp. to Ct.'s Questions for Oral Arg., July 14, 2020, ECF No. 57. Oral argument was held on July 16, 2020 via teleconference. ECF No. 59. Parties provided post-oral argument submissions on July 20, 2020. Pls.' Additional Comments Following Oral Arg., ECF No. 62; Def.'s Post-Oral Arg. Submission, ECF No. 60; Def.-Inter. Nucor Resp. to Ct.'s Req. for Additional Submission, ECF No. 61.

## JURISDICTION, STANDARD OF REVIEW, AND INTERPRETIVE FRAMEWORK

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c), 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and 19 U.S.C. § 1516a(a)(2)(B)(i). The standard of review in AD duty proceedings is governed by 19 U.S.C. § 1516a(b)(1)(B)(i), which provides that “[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” Agency determinations must be supported by substantial evidence. *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 (Fed. Cir. 1984). Substantial evidence “has been defined as ‘more than a mere scintilla,’ as ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The substantiality of evidence must account for anything in the record that reasonably detracts from its weight. *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997)). This includes “contradictory evidence or evidence from which conflicting inferences could be drawn.” *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)). Commerce must also examine the record and provide an adequate explanation for its findings such that the record demonstrates a rational connection between the facts accepted and the determination made. See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Jindal Poly Films Ltd. of India v. United States*, 43 CIT \_\_, \_\_, 365 F. Supp. 3d 1379, 1383 (2019). Commerce’s findings may still be found to be supported by substantial evidence despite the possibility that two inconsistent conclusions may be drawn from the record. *Aluminum Extrusions Fair Trade Comm. v. United States*, 36 CIT 1370, 1373 (2012). However, agencies act contrary to law if their decision-making is not reasoned. *Burlington Truck Lines, Inc. v. United States* 371 U.S. 156, 167–68 (1962).

Additionally, to determine whether Commerce’s interpretation and application of a statute “is in accordance with the law,” the court must apply the two-step test laid out in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*,

[f]irst, always, is the question [of] whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; the court, as well as the

agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842–43. Deference to an agency's interpretation of a statute is only required under *Chevron* when that interpretation is reasonable. *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994).

## DISCUSSION

Plaintiffs moved for judgment on the agency record, arguing that: (1) Commerce's PMS determination was unsupported by substantial evidence, Pl.'s Br. at 9; (2) even if the PMS determination was valid, Commerce improperly interpreted and applied section 504 of the TPEA when imposing an additional cost-based PMS adjustment, *id.* at 10; (3) Commerce's use of theoretical rather than actual weights for the calculation of DOSCO's AD margin introduced distortions in contravention of Commerce's obligation to maximize accuracy, *id.* at 28; (4) Commerce erred in determining that DOSCO was not entitled to a CEP offset, *id.* at 33; and (5) Commerce's decision to adjust DOSCO's reported raw costs in the calculation of DOSCO's AD margin was unsupported by substantial evidence on the record, *id.* at 39. *See also* Consol. Pl.'s Br. at 3.<sup>12</sup> Plaintiffs' arguments are largely consistent with the points raised in the comments to the *Preliminary Results*.

The Government responds that: (1) Commerce's PMS determination was supported by substantial evidence and in accordance with law, Def.'s Br. at 8; (2) Commerce properly determined that section 504 of the TPEA grants statutory authority to Commerce to make PMS adjustments to cost of production outside of a constructed value-to-price comparison methodology, *id.* at 12; (3) Commerce's calculation of DOSCO's margins using theoretical rather than actual weights was supported by substantial evidence on the record and in accordance with law, *id.* at 25; (4) Commerce properly determined that DOSCO was not entitled to a CEP offset, *id.* at 29; and (5)

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<sup>12</sup> Kukje indicated its support for DOSCO's motion and arguments before this court. Consol. Pl.'s Br. at 3. Kukje explained that it "was assigned a final [AD] duty margin that was an average of the rates assigned to mandatory respondents" and thus requests "any relief granted to DOSCO as a result of this appeal." *Id.*

Commerce correctly found that DOSCO's reported raw material costs warranted adjustment, *id.* at 34. *See also* Def.-Inter.'s Br. at 1.<sup>13</sup>

The court grants Plaintiffs' motion for judgment on the agency record with respect to the first two issues. For the reasons discussed below, the court holds that Commerce's PMS determination was not supported by substantial evidence. Thus, the court remands to Commerce its PMS determination and adjustment. In the interest of judicial economy, the court also addresses the issue of statutory interpretation. The court holds that Commerce applied an impermissible interpretation of section 504 of the TPEA in applying the PMS adjustment; the plain meaning of the statute delineates narrow circumstances under which PMS adjustments may be applied. The first two issues notwithstanding, the court affirms the remaining three determinations made by Commerce and challenged by Plaintiffs.

### ***I. Commerce's PMS Determination Was Unsupported by Substantial Evidence.***

In its *Final Results*, Commerce determined that a PMS existed for HRC in Korea, which distorted the cost of production of Korean HWR. IDM at 13. Commerce reached this conclusion "based on the collective impact of Korean HRC subsidies, Korean imports of HRC from China, strategic alliances, and government involvement in the Korean electricity market." *Id.* In support of its PMS finding, Commerce drew on its recent determinations on OCTG, CWP, WLP, and large diameter line pipe ("LDWP"), in which "the same four factors" were found to support a PMS determination. *Id.* at 15 (citations omitted).

Plaintiffs argue that Commerce's PMS determination was erroneous, as it relied "heavily" on Commerce's prior determinations that this court determined were not based on substantial evidence. Pl.'s Reply at 7–8 (citing *Nesteel Co. v. United States*, 43 CIT \_\_, 355 F. Supp. 3d 1336 (2019) ("*Nesteel I*"); *Nesteel Co. v. United States*, 43 CIT \_\_, 392 F. Supp. 3d 1276 (2019) ("*Nesteel II*"); *Hyundai Steel Co. v. United States*, 43 CIT \_\_, 415 F. Supp. 3d 1293 (2019) ("*Hyundai II*")); Pl.'s Br. at 15–16. Plaintiffs contend that Commerce thereby failed to meet the substantial evidence burden. Pl.'s Br. at 10. *See also* Consol. Pl.'s Br. at 5 ("Because Commerce's calculation of the final [AD] duty rate assigned to DOSCO was unsupported by substantial evidence and otherwise not in accordance with law, Commerce's calculation of the review-specific average rate assigned to Kukje[] as a non-examined company, which was based in part on DOSCO's final [AD] rate, likewise was unsupported by substantial evidence and other-

<sup>13</sup> Nucor responds to Plaintiffs first issue and "incorporate[s] by reference the arguments made by the United States in its Response Brief." Def.-Inter.'s Br. at 2.

wise in accordance with law.”). The Government counters by arguing that the four factors it relied upon, viewed together, constitute substantial evidence. Def.’s Br. at 18. *See also* Def.-Inter.’s Br. at 18–19.

**A. *The Nonprecedential but Influential Nexteel Line of Cases, Involving First Impression of a PMS Determination Made by Commerce Under Section 504 of the TPEA, Are Persuasive.***

For a valid PMS determination, substantial evidence must support a finding that “the costs of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade,” thereby preventing Commerce from drawing accurate comparisons in its calculation of appropriate AD margins. 19 U.S.C. § 1677b(e). Caselaw involving PMS determinations under the TPEA is sparse. In fact, *Nexteel I*, on which Plaintiffs rely, is a case of first impression on the matter. In *Nexteel I*, plaintiff Nexteel challenged Commerce’s determination that a PMS existed with regard to Korean HRC. 355 F. Supp. 3d at 1346. In its 2014–2015 administrative review of OCTG imported from Korea, Commerce determined the existence of a single PMS in Korea on the basis of four factors—(1) government subsidization of Korean hot-rolled steel products; (2) the distortive pricing of unfairly traded HRC from China; (3) strategic alliances between Korean HRC suppliers and Korean HWR pipes and tubes producers; and (4) distortive government control over electricity prices in Korea. *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Anti-dumping Duty Administrative Review; 2014–2015*, 82 Fed. Reg. 18,105 (Dep’t Commerce Apr. 17, 2017) and accompanying Issues and Decision Mem. (“*OCTG from Korea 14–15*”). Commerce previously declined to find the existence of four separate PMSs, one for each cited factor. *Nexteel I*, 335 F. Supp. 3d at 1346. The court at the time held it “unreasonable that Commerce reversed its position and subsequently found a particular market situation based on the same evidence. It does not stand to reason that individually, the facts would not support a particular market situation, but when viewed as a whole, these same facts could support the opposite conclusion.” *Id.* at 1351. Consequently, the court held Commerce’s PMS determination with respect to OCTG products from Korea to be unsupported by substantial evidence. *Id.*

In its subsequent 2015–2016 administrative review of the same matter, Commerce again affirmed the existence of a PMS in Korea. *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015–2016*, 83

Fed. Reg. 17,146 (Dep't Commerce Apr. 18, 2018) (“*OCTG from Korea 15–16*”) and accompanying Issues and Decision Mem. In so doing, “Commerce relied on its prior finding of the existence of a particular market situation in the first administrative review and continued to find in this administrative review that the circumstances remain ‘largely unchanged.’” *Nexteel II*, 392 F. Supp. 3d at 1287. As a result, the court again held that the PMS determination was unsupported by substantial evidence. *Id.* at 1288.

The arguments raised by Plaintiffs here are similar in nature to those raised by the plaintiffs in *Nexteel I* and *Nexteel II*. Plaintiffs note that, by Commerce’s own admission, “the circumstances present during this review—that is, the PMS allegation itself and the record evidence concerning the allegation—remained *largely unchanged* from those that led to the finding of a PMS in Korea in the other reviews.” IDM at 13 (citing *OCTG from Korea 14–15*; *OCTG from Korea 15–16*) (emphasis added). The language used by Commerce in its administrative review of the *Order* here—referencing the “largely unchanged” nature of the “record evidence”—identically mirrors the language used by Commerce in the administrative review that gave rise to *Nexteel II*. See 392 F. Supp. 3d at 1287. Thus, the record evidence that Commerce relies upon to support its PMS determination here appears to be consistent with the evidence from prior administrative reviews, which the court has held to be insufficient to satisfy the substantial evidence burden.

The Government argues in response that *Nexteel I* and *Nexteel II* are distinguishable and non-binding. Def.’s Br. at 20–22. While it is true that those decisions are non-binding, the court has determined that those earlier decisions are informative and persuasive here. Moreover, the court notes that neither the Government nor Nucor offers more persuasive or binding case law as an alternative.

### ***B. Hyundai II is also Persuasive for Plaintiffs.***

Following *Nexteel I* and *Nexteel II*, the court was presented once more with a case involving a PMS determination under the TPEA. In its 2018 suit, plaintiff Hyundai contended that, in finding the existence of a PMS in Korea with regard to CWP, Commerce improperly relied on “the same insufficient facts and record evidence” that had formed the basis for the PMS determination in *OCTG from Korea 14–15*, and since rebuked by the court in *Nexteel I* and *Nexteel II*. *Hyundai II*, 415 F. Supp. 3d at 1297; *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015–2016*, 83 Fed. Reg. 27,541 (Dep’t Commerce June 13, 2018) and accompanying Issues and Decision Mem. In

response to this claim, the court reiterated that “because Commerce’s original finding of a [PMS] was not supported by substantial evidence [in *Nesteel I* ], . . . Commerce’s finding of a [PMS] in the second administrative review was not supported by substantial evidence” in *Nesteel II. Hyundai II*, 415 F. Supp 3d at 1299. It follows that, as “Commerce’s finding of a [PMS] in the instant review was based upon ‘the same evidence . . . on the record,’ the court is compelled to conclude that Commerce’s finding of a [PMS] in the instant review is also not supported by substantial evidence.” *Id.* at 1300 (citations omitted).

Plaintiffs in the immediate action raise a nearly identical claim as the plaintiff in *Hyundai II*. Plaintiffs first note that the PMS allegation in *Hyundai II* was “substantively the same” as the PMS allegation raised in *OCTG from Korea 14–15*. Pl.’s Reply at 8 (citing *Hyundai II*, 415 F. Supp. 3d at 1300). Plaintiffs then observe that, in Commerce’s own words, “the facts in this review are largely identical to the facts in [OCTG from Korea 14–15].” *Id.* (quoting IDM at 15). Under the court’s holding in *Hyundai II*, record evidence that is “largely identical” or “virtually the same” to that raised in *OCTG from Korea 14–15* will not support a PMS determination. 415 F. Supp. 3d at 1300. Since “the same evidence is on the record” here, Commerce’s PMS determination with respect to this administrative review appears likewise unsupported by substantial evidence. *See* IDM at 15. While the Government correctly argues that *Hyundai II* is non-precedential, Def.’s Br. at 21–22, the court finds it to be persuasive. Again, the Government nor Nucor offers any more persuasive or binding case law on the matter.

### ***C. The Government’s Arguments Are Uncompelling.***

The Government argues that, despite this court’s earlier rulings, the court should find the “confluence” of the four factors, viewed in “totality of the record evidence,” to meet the requisite evidentiary burden, even though only one of the factors is directly quantifiable. Def.’s Br. at 18, 20. The Government here articulates the view that the four factors, though spelled out individually, are necessarily interrelated and that they “represent[] facets of a single [PMS].” *Id.* at 18. Similarly, Nucor argues that no standard exists which requires Commerce to quantify and analyze each factor individually. Def.-Inter.’s Br. at 19–20.

The Government further argues that, in addition to being non-binding, *Nesteel I* and *Nesteel II*, as well as *Hyundai II*, can all be

distinguished from the immediate case. *Id.* at 21. In *Nesteel I*, the court found it “unreasonable that Commerce reversed its position,” between the publication of the preliminary and final results as to the existence of a PMS in Korea. *Nesteel I*, 355 F. Supp. 3d at 1351. The Government contends that the reversal of position, rather than the evidentiary support for a PMS finding (or lack thereof), constituted the crux of the *Nesteel* holding. Def.’s Br. at 21. Under the Government’s view, since Commerce here made an affirmative PMS determination in its *Preliminary Results*, which it sustained in its *Final Results*, there was no reversal of position, and “notwithstanding that Commerce compared the record here to that of *Nesteel I*, this is a fundamentally different case.” *Id.* The Government further argues that, since the outcomes of *Nesteel II* and *Hyundai II* were both derived from the holding in *Nesteel I*, the latter cases also turned on the reversal of Commerce’s initial PMS determination, rather than on the record evidence. *Id.* The Government’s argument here is unpersuasive. Though the court indeed found it “unreasonable that Commerce reversed its position,” the court’s holding (that the PMS determination was unsupported by substantial evidence) was ultimately based on the lack of record evidence, which did not change between the preliminary and final results of the administrative review. *Nesteel I*, 355 F. Supp. 3d at 1349–51 (“Commerce failed, however, to substantiate its finding of one particular market situation with evidence on the record.”). The record evidence (or rather, lack thereof) which was the underlying basis for the court’s decisions in *Nesteel II* and *Hyundai II* also serves as the record evidence in the immediate case. This overlap is more dispositive than any reversal in position made by Commerce between the preliminary and final results.

While Commerce acknowledged that “the same evidence is on the record of this review,” IDM at 12, it argued that the facts available here are more complete than in previous proceedings, a claim that the Government repeats. IDM at 18–19; Def.’s Resp. to the Ct.’s Questions at 5 (“[T]his record contains additional information supporting the four factors upon which Commerce determined a PMS exists”). This alone is insufficient—the Government must additionally demonstrate that Commerce actually relied on the more expansive factual evidence in reaching the PMS determination. *Hyundai II*, 415 F. Supp. 3d at 1300 (“Despite the more expansive record, . . . Commerce relied upon virtually the same record evidence that was present in the [earlier] OCTG record”). Commerce is entitled to a presumption that it has “considered all of the record evidence,” absent a showing to the contrary. *Jacobi Carbons AB v. United States*, 43 CIT \_\_, \_\_, 422 F. Supp. 3d 1318, 1325 n.10 (2019) (citing *Siemens Energy, Inc. v.*

*United States*, 38 CIT \_\_, \_\_, 992 F. Supp. 2d 1315, 1324 (2014), *aff'd*, 806 F.3d 1367 (Fed. Cir. 2015)). However, a presumption of consideration differs markedly from a demonstration of actual reliance on the evidentiary record. Here, Commerce did place the evidence on the record, but, despite what Commerce or the Government may argue, it is clear from the reasoning provided by Commerce itself that the PMS determination was predicated on the “largely unchanged,” “largely identical,” “same” record evidence from the prior proceedings. IDM at 13, 15; *see* Background *supra* Sec. I. (A.–B.).

Even barring Commerce’s “largely unchanged” language in the IDM, it is apparent that Commerce nonetheless drew heavily on the same record evidence from prior administrative reviews to reach its determination here. *Compare* Petitioners’ PMS Allegation at 11 (arguing that “[a]s it found with respect to OCTG, WLP, and CWP . . . , and preliminarily for LDWP from Korea, [Commerce] here should find that a PSM exists in Korea” for HWR), *id.* at 15–23 (describing the nature of the exhibits associated with the PMS allegation, including that many from earlier administrative proceedings implicated in *Nexteel I*, *Nexteel II*, and *Hyundai II*), and *id.* at 23 (acknowledging that “evidence for this review [includes] evidence considered by [Commerce] in the first and second administrative reviews of OCTG from Korea, the first administrative review of WLP from Korea, the 2015–2016 administrative review of CWP from Korea, and the investigation on LWP from Korea”) *with* IDM at 12–19 (relying on the PMS Allegation exhibits, which refer back to the prior administrative reviews, or directly invoking the prior administrative reviews to defend the PMS determination with regard to Korean HWR).

#### ***D. The Original Record Evidence Was and Remains Insufficient To Constitute Substantial Evidence.***

Commerce, by its own admission and contrary to the arguments raised by the Government, relied on substantially the same record evidence in reaching its PMS determination here as underlay earlier administrative reviews. Applying the court’s reasoning in *Nexteel I*, *Nexteel II*, or *Hyundai II* the court therefore finds, again, that the record evidence fails to meet the substantial evidence burden. As an example of the overlap in record evidence, the court takes Commerce’s argument that the distortive influx of cheaply priced Chinese HRC contributes to the existence of a PMS. IDM at 13. As evidence that this influx “plac[es] downward pressure on Korean domestic steel prices,” Commerce relied upon Exhibits 2–5 of the Petitioners’ PMS Allegation. *Id.* Problematically, each of these exhibits simply constitutes portions of the record evidence from Commerce’s prior administrative reviews (Exhibit 2 is the IDM for *OCTG from Korea*

14–15; Exhibit 3 is the IDM for *OCTG from Korea 15–16* ; Exhibit 4 is the IDM for Commerce’s 2015– 2016 administrative review of CWP from Korea; Exhibit 5 is the IDM for Commerce’s first administrative review of WLP from Korea). Petitioners’ PMS Allegation at 17–20. By relying on previous record evidence that the court already deemed insufficient to meet the substantial evidence standard, Commerce merely incorporates and accentuates the flaws the court previously identified. Regarding the unfairly traded HRC from China, for example, Commerce previously, and again here, neglected to clarify whether the rise in steel exports from China is a trend “unique to Korea.” See *Nexteel I*, 355 F. Supp. 3d at 1350 (citation omitted). Otherwise, “[t]he potential broad effect on prices creates a situation outside the scope of a [PMS], as the impact of Chinese exports in the Korean market [may] also [be] reflected in other markets across the world.” *Id.* (quotation omitted). By the same logic, similar flaws may be identified regarding the other three factors.<sup>14</sup>

Accordingly, the court grants Plaintiffs’ motion as to the PMS determination and remands this determination to Commerce.

## ***II. Commerce’s Application of Section 504 of the TPEA To Impose a PMS Adjustment Outside the Context of a Price-to-Constructed Value Comparison Is Not in Accordance with Law.***

On the basis of its PMS determination, Commerce applied an upward adjustment to the AD margin calculations. Plaintiffs argue that, even if the PMS determination was valid, the adjustment was proce-

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<sup>14</sup> The Government contends that the record evidence “contains additional information supporting the four factors upon which Commerce determined a PMS exists.” Def.’s Resp. to the Ct.’s Questions for Oral Arg. at 5. The Government provided examples of such additional record evidence available to Commerce:

- Global Trade Monitor reports on steel exports (Exhibits 40 and 41);
- Global Trade Atlas data on Chinese exports of hot-rolled steel and Korean imports of hot-rolled steel (Exhibits 44–47);
- Additional articles and reports on the global overcapacity of steel (Exhibits 54, 57, 59, 60);
- POSCO’s earnings during the period of review (Exhibits 55, 67),
- Information about POSCO’s and Hyundai steel merger (Exhibits 71, 72);
- Regression analysis to estimate the effect of global excess capacity of steel on Korean hot-rolled steel imports (Exhibit 82); and
- Decisions of the Korea Fair Trade Commission (Exhibits 95–103), and information on electricity rates (Exhibits 106–108) and operating losses of Korean electricity providers (Exhibits 104, 105, and 118).

*Id.* However, Commerce did not invoke these exhibits, except the Decisions of the Korea Fair Trade Commission, in explaining its PMS determination in the IDM. See IDM at 15–17 nn.54– 55 (citing to Exhibit 9, a memorandum from the earlier Hot Rolled Steel from Korea countervailing duty investigation), n.57 (citing to Exhibits 2–5), n.65 (citing to Exhibit 9), n.67 (citing to Exhibits 31, 77, materials from the earlier LDWP and OCTG investigations), and n.69 (citing to Exhibit 4, the IDM from CWP).

durally deficient under relevant provisions of the TPEA. Pl.'s Br. at 9, 11. The Government and Nucor contend in response that Congress intended the TPEA to broadly empower Commerce to make PMS adjustments. Def.'s Br. at 13; Def.-Inter.'s Br. at 3–4.

The question of procedural adequacy only becomes an issue if, upon remand, Commerce determines that its PMS determination was supported by substantial evidence beyond the evidence cited in the IDM and that Commerce actually relied on that evidence. Nevertheless, in the interests of judicial economy, the court addresses the issue here.

**A. Section 504 of the TPEA May Not Be Applied to Commerce's AD Calculations Outside of a Price-to-CV Calculation.**

Plaintiffs, the Government, and Nucor are correct that the crux of this issue will largely turn on the interpretation and scope of the TPEA's provisions, in particular section 504. Under *Chevron*, the court must first consider whether Congress has “directly spoken to the precise question at issue.” 467 U.S. at 842–43. To do so, the court may take into account the statutory structure and legislative history. See *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998). Both are raised by the parties and are discussed in turn below.

Plaintiffs advocate for a reading of the statute that aligns with the scope-of-subparts canon.<sup>15</sup> Plaintiffs assert that TPEA section 504 authorizes Commerce to adjust a producer's actual cost of production following a PMS allegation *only* when calculating an AD margin based on a price-to-constructed value metric. Pl.'s Br. at 11–12. Plaintiffs note that, since Commerce found the Korean home market viable in the *Final Results*, a price-to-price comparison methodology was appropriate. *Id.* at 10–11. Plaintiffs allege that Commerce acted improperly by deriving the PMS adjustment to the Plaintiffs' AD margin calculations by comparing “net U.S. prices to above-cost, net home market prices (i.e., ‘price-to-price comparisons’)” rather than price-to-constructed value comparisons. *Id.* Plaintiffs draw this conclusion by pointing to the text of the TPEA. Section 504(a) of the TPEA incorporated PMS determinations as a circumstance existing outside of the ordinary course of trade (as set forth in 19 U.S.C. § 1677(15)(C)). Section 504(b) amended the calculation of constructed value as defined in 19 U.S.C. § 1677b(e) to likewise allow for PMS-specific adjustments. 19 U.S.C. § 1677b(e)(3). Plaintiffs argue that since the TPEA did not alter other statutory provisions, including the

<sup>15</sup> The scope-of-the-subparts canon advocates for a reading of statutory text such that “[m]aterial within an indented subpart relates only to that subpart; material contained in unindented text relates to all the following or preceding indented subparts.” Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xii (2012).

provisions specifically governing the calculation of cost of production for sales-below-cost purposes, Congress “unambiguously signaled” its intent to limit PMS adjustments of cost of production to cases involving only CV-based calculations. Pl.’s Br. at 12.

In contrast, the Government argues that the court should apply the whole-text and harmonious-reading canons to its interpretation of the TPEA. Under this approach, the focus of the court should be the statute’s bigger picture. The Government argues generally that Commerce acted with proper statutory authority when it imposed the PMS adjustment. Def.’s Br. at 12. The Government and Nucor note that 19 U.S.C. § 1677b mandates Commerce to achieve a fair comparison between normal value and export price, and that this “broader statutory purpose of fair comparison” requires Commerce to refrain from using distorted values in its margin calculations. *Id.* at 13; Def.-Inter.’s Br. at 3. More specifically, the Government contends that the language of these provisions broadly tasks Commerce to use “non-distorted values in its comparisons of normal value and export price, regardless of whether normal value is based on sales prices or a constructed value.” Def.’s Br. at 13. Thus, under the Government’s view, Plaintiffs ignore the forest for the trees. Additionally, the Government refers to the TPEA language allowing Commerce to employ “any other calculation methodology” to estimate constructed value upon determining the existence of a PMS. *Id.* at 16 (citing 19 U.S.C. § 1677(b)). It then argues it would be “illogical” to conclude that Congress intended for Commerce to correct PMS distortions in the context of constructed value but to disregard similar distortions when considering cost of production or the sales-below-cost test, especially as “distortions prevent proper comparison whether normal value is based on home market prices or constructed value.” *Id.*<sup>16</sup> See also Def.-Inter.’s Br. at 8–9 (arguing that Commerce did not intend to limit Commerce’s flexibility in adjusting for a PMS, but instead that it required Commerce to adjust for PMS”).

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<sup>16</sup> To further support its claim, the Government refers to the TPEA’s legislative history, arguing it demonstrates Congressional intent to give Commerce great “flexibility” over methodology so as to avoid distortions in the calculation of prices and costs. *Def.’s Br.* at 14 (citing S. Rep. No. 11445, at 37 (2015)). The legislative history, the Government observes, “does not distinguish between calculating a duty based on sales prices or constructed value.” *Id.* Plaintiffs argue in response that the legislative history cited by the Government constitutes “cherry-picked statements” that support their conclusion only when coupled with “a tortured analysis of various statutory provisions,” but decline to present an alternative interpretation. Pl.’s Reply at 2. Even so, the Government’s argument is not persuasive. Where a statute is unambiguous, its interpretation need not turn on legislative intent. *Chevron*, 467 U.S. at 842–43; *Timex V.I., Inc.*, 157 F.3d at 882. Here, the statute clearly describes the circumstances under which Commerce is authorized to find and adjust for PMS determinations. As such, any debate over legislative history does not alter the outcome.

The Government also advances the view that, by incorporating PMS determinations into the definition of ordinary course of trade (spelled out in 19 U.S.C. § 1677(15)), Congress implicitly authorized PMS determinations—and corresponding PMS adjustments—to be incorporated into all portions of the statute that cite to 19 U.S.C. § 1677(15) or that invoke the “ordinary course of trade” language. Def.’s Br. at 16. *See also* Def.-Inter.’s Br. 3. However, as noted by Plaintiffs, the TPEA limited its definition of “outside the ordinary course of trade” to those “[s]ituations in which the administering authority determines that the [PMS] prevents a proper comparison *with the export price or [CEP].*” 19 U.S.C. § 1677(15) (emphasis added). Thus, under Plaintiffs’ reading, the inclusion of the PMS clause into the statutory definition of “ordinary course of trade” would be limited to circumstances where the PMS interferes with fair comparisons with export price or CEP, but not with constructed value or other metrics.

Although the interpretations raised by the parties appear defensible to a degree, the court has previously adopted the narrower view advanced by the Plaintiffs, as discussed further below. The court is also bound by precedent dictating that, “where ‘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) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). This is complementary to the scope-of-subparts canon that Plaintiffs indirectly invoke. Under such a presumption Plaintiffs’ narrower interpretation is compelling, as it is presumed that Congress intended to limit the circumstances under which a PMS determination would authorize Commerce to apply an adjustment. Plaintiffs’ view is also more congruent with the purpose of statutory interpretation as articulated by the Supreme Court. *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373–74 (1986) (“Invocation of the “plain purpose” of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.”) (citations omitted).

***B. Plaintiffs’ Argument that the PMS Actually Constitutes Part of the “Ordinary Course of Trade” Is Unconvincing***

Plaintiffs observe that:

Commerce first concluded that a PMS existed in [OCTG from Korea 14–15]. POR for the review at issue in this action ended

in August 2017. Thus, for a minimum of 37 months, Commerce has found that a PMS has existed in Korea that has distorted the cost of production. In other words, Commerce itself has determined that for a period of three years and perhaps longer, the market situation in Korea is not unusual, but rather, actually represents “the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal.

Pl.’s Br. at 17–18 (citation omitted). On the basis of the longevity of this determination, Plaintiffs suggest that the very market situation that Commerce deems unusual is actually “normal” and therefore requires no correction. *Id.* However, Plaintiffs do not provide any statutory basis for this conclusion, and the Government notes that “[t]he statute contains no temporal limit for how long a PMS may exist.” Def.’s Br. at 23. Nowhere in the language of the Tariff Act or the TPEA does Congress provide a maximum duration requirement for PMS determinations. Moreover, a PMS by its very definition exists outside the “ordinary course of trade.” *See* 19 U.S.C. § 1677(15)(C). Rather, Plaintiffs would read in an implied limitation to PMS determinations, whereby a sustained determination would eventually render itself void. *See* Pls.’ Resp. to Questions for Oral Arg. at 8–9. Lacking a statutory basis for this conclusion, Plaintiffs’ line of argument is not convincing.

### ***C. Persuasive Caselaw Supports Plaintiffs’ Position.***

Plaintiffs also bolster their position—“that Commerce is statutorily permitted to modify a respondent’s reported costs under 19 U.S.C. § 1677b because of a PMS only when calculating normal value using [constructed value] under 19 U.S.C. § 1677b(e)” —by referring to recent decisions by the court. *See, e.g.*, Pl.’s Reply at 3 (citing *Saha Thai Steel Pipe Public Co. v. United States*, 43 CIT \_\_, \_\_, 422 F. Supp. 3d 1363, 1369 (2019) (citations omitted) (holding “unsupported in the law” the “contention that Section 504 [of the TPEA] authorized Commerce’s comparison of U.S. prices to home-market sales instead of CV”). The court finds *Saha Thai* to be persuasive here. As the court discussed in *Saha Thai*, the TPEA did not amend 19 U.S.C. § 1677b(b)(3) defining cost of production; rather, it only directly modified 19 U.S.C. § 1677b(e) defining CV. 422 *F. Supp. 3d* at 1368. For this reason, the court there held that PMS determinations made under TPEA Section 504 do not authorize Commerce to make PMS adjustments outside the scope of a price-to-constructed value calculation. *Id.* The Government offers little in way of reply, other than to

note that the *Saha Thai* decision is non-binding. Def.'s Br. at 17–18. However, neither the Government nor Nucor presents more persuasive alternative case law.

Similarly, Plaintiffs rely on *Husteel Co. v. United States*. Pl.'s Br. at 4 (quoting *Husteel Co. v. United States*, 44 CIT \_\_, \_\_, 426 F. Supp. 3d 1376, 1387 (2020) (“[N]othing in the statutory scheme . . . can be read to grant Commerce the authority to modify the below cost sales test to account for a PMS. Indeed, the statute precludes a PMS adjustment to [cost of production] for the below cost sales analysis.”) (citations omitted)). The court in *Husteel* held that “Commerce is not authorized to tinker with the below cost sales calculation because of a PMS. No part of the [TPEA] allows Commerce to use ‘any other methodology’ when market sales are used for normal value. The ‘any other methodology’ language is reserved solely for when normal value is determined by constructed value.” 426 F. Supp. 3d at 1388. The court in *Borusan Mannesmann Boru Sanayi v. Ticaret A.S.*, moreover, adopted the same reasoning, holding that Commerce’s PMS adjustment was contrary to law. 44 CIT \_\_, \_\_, 426 F. Supp. 3d 1395, 1411 (2020). As the court noted, in “recent and thorough opinions[,] the court has explained that no adjustment for a PMS is permitted for the sales below cost test.” *Id.* (citing *Husteel*, 426 F. Supp. 3d 1376, and *Saha Thai*, 422 F. Supp. 3d 1363). The court determines that *Husteel* and *Borusan* are persuasive here. As in *Saha Thai*, the court in *Husteel* and *Borusan* applied a narrow interpretation of the circumstances under which Commerce may make PMS adjustments. As noted above, the Government similarly declines to suggest any alternative case law.

The court in *Husteel* also held, regarding the ordinary course of trade language, that “[i]f a PMS prevents a proper comparison with export price or CEP, sales would indeed be considered outside the ordinary course of trade; as such, they shall be disregarded. Alternatively, the existence of the PMS would justify Commerce using third country sales or constructed value.” *Husteel*, 426 F. Supp. 3d at 1388. In either case, Commerce would not be allowed to adjust the sales-below-cost calculation on account of a PMS determination. Because of the similar facts present here, the court reaches the same conclusion.

In sum, the court determines that *Saha Thai*, *Husteel*, and *Borusan* are persuasive for the determination of the case at bar. Moreover, there is binding precedent that supports Plaintiffs’ narrower interpretation of the statutory limits of the TPEA. See *Thomas*, 423 F.3d at

1284; *Russello*, 464 U.S. at 23. Accordingly, if Commerce decides on remand that a PMS exists, the court remands the PMS adjustment determination to Commerce for a determination in accordance with this opinion.

### ***III. Substantial Evidence Supports Commerce’s Decision to Use Theoretical Rather than Actual Weights.***

In its *Final Results*, Commerce chose to use DOSCO’s theoretical rather than actual product weights. IDM at 34–35.<sup>17</sup> DOSCO alleges that Commerce not only failed to adequately justify its use of theoretical weights, but that in relying on the theoretical metric, Commerce actually distorted its own calculation of DOSCO’s AD duty margins in contravention of its obligations under 19 U.S.C. § 1677b(a) to administer AD duty laws based on a “fair comparison . . . between the export price or [CEP] and normal value.” DOSCO’s Br at 26, 30. In particular, DOSCO reported that it agrees to quantity tolerances for its U.S. sales that are [[ ]] times larger than tolerances for its home market sales, indicating the presence of meaningful variation in theoretical weights.<sup>18</sup> *Id.* at 31. DOSCO also notes that its specific internal operating standards tended to produce actual weights that erred, on the whole, toward the [[ ]] of the tolerance spectrum. *Id.* at 32. Therefore, DOSCO argues that using theoretical weights overinflates the true weight of the merchandise to which the AD duty margin is applied.

<sup>17</sup> In justifying its decision, Commerce provided:

First, we are able to compare sales and costs on a consistent weight basis for DOSCO, as it provided theoretical weight data for its home market and U.S. sales, and cost databases based upon those theoretical weights. Second, DOSCO’s U.S. customers order products based on nominal dimensions, and are invoiced on a theoretical weight basis (not a “theoretical actual” weight basis). Third, the CONNUM, which is used to match sales in the home and U.S. markets, is created from the nominal product dimensions as reported by DOSCO in its responses to Commerce’s questionnaire, and theoretical weight is derived from nominal dimensions. Accordingly, there is a correspondence between the product CONNUM, i.e., the basis for market comparisons, and theoretical weight. This correspondence does not exist between the product CONNUM and “theoretical actual” weight. Finally, Commerce’s methodology in this case has been upheld by the CIT.

IDM at 34–35 (citations omitted).

<sup>18</sup> The weighted average tolerance captures the average percentage difference between the product’s aggregate theoretical and aggregate actual quantities. In practice, the tolerance represents the variance between the product’s theoretical and actual weight—a lower tolerance indicates that the theoretical and actual weights will be more similar, while a higher tolerance indicates that the theoretical and actual weights will differ more meaningfully. According to DOSCO’s submitted databases, the weighted-average tolerance over the period of review was [[ ]] percent for the home market but [[ ]] for the U.S. market. Pl.’s Br. at 31. Further, DOSCO asserts that its home market consumers generally agree to a tolerance within [[ ]] percent while its sales to U.S. customers generally have a [[ ]] percent tolerance agreement. *Id.*

In response, the Government notes that Commerce successfully relied on theoretical weights in past proceedings. Def.'s Br. at 26. Moreover, the Government emphasizes that "DOSCO's U.S. customers order products based on nominal dimensions (used to calculate theoretical weight), and are invoiced on a theoretical weight basis. Thus, the use of theoretical weight is consistent with Commerce's general preference for making sales comparisons on the basis on which U.S. sales [are] made." *Id.* (citations and quotations omitted). The Government also argues that DOSCO's claims suffer on two counts: first, by failing to show that actual weights are any more accurate than theoretical weights, and second, by failing to demonstrate the precise nature or dimension of the distortions allegedly arising from Commerce's use of theoretical weights. *Id.* at 28. Finally, the Government argues that, barring a clear mandate from Congress, Commerce is free to "perform its duties in the way it believes most suitable," including in the selection of theoretical or actual weights for the calculation of AD margins. *Id.* (citing *JB F RAK LLC v. United States*, 790 F.3d 1358, 1363 (Fed. Cir. 2015)). The reasonable exercise of Commerce's discretion, however, remains subject to the substantial evidence standard.

#### ***A. Persuasive Case Authority of Dong-A Steel***

The parties note that Commerce has in prior instances relied on theoretical weights and actual weights alike and has successfully converted between the two without issue. *See* DOSCO's Case Brief at 29–33; Def.'s Br. at 26. Given this pattern, DOSCO argued that Commerce "does not have a stated preference" for using either actual or theoretical weights, but rather uses whichever metric best serves its mandate for drawing a fair comparison. DOSCO's Case Brief at 33. In response, the Government notes Commerce's preference for comparing prices based on U.S. sales. Def.'s Br. at 26. Further, the Government cites to this court's previous holding, on nearly identical facts, that "Commerce's decision to use theoretical weight is supported by evidence on the record that U.S. customers ordered and were billed using nominal values." Def.'s Br. at 26 (citing *Dong-A Steel Co.*, 337 F. Supp. 3d at 1373). There, based on identical facts—that DOSCO's American customers placed orders and received invoices on a nominal (theoretical) basis—the court was convinced that Commerce met its substantial evidence burden. *Dong-A Steel Co.*, 337 F. Supp. 3d at 1373. The court agrees. That DOSCO's clients continue to place orders and receive invoices on the same nominal, theoretical basis, is therefore compelling evidence for finding Commerce's determination to be supported by substantial evidence in the current

proceeding. Consequently, the court finds that Commerce's use of theoretical weights was supported by substantial evidence.<sup>19</sup>

### ***B. Commerce Did Not Fail To Respond to All Material Issues***

Next, DOSCO argues that, because it negotiates selling prices on an actual weight basis, the "commercial reality" is that "the theoretical weight stated on the invoice [is] presented solely for the customer's purpose." Pl.'s Br. at 29. In response to a similar point raised by DOSCO in its case brief, Commerce originally argued that "the record demonstrate[s] that such information is not readily available." IDM at 35. The Government, too, responds that "DOSCO did not cite to any record evidence, other than its own statements," in support of its claim "that the theoretical actual weight was more reasonable than the theoretical weight used on the invoices." Def.'s Br. at 27 (citation omitted). DOSCO takes issue with the Government's response, arguing that it provided "narrative explanations in questionnaire responses, which are certified as accurate by company officials, [and which] constitute record evidence." Pls. Reply at 14. By disregarding such evidence, DOSCO seems to contend, Commerce failed to fulfill its obligation to discuss all arguments made by interested parties involving "issues material to the agency's determination." See *Itochu Bldg. Products*, 40 CIT \_\_, \_\_, 163 F. Supp. 3d 1330, 1337 (2016).

Commerce, however, is not required to address every piece of evidence submitted by participating parties, and its determinations may be found to be supported by substantial evidence despite the possibility that two inconsistent conclusions may be drawn from the same record. *Aluminum Extrusions Fair Trade Comm. v. United States*, 36 CIT 1370, 1373 (2012). For this reason, DOSCO's claim is unavailing. As discussed above, the simple fact that DOSCO transacted with clients on a theoretical weight basis is sufficient to constitute substantial evidence. That DOSCO's narrative explanations suggest a different conclusion does not detract from the weight of the former evidence. Moreover, as mentioned previously, Commerce is entitled to a presumption that it has, "absent a showing to the contrary, considered all of the record evidence." *Jacobi Carbons*, 422 F. Supp. 3d at 1325 n.10 (citations omitted). Neither Commerce's nor the Govern-

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<sup>19</sup> DOSCO similarly argued that Commerce has, in past instances, "converted a respondent's U.S. sales from the basis on which the sales were made." DOSCO's Case Br. at 30 (internal quotation and citation omitted). While Plaintiffs are able to provide several examples of this behavior, they fall short of showing conclusively that Commerce, in certain cases, is compelled to convert a respondent's U.S. sales. By DOSCO's own argument, Commerce has no preference for either actual or theoretical weights. *Id.* at 33. Thus, Plaintiffs show at most that Commerce may, not that it must, convert DOSCO's invoiced theoretical weights to actual weights for the purpose of calculating AD margins

ment's statements demonstrate that Commerce affirmatively ignored DOSCO's proffered narrative evidence. Indeed, the Government asserts that Commerce was in fact aware that DOSCO provided its "own statements" as evidence, yet nonetheless reached a different conclusion, suggesting that Commerce considered, but was unconvinced by, said evidence. Def.'s Br. at 27.<sup>20</sup>

In similar fashion, DOSCO challenges the Government's contention that "DOSCO fails to identify the precise nature of the distortion that purportedly results from the use of theoretical weight." Def.'s Br. at 28. DOSCO argues that Commerce overlooks the "specific mathematical distortions that Plaintiff demonstrated to the agency using real examples." Pl.'s Reply at 15. Commerce indeed recognized that DOSCO provided such an analysis as part of its evidence, since the Government is able to cite to and recognize the relevant portions of DOSCO's Case Brief. *See* Def.'s Br. at 28. That Commerce nonetheless found that evidence unconvincing when making its final determination is not dispositive of a failure to meet the substantial evidence burden. Rather, it merely points to a disagreement between the parties as to the meaning of what constitutes the "precise nature" of an alleged distortion. *Id.* For this reason, the court finds that Commerce responded to all material issues in determining to use theoretical weights.

In light of the above, the court sustains Commerce's determination to use converted theoretical weights rather than actual weights in the calculation of DOSCO's AD duties.

#### ***IV. Commerce's CEP Offset Determination Is Reasonable and Supported by Substantial Evidence.***

Plaintiffs contend that "DOSCO performed significantly more selling activities to support its sales to home market customers than to support its sales to its U.S. affiliate . . . both in terms of number of selling activities and the intensity of the selling activities performed" and therefore deserved a CEP offset from Commerce for having home marketing that was more meaningfully developed than its foreign marketing. Pl.'s Br. at 3, 34. The term "marketing stage" is not defined by statute. Rather, Commerce's regulations provide that, "The Secretary will determine that sales are made at different [LOTS] if they are made at different marketing stages. Substantial differ-

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<sup>20</sup> The Government raises some issues to which Plaintiffs provide no reply. For instance, the Government notes that "DOSCO uses theoretical weight in its normal books and records" and argues that it would be "highly unusual [for] DOSCO to use such a method in its bookkeeping if, as it alleges, that method led to distortion." Def.'s Br. at 28. DOSCO, in its reply brief, skirt this issue, contending only that it provided evidence of "specific mathematical distortions" that, it alleges, Commerce overlooked. Pl.'s Reply at 15.

ences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing.” See 19 C.F.R. § 351.412(c)(2).<sup>21</sup> That is, the regulation requires there to exist a difference in LOTS before differences in marketing stages may be found. However, a difference in LOTS may not, in and of itself, be enough to prove that differences in marketing stages exist. *Id.* Conversely, neither will common sales activity across LOTS necessarily preclude a finding that an exporter’s home market sales were at a different stage than the exporter’s foreign market sales. *Id.* The party seeking a CEP offset ultimately bears the burden of demonstrating substantial differences in selling activities across the LOTS. See also 19 C.F.R. § 351.401(b)(1). The court is unpersuaded by Plaintiffs’ arguments and finds that Commerce reasonably concluded, based on the record evidence, that the differences in LOTS—and therefore, in marketing activities—was not substantial enough to warrant a CEP offset.

***A. DOSCO’s Arguments Are Not New, and the Same Reasoning that Supported the Court’s Decision in Dong-A Steel Also Applies Here.***

DOSCO argues that it engaged in three times as many selling activities at home than abroad (in other words, that its HM LOT was significantly greater than its CEP LOT). Pl.’s Br. at 35. To demonstrate this, DOSCO provided Commerce with data on its marketing activities, which Commerce grouped into four categories spanning sales and marketing, freight and delivery, inventory maintenance and warehousing, and warranty and technical support. IDM at 38; see also Pl.’s Br. at 35. Each category in turn consisted of specific activities: order input and processing, for example, constituted one activity within sales and marketing. IDM at 38. Within each category, DOSCO summed up the number of activities corresponding to that category and organized the activities by intensity (high, medium, or low). Pl.’s Br. at 35. Among these activities, DOSCO documented that at the home market, it engaged in [[ ]] “high” intensity, [[ ]] “medium” intensity, and [[ ]] “low” intensity sales and marketing activities, whereas it performed [[ ]] “high” and [[ ]] “low” intensity activity at the CEP LOT within the same category. *Id.* In total, under DOSCO’s reported figures, the company performed [[ ]] activities at the HM LOT of varying intensities, but [[ ]] at

<sup>21</sup> Further, 19 C.F.R. § 351.412(c)(1) provides that LOTS will be based on:

- (i) In the case of export price, the starting price;
- (ii) In the case of constructed export price, the starting price, as adjusted under section 772(d) of the [Tariff] Act; and
- (iii) In the case of normal value, the starting price or constructed value.

the CEP LOT, giving rise to the three-times difference in LOT activity. *Id.* Furthermore, of the four categories of sales activities, DOSCO asserts that it engaged in three at the HM LOT. *Id.* In contrast, DOSCO reports that it engaged in only two categories of sales activities at the CEP LOT. *Id.*

These arguments mirror claims raised by DOSCO in the earlier case, *Dong-A Steel*, in which, based on virtually the same facts, the court held that “Commerce acted reasonably when it determined that the record did not support” granting a CEP offset adjustment. 337 F. Supp. 3d at 1373–76. Specifically, the court held that, even though “DOSCO reported additional selling activities: sales forecasting, strategic/economic planning, personnel training/exchange, advertising, inventory maintenance, sales/marketing support, and market research in the home market . . . [Commerce reasonably found that] these activities were not substantially different from those performed with respect to DOSCO’s U.S. sales.” *Dong-A Steel*, 337 F. Supp. 3d at 1375. As in the prior *Dong-A Steel* case, DOSCO once more reported additional sales activity at the HM LOT, including “annual sales forecasting, annual strategic/economic planning, training of new employees, using stock ledgers and brochures to advertise and promote sales, monitoring raw material prices and exchange rate trends, and making order sheets.” IDM at 39. And once again, Commerce “acknowledge[d] that the selling functions performed for home market customers may have entailed additional activities, [but] disagree[d] that these activities were substantial or so significant that they constitute a different marketing stage.” *Id.*

DOSCO argues specifically that, among other flaws in its reasoning, Commerce “attempted to dismiss” significant pieces of the evidentiary record when reaching its conclusion that a CEP offset was not warranted, especially as it pertained to inventory management. Pl.’s Br. at 37. Under DOSCO’s view, the record evidence demonstrates that DOSCO expended significant resources on inventory maintenance activities only at the home market LOT. *Id.* By contrast, Commerce found that, based on the record evidence, “DOSCO failed to demonstrate that maintaining home market inventory required significant resources . . .” IDM at 41. As noted, Commerce is entitled to a presumption that it has considered all of the record evidence, absent a showing to the contrary.” *Jacobi Carbons AB*, 422 F. Supp. 3d at 1325 n.10 (citations omitted). Here, in fact, DOSCO readily admits that Commerce had considered the evidence by virtue of “attempting to dismiss” it. Pl.’s Br. at 37. At this point, then, the interpretation of the record evidence becomes a matter of disagreement between DOSCO and Commerce. This disagreement persisted

in this litigation. For instance, in responding to the court's questions the Government reaffirmed its position that:

Commerce found that the company's [DOSCO's] review of its inventory (including the use of stock ledgers) and creation of home market order sheets appear to be basic administrative functions that involved little actual selling activity, and this evidence does not support DOSCO's claim that the home market inventory maintenance activities were extensive.

Def.'s Resp. to the Court's Questions at 11 (citations omitted).

The court may find that substantial evidence supports Commerce's findings despite the possibility that two inconsistent conclusions may be drawn from the record. *Aluminum Extrusions Fair Trade Comm.*, 36 CIT at 1373. Commerce acted reasonably in finding DOSCO's evidence to be unconvincing. As evidence of the cost of maintaining a warehouse to store inventory, DOSCO referred to DOSCO's Section B Response and accompanying exhibits. Pl.'s Br. at 37. Exhibit B15, showing "inventory carrying costs," simply provides for the "calculation of the inventory carrying period," which represents the average duration for which a business holds onto its inventory. Letter from DOSCO to Sec'y of Commerce, re: DOSCO's Sec. B-D Questionnaire Resps. at B-36-B-37; Exh. B-15 (March 12, 2018), C.R. 25-35, P.R. 56-61. The inventory carrying period is estimated from averaged sales and inventory amounts. *Id.* While Exhibit B-15 indeed contains the data on DOSCO's sales and inventory values measured monthly and quarterly, it does not provision explicit data on the actual costs associated with maintaining the inventory storage. *Id.* at Exh. B-15. Rather, DOSCO's [ ] inventory carrying period for HWR must be scaled by an "applicable short term interest rate" to estimate the inventory carrying costs, or the costs associated with maintaining the inventory balance. *Id.* at B-36-B-37; Exh. B-15. Faced with this approach to inventory carrying cost estimates, the court affords "tremendous deference" to determinations drawn from Commerce's technical expertise, including determinations of definitions and appropriate methodologies. *See Fujitsu Gen.*, 88 F.3d at 1039. Under such a view, it was reasonable for Commerce to conclude based on substantial evidence that "DOSCO failed to demonstrate that maintaining home market inventory required significant resources or indeed, any resources beyond placing products in its own storage area at the factory and then removing them once it sold the products." *See* Def.'s Br. at 32; *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d at 1335 (quotation omitted). Further, even assuming the validity of DOSCO's proffered methodology and evidence for the calculation of

the inventory carrying costs, Commerce is still entitled to draw its own conclusions over what constitutes a sufficiently “significant” difference in LOTs so as to merit a CEP offset. *See* 19 C.F.R. § 351.412(c)(2) (“Substantial difference . . . are a necessary, but not sufficient, condition”). This being the case, it was reasonable for Commerce to determine, as it did, that DOSCO failed to meet its evidentiary burden on the inventory aspect.

Beyond inventory management, similar disputes arise between DOSCO’s and Commerce’s interpretation of the record. For instance, Plaintiffs note that DOSCO had only [[ ]] sales personnel dedicated to the U.S. market but had [[ ]] salespersons and staff servicing the home market. Pl.’s Br. at 36. The Government argues that Commerce acknowledged the difference in the sizes of the respective sales forces, but based on the record evidence determined that the HM staff’s activities—consisting primarily of producing an annual business plan and a sales forecasting report—did not “pertain[] exclusively to the home market.” Def.’s Br. at 32 (quoting IDM at 40). Rather, under Commerce’s view, the work produced by what DOSCO pointed to as regional-specific staff in fact related to “high level annual sales strategies” that guided and impacted both the home and CEP markets. *Id.* As for the other evidence raised by DOSCO to demonstrate the difference between its HM and CEP LOTS—for example the “education system” DOSCO set up to train salespeople, the cultivation of regional clientele and the development of regional research—Commerce reasonably determined either that the evidence was insufficient to reach DOSCO’s desired conclusion, IDM at 40, or else was overrepresented by DOSCO, IDM at 41.<sup>22</sup> In short, Commerce did not find the record to be deficient, merely that DOSCO’s reasoning—based on the same evidence—was unconvincing.

For these reasons, the court affirms Commerce’s determination with respect to the denial of the CEP offset claim.

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<sup>22</sup> Similarly, DOSCO’s contention that “Commerce never requested any additional information or clarifications regarding DOSCO’s CEP offset claim in any supplemental questionnaire or otherwise indicated that any deficiency existed in the record regarding this issue” is misplaced and lacks muster. Pl.’s Reply Br. at 18. The burden falls to the party seeking the CEP offset to provide the requisite evidence that would allow Commerce to determine that a CEP offset adjustment is warranted. *See, e.g., Hyundai II*, 365 F. Supp. 3d at 1297; 19 C.F.R. § 351.401(b). That Commerce did not request any additional information beyond what was provided by DOSCO does not discredit the validity of the conclusion drawn from that evidence. Furthermore, Commerce had no obligation under 19 U.S.C. § 1677m(d) to work with DOSCO to correct for “deficiencies” in the record, since as discussed above, it does not appear that deficiencies existed in the first place. *See* Pl.’s Reply Br. at 18. Rather, the fundamental difference in conclusions reached by DOSCO and Commerce derived not from any shortcomings in the data, but rather from differing yet equally reasonable interpretations of the evidence.

## ***V. Commerce’s Adjustment of Reported Costs Is Supported by Substantial Record Evidence.***

Following a comment submitted by petitioners in response to the *Preliminary Results*, Commerce updated the *Final Results* to reflect an additional adjustment to the calculation of DOSCO’s AD margin, by compensating for the fact that “DOSCO has reported significantly different [HRC input] costs for similar CONNUMs.” IDM at 42 (discussing “cost differences unrelated to defined physical characteristics”). Specifically, Commerce “adjusted the reported CONNUMs that are identical in all of Commerce’s physical characteristics except for painting . . . to reflect the same HRC cost.” IDM at 42. DOSCO contests that the adjustment was unreasonable and unsupported by substantial evidence, since, as DOSCO asserts, the decision lacked quantitative support and ran afoul of Commerce’s statutory obligations to eliminate distortions in its calculations wherever possible. Pl.’s Br. at 39.

### ***A. Basis for the Adjustment***

At the start of every investigation, Commerce defines the key physical characteristics for the product under investigation. The characteristics represent the elements that “define unique products, i.e., the CONNUMs, for sales comparison purposes.” IDM at 43. In the case at hand, Commerce identified the key characteristics of HWR to be the “steel input type, quality, metal coating, painting, perimeter, wall thickness, scarfing, and shape.” *Id.* Differences among each product’s reported costs “should reflect meaningful differences attributable to these different physical characteristics.” *Id.* (citations omitted). Here, however, Commerce found that “the large fluctuation in costs between [DOSCO’s] CONNUMs cannot be explained by the physical characteristics of those CONNUMs. Rather, the differences are linked to production time and quantities, and trial runs in some instances.” *Id.* To correct for the “arbitrary cost differences between nearly identical CONNUMs which are independent of the physical characteristics,” Commerce saw fit to apply an additional adjustment to DOSCO’s reported cost figures. *Id.* at 44.

DOSCO argues two points. DOSCO contends first, that Commerce’s “determination was devoid of any quantitative analysis,” and second, that “Commerce’s determination undermined the statutorily required difference-in-merchandise (“DIFMER”) adjustment.” Pl.’s Br. at 39–40. The Government contends that DOSCO’s two claims lack

merit while Commerce's decision is supported by substantial evidence. *Id.*<sup>23</sup>

### ***B. Commerce's Determination Is Supported by Substantial Evidence.***

Firstly, DOSCO claims that Commerce erred by not providing quantitative analysis to support its determination to adjust the reported raw material costs. Pl.'s Br. at 39. DOSCO itself asserts that there existed a cost variation of [[ ]] percent between two given CONNUM pairs, which DOSCO holds out to be so small as to be negligible. *Id.* at 40. However, as DOSCO correctly argued, Commerce has an obligation to be as accurate as possible in the computation of AD margins. *See* Pl.'s Br. at 25 (citing *Rhone Poulenc*, 899 F.2d at 1191). In the interest of maximizing accuracy, even a [[ ]] percent variation should not be overlooked.<sup>24</sup> Moreover, the Government accurately and compellingly points out that DOSCO provides no authority or statutory basis explicitly requiring Commerce to justify a finding of cost differences with a robust quantitative analysis, or indeed any quantitative analysis at all. Def.'s Br. at 35. The Government also notes that Commerce's determinations of applicable adjustments (as evidenced here with regard to cost adjustments) are consistent with practices previously sustained by the courts, including a holding that "Commerce's methodology is 'presumptively correct'. . . [insofar as plaintiff] has not shown that Commerce lacked authority to adjust costs based on differences in physical characteristics." *Id.* at 36 (quoting *Thai Plastic Bags Industries Co. v. United States*, 746 F.3d 1358, 1368 (Fed. Cir. 2014)).

Secondly, DOSCO argues that, under the provisions of 19 U.S.C. § 1677b(a)(6)(C)(ii):

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<sup>23</sup> The Government, in a one-sentence assertion, argues that DOSCO has waived its right to raise either argument. Def.'s Br. at 35 (citing *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998)). Though the Government does not directly say so, it effectively argues that DOSCO failed to exhaust administrative remedies. Failure of exhaustion is simply not the case here. *See Timken Co. v. United States*, 26 CIT 434, 460, 201 F. Supp. 2d 1316, 1340–41 (2002). DOSCO successfully points to several occasions where it advanced its challenges, and where Commerce incorporated those concerns through its responses. *See* DOSCO's Resp. to Questions for Oral Arg. at 18 (citing DOSCO's Rebuttal Br. at 17–19); *IDM* at 42 (discussing the points raised in DOSCO's Rebuttal Brief, including the size of some of the cost differences being so small as to "require no explanation" and "differences in production time and quantity," among others).

<sup>24</sup> Plaintiffs posit that "Commerce failed to articulate the circumstances under which a cost variation is 'significant,' failed to explain what is the significance threshold above which cost variations rise to the level of a distortion that must be corrected, and, most importantly, failed to explain why the cost variations between DOSCO's painted and non-painted products were so 'significant' that an adjustment was warranted." Pl.'s Reply at 20. However, Plaintiffs present no alternatives for defining significance, beyond asserting that Commerce failed to do so.

Commerce is required to increase or decrease normal value—as the case may be—to account for . . . the DIFMER adjustment to the net selling prices in the comparison market, . . . to account for the differences in the physical characteristics of the merchandise sold in the United States and the comparison market, and is calculated as the difference between the variable costs of manufacturing (“VCOM”) of the two similar CONNUMs.

Pl.’s Br. at 40 (citing IDM at 43). “If the VCOM of the U.S. model is lower than the VCOM of the similar comparison market model, normal value is reduced by the difference in those VCOMs.” *Id.* Under DOSCO’s view, “by smoothing the costs such that the HRC costs were the same for CONNUMs that are identical but for whether the finished product is painted . . . Commerce introduced rather than eliminated distortions into the calculations.”<sup>25</sup> *Id.* In this manner, DOSCO argues that the adjustment imposed by Commerce actually violated the underlying purpose of the DIFMER adjustment—“to capture physical differences in merchandise.” Pl.’s Reply at 20 (quoting *IDM* at 36); *see also* 19 C.F.R. § 351.411(b). However, DOSCO does not provide any evidence of the purported distortions resulting from Commerce’s determination. The Government, in response, asserts that Commerce’s adjustments “ensure that differences in cost were related only to differences in physical characteristics (here, painting),” and therefore fall squarely within the defined purpose of the DIFMER adjustment. Def.’s Br. at 36. Because DOSCO has not demonstrated the scope or extent of the alleged distortion and 19 C.F.R. § 351.411(b) gives Commerce the discretion to adjust for variations in “costs associated with the physical differences,” the court sustains Commerce’s adjustments.

## CONCLUSION

For the reasons discussed above, the court sustains (1) Commerce’s use of DOSCO’s theoretical weights for the calculation of DOSCO’s dumping margin; (2) Commerce’s denial of DOSCO’s CEP offset claim; and (3) Commerce’s decision to adjust DOSCO’s reported raw material costs as supported by substantial evidence and in accordance with law. However, because the court finds: (1) Commerce’s PMS determination to be unsupported by substantial evidence and not in accordance with law; and (2) Commerce’s PMS adjustment to be improper under the provisions of the TPEA, the court remands to

<sup>25</sup> As DOSCO describes it, smoothing the costs eliminated the “true variations in the VCOMs” that would have otherwise been captured in the selling prices. Pl.’s Br. at 40. Without adjusting the sales prices commensurately, DOSCO purports that Commerce effectively introduced a distortion into their margin calculations. *Id.*

Commerce its PMS determination and adjustment and calculation of dumping margins consistent with this opinion.<sup>26</sup> Commerce shall file with the court and provide to the parties its remand results within 90 days of the date of this order; thereafter the parties shall have 30 days to submit briefs addressing the revised final determination with the court, and the parties shall have 30 days thereafter to file reply briefs with the court.

**SO ORDERED.**

Dated: September 29, 2020  
New York, New York

*/s/ Gary S. Katzmann*  
JUDGE

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<sup>26</sup> As appropriate, Commerce should also recalculate the AD margin applied to Kukje in line with this opinion.

## Slip Op. 20–140

ECHJAY FORGINGS PRIVATE LIMITED, Plaintiff, v. THE UNITED STATES, Defendant, and COALITION OF AMERICAN FLANGE PRODUCERS, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge  
Court No. 18–00230  
PUBLIC VERSION

[The court remands Commerce’s *Final Determination* for further explanation.]

Dated: October 8, 2020

*Peter J. Koenig*, Squire Patton Boggs (US) LLP, of Washington, DC, argued for plaintiff. With him on the brief was *Wojciech Maciejewski*.

*Geoffrey M. Long*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of Counsel *Daniel J. Calhoun*, Assistant Chief Counsel, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

*Cynthia C. Galvez*, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor. With her on the brief were *Daniel B. Pickard* and *Stephanie M. Bell*.

### OPINION

#### Katzmann, Judge:

“All happy families are alike; each unhappy family is unhappy in its own way,” so opens the classic, intense novel, *Anna Karenina*.<sup>1</sup> What can be said of the Doshi family? Their saga is central to the case now before the court.

In assessing antidumping (“AD”) duties on foreign producers who sell goods in the American market at below reasonable fair market value in violation of domestic trade laws, where appropriate, the United States Department of Commerce (“Commerce”) is authorized by statute and regulation to “collapse” multiple entities into a single entity to reflect their market relationship. This case involves issues of collapsing affiliated entities exclusively owned by members of the same, albeit estranged, family—the Doshi family. All of the companies produce or have produced in the past merchandise subject to Commerce’s AD investigation. Commerce collapsed the entities, concluding they were affiliated, would not require substantial retooling of their facilities to restructure production priorities, and had a significant potential to manipulate price or production. *Stainless Steel Flanges From India: Final Affirmative Determination of Sales at Less*

<sup>1</sup> Leo Tolstoy, *Anna Karenina* (1877).

*Than Fair Value and Final Affirmative Critical Circumstance Determination*, 83 Fed. Reg. 40,745 (Dep't Commerce Aug. 16, 2018), P.R. 411 (“*Final Determination*”).

Plaintiff Echjay Forgings Private Limited (“Echjay”), an India-based stainless steel flanges producer, brought an action against the United States (“Government”) to challenge Commerce’s decision to collapse Echjay with three other companies into a single entity for the purposes of its *Final Determination*. Defendant-Intervenor Coalition of American Flange Producers (“Coalition”) joins the Government in support of Commerce’s decision. Mot. to Intervene as Def.-Inter., Dec. 19, 2018, ECF No. 10; Ct. Order Granting Mot., Dec. 20, 2018, ECF No. 14. The court concludes that Commerce’s collapsing determination was not adequately explained based on the record evidence. Accordingly, the case is remanded to Commerce for further proceedings consistent with this opinion.

## BACKGROUND

### *I. Legal and Regulatory Framework*

Dumping occurs when a foreign company sells goods in the United States at a lower price than the company charges for the same product in its home market. *Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). This practice constitutes unfair competition because it permits foreign producers to undercut domestic companies by selling products below reasonable fair market value. *Id.* at 1046–47. To address the harmful impact of such unfair competition, Congress enacted the Tariff Act of 1930, as amended,<sup>2</sup> which empowers Commerce to investigate potential dumping and, if necessary, to issue orders instituting duties on subject merchandise. *Id.* Pursuant to 19 U.S.C. § 1673, Commerce imposes AD duties on foreign goods if they are being or are likely to be sold in the United States at less than fair value and the International Trade Commission determines that the sale of the merchandise at less than fair value materially injures, threatens, or impedes the establishment of an industry in the United States. *See also Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT \_\_, \_\_, 331 F. Supp. 3d 1390, 1394 (2018). “Sales at less than fair value are those sales for which the ‘normal value’ (the price a producer charges in its home market) exceeds the ‘export price’ (the price of the product in the United States).” *Apex Frozen Foods v. United States*, 862 F.3d

<sup>2</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

1322, 1326 (Fed. Cir. 2017) (quoting *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013)). The amount of the AD duty is “the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.” 19 U.S.C. § 1673; see also *Shandong Rongxin*, 331 F. Supp. 3d at 1394.

“In some instances, Commerce will treat related entities as a single entity for purposes of [AD] calculations.” *Prosperity Tieh Enter. Co. v. United States*, 965 F.3d 1320, 1323 (Fed. Cir. 2020) (citing *Carpenter Tech. Corp. v. United States*, 510 F.3d 1370, 1373 (Fed. Cir. 2007)). “The purpose of collapsing multiple entities into a single entity is to prevent affiliated entities from circumventing [AD] duties by ‘channel[ing] production of subject merchandise through the affiliate with the lowest potential dumping margin.’” *Prosperity Tieh*, 965 F.3d at 1323 (quoting *Slater Steels Corp. v. United States*, 27 CIT 1255, 1261, 279 F. Supp. 2d 1370, 1376 (2003) (“*Slater Steels I*”). Although the AD duty statute does not directly address collapsing, “Commerce’s collapsing practice is a permissible construction of the statute, and thus in accordance with the law.” *Koenig & Bauer-Albert AG v. United States*, 24 CIT 157, 159–60, 90 F. Supp. 2d 1284, 1287–88. See also *id.* at 1277–78; *Hontex Enters., Inc. v. United States*, 27 CIT 272, 289–90, 248 F. Supp. 2d 1323, 1338 (2003) (“*Hontex Enters. I*”) (noting that Commerce’s collapsing practice, as specified in its regulations, has been upheld as a reasonable interpretation of the AD statute). The principal regulation promulgated by Commerce governing collapsing of companies, 19 C.F.R. § 351.401(f), provides:

(1) In general. In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

(2) Significant potential for manipulation. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:

- (i) The level of common ownership;
- (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
- (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and

pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

19 C.F.R. § 351.401(f) (2019). *See also Prosperity Tieh*, 965 F.3d at 1323 (“Commerce’s practice of collapsing entities is governed by 19 C.F.R. § 351.401(f)”).

Under Section 351.401(f), three requirements must be satisfied in order for Commerce to collapse entities: Commerce must determine that (1) the companies are affiliated, (2) they share “production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities,” and (3) there is “a significant potential for the manipulation of price or production” between the affiliated companies. *Carpenter Tech. Corp.*, 510 F.3d at 1373. *See also Prosperity Tieh*, 965 F.3d at 1323; *Dongkuk Steel Mill Co. v. United States*, 29 CIT 724, 733, 27 ITRD 1890 (2005). In determining whether to collapse entities, Commerce looks for “relatively unusual situations, where the type and degree of relationship is so significant that [it finds] there is a strong possibility of price manipulation.” *Koyo Seiko Co. v. United States*, 31 CIT 1512, 1535, 516 F. Supp. 2d 1323, 1346 (2007) *aff’d*, 551 F.3d 1286 (Fed. Cir. 2008) (“*Koyo Seiko II*”) (quoting *Nihon Cement Co. v. United States*, 17 CIT 400, 426–27, 15 ITRD 1558 (1993)).

### A. Affiliation

With respect to the first condition for collapsing, that the producers must be “affiliated,” that term is set forth in 19 U.S.C § 1677(33), codifying the Tariff Act of 1930 as amended by the Uruguay Round Agreements Act (“URAA”).<sup>3</sup> Subsections (A), (F), and (G) of that statute are relevant to this dispute:

The following persons shall be considered to be “affiliated” or “affiliated persons”:

(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants

.....

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

<sup>3</sup> The statute does not address the consequences of finding entities affiliated in terms of calculating the dumping margin. *Jinko Solar Co. v. United States*, 41 CIT \_\_, \_\_, 229 F. Supp. 3d 1333, 1344 (2017).

(G) Any person who controls any other person and such other person.

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

19 U.S.C § 1677(33) (2018).

The Statement of Administrative Action (“SAA”) accompanying the URAA clarifies the purpose of affiliation as to family members.

The traditional focus on control through stock ownership fails to address adequately modern business arrangements, which often find one firm “operationally in a position to exercise restraint or direction” over another in the absence of an equity relationship. A company may be in a position to exercise restraint or direction for example, through corporate or family groupings, franchise or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.

Uruguay Round Agreements Act, Statement of Administrative Action, accompanying H.R. 103–5110 at 838 (1994), reprinted in 1994 U.S.C.C.A.N. 3773.<sup>4</sup>

Commerce’s regulation, 19 C.F.R. § 351.102(b)(3), adopts the definition of “affiliated” and “affiliated persons” set forth in 19 U.S.C § 1677(33). The regulation further clarifies “affiliated persons” with reference to the statutory definition.

Affiliated persons; affiliated parties. “Affiliated persons” and “affiliated parties” have the same meaning as in section 771(33) of the Act [19 U.S.C § 1677(33)]. In determining whether control over another person exists, within the meaning of section 771(33) of the Act, the Secretary will consider the following factors, among others: Corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.

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<sup>4</sup> The SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.” 19 U.S.C. § 3512(d).

19 C.F.R. § 351.102(b)(3). Commerce further defines “person” as “any interested party as well as any other individual, enterprise, or entity, as appropriate.” 19 C.F.R. § 351.102(b)(37).

### ***B. “No substantial retooling” Requirement***

To collapse entities pursuant to Section 351.401(f), Commerce must additionally find the collapsed “producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities.” 19 C.F.R. § 351.401(f). This factor “requires similarity in the products produced, not in the facilities that produced them.” *Viraj Group v. United States*, 476 F.3d 1349, 1356 (Fed. Cir. 2007). Commerce may look to the cost of retooling in determining whether retooling would be substantial. *See, e.g., id.* at 1358–59 (affirming Commerce’s finding that the retooling would not be substantial based on the cost of retooling in relation to the company’s historical capital expenditure and financial resources); *Slater Steels Corp. v. United States*, 28 CIT 340, 350–51, 316 F. Supp. 2d 1368, 1378–79 (2004) (“*Slater Steels II*”) (holding that a given cost of retooling, as a proportion of a company’s fixed asset value, would not on its own qualify as substantial). The Federal Circuit has held that companies may satisfy the “no substantial retooling” requirement when they do not possess production facilities themselves but use the same subcontractor’s facilities and the subcontracted production would also enable the collapsed companies to shift production quantities among themselves. *Carpenter Tech. Corp.*, 510 F.3d at 1373–74. Commerce may also collapse non-producers, such as exporters, following Section 351.401(f) to the extent that the regulations are applicable. *See Hon-tex Enters. I*, 248 F. Supp. 2d at 1342–43.

### ***C. Potential for Manipulation***

Finally, to determine whether the third collapsing requirement under Section 351.401(f), has been met—that there be “a significant potential for the manipulation of price or production,” Commerce “may consider” the following factors enumerated in Section 351.401(f)(2): “(i) the level of common ownership; (ii) the extent to which managerial employees or board members of one company sit on the board of director for an affiliated company; (iii) whether operations are intertwined.” *Prosperity Tieh*, 965 F.3d at 1323 (citing 19 C.F.R. § 351.401(f)(2)). No one factor alone is dispositive, but Commerce must consider these factors in light of the totality of the circumstances. *Id.*; *Zhaoqing New Zhongya Aluminum Co. v. United*

*States*, 39 CIT \_\_, \_\_, 70 F. Supp. 3d. 1298, 1306 (2015); *Koyo Seiko II*, 31 CIT at 1535, 516 F. Supp. 2d at 1346. In evaluating the potential for manipulation, Commerce considers both actual manipulation in the past and possibility of future manipulation. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,346 (Dep't Commerce May 19, 1997) (“Preamble”).

## **II. Facts and Procedural History of the Case**

### **A. Commerce’s Investigation into the Doshi Companies**

On September 11, 2017, Commerce initiated an AD duty investigation of stainless steel flanges (the “subject merchandise”) imported from India and China, upon the petition by Coalition. *Stainless Steel Flanges From India and the People’s Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 82 Fed. Reg. 42,649 (Dep’t Commerce Sept. 11, 2017), P.R. 18. The period of investigation (“POI”) was July 1, 2016 through June 30, 2017. *Id.* at 42,649. Commerce selected Echjay as one of the mandatory respondents<sup>5</sup> to the investigation and issued Echjay a questionnaire. Mem. from C. Canales to E. Yang, re: Respondent Selection (Dep’t Commerce Oct. 3, 2017), P.R. 29. Commerce requested information on certain companies with regards to their affiliation with Echjay: Echjay Industries Private Limited (“Echjay Industries”), Echjay Forging Industries Private Limited (“EFIPL”), and Spire Industries Private Limited (“Spire”) (together with Echjay, the “Doshi Companies”). *See id.*

In its response to Commerce, Echjay explained that all Doshi Companies are owned by members of the same Doshi family but that it

<sup>5</sup> In CVD investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(e)(2), which provides:

If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may—

(A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to—

(i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or

(ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; or

(B) determine a single country-wide subsidy rate to be applied to all exporters and producers.

The individual countervailable subsidy rates determined under subparagraph (A) shall be used to determine the all-others rate under section 1671d(c)(5) of this title.

was not affiliated with any of the other Doshi Companies due to past and ongoing family partitions. Letter from Echjay to Sec’y of Commerce, re: Echjay’s Resp. to Sec. A of Original AD Duty Questionnaire at 8–10 (Oct. 31, 2017), C.R. 14–23, P.R. 47–55 (“Echjay Questionnaire Resp.”). The following summarizes Echjay’s contentions regarding the Doshi family divisions: Prior to 1983, the Doshi family owned Echjay Industries which had two manufacturing units in India. Letter from Echjay to Sec’y of Commerce, re: Echjay’s Resp. to 2nd Suppl. Sec. AAD Duty Questionnaire at 5–6, P.R. 120–131 (“Echjay’s Suppl. Questionnaire Resp.”). In 1983, a family partition and legal separation agreement divided the two manufacturing units, with Echjay Industries retaining one facility and Echjay being created to retain another. *Id.* at 6. Since the 1983 partition, Echjay has been owned and managed by the Sarvadaman Doshi family. *Id.* at 6–8. This legal separation ended all common ownership, and the two companies became “full-fledged competitor[s].” Echjay Questionnaire Resp. at 8. Echjay later acquired a second manufacturing unit. *Id.* at 9. A second family partition then occurred within the Sarvadaman Doshi family in [[ ]]. *Id.* At that time, Sarvadaman Doshi’s brothers, Deepak Doshi and Nagin Doshi, created EFIPL and retained one manufacturing unit from Echjay. *Id.* At the time of the separation, an interim legal order was put into place to bar interference of the Sarvadaman Doshi family and the Deepak Doshi family in their respective companies. *Id.* After that separation, the Deepak Doshi family also created Spire, in which the Sarvadaman Doshi family has never had ownership or participation. *Id.* at 11. Legal agreements, finalized by the Bombay High Court in [[ ]], retroactively separated Echjay from EFIPL, and members of the family group controlling EFIPL resigned from directorship of Echjay [[ ]] to eliminate sharing of managerial employees. *Id.* at 9–10. Shares held in each other’s company were “still pending to be transferred” but, per the legal agreements, neither family could control, intervene in the operations, or hold the shares on behalf of each other. *Id.* at 10.

Thus, by the time of the POI and Commerce’s investigation, the Doshi family fractured into three camps—the original Doshi family owning Echjay Industries, the Sarvadaman Doshi family owning Echjay, and the Deepak Doshi family owning EFIPL and Spire. Echjay acknowledged that Echjay Industries may have exported subject merchandise during the POI. *Id.* at 8. However, as Echjay reported, EFIPL and Spire both ceased production of subject merchandise years prior to the POI. *Id.* at 10–11. Neither EFIPL nor Spire produced or sold subject merchandise during the POI. *Id.* Echjay

reported that it had no supply of input, sharing of facilities, or other instances of intertwined operations with other Doshi Companies; Echjay functioned independently. *Id.* at 8–12.

Based on this response, Commerce requested additional information from Echjay, including supporting documentation on production of subject merchandise of Echjay Industries, EFIPL, and Spire. Letter from C. Canales to Echjay, re: Commerce Suppl. Questionnaire to Echjay at 7 (Dep’t Commerce Nov. 27, 2017), P.R. 91. Commerce also asked Echjay to address that Spire’s website indicated that it produced forged products and flanges, contrary to Echjay’s assertions. *Id.* In its response, Echjay reviewed the history of the Doshi family and the Doshi Companies, laying out three separate family groups owning and controlling the Doshi Companies. Echjay’s Suppl. Questionnaire Resp. at 5–8. Echjay also highlighted for each partition the family agreements and court-approved scheme of arrangements. *Id.* Echjay stated that it had limited information of other Doshi Companies due to the “hostile separation” and specified its efforts in collecting certain organizational information Commerce required. *Id.* at 8–9. With regard to status of production, Echjay restated that EFIPL and Spire had already closed down their plants and had disposed, or were disposing, of the equipment for the production of subject merchandise. *Id.* at 13–15. Echjay included the closure letter of EFIPL’s plant as well as photographs and projected design showing the construction of a residential complex at the plant’s location. *Id.* at 13–14. Echjay also provided Spire’s audited financials, a letter from Spire, and [[ ]], suggesting that Spire’s plant was dysfunctional and [[ ]]. *Id.* at 14–15, 22. Echjay further claimed that Spire was in the process of updating its website to reflect the change. *Id.* at 15, 30. Echjay noted that, according to a letter from Echjay Industries, it exported “very small quantities” of subject merchandise to the United States prior to but none during the POI. *Id.* at 12.

### ***B. Commerce’s Determination***

Commerce published its preliminary determination on March 28, 2018, finding Echjay affiliated with the rest of the Doshi Companies and collapsing them into a single entity for the AD investigation. *See Stainless Steel Flanges From India: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures*, 83 Fed. Reg. 13,246 (Dep’t Commerce Mar. 28, 2018), P.R. 339 (“*Preliminary Determination*”); Mem. from J. Maeder to G. Taverman, re: Decision

Mem. for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Stainless Steel Flanges from India at 9, (Dep't Commerce Mar. 19, 2018), P.R. 327 ("PDM"); Mem. from J. Hancock to J. Doyle, re: Affiliation Mem. of Echjay, Echjay Industries, EFIPL, and Spire (Dep't Commerce Mar. 19, 2018), C.R. 339–41, P.R. 346 ("Preliminary Affiliation Memo"). Commerce collapsed the Doshi Companies because it found that they were affiliated through common ownership by the Doshi family, had similar production facilities that would not require substantial retooling to shift manufacturing priorities, and had a significant potential for manipulation of prices or production. Preliminary Affiliation Memo at 9–13.

Echjay challenged Commerce's determination to collapse it with each of the other Doshi Companies in its case brief. Letter from Echjay to Sec'y of Commerce, re: Stainless Steel Flanges from India; Echjay Case Br. (May 25, 2018), P.R. 393 ("Echjay Case Br."). Nevertheless, Commerce maintained its decision to collapse the entities for the purposes of its AD investigation in its *Final Determination*. 83 Fed. Reg. at 40,746; Mem. from J. Doyle to J. Maeder, re: Issues and Decision Mem. for the Final Determination of the AD Duty Investigation of Stainless Steel Flanges from India at 14–27 (Dep't Commerce Aug. 10, 2018), P.R. 406 ("IDM").

Echjay initiated this litigation on November 8, 2018 and filed a complaint on December 8, 2018. Summons, ECF No. 1; Compl., ECF No. 7. Echjay challenges Commerce's decision to collapse the Doshi Companies in its *Final Determination* as not supported by substantial evidence or otherwise in accordance with law. Echjay Opening Br., June 25, 2019, ECF No. 26 ("Pl.'s Br."). The Government and Coalition respond that the *Final Determination* should be affirmed. Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., Sept. 23, 2019, ECF No. 30 ("Def.'s Br."); Resp. Br. of Def.-Inter., Sept. 23, 2019, ECF No. 33 ("Def.-Inter.'s Br."). Echjay replied on November 12, 2019. Pl. Echjay Reply to Opp'n Br., ECF No. 36 ("Pl.'s Reply"). The parties provided written responses to the court's questions in advance of oral argument. Ct.'s Letter re: Questions for Oral Arg., June 11, 2020, ECF No. 50; Ct.'s Letter re: Suppl. Questions for Oral Arg., June 17, 2020, ECF No. 54; Pl.'s Resp. to the Ct.'s Questions, June 22, 2020, ECF No. 59; Def.'s Resps. to the Ct.'s Questions in Advance of Oral Arg., June 24, 2020, ECF No. 63; Def.-Inter.'s Resp. to Ct.'s Questions for Oral Arg., June 23, 2020, ECF No. 62. Oral argument was held on July 13, 2020. ECF No. 64. The parties then filed post-argument submissions on July 16, 2020. Echjay Further Comments, ECF No. 67; Def.-Inter.'s Subm'n of Suppl. Comments, ECF No. 66.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iv), (vi). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): “[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” In reviewing for substantial evidence, the court “must do more than create a suspicion of the existence of the fact to be established,” *N.L.R.B. v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939), and search for “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938). “[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

## DISCUSSION

Echjay challenges Commerce’s decision to collapse the Doshi Companies on four bases—on each of the three collapsing prongs and as inconsistent with other Commerce determinations. First, Echjay contends that Commerce wrongly interpreted the statute governing affiliation, 19 U.S.C. § 1677(33), to find companies owned by different individuals in a family affiliated. Pl.’s Br. at 5. Echjay also contends that substantial evidence does not support the determination that the Doshi family was “a person” under Section 1677(33) and thus that the Doshi Companies were affiliated. *Id.* at 10. Second, Echjay argues that two of the Doshi Companies—EFIPL and Spire—do not have relevant production facilities and thus would require substantial retooling contrary to Commerce’s finding. *Id.* at 24–28. Third, Echjay states that it has no common ownership, common managerial employees, or intertwined operations with other Doshi Companies, and therefore there is no potential for manipulation. Pl.’s Br. at 32–33. Lastly, Echjay argues that Commerce’s decision to collapse is unlawfully inconsistent with a prior AD determination and the countervailing duty (“CVD”) determination concurrent with the AD determination at issue here. Pl.’s Br. at 30–32, 33.

While the court holds that Commerce’s interpretation of the affiliation statute was permissible, the court concludes that Commerce did not determine the Doshi family to be a “person” under Section 1677(33)(F) based on substantial evidence. Further, the court con-

cludes that Commerce did not find Echjay, EFIPL, and Spire could shift manufacturing priorities without substantial retooling of the production facilities based on substantial evidence. With respect to the third prong of the collapsing analysis, the court determines that Commerce did not find a “potential for manipulation” based on substantial evidence. Lastly, the court concludes that Commerce did not explain the apparent inconsistency between its determination to collapse Echjay and Echjay Industries in the *Final Determination* with its contrary decision in its prior AD determination. Therefore, the court remands to Commerce its decision to collapse Echjay with the Doshi Companies in its *Final Determination* for further explanation of its collapsing determination based on substantial record evidence.

***I. Commerce’s Decision to Find The Doshi Companies Affiliated Through the Doshi Family Grouping Was Based on a Permissible Statutory Interpretation, But Unsupported By Substantial Evidence.***

In analyzing the first collapsing prong, Commerce found the Doshi Companies to be affiliated “pursuant to § 771(33)(A) and (F) of the Act,” referring to 19 U.S.C. § 1677(33)(A) and (F). Preliminary Affiliation Memo at 4; IDM at 18. Citing to the SAA, *Ferro Union v. United States*, 23 CIT 178, 193, 44 F. Supp. 2d 1310, 1325 (1999), and agency practice in other cases, Commerce concluded that “person” in § 1677(33)(F) can be interpreted to encompass a “family.” PDM at 7; IDM at 20. Based on the submission of Echjay, Commerce summarized the evidence that, in relation to Sarvadaman Doshi, Chairman and Managing Director for Echjay, his uncle owned Echjay Industries, his brother Deepak Doshi owned EFIPL, and his brother Nagin Doshi owned Spire. Preliminary Affiliation Memo at 4. Commerce thus found the owners of the Doshi Companies to be to be members of the same family group and thus “affiliated family members” pursuant to Section 1677(33)(A). *Id.* at 4. Commerce then found the Doshi family a “person” as the only shareholders and senior managers of the Doshi Companies and with control over the major decisions of the Doshi Companies under Section 1677(33)(F). *Id.* at 4–6. In this way, Commerce found the Doshi Companies to be affiliated as under common control by the Doshi family.

***A. Commerce Properly Interpreted Section 1677(33)(F) to Include a Family as a “Person” For Purposes of Affiliation.***

Echjay first challenges Commerce’s interpretation of Section 1677(33)(F). Pl.’s Br. at 4–20. Echjay contends that a family grouping

is not “a person” within the meaning of Section 1677(33)(F). Pl.’s Br. at 5. Rather, Echjay contends that the common meaning of the word “family grouping” suggests that it is “a group of persons.” *Id.* Echjay argues that there is no reason for Commerce to interpret the singular “person” in Section 1677(33) in the plural to facilitate statutory intent. *Id.* at 5–6 (citing *First Nat’l Bank in St. Louis v. Missouri*, 263 U.S. 640, 657 (1924)). Treating a family as a person under Section 1677(33)(F), Echjay further argues, would leave redundant Section 1677(33)(A) that provides for affiliation among family members. *Id.* at 6–8.

The Government counters that Commerce reasonably interpreted the language of Section 1677(33)(F) through Commerce’s regulation, 19 C.F.R. § 351.102(b)(37), which defines “person” as including “any interested party as well as any other individual, enterprise, or entity, as appropriate.” Def.’s Br. at 7, 10–11. The Government notes that the court previously upheld this interpretation and that Commerce has made similar findings based on this interpretation in other determinations. Def.’s Br. at 11–12 (citing *Ferro Union*, 44 F. Supp. 2d at 1324, 1326; *Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China*, 79 Fed. Reg. 76,970 (Dep’t Commerce Dec. 23, 2014); *Aluminum Extrusions from the People’s Republic of China*, 76 Fed. Reg. 18,524 (Dep’t Commerce Apr. 4, 2011)). Coalition makes similar arguments to rebut Echjay’s claims. *See* Def.-Inter.’s Br. at 12–13.

The court concludes that Commerce’s interpretation of the statute to include treating a family as an entity or an enterprise and thus a “person” is a permissible interpretation. In reviewing Commerce’s interpretation of statutes, the court must apply the two-step test laid out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See also Apex Frozen Foods Priv. Ltd.*, 862 F.3d at 1329. Under *Chevron*, the court first asks “whether Congress has directly spoken to the precise question at issue.” 467 U.S. at 842. If yes, “that is the end of the matter,” and the court “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. However, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. Deference to the agency’s interpretation of a statute is only required by *Chevron* when that interpretation is reasonable. *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994) (“*Koyo Seiko I*”). Section 1677(33)(A) specifies that “[m]embers of a family, including brothers and sisters (whether by whole or half blood), spouse, ancestors, and lineal descendants” shall be considered as

“affiliated persons.” 19 U.S.C. § 1677(33)(A). Further, Section 1677(33)(F) specifies that “[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person” are also affiliated. *Id.* at § 1677(33)(F). Here, Commerce used these two provisions to conclude that the Doshi Companies were affiliated through common control by the Doshi family, as an entity or “person.” Preliminary Affiliation Memo at 4. Because the affiliation statute does not directly speak to whether “person” encompasses family groupings, the court will defer to a reasonable interpretation of the statute by Commerce. *See Chevron*, 467 U.S. at 842–43; *Koyo Seiko I*, 36 F.3d at 1573.

The court previously addressed Commerce’s interpretation of the affiliation statute in relation to families in *Ferro Union v. United States*. 44 F. Supp. 2d at 1326. *Ferro Union* held that Commerce may interpret a “family” as a “person” for purposes of Section 1677(33)(F) to establish affiliation. *Id.* There, the court upheld Commerce’s finding of affiliation among a series of companies through common control of several families, even though there were no common individuals in control of some of the affiliated companies. *Id.* at 1320–21, 1326. In its analysis, the court noted that there is no statutory definition of “person” in Section 1677(33) or the general definitions section of the URAA. *Id.* at 1326. Further, the court explained that Section 1677(33) was amended by the URAA and its accompanying SAA, and that the SAA indicated an intent to “permit a more sophisticated analysis [of affiliation] which better reflects the realities of the marketplace” and to find control “through corporate or family grouping,” to which Commerce’s interpretation of Section 1677(33)(F) gave effect. *Id.* at 1323, 1326 (citing SAA at 838). Furthermore, Commerce’s regulations define “person” as “any interested party as well as any other individual, enterprise, or entity, as appropriate.” 19 C.F.R. § 351.102(b)(37). The court in *Ferro Union* concluded that considering a family as a “person” complied with Commerce’s regulations as “a family can reasonably be considered an ‘entity’ or an ‘enterprise’ because family members likely share a common interest.” 44 F. Supp. 2d at 1326.

The court agrees with the conclusion of *Ferro Union* and holds that Commerce permissibly interpreted Section 1677(33) to include a family grouping as a “person” for purposes of affiliation. *See also Dongkuk Steel Mill*, 29 CIT at 732 (“The court finds that *Ferro Union*’s conclusion that Commerce’s interpretation of section 1677[(33)](F) was reasonable under *Chevron* should not be disturbed because it complies with the statutory framework.”); *Zhaoqing New Zhongya Aluminum*,

70 F. Supp. 3d at 1304 (“[T]he decision in *Ferro Union Inc.* supports the proposition that the singular person in the statute can be interpreted in the plural to facilitate statutory intent.”).

Finally, the court is not persuaded by Echjay’s argument that Commerce’s inclusion of a family grouping as a person would leave subsection (A) redundant. *See* Pl.’s Br. at 6–8. Echjay claims that, because family members are defined as ‘affiliates’ in subsection (A), they cannot then be viewed as one person for purposes of subsection (F). *Id.* However, as explained, Commerce relied on both subsection (A) and subsection (F) to reach its conclusion that the Doshi Companies were affiliated. Preliminary Affiliation Memo at 4–5; IDM at 4–5, 18–19. In short, Commerce’s determination did not render subsection (A) redundant. It is also not obvious that Commerce’s interpretation of a “person” for the purposes of subsection (F) necessarily bears any implication on subsection (A) when the interpreted term “person” does not appear in subsection (A).

***B. Commerce’s Determination that the Doshi Family Was a “Person” Under Section 1677(33)(F) Was Not Based on Substantial Evidence.***

Echjay also challenges Commerce’s application of the affiliation statute to the Doshi family. Echjay disputes Commerce’s determination by arguing that Commerce failed to “analyze [the] ‘nature of the relationships among’ the persons in a family, and justify its finding by substantial evidence.” Pl.’s Br. at 9 (quoting *Ferro Union*, 44 F. Supp. 2d at 1320). Thus, Echjay contends that had Commerce analyzed the relationships among the Doshi family members, Commerce could not conclude based on substantial evidence that a family that has divided joint assets through hostile, legally binding separation agreements, constitutes a family that could commonly control the Doshi Companies. *Id.* at 10. The Government and Coalition respond that Commerce’s analysis under Section 1677(33)(A) supports the conclusion that Doshi family members are affiliated persons and thus constitute a “person” that controls the Doshi Companies under Section 1677(33)(F). *See* Preliminary Affiliation Memo at 4–5; IDM at 20; Def.’s Br. at 11; Def.-Inter.’s Resp. to Ct.’s Questions for Oral Arg. at 1–2.

Commerce’s determination that the Doshi Family constituted a “person,” pursuant to a reasonable interpretation of the statute that a family grouping may be a “person,” must also be based on substantial evidence. *See Fujitsu Gen. Ltd v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)). Subsection (A) provides that “members of a family” are “affiliated persons,” and thus Commerce correctly concluded that the owners of the Doshi

Companies were affiliated persons as Echjay acknowledged that the Doshi Companies were each owned by members of the same Doshi family. Echjay Questionnaire Resp. at 6–7; *see also Ferro Union*, 44 F. Supp. 2d at 1325 (holding that uncles and nephews would be included in the statute’s definition of “family”). However, this conclusion alone does not support that a family grouping constitutes a “person” that may control multiple companies in accordance with Section 1677(33)(F). On that point, Commerce’s regulation implementing the affiliation statute provides further explanation. The regulation states, “[i]n determining whether control over another person exists, within the meaning of section 771(33) of the Act, . . . [t]he Secretary will not find that control exists on the basis of these factors [, including family groupings,] unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.” 19 C.F.R. § 351.102(b)(3). Further, Commerce defines a “person” to be “any interested party as well as any other individual, enterprise, or entity, as appropriate.” 19 C.F.R. § 351.102(37). Thus, in order to consider a family grouping to be a “person” capable of collective control, Commerce must also find that family grouping to share a common interest or consist of relationships that could impact business decisions of family owned companies. *See also Ferro Union*, 44 F. Supp. 2d at 1326 (“Commerce concluded that anyone with the same surname was a member of the same family. On remand, Commerce should inform itself of the nature of the relationships among these people in order to assure itself that it has properly determined that the persons involved are family members as contemplated by the statute.”). In this way, a family grouping could constitute an entity or person that controls related companies for purposes of affiliation under Section 1677(33)(F).

The court concludes that Commerce did not adequately explain that the Doshi family constitutes a person such that it collectively controlled the Doshi Companies and that those companies were affiliated in light of the record evidence. Echjay presented legal documentation showing hostile family partitions among the owners of the Doshi Companies, resulting in the splitting of family assets. IDM at 16; Echjay Questionnaire Resp. at 6–8. This legal separation prevents various Doshi family members from interfering in, controlling, or participating in the business of other family members. Echjay Questionnaire Resp. at 6–8. For this reason, Echjay argued that the owners of the Doshi Companies were not one family grouping, but several. *Id.* at 6–8. Commerce responded to this point by explaining: “the partition between shareholders of Echjay and Echjay Forgings has

not been finalized. Moreover, the current family partition does not preclude cooperation among family members in the future [and] this ownership structure provides the family grouping the ability and financial incentive to coordinate their actions to act in concert with each other.” IDM at 25. However, this explanation fails to address the Sarvadaman Doshi family relationship with the original Doshi family, whose assets were divided pursuant to a separation agreement from 1983. Further, that the transfer of shareholdings between Echjay and EFIPL had not been finalized, as Commerce alludes to, does not explain how the operative separation agreements barring Echjay from interfering in or controlling EFIPL or Spire would not be effective.

Admittedly, the court in *Ferro Union* doubted whether Commerce should be required to distinguish families due to estranged family members, because “[n]either the statute, nor the regulations, provide for an exception to family for members who are estranged,” and such a finding “would invite parties in administrative reviews to assert subjective criteria for determining familial relationships” and is thus “not administrable.” 44 F. Supp. 2d at 1325. However, the objective evidence of legal separation agreements that Echjay provided alleviates that concern here. Thus, Commerce may not automatically find affiliated family members to be a person under subsection (F) but must instead address the evidence presented by Echjay. Without fully examining and addressing the evidence of the family partitions, Commerce’s finding that the Doshi family was a “person” capable of collectively controlling the Doshi Companies pursuant to Section 1677(33)(F) was not based on substantial evidence. *See CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016) (holding that the substantiality of evidence must account for anything in the record that reasonably detracts from its weight).

***II. Commerce’s Finding that EFIPL and Spire Would Not Require Substantial Retooling to Restructure Manufacturing, Exporting, and Selling Priorities Was Not Based on Substantial Evidence.***

As has been noted, with respect to the second prong required for collapsing entities, Commerce determined that the Doshi Companies “would require no substantial retooling in order to restructure manufacturing, exporting, and selling priorities” among themselves. IDM at 24. Commerce found that Echjay Industries satisfies the “no substantial retooling” requirement as it had a production facility and had exported subject merchandise to the United States before [[

]] the POI [[ ]]. Preliminary Affiliation Memo at 9. While Commerce did not find EFIPL to produce and

sell subject merchandise at the time of the decision or during the POI, Commerce concluded that EFIPL satisfied the “no substantial retooling” requirement based on the evidence that it had produced and sold subject merchandise prior to the POI. *Id.* at 11. Although record evidence did not demonstrate that Spire exported subject merchandise to the United States at that time, Commerce found that Spire met the “no substantial retooling” requirement based on the evidence that Spire was a producer of identical products at the time of investigation and had sold subject merchandise in the past. *Id.* at 10. Commerce noted that Spire’s website still listed stainless steel products, contrary to Echjay’s claim that Spire had closed down its plant and Echjay’s assurance that the website would be updated, which supported Commerce’s finding that Spire was a producer of identical products. *Id.* In short, Commerce concluded that EFIPL and Spire were producers of subject merchandise based on their past production and thus met the “no substantial retooling” prong of Commerce’s collapsing analysis.<sup>6</sup>

Echjay disputes the finding as to EFIPL and Spire, Pl.’s Br. at 24–29. Echjay argues that EFIPL and Spire were not producers of subject merchandise during the period of investigation. Pl.’s Br. at 24. It claims that Commerce did not consider the evidence it submitted showing that there were no production facilities at the original plant locations and no revenue from subject merchandise. *Id.* at 24–28. Echjay contends that Spire’s website, relied on by Commerce, was outdated and Commerce’s examination of the website fell outside of the POI. *Id.* at 27; Pl.’s Reply at 5. Echjay also suggests that Commerce could have visited the former manufacturing sites of EFIPL and Spire during its verification in India but instead made speculative claims about the two companies. Pl.’s Br. at 29; Pl.’s Reply at 5. Echjay concludes that there is no reason to find that EFIPL and Spire meet the “no substantial retooling” requirement simply because they have produced subject merchandise in the past. Pl.’s Br. at 24. The Government responds that Commerce’s findings were based on substantial evidence because of evidence of their past production and Spire’s website. Def.’s Br. at 13–15.

Commerce’s determination that EFIPL and Spire would not require substantial retooling to shift manufacturing priorities towards the subject merchandise does not satisfy the court’s review for substan-

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<sup>6</sup> Commerce may determine that collapsing affiliated non-producers is appropriate when there is “significant potential for the manipulation of price or production.” *Hontex Enters., Inc., v. United States*, 28 CIT 1000, 342 F. Supp. 1225, 1231 (2004) (“*Hontex Enters. II*”). However, both the Government and the Coalition clarified that the Doshi Companies were collapsed as producers rather than non-producers. Def.’s Resps. to the Ct.’s Questions in Advance of Oral Arg. at 15; Def.-Inter.’s Resp. to Ct.’s Questions for Oral Arg. at 17.

tial evidence. First, Commerce’s finding that EFIPL satisfies the “no substantial retooling” requirement is supported only by the evidence that EFIPL produced subject merchandise prior to the POI. IDM at 23–24. The caselaw demonstrates a much higher bar for a substantial evidence showing that no substantial retooling is required. In *Viraj Group v. United States*, the Federal Circuit upheld Commerce’s finding that no substantial retooling was required among collapsed companies. 476 F.3d at 1358–59. The court reviewed evidence provided by Commerce that the production facilities of one company could be retooled to make a product identical to that produced by the other companies, including the existing production facilities and the equipment to be added. *Id.* The court then confirmed Commerce’s finding that the retooling would not be substantial based on the cost of retooling in relation to the company’s historical capital expenditures and financial resources. *Id.* Similarly, in *Slater Steels II*, Commerce on remand referenced only the cost of retooling with company’s financials to further support its determination that the retooling would not be “substantial.” 316 F. Supp. 2d at 1378–80. There, the court ruled that a given cost of retooling, as a proportion of a company’s fixed asset value, may not on its own qualify as “substantial.” *Id.*

Commerce acknowledged that EFIPL did not produce subject merchandise during the POI and record evidence supported EFIPL’s statement that it had closed its plants. IDM at 23–24. In light of these assertions, Commerce did not address whether EFIPL’s facilities would require retooling to produce similar products to Echjay, nor how much retooling would be required. Echjay and EFIPL submitted photographs and design plans showing that EFIPL’s manufacturing facilities were removed and there was ongoing construction to repurpose the site as a residential complex. *See* Echjay’s Suppl. Questionnaire Resp. at 14–15. Given the record evidence, it is reasonable to conclude that, for EFIPL to shift production of subject merchandise, EFIPL would have to build the production facilities anew, incurring the upfront cost like any other new market entrant, costs that would likely be substantial. *See also Slater Steels I*, 279 F. Supp. 2d at 1376–77 (rejecting Commerce’s finding of no substantial retooling where the affiliated companies did not have the production capability to produce the finished subject merchandise, only inputs). Commerce did not explain with sufficient clarity what linked its finding of EFIPL’s past production to its conclusion that EFIPL satisfied the “no substantial retooling” requirement, and is thus not supported by substantial evidence. *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43–44.

Second, with regard to Spire, Commerce relied on the record evidence that Spire's website continued to include products similar to the subject merchandise, in addition to evidence of past production. IDM at 24. Similar to EFIPL, Commerce acknowledged that the record evidence did not demonstrate that Spire exported subject merchandise at the time of investigation but noted that Spire had produced it in the past. *Id.* Commerce also concluded that the website information demonstrated that Spire was a producer of subject merchandise at the time of investigation, and that the website continued to list subject merchandise even after Echjay stated that it would be updated. Preliminary Affiliation Memo at 10; IDM at 24. Commerce did not explain how website information adequately established Spire as a current producer, in light of other record evidence showing that it no longer had production facilities. Thus, Commerce's determination that Spire satisfied the "no substantial retooling" requirement did not address important factors and evidence raised by Echjay nor offer an adequate explanation of its conclusion in light of the record evidence. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

In sum, substantial evidence does not support Commerce's finding that EFIPL and Spire would not require substantial retooling to restructure manufacturing, exporting and selling priorities.<sup>7</sup>

### ***III. Commerce's Finding of the Significant Potential for Manipulation Was Not Based on Substantial Evidence.***

In determining the potential for manipulation—the third prong of the collapsing decision—Commerce looks to the following factors: the level of common ownership, the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm, and intertwined operations. 19 C.F.R. § 351.401(f)(2). Commerce considers the totality of circumstances so that none of the factors above is dispositive of determining the potential for manipu-

<sup>7</sup> The court does not address the issue of the application of adverse inferences alluded to by Echjay, the Government, and Coalition in various filings. While Echjay contested Commerce's finding of "non-cooperation and application of adverse facts available" in its complaint, Compl. ¶ 6, Echjay does not explicitly pursue its arguments on non-cooperation and adverse inference findings in the opening brief and thus waived such contentions. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("Our law is well established that arguments not raised in the opening brief are waived."). Both the Government and the Coalition emphasize Echjay's failure in providing "complete and accurate responses" to Commerce's questions with regard to the other Doshi Companies. Def.'s Resps. to the Ct.'s Questions in Advance of Oral Arg. at 13–14; Def.-Inter.'s Resp. to Ct.'s Questions for Oral Arg. at 14. However, Commerce did not specifically apply an adverse inference to support its collapsing determination, and Commerce's discussion of adverse inferences occurred in separate sections in both the PDM and IDM. *See* PDM at 9; IDM at 28–29.

lation. *Koyo Seiko II*, 31 CIT at 1535, 516 F. Supp. 2d at 1346. Here, Commerce found a significant potential for future manipulation among the Doshi Companies based on the level of common ownership and common board members or managers by the Doshi family collectively. IDM at 24–26. Commerce observed that the Doshi family owned and controlled the Doshi Companies, and therefore found common ownership among the Doshi Companies. *Id.* at 24–25. Commerce noted that the ownership structure provided the Doshi family the ability and financial incentive to coordinate and positioned the Doshi family to have significant influence over the production and sales decisions of each of the entities involved in the production and sales of subject merchandise. *Id.* at 25. Commerce determined that the fractured relationships within the Doshi family should not alter the finding because a current family partition does not preclude future cooperation. *Id.* Commerce then found overlap among the managerial employees or board members among the Doshi Companies, as “the Doshi family grouping serves as board members and directors” on each of the Doshi Companies. *Id.* Commerce also noted that one Doshi family member sat on the boards of both EFIPL and Spire. *Id.* at 26. Commerce concedes that the third factor of intertwined operations is not present but non-dispositive considering the totality of the circumstances. *Id.*

Echjay disputes Commerce’s finding that there is a potential for manipulation among the Doshi companies because it rejects Commerce’s conclusion that the Doshi family is properly considered one cohesive family grouping. Pl.’s Br. at 21–22. Echjay argues that there is no common ownership, as separate siblings and their spouses own separate companies and common family ownership alone is insufficient to support collapsing because it does not indicate common control. *Id.* Echjay also reports that no individual works in both Echjay and any of the other Doshi Companies and thus there are no shared managerial employees to support finding potential for manipulation between Echjay and the rest of the Doshi Companies. *Id.* The Government contends that Commerce’s finding was based on substantial evidence. Def.’s Br. at 15–18. The Government argues that “[n]either the statute, nor the regulations, provide for an exception to family for members who are estranged.” *Id.* at 16 (quoting *Ferro Union*, 44 F. Supp. 2d at 1325). The Government also emphasizes that Commerce considers the totality of circumstances in finding a significant potential for manipulation. *Id.* at 17. Coalition argues that Commerce’s finding of a potential for manipulation correctly contributed to the

totality of the circumstances and rejects the idea that a partition would preclude the ability or incentive to coordinate their future actions. Def.-Inter.'s Br. at 27.

Here, Commerce's finding that there is a potential for manipulation depends upon the assumption that the Doshi family is a person or entity that acts as a cohesive unit. For the reasons discussed above regarding affiliation, Commerce has not explained how this assumption is warranted based on the record evidence. Therefore, Commerce's finding that there is a potential for manipulation among the Doshi Companies also fails to be supported by substantial evidence.

On the first factor, the court concludes that Commerce did not adequately explain its finding of common management among the Doshi Companies. The court finds persuasive the conclusion of the court in a similar case, *Jinko Solar Co. v. United States*, 41 CIT \_\_, \_\_, 229 F. Supp. 3d 1333 (2017) ("*Jinko I*"). In that case, the court refused to affirm Commerce's conclusion that a family grouping's collective indicia of control supported a finding of common management. *Id.* at 1344. The court there noted that, while the affiliation statute leaves Commerce discretion to define "persons" broadly to include a "family," Commerce's regulation on common management has defined the inquiry much more narrowly "to require Commerce to compile a list of managers or board members on one firm and compare them to the board of directors of an affiliated firm." *Id.* at 1344 n.12. The court in *Jinko I* held that, while "nothing precludes Commerce from considering that members of a family unit sit on the boards of two sets of entities as reflecting a potential for manipulation . . . if Commerce wishes to rely upon board memberships and management positions held by a family grouping, it must so state and explain how this factor creates a significant potential for the manipulation of price or production or reconsider its determination." *Id.* at 1345.

The court agrees with *Jinko I* and concludes that Commerce must explain why a different factor it relied upon justifies its finding of potential for manipulation. Here, Commerce provided the explanation that it "find[s] the Doshi family grouping to be a 'person' which owns and controls [the Doshi Companies], and as the Doshi family grouping serves as board members and directors of these companies, [Commerce] find[s] that there is overlap among the managerial employees or board members of the various companies, in accordance with 19 [C.F.R.] [§] 351.401(f)(2)(ii)." IDM at 25–26. Commerce must state that it relied upon the shared management through a family grouping to find potential for manipulation and explain how the evidence supports this conclusion. *See Jinko I*, 229 F. Supp. 3d at 1345. It would also need to address the partitions and hostility among

the owners of the Doshi Companies raised by Echjay and explain whether the family relationships here are “beyond normal commercial considerations” and “out of common interest,” as the court noted in *Jinko Solar Co. v. United States*, 41 CIT \_\_, \_\_, 279 F. Supp. 3d 1253, 1260 (2017) (“*Jinko II*”).<sup>8</sup> Commerce did not provide sufficient explanation on this point or any additional path to justify linking the Doshi Companies’ management to the potential for manipulation. Commerce’s assertion—that “the current family partition does not preclude cooperation among family members in the future,” IDM at 25—does not affirmatively support the potential for manipulation; rather it is simply an argument that the possibility cannot be eliminated. Therefore, Commerce’s finding on shared management does not support its finding of potential manipulation.

Regarding the common ownership factor, caselaw supports Commerce’s finding of common ownership by a family grouping to support finding significant potential for manipulation. See *Zhaoqing New Zhongya Aluminum*, 70 F. Supp. 3d at 1304–05 (while “a different person owns each of the three companies,” the family grouping as a whole held controlling ownership in all three companies and common ownership by the family was “a positive indicator of the significant potential for manipulation”); *Catfish Farmers of America v. United States*, 33 CIT 1258, 1265, 641 F. Supp. 2d 1362, 1371 (2009) (affirming a finding of common ownership where the family members were “the only shareholders, and the largest shareholders” in each of the collapsed companies and thus concluded that the companies “have the ability or incentive to coordinate their actions in order to direct the companies to act in concert with each other”). While Commerce stated that the Doshi family in aggregate own a majority of the Doshi Companies, which indicates the ability and financial incentive to coordinate and manipulate production and sales, this conclusion requires the predicate analysis that the Doshi family is in fact an intact family grouping. As noted above, however, Commerce did not address the partitions that included legal separation agreements. Thus, while the Government is correct that there may not be an exception for estranged family members, Commerce still must provide a level of explanation of its decision that shows a rational connection between

<sup>8</sup> On remand, the court found Commerce satisfied this requirement after explaining “the enumerated and non-enumerated factors that it considered, and why each was relevant” in finding the potential for manipulation. *Jinko Solar II*, 279 F. Supp. 3d at 1260. Commerce clarified that the family as a whole played a prominent role in the management of the companies and the family relationship created potential “to make decisions based on considerations ‘beyond normal commercial considerations’ and ‘out of common interest.’” *Id.* at 1260. The court confirmed Commerce’s explanation noting that family relationships are indeed “beyond the scope of a normal commercial relationship.” *Id.* at 1260.

the facts found and its conclusion. See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Commerce has not done so here.

As the Federal Circuit recently noted, “[w]hen Commerce promulgated 19 CFR § 351.401(f), it emphasized that collapsing requires a ‘significant’ potential for manipulation,” not merely “any potential for price manipulation.” *Prosperity Tieh*, 965 F.3d at 1323 (quoting *Preamble*, 62 Fed. Reg. at 27,345) (emphasis original). In sum, on remand Commerce must consider the record evidence of the family partition and also explain its impact on the potential for manipulation among the Doshi Companies.<sup>9</sup>

***IV. Commerce’s Decision to Collapse the Echjay and Echjay Industries Is Arbitrary and Capricious as it is Inconsistent with the Prior Decision Not to Collapse, But Not Inconsistent with the Concurrent CVD Decision Not to Find Cross-Ownership.***

Finally, Echjay challenges Commerce’s decision as inconsistent with (1) its prior decision not to collapse Echjay with Echjay Industries in *Certain Forged Stainless Steel Flanges From India; Final Results of Antidumping Duty Administrative Review*, 71 Fed. Reg. 29,314 (Dep’t Commerce May 22, 2006) (“*Flanges 2006*”); and (2) its determination that there is no cross-ownership between Echjay, Echjay Industries, and Spire in the concurrent CVD investigation, *Stainless Steel Flanges from India: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances*, 83 Fed. Reg. 40,748, and accompanying Issues and Decision Mem. C-533–878 (“*Flanges CVD IDM*”). Pl.’s Br. at 30–31, 33. The court concludes that on remand Commerce must address and explain any inconsistency with its *Flanges 2006* determination.

***A. Inconsistency with Flanges 2006***

Echjay argues that, in its 2006 AD investigation into the same subject merchandise, Commerce determined not to collapse Echjay and Echjay Industries because a significant potential for manipula-

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<sup>9</sup> Echjay suggests that, under the statutory scheme, Commerce should deal with any future manipulation retroactively through the annual administrative review process, rather than speculating about future manipulation in the original AD investigation. Pl.’s Br. at 32–33; Pl.’s Reply at 6–7. The Government argues that Commerce’s practice is to consider both actual, past manipulation and the potential for future manipulation in its investigation, rather than to examine manipulation retroactively. Def.’s Br. at 17 (citing *Preamble*, 62 Fed. Reg. at 27,346). Commerce’s practice to consider both current and future manipulation in the initial investigation complies with the § 351.401(f) regulation and does not clearly contradict with the overall purpose of the AD statute to determine margins as accurately as possible. See *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013).

tion did not exist. Pl.’s Br. at 31 (citing *Flanges 2006*). Echjay argued to Commerce and here that there was no factual change in the relationship of Echjay and Echjay Industries with regard to company ownership or management, but that Commerce’s treatment of this relationship did change. Echjay Case Br. at 6–7; Pl.’s Br. at 31; Pl.’s Reply at 8. Thus, Echjay argues that Commerce’s determination to collapse the entities in this investigation was “unlawful.” Pl.’s Br. at 30.

The Government counters that *Flanges 2006* is not controlling because “each proceeding and segment of proceeding stands its own record.” Def.’s Br. at 18 (citing *Peer Bearing Co.-Changshan v. United States*, 32 CIT 1307, 1310, 587 F. Supp. 2d 1319, 1325 (2008)). Coalition also contends that Echjay bears the burden of building the record in each investigation. Def.-Inter.’s Br. at 22. The Government and Coalition each characterize the inconsistency claim in the current case as regarding a factual determination, which Commerce has substantial discretion over, rather than a legal determination. Def.’s Resps. to the Ct.’s Questions in Advance of Oral Arg. at 17–18; Def.-Inter.’s Resp. to Ct.’s Questions for Oral Arg. at 19–20. Facts also changed, the Government suggests: Commerce found Echjay and Echjay Industries did not meet the “no substantial retooling” requirement in *Flanges 2006*, but that it did in this investigation because both companies produced and sold subject merchandise during the POI. Def.’s Br. at 19. The Government also claims EFIPL and Spire, created after the investigation of *Flanges 2006*, to be new factual elements, *id.*, though Echjay claims the two companies are irrelevant for the consistency argument, Pl.’s Reply at 7. The Government concludes that the facts above render the current determination “fundamentally different” from *Flanges 2006* and thus is not inconsistent. Def.’s Br. at 19.

“[C]onsistency has long been a core interest of administrative law, and inconsistent treatment is inherently significant.” *DAK Americas LLC v. United States*, 44 CIT \_\_, \_\_, Slip Op. 20–80 at 18 (June 4, 2020) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Chisholm v. Def. Logistics Agency*, 656 F.2d 42, 47 (3d Cir. 1981)). “[W]here an agency departs from prior determinations, it is appropriate to compel the agency to explain whether: (1) good reasons prompt that departure; or (2) the prior determinations are inapposite such that it is not in fact a departure at all.” *Id.* at 20. Though Commerce may enjoy wide latitude in its application of the AD and CVD statute and prior determinations are not legally binding in same

way as case law through stare decisis, *DAK Americas*, Slip Op. 20–80 at 18–19, nn. 9–10 (citations omitted), its discretion is limited by the need to provide an adequate explanation for any deviation from its past practice and interpretations. *SKF USA Inc.*, 263 F.3d at 1382 (“[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.”).

Commerce’s explanation of its different determinations regarding the same entities does not meet the stated standard. In its 2006 investigation, Commerce found Echjay and Echjay Industries to be affiliated but decided not to collapse them based on the findings that 1) Echjay and Echjay Industries had production facilities that would require substantial retooling to restructure manufacturing priorities, and 2) Echjay and Echjay Industries had no significant potential for manipulation. *Certain Forged Stainless Steel Flanges From India; Preliminary Results of Antidumping Duty Administrative Review*, 71 Fed. Reg. 11,379, 11,383 (Dep’t Commerce Mar.7, 2006). Here, Commerce departed from *Flanges 2006* regarding the second two collapsing prongs. See IDM at 24–25. Echjay did not dispute Commerce’s departure on the finding regarding the “no substantial retooling” requirement but challenged its departure of the finding of potential for manipulation. Echjay Case Br. at 6–7; Pl.’s Br. at 30–32. Echjay argued to Commerce that the same relationship between Echjay and Echjay Industries that led Commerce to conclude there was no potential for manipulation in *Flanges 2006* was unchanged in this investigation. Echjay Case Br. at 7. Commerce neither met the burden to “reasonably address” Echjay’s challenge or the requirement that it sufficiently distinguish its past decisions. Commerce discussed the relevance of *Flanges 2006* only with reference to the determination on the “no substantial retooling requirement,” which Echjay did not dispute, and did not mention how *Flanges 2006* impacts its decision as to the potential for manipulation. IDM at 23–27; Preliminary Affiliation Memo at 9–12. Contrary to the Government’s assertion, the addition of EFIPL and Spire does not facially concern the relationship between Echjay and Echjay Industries, and the Government provided no additional justification for why it should. See Def.’s Br. at 19. Commerce did not distinguish the relevant facts that would otherwise support a differential finding in this case from *Flanges 2006* and failed to provide good reasons that prompted the departure in this case. Therefore, this aspect of its decision is arbitrary and capri-

cious, and Commerce must explain any inconsistency on remand. *See SKF USA Inc.*, 263 F.3d at 1382.<sup>10</sup>

### ***B. Inconsistency with Concurrent CVD Determination***

Echjay also challenges Commerce’s decision to collapse as inconsistent with the lack of finding cross-ownership in the CVD investigation. Pl.’s Br. at 33. Commerce determined that Echjay, Echjay Industries, and Spire are collapsed but not cross-owned. In the CVD determination, Commerce found Echjay to be cross-owned with EFIPL, but it did not mention Echjay Industries or Spire. Mem. from J. Maeder to G. Taverman, re: Decision Mem. for the Preliminary Determination in the Countervailing Duty Investigation of Stainless Steel Flanges from India (Dep’t Commerce Jan. 16, 2018) (West) (“Flanges CVD PDM”); Flanges CVD IDM.<sup>11</sup> Notably, Commerce found cross-ownership “because of the substantial ownership positions held by family members.” Flanges CVD PDM. Echjay argues that collapsing determinations in AD investigations and cross-ownership determinations in CVD investigations have the same goal—to avoid manipulation of trade laws and prevent companies from selling through its affiliates with a lower duty margin. Pl.’s Br. at 33. Thus, Echjay argues that the different determinations regarding collapsing and cross-ownership in these investigations was “unlawful.” Pl.’s Br. at 33.

The Government and Coalition explain that these two determinations serve different purposes and are governed by different regulations. Def.’s Br. at 19–21; Def.-Inter.’s Br. at 28. The court agrees with the Government and Coalition’s argument that the cross-ownership determination in CVD investigations bears no weight on the finding of collapsing in Echjay’s AD investigation. The collapsing decision in AD investigations is governed by 19 C.F.R. § 351.401(f), while the cross-ownership finding in CVD investigations is determined by 19 C.F.R. § 351.525(b)(6). Cross-ownership is found “between two or

<sup>10</sup> The Government cites *Peer Bearing Co.-Changshan*, 587 F. Supp. 2d at 1325, and *Shandong Huarong Machinery Co. v. United States*, 29 CIT 484, 491, in support of its contention that each proceeding and segment of proceeding stands its own record” and that *Flanges 2006* is not controlling in this case. Def.’s Br. at 18. Both of the cases cited address a scenario in which the investigated parties failed to establish an adequate record for Commerce’s administrative review and held that the investigated parties could not rely on the record in previous investigations or administrative reviews. *Peer Bearing Co.-Changshan*, 587 F. Supp. 2d at 1324–25; *Shandong Huarong Mach. Co.*, 29 CIT at 490–91. Here, Echjay did not rely on the record in *Flanges 2006* to establish its claim but provided record evidence indicating the same factual situation. *See Echjay Case Br.* at 7.

<sup>11</sup> Neither memoranda are on the record for this case but are otherwise available to the court through submission in another case (IDM), *see Bebitz Flanges Works Pvt. Ltd. v. United States*, 44 CIT \_\_\_, 433 F. Supp. 3d 1297 (2020), and open database (PDM and IDM).

more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets.” 19 C.F.R. § 351.525(b)(6)(vi); see *Fabrique de Fer de Charleroi v. United States*, 25 CIT 567, 166 F. Supp. 2d 593, 600–04 (2001). The standard is normally met when “there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations.” 19 C.F.R. § 351.525(b)(6)(vi). “Different standards applied to the same facts may reasonably lead to different outcomes. Thus, there is no inconsistency between Commerce’s decision to treat the companies as a single entity in the [AD] proceeding but not in the CVD investigation.” *Zhaoqing New Zhongya Aluminum Co.*, 70 F. Supp. 3d at 1307. Lastly, Commerce made positive determinations in both collapsing and cross-ownership between Echjay and EFIPL and did not address the cross-ownership issue regarding Echjay Industries and Spire. Even if the court were to accept Echjay’s interpretation, Commerce’s decisions contained no facially inconsistent analyses or reasoning that could support remanding the AD collapsing determinations as to Echjay Industries and Spire. Therefore, the court dismisses Echjay’s claim as to inconsistency between the AD and CVD investigations.

### CONCLUSION

The *Final Determination* is remanded to Commerce for further proceedings consistent with this opinion. On remand, Commerce should explain based on the record evidence why the Doshi family should be viewed as a “person” within Section 1677(33)(F), why EFIPL and Spire would not require substantial retooling in light of the evidence raised by Echjay, why there is a potential for manipulation between the Doshi Companies, and address any inconsistency with its *Flanges 2006*. Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the revised final determination to the court, and the parties shall have 15 days thereafter to file reply briefs with the court.

### SO ORDERED.

Dated: October 8, 2020

New York, New York

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

## Slip Op. 20–141

CLEARON CORP. AND OCCIDENTAL CHEMICAL CORP., Plaintiffs, v. UNITED STATES, Defendant, and HEZE HUAYI CHEMICAL CO., LTD., Defendant-Intervenor.

Before: Richard K. Eaton, Judge  
Consol. Court No. 17–00171

[United States Department of Commerce’s remand results are remanded.]

Dated: October 8, 2020

*James R. Cannon, Jr.*, Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for Plaintiffs. With him on the brief were *Jonathan M Zielanski* and *Ulrika K. Swanson*.

*Sonia M Orfield*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M McCarthy*, Assistant Director. Of Counsel on the brief was *Catherine Miller*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Gregory S. Menegaz*, deKieffer & Horgan, PLLC, of Washington, DC, argued for Defendant-Intervenor. With him on the brief were *J. Kevin Horgan* and *Alexandra H. Salzman*.

### OPINION and ORDER

#### Eaton, Judge:

Before the court are the remand results of the United States Department of Commerce (“Commerce” or the “Department”), pursuant to the court’s order in *Clearon Corp. v. United States*, 43 CIT \_\_, 359 F. Supp. 3d 1344 (2019) (“*Clearon I*”).<sup>1</sup> See Final Results of Redetermination Pursuant to Court Order (May 16, 2019), P.R.R.<sup>2</sup> 5 (“Remand Results”). Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012).

In the final results under review in *Clearon I*, Commerce used adverse facts available, pursuant to its authority under 19 U.S.C. § 1677e(a)-(b),<sup>3</sup> to determine a countervailing duty rate for Consoli-

<sup>1</sup> This case involves the first administrative review of the countervailing duty order on chlorinated isocyanurates from the People’s Republic of China. See *Chlorinated Isocyanurates From the People’s Rep. of China*, 79 Fed. Reg. 67,424 (Dep’t Commerce Nov. 13, 2014) (countervailing duty order); *Chlorinated Isocyanurates From the People’s Rep. of China*, 82 Fed. Reg. 27,466 (Dep’t Commerce June 15, 2017) (final results) and accompanying Issues and Dec. Mem. (June 9, 2017), P.R. 117. Chlorinated isocyanurates are “derivatives of cyanuric acid, described as chlorinated s-triazine triones” that are used for water treatment, among other uses. See *Clearon I*, 43 CIT at \_\_, 359 F. Supp. 3d at 1346 n.2 (citation omitted).

<sup>2</sup> References to the public record are designated as “P.R.” and to the public remand record as “P.R.R.”

<sup>3</sup> The statute provides that, when necessary information is missing from the record, Commerce must use “facts otherwise available.” 19 U.S.C. § 1677e(a). The statute also

dated Plaintiff and Defendant-Intervenor Heze Huayi Chemical Co., Ltd. (“Heze”),<sup>4</sup> a mandatory respondent. The Department found that the use of adverse facts available was warranted, even though Heze had been cooperative, because the Government of China (“China”) failed to provide information that Commerce requested about the operation of a governmental loan program called the Export Buyer’s Credit Program.<sup>5</sup> See *Chlorinated Isocyanurates From the People’s Rep. of China*, 82 Fed. Reg. 27,466 (Dep’t Commerce June 15, 2017) (“Final Results”) and accompanying Issues and Dec. Mem. (June 9, 2017), P.R. 117 (“Final IDM”). Without this information, Commerce found it could not fully understand the program, and therefore could not verify Heze’s declarations of non-use of the program; thus, Commerce found the declarations unreliable. Using adverse facts available, Commerce then concluded that Heze had used and benefitted from the program during the period of review. In other words, it used adverse facts available to find that the statutory requirement, that a respondent receive a “benefit” from a “financial contribution” (e.g., a government loan), was satisfied. See 19 U.S.C. § 1677(5)(B) (defining subsidy). Commerce found that Heze used and benefitted from the program, notwithstanding uncontroverted declarations on the record stating that neither Heze nor its customers had used or benefitted from the program during the period of review.

Thereafter, the Department selected an adverse facts available subsidy rate for the Export Buyer’s Credit Program by applying its hierarchical method for administrative reviews. The Department selected a 0.87 percent rate, which had been determined for a governmental loan program (the Export Seller’s Credit Program) in a prior segment of the same proceeding. See *Clearon I*, 43 CIT at \_\_, 359 F. Supp. 3d at 1360–62; 19 U.S.C. § 1677e(d) (Supp. III 2015).

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permits Commerce to use an adverse inference when selecting from among the facts available, if “an interested party or any other person,” including a foreign government, fails to cooperate with Commerce’s requests for information to “the best of its ability.” 19 U.S.C. § 1677e(a), (b); see *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1371 (Fed. Cir. 2014).

<sup>4</sup> Heze is the plaintiff in *Heze Huayi Chemical Co. v. United States*, Court No. 17–00185, which is consolidated under the lead case, Consolidated Court No. 17–00171.

<sup>5</sup> As discussed *infra*, the Export Buyer’s Credit Program “provides credit at preferential rates to foreign purchasers of goods exported by Chinese companies” through the state-owned China Export Import Bank. *Clearon I*, 43 CIT at \_\_, 359 F. Supp. 3d at 1347. Commerce asked China to provide information regarding: (1) whether the China Export Import Bank used third-party banks to disburse/settle export buyer’s credits; (2) interest rates during the period of review; (3) whether export buyer’s credits were limited to business contracts exceeding \$ 2 million; and (4) suspected 2013 amendments to the bank’s internal procedures for the Export Buyer’s Credit Program. See *id.*, 43 CIT at \_\_, 359 F. Supp. 3d at 1355–56.

When calculating the net countervailing duty rate for Heze, Commerce included the *ad valorem* subsidy rate of 0.87 percent as a part of its calculation (*i.e.*, as an adverse facts available rate for the Export Buyer's Credit Program).<sup>6</sup> With the addition of subsidy rates for electricity provided for less than adequate remuneration, and for self-reported grants, Heze received a net countervailing duty rate of 1.91 percent,<sup>7</sup> which it appealed to this Court. *See* Final Results, 82 Fed. Reg. at 27,467; Final IDM at 7.

In *Clearon I*, the court held that Commerce's use of adverse facts available could not be sustained because the agency had failed to explain, and support with record evidence, its finding that the operational information that was missing from the record was "necessary"—a statutory requirement that must be satisfied before Commerce may apply an adverse inference to the missing information. *See* 19 U.S.C. § 1677e(a)-(b). In particular, the court found, Commerce had failed to "tie its facts available determination (and therefore its adverse facts available determination) to Heze, its products, or its customers," and remanded the matter for further action. *See Clearon I*, 43 CIT at \_\_, 359 F. Supp. 3d at 1360.

In the Remand Results, now before the court, Commerce again found that necessary information was missing from the record. For Commerce, information about the operation of the Export Buyer's Credit Program was necessary because without it, verification of Heze's claims that neither it, nor its customers, used or benefitted from the program during the period of review would be "unreasonably onerous, if not impossible." *See* Remand Results at 19. The "unreasonably onerous" finding was made without an actual attempt to verify the claims of non-use.

For the reasons below, Commerce's explanation, that the missing operational information was necessary to permit verification of the evidence supporting Heze's claims of non-use, lacks the support of substantial evidence and is otherwise not in accordance with law. This matter is remanded again for Commerce to at least attempt to verify this evidence, which is pertinent to the statutory inquiry of

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<sup>6</sup> Commerce calculates "an *ad valorem* subsidy rate by dividing the amount of the benefit allocated to the period of [review] . . . by the sales value during the same period of the product or products to which [it] attributes the subsidy . . ." 19 C.F.R. § 351.525(a).

<sup>7</sup> Although the parties do not dispute the Commerce's computation of Heze's final net subsidy rate of 1.91 percent *ad valorem*, it is not clear how the agency arrived at this figure, when it determined a 0.91 percent rate for electricity provided for less than adequate remuneration and a 0.55 percent rate for self-reported grants. *See* Final IDM at 7. Together with the 0.87 percent rate for the Export Buyer's Credit Program, the sum of these figures equals 2.33 percent.

whether a “benefit” was received by Heze. *See* 19 U.S.C. § 1677(5)(B). Based on the results of verification, Commerce must then determine whether “the manufacture, production, or export of” Heze’s merchandise was unlawfully subsidized. *See* 19 U.S.C. § 1671(a)(1). The parties are directed to confer and agree upon a procedure that will allow Commerce to verify Heze’s declarations of non-use. Alternatively, Commerce may find, based on the existing record evidence, that neither Heze nor its customers used or received a benefit under the program.

## BACKGROUND

### I. Summary of Relevant Statutory Background

Under the countervailing duty statute, Commerce is tasked with determining whether “the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States.” 19 U.S.C. § 1671(a)(1). A subsidy is countervailable when (1) a foreign government provides a financial contribution, such as a loan, (2) to a specific industry, and (3) a recipient within the industry receives a benefit as a result of that contribution. *See id.* § 1677(5)(A), (B), (D). If Commerce determines that each of these elements is satisfied, then it must impose a duty equal to the amount of the net countervailable subsidy. *Id.* § 1671(a)(1).

Under the adverse facts available statute, if Commerce determines that “necessary information is not available on the record,” or a party withholds information that has been requested by Commerce, Commerce must use “facts otherwise available” to fill in the gaps in the record. *See* 19 U.S.C. § 1677e(a). If Commerce determines that the use of facts otherwise available is warranted, and makes the additional finding that a party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” it may use an adverse inference “in selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b).

The aim of the adverse facts available statute is to encourage future compliance with Commerce’s requests for information, not to punish. *See Bio-Lab, Inc. v. United States*, 44 CIT \_\_, \_\_, 435 F. Supp. 3d 1361, 1368 (2020) (citation omitted). In countervailing duty cases, where a foreign government is the primary possessor of information about, e.g., governmental loan programs, courts have found permissible Commerce’s use of adverse facts available even when it has an ad-

verse impact on a cooperative respondent. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1371, 1373 (Fed. Cir. 2014). “The rationale for permitting the application of [adverse facts available] to cooperative respondents is that ‘a remedy that collaterally reaches [a cooperative respondent] has the potential to encourage the [foreign government] to cooperate so as not to hurt its overall industry.’” *Bio-Lab*, 44 CIT at \_\_, 435 F. Supp. 3d at 1368 (quoting *Fine Furniture*, 748 F.3d at 1373).

## II. Factual Background

The factual background of this case is set out in detail in *Clearon I*, familiarity with which is presumed. The facts pertinent to the issues discussed in this opinion are summarized here.

The China Export Import Bank, a state-owned entity, administers the Export Buyer’s Credit Program, through which it extends “mid- to long-term credit loans issued to foreign borrowers used for importers to make payments to Chinese exporters for goods, thereby promoting the export of Chinese goods and technical services.” *Clearon I*, 43 CIT at \_\_, 359 F. Supp. 3d at 1347.

Here, Commerce sought information about the program by issuing questionnaires to Heze and China. Commerce asked Heze, *inter alia*, whether the company or its customers used or benefitted from the program during the period of review. Heze answered that neither it nor its customers used or benefitted, directly or indirectly, from the program, and filed customer declarations certifying their non-use of the program. *See id.*, 43 CIT at \_\_, 359 F. Supp. 3d at 1347. The company submitted a total of forty-four declarations of non-use by its U.S. and non-U.S. customers during the review. *Id.*, 43 CIT at \_\_, 359 F. Supp. 3d at 1347. Its responses regarding non-use were confirmed by China. *See id.*, 43 CIT at \_\_, 359 F. Supp. 3d at 1348 & n.5.

By questionnaires to China, Commerce sought information about the Export Buyer’s Credit Program, including (1) whether the China Export Import Bank uses third-party banks to disburse/settle export buyer’s credits; (2) the interest rates<sup>8</sup> the bank used during the period of review; (3) whether the bank limits the provision of export buyer’s credits to business contracts exceeding \$2 million; and (4) suspected 2013 amendments to the internal procedures for the Export Buyer’s Credit Program. *Clearon I*, 43 CIT at \_\_, 359 F. Supp. 3d at 1355–56. China, however, withheld the information requested, deeming it “not applicable” because neither Heze nor its customers had received

<sup>8</sup> Under Commerce’s regulations, “[i]n the case of a loan, a benefit exists to the extent that the amount a firm pays on the government-provided loan is less than the amount the firm would pay on a comparable commercial loan(s) that the firm could actually obtain on the market.” 19 C.F.R. § 351.505(a)(1).

buyer's credits during the period of review. *Id.*, 43 CIT at \_\_, 359 F. Supp. 3d at 1349.

As observed by the court in *Clearon I*, with respect to the information withheld by China, “[a]t no point . . . did Commerce say why it needed this information or connect its request with respondents, respondents’ products, or their customers.” *Clearon I*, 43 CIT at \_\_, 359 F. Supp. 3d at 1349.

Notwithstanding the absence of a clear connection between the requested operational information that China withheld, and Heze, its products, or its customers, the Department found, as adverse facts available, that the company used and benefitted from the Export Buyer’s Credit Program. It determined, under the two-step analysis required by the statute that: (1) the use of “facts otherwise available” was required because China withheld necessary information requested by Commerce, 19 U.S.C. § 1677e(a); and (2) the use of an adverse inference was warranted because, by withholding information that was in its possession, China failed to act “to the best of its ability” to comply with Commerce’s requests for information. 19 U.S.C. § 1677e(b).

Further, based on its adverse facts available determination, Commerce found unreliable the declarations by Heze and its customers indicating that they neither used nor benefitted from the Export Buyer’s Credit Program, because, for the Department, without the information that China withheld, it was “unable to analyze fully how the Export Buyer’s Credits flow to/from foreign buyers and the China Ex-Im,” and, thus, it could not verify the accuracy of Heze’s claims of non use. *See* Final IDM at 6, 13.

### **III. The Court’s Findings and Remand Order in *Clearon I***

In *Clearon I*, the court found that Commerce’s use of adverse facts available could not be sustained because the Department had failed to explain, and support with record evidence, its finding that “necessary” information was missing from the record—a statutory requirement that must be satisfied before Commerce may consider applying an adverse inference to the missing information. *See* 19 U.S.C. § 1677e(a)-(b). That is, the Department failed to explain why the information it sought from China, which it failed to provide, about the operation of the Export Buyer’s Credit Program was necessary to its determination that the “manufacture, production, or export” of Heze’s merchandise had been subsidized. *See* 19 U.S.C. § 1671(a); *Clearon I*, 43 CIT at \_\_, 359 F. Supp. 3d at 1363. The court thus remanded the matter, directing Commerce to:

(1) explain how the information it sought as to (a) whether the China Export Import Bank uses third-party banks to disburse/settle export buyer's credits; (b) the interest rates the bank used during the period of review; (c) whether the bank limits the provision of export buyer's credits to business contracts exceeding \$2 million; and (d) suspected amendments to the internal procedures for the Export Buyer's Credit Program, is necessary to make a determination of whether the "manufacture, production, or export" of Heze's merchandise has been subsidized, pursuant to 19 U.S.C. § 1671(a). In doing so, Commerce was directed that it "shall tie its inquiries to Heze, its products, and/or its customers";

(2) either provide an adequate answer relating to why the information it seeks "to fully understand the operation of the program" fills a gap as to Heze's products and their sale, or rely on the information it has on the record;

(3) comply with the statute by tying its facts available and adverse facts available determinations to Heze, its products, or its customers; and

(4) support with substantial evidence its necessary conclusion that there were gaps in the record evidence that could only be filled with China's responses to its questionnaires. *See id.*

The court also held that if, on remand, Commerce continued to use adverse facts available, and the court sustained that use, it could apply the 0.87 percent rate that it selected as the adverse facts available rate for the Export Buyer's Credit Program to calculate Heze's final net subsidy rate. *Clearon I*, 43 CIT at \_\_\_, 359 F. Supp. 3d at 1361.

#### **IV. The Remand Results Now Before the Court**

In the Remand Results, Commerce continued to find that without the information that China withheld about the operation of the Export Buyer's Credit Program, the use of facts available was required because "necessary" information was missing from the record, under 19 U.S.C. § 1677e(a). It further found that the application of an adverse inference was justified because China failed to cooperate with Commerce's information requests to "the best of its ability." 19 U.S.C. § 1677e(b); Remand Results at 40.

Using adverse facts available, the Department thus determined that Heze used and benefitted from the Export Buyer's Credit Program, and it continued to use 0.87 percent as the adverse facts available rate for the program. *See* Remand Results at 40. For Commerce, the information that China withheld was "necessary" because without a complete understanding of how the program operates Com-

merce could not, without undue burden, verify the declarations by Heze and its customers that they did not use or benefit from the program during the period of review. *See* Remand Results at 24. In its decisional memorandum, Commerce addressed each of the court's instructions in turn.

## **1. Commerce's Response to Instruction 1**

### **(a) Third-Party Banks**

Commerce responded to the court's instruction to explain why it is necessary to know whether the China Export Import Bank uses third-party banks to disburse/settle export buyer's credits:

[K]nowing the bank that disbursed the loan, which may have changed with the [2013] amendments, is necessary information because Commerce needs to know which bank names to look for in the books and records during verification of [Heze]'s customers. Without having knowledge of the banks that disburse funds or how those funds are disbursed to [Heze]'s customers, Commerce is unable to decipher which loans could be attributed to receiving export buyer's credits. Thus, a thorough verification of [Heze]'s customers' non-use of this program without understanding the identity of these correspondent banks would be unreasonably onerous, if not impossible. Without knowing the identities of these banks, Commerce's second step of its typical non-use verification procedure (*i.e.*, examining the company's subledgers for references to the party making the financial contribution) could not by itself demonstrate that the U.S. customers did not use the program (*e.g.*, no correspondent banks in the subledger). Nor could this second step of Commerce's typical non-use verification procedure be used to narrow down the company's lending to a subset of loans likely to be the export buyer's credit (*i.e.*, loans from the corresponding banks). Furthermore, the third step of Commerce's typical non-use verification procedures (*i.e.*, selecting *specific* entries from the subledger and requesting to see underlying documentation such as applications and loan agreements) likewise would be of no value without knowing which banks disburse the loans. This step might serve merely to confirm whether banks were correctly identified in the subledger – not necessarily whether those banks were correspondent banks participating in the Export Buyer's Credit Program. This is especially true given [China]'s failure to provide other requested information, such as the 2013 revisions, a

sample application, and other documents making up the “paper trail” of a direct or indirect export credit from the China Ex-Im Bank.

Remand Results at 27–28.

### **(b) Interest Rates**

Next, Commerce addressed why it needed to know about interest rates during the period of review:

[K]nowing the interest rates for [Heze]’s customers during the [period of review] is not only necessary for verifying whether a loan was received under this program by matching the reported interest rate for this program with interest rates in the books and records of [Heze]’s customers during verification, but is also necessary for calculating a benefit.

Remand Results at 28.

### **(c) Minimum Contract Size**

Commerce then addressed why it needs to know whether the Export Buyer’s Credit Program is limited to specified business contracts:

[K]nowing the size of the business contracts for which export buyer’s credits flow from foreign buyers and the China Ex-Im Bank, or other Chinese banks, is necessary to narrow the scope of the verification and identify which export buyer’s credit loans are being examined during verification proceedings. A thorough understanding of the extent of the export buyer’s credits afforded to [Heze]’s customers would have allowed Commerce to further determine whether a loan was provided under the Export Buyer’s Credit Program. Thus, verifying non-use of the programs without knowledge of the correspondent banks and the limits on the size of business contracts that would be subject to export buyer’s credits would require Commerce to view the underlying documentation for all entries from the subledger *to attempt* to confirm the origin of each loan (*i.e.*, whether the loan was provided from the China Ex-Im Bank via an intermediary bank). This would be an unreasonably onerous undertaking for any company. Therefore, answers to all these questions make up the framework which is used at verification, so Commerce knows which documents to request for review and then what information to use for confirming non-use in the books and

records (*i.e.*, which bank names, interest rate amounts, *etc.*). Without this information, Commerce lacks the requisite roadmap for verification. Specifically, answers to these questions were necessary before Commerce could verify [Heze]’s U.S. customers’ claims of non-use in this review.

Remand Results at 28–29. Thus, Commerce found:

[I]t could not *accurately and effectively* verify usage at [Heze]’s customers, even were it to attempt the unreasonably onerous examination of each of the customers’ loans. To conduct verification at the customers without the information requested from [China] would amount to looking for a needle in a haystack with the added uncertainty that Commerce might not even be able to identify the needle when it was found.

Remand Results at 21.

#### **(d) Suspected 2013 Amendments to the Export Buyer’s Credit Program**

Finally, with respect to why Commerce needs to know what amendments were made to the Export Buyer’s Credit Program in 2013, Commerce stated:

[China] has refused to provide the requested information or any information concerning the 2013 program revision, which is necessary for Commerce to analyze how the program functions. We requested all documents related to revisions to the program, including the 2013 revisions, because our prior knowledge of this program (as established in the Citric Acid Verification Report on the record of this segment of the proceeding) demonstrates that the 2013 revisions affected [sic] important program changes. For example, in the Citric Acid Verification Report we stated that “EXIM officials indicated the Administrative Measures was revised in 2013 and eliminated the {USD 2 million} contract minimum.” We, therefore, sought the 2013 revisions in this proceeding to review this change in program requirements and any other revisions. Specifically, the 2013 revisions (which [China] refers to as “internal guidelines”) appear to be significant and have impacted a major condition in the provision of loans under the program.

This information is necessary and critical to our understanding of the program and for any determination of whether the “manufacture, production, or export” of [Heze]’s merchandise has been subsidized. For instance, if the program continues to be limited

to USD 2 million contracts between a mandatory respondent and its customer, this is an important limitation to the universe of potential loans under the program and can assist us in targeting our verification of non-use. However, if the program is no longer limited to USD 2 million contracts, this increases the difficulty of verifying loans without any such parameters, as discussed further below. Therefore, by refusing to provide the requested information, and instead providing unverifiable assurances that other rules regarding the program remained in effect, [China] impeded Commerce's understanding of how this program operates and how it can be verified. Further, to the extent [China] had concerns regarding the non-public nature of the 2013 revisions, Commerce has well-established rules governing the handling of business proprietary information in its proceedings.

Remand Results at 13–14.

## **2. Commerce's Response to Instructions 2 and 4**

Commerce addressed the court's second and fourth instructions together:

[T]he Court ordered Commerce to provide an adequate answer, supported by the record, as to why it needed the requested information to fill a gap as to [Heze]'s products and their sale. These issues have the same underlying rationale as the first issue in that Commerce does not know what to look for in [Heze]'s books and records if it does not know the bank names or interest rates. This program has gaps on the record because [China] refused to provide requested information about the Export Buyer's Credit Program's bank disbursement, interest rates, or possible limitations regarding business contracts.

Remand Results at 29.

## **3. Commerce's Response to Instruction 3**

As to instruction three, directing Commerce to tie the application of adverse facts available to Heze, Commerce stated:

[B]y refusing to provide information regarding the operation, disbursement, and allocation of funds of the Export Buyer's Credit Program after it implemented [the 2013] changes, [China] withheld information requested by Commerce pursuant to [19 U.S.C. § 1677e(a)(2)(A)]. As a result, [China] significantly impeded the review pursuant to section [19 U.S.C. §

1677e(a)(2)(C)]. Accordingly, Commerce continued to determine that application of facts available to [Heze] regarding this program is warranted pursuant to [19 U.S.C. § 1677e(a)(1) and (2)(A), (C)] because we are unable to rely on the information provided by [Heze] due to our lack of an understanding of the Export Buyer's Credit Program. Further, by failing to provide the necessary information after repeated requests, [China] failed to cooperate to the best of its ability to comply with Commerce's request for information because it refused to provide information regarding the operation, disbursement, and allocation of funds of the Export Buyer's Credit Program after it implemented changes. Accordingly, the application of an adverse inference to facts available to [Heze] is warranted pursuant to [19 U.S.C. § 1677e(b)(2)]. As noted . . . , Commerce may allow an adverse inference against a government to impact an otherwise cooperative respondent, when the government is the holder of the missing necessary information, as is the case here.

Remand Results at 29–30.

Consolidated Plaintiff and Defendant-Intervenor Heze filed comments on the Remand Results. *See* Heze's Cmts., ECF No. 49 ("Heze's Br."). Plaintiffs Clearon Corp. and Occidental Chemical Corp., U.S. domestic producers of the subject chemicals and the petitioners in this proceeding (collectively, "Clearon" or "Plaintiffs") and Defendant the United States ("Defendant"), on behalf of Commerce, have filed responses to Heze's comments. *See* Clearon's Resp. to Cmts., ECF No. 53 ("Clearon's Br."); Def.'s Resp. to Cmts., ECF No. 50 ("Def.'s Br.>").

Heze disputes Commerce's use of adverse facts available in the Remand Results. For Heze, it was unreasonable for Commerce to use adverse facts available to make a finding that conflicts with uncontroverted record evidence showing that neither the company nor its customers used or benefitted from the Export Buyer's Credit Program during the period of review. Moreover, it maintains that Commerce could have verified the declarations of non-use placed on the record, even without the information that China withheld. *See generally* Heze's Br.

For their part, Clearon and Defendant urge the court to sustain the Remand Results. *See* Clearon's Br. 2; Def.'s Br. 7.

### STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

## LEGAL FRAMEWORK

Where the Department lacks the information it needs to make a countervailing duty determination, it must use “facts otherwise available.” 19 U.S.C. § 1677e(a). If Commerce determines that the use of facts otherwise available is warranted, and makes the additional finding that a party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” it may use an adverse inference “in selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b)(1); *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (discussing the two-step analysis that applies to the use of facts available and adverse inferences under 19 U.S.C. § 1677e).

A foreign government may be found to be a non-cooperating party. *See Fine Furniture*, 748 F.3d at 1371 (“[O]n its face, the statute authorizes Commerce to apply adverse inferences when an interested party, including a foreign government, fails to provide requested information.”). Under such circumstances, the application of adverse facts available “may adversely impact a cooperating party, although Commerce should seek to avoid such impact if relevant information exists elsewhere on the record.” *Archer Daniels Midland Co. v. United States*, 37 CIT \_\_, \_\_, 917 F. Supp. 2d 1331, 1342 (2013) (citation omitted). When making an adverse inference, Commerce may rely upon information derived from the petition, a final determination in the investigation, any previous review or determination, or any other information placed on the record. *See* 19 U.S.C. § 1677e(b)(2)(A)-(D).

## DISCUSSION

Central to Commerce’s argument in support of its use of adverse facts available in the Remand Results is that without the information that it requested from China,<sup>9</sup> it would be unreasonably onerous, if not impossible, to verify Heze’s claims that neither it nor its U.S. customers used or benefitted from the program. *See* Remand Results at 21; 19 U.S.C. § 1677(5)(B). That is, for Commerce, the missing information was “necessary” to carry out verification of the claims according to its usual non-use verification method. Commerce described this method in the Remand Results:

If Commerce were attempting to confirm whether a respondent exporter had received any loans from a state-owned bank, for

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<sup>9</sup> As noted, this information included (1) whether the China Export Import Bank uses third-party banks to disburse/settle export buyer’s credits; (2) the interest rates the bank used during the period of review; (3) whether the bank limits the provision of export buyer’s credits to business contracts exceeding \$2 million; and (4) suspected 2013 amendments to the internal procedures for the Export Buyer’s Credit Program.

example, its first step would be to examine the company's balance sheets to derive the exact amount of lending outstanding during the period of examination. Second, once that figure was confirmed, Commerce would then begin examining subledgers or bank statements providing the details of all individual loans. Because Commerce could tie the subledgers or bank statements to the total amount of outstanding lending derived from the balance sheets, it could be assured that the subledgers were complete and that it therefore had the entire universe of loan information available for further scrutiny. After examining the subledgers for references to the state-owned banks (for example, "Account 201-02: Short-term lending, Industrial and Commercial Bank of China"), Commerce's third step would be to select specific entries from the subledger and request to see underlying documentation, such as applications and loan agreements, in order to confirm the accuracy of the subledger details. Thus, confirmation that a complete picture of relevant information is in front of the verification team, by tying relevant books and records to audited financial statements or tax returns, is critical.

#### Remand Results 7-8.

Heze urges the court to reject Commerce's claim that it cannot rely on the information in Heze's questionnaire responses because it cannot verify that information. The company maintains that its responses are fully verifiable using Commerce's usual verification methods:

[T]he Department can verify [Heze's] customer's non-receipt of funding through the China Ex-Im Bank by using its normal verification methodologies to tie the customer's reported receipt of loans and financing to the customer's books and records. The Department can also verify [Heze]'s non-use of Export Buyer's Credit funding by reviewing [Heze]'s books and records for reported payment of goods sold to its U.S. customers and reported financing and loans.

Heze's Br. 13. Heze also points out that it fully cooperated with Commerce's requests for information, and that the record evidence shows that neither Heze nor its U.S. customers used the Export Buyer's Credit Program during the period of review. *See* Heze's Br. 10.

Further, Heze contends that Commerce has failed to comply with the court's remand order because it has failed to demonstrate that the operational information about the program that Commerce de-

sires (*i.e.*, the role of third-party banks, interest rates, minimum contract values, and 2013 amendments to the program) is necessary to make a determination of whether the “manufacture, production, or export” of Heze’s merchandise has been subsidized, pursuant to 19 U.S.C. § 1671(a). *See* Heze’s Br. 1–2. Indeed, for Heze, Commerce has failed to tie its inquiries to Heze, its products, and/or its customers, or answered the question why the missing information “would fill a gap as to [Heze’s] products and sales.” Heze’s Br. 2; *see* 19 U.S.C. § 1677e(a).

Commerce’s use of adverse facts available to fill in purported gaps in the factual record of proceedings in which China has failed to provide requested information about the operation of the Export Buyer’s Credit Program has been the subject of several opinions by this Court. On similar factual records, the Court has rejected Commerce’s position that information about the *operation* of the Export Buyer’s Credit Program is necessary for it to verify a respondent’s claimed non-use of the program. *See, e.g.*, the line of cases captioned *Guizhou Tyre Co. v. United States*<sup>10</sup>; the line of cases captioned *Changzhou Trina Solar Energy Co. v. United States*<sup>11</sup>; and the line of

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<sup>10</sup> *See Guizhou Tyre Co. v. United States*, 42 CIT \_\_, \_\_, 348 F. Supp. 3d 1261, 1270 (2018) (remanding to Commerce, noting that although “information as to the functioning of the Program was missing, this finding was rendered immaterial by responses from both Guizhou and [China] as to the Program’s use. This defect proves fatal to Commerce’s imposition of [adverse facts available.]”); *Guizhou Tyre Co. v. United States*, 43 CIT \_\_, \_\_, 399 F. Supp. 3d 1346, 1353 (2019) (remanding, noting that “Commerce has failed to demonstrate why the 2013 [Export Buyer’s Credit Program] rule change [allegedly impacting the functioning of the program] is relevant to verifying claims of non-use, and how that constitutes a ‘gap’ in the record.”); *Guizhou Tyre Co. v. United States*, 43 CIT \_\_, \_\_, 415 F. Supp. 3d 1402, 1405 (2019) (sustaining Commerce’s conclusion that “Plaintiffs did not use the [Export Buyer’s Credit Program] based on the record evidence”); *see also Guizhou Tyre Co. v. United States*, 43 CIT \_\_, \_\_, 389 F. Supp. 3d 1315, 1329 (2019) (remanding, noting that “the Department’s decision to apply [adverse facts available] as to the Export Buyer’s Credit Program based on an alleged lack of cooperation was unlawful because Commerce demonstrated no gap in the record, the respondents submitted evidence of non-use of the Program, and the Department’s findings of unverifiability of necessary information [were] unsupported by record evidence.”); *Guizhou Tyre Co. v. United States*, 43 CIT \_\_, \_\_, 415 F. Supp. 3d 1335, 1343 (2019) (remanding, noting that “[t]here is evidence in the record that squarely detracts from Commerce’s inference that Plaintiffs used and benefited from the [Export Buyer’s Credit Program]. Commerce may not simply declare that the evidence cannot be verified and therefore, a gap exists. That is not how it works. Commerce must attempt verification *in order to conclude* that a gap exists related to that inquiry.”); *Guizhou Tyre Co. v. United States*, No. 18–00100, 2020 WL 3033244, at \*2 (CIT June 5, 2020) (sustaining Commerce’s conclusion “that the factual record in this case indicates that there was no use of the [Export Buyer’s Credit Program] by Guizhou.”).

<sup>11</sup> *See Changzhou Trina Solar Energy Co. v. United States*, 42 CIT \_\_, \_\_, 352 F. Supp. 3d 1316, 1326 (2018) (remanding where “Commerce provided reasoning as to why [China]’s failure to respond adequately made it impossible for it to understand fully the operation of the [Export Buyer’s Credit Program] [*i.e.*, which would pertain to the “financial contribution” element of the statute], but it failed to show why a full understanding of the [Export Buyer’s Credit Program]’s operation was necessary to verify non-use certifications [which

cases captioned *Jiangsu Zhongji Lamination Materials Co. v. United States*.<sup>12</sup>

The court finds *Guizhou Tyre Co. v. United States*, 43 CIT \_\_, 415 F. Supp. 3d 1335 (2019) particularly instructive. There, the Court reviewed an explanation by Commerce, as to why it could not verify the respondent's claims of non-use of the Export Buyer's Credit Program, that is similar to that found in the Remand Results. As summarized by the Court:

Commerce continues to find that there is a gap in the record because the Department cannot verify the submitted non-use declarations without additional information surrounding the 2013 revisions to the [Export Buyer's Credit Program]. One of the revisions involved routing [Export Buyer's Credit Program] loans through (undisclosed) third-party banks, and not through the Export-Import Bank of China . . . as Commerce originally thought. As in the previous administrative review, the Department reiterated that "[China] once again refused to provide the sample application documents or any regulations or manuals governing the approval process [for the Program]." Without this information, Commerce concluded that it could "not verify non-use of export buyer's credits" "in a manner consistent with its verification methods, which are primarily the methods of an auditor, attempting to confirm usage or claimed non-usage by examining books and records which can be reconciled to audited financial statements, or other documents." Commerce asserts

would pertain to the "benefit conferred" element]."); *Changzhou Trina Solar Energy Co. v. United States*, No. 17-00198, 2019 WL 5856438, at \*4 (CIT Nov. 8, 2019) (remanding, where "[a]lthough Commerce has shown that [China] failed to answer certain questions regarding the [Export Buyer's Credit Program]'s operation, it is still not entirely clear to the court that the missing information is required to effectively verify respondent's non-use of the program."); *Changzhou Trina Solar Energy Co. v. United States*, No. 17-00198, 2020 WL 4464258, at \*4 (CIT Aug. 4, 2020) (sustaining "Commerce's decision to accept the certifications of non-use"); see also *Changzhou Trina Solar Energy Co. v. United States*, No. 17-00246, 2018 WL 6271653, at \*3 (CIT Nov. 30, 2018) (remanding where Commerce had "not explain[ed] why it was necessary for it to fully understand the [Export Buyer's Credit Program] in order to ascertain claims of non-use."); *Changzhou Trina Solar Energy Co. v. United States*, No. 17-00246, 2019 WL 6124908, at \*3 (CIT Nov. 18, 2019) (remanding to Commerce, noting that although "[China] failed to answer certain questions regarding the [Export Buyer's Credit Program]'s operation, it is still not entirely clear to the court that the missing information is required to effectively verify respondent's non-use of the program."); *Changzhou Trina Solar Energy Co. v. United States*, No. 17-00246, 2020 WL 4464251, at \*3 (CIT Aug. 4, 2020) (sustaining "Commerce's decision to accept [the plaintiffs'] claims of non-use on remand in this instance [as] supported by substantial evidence").

<sup>12</sup> See *Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT \_\_, \_\_, 405 F. Supp. 3d 1317, 1333 (2019) (remanding because "Commerce again does not explain why a complete understanding of the operation of the program is necessary to verify non-use of the program."); *Jiangsu Zhongji Lamination Materials Co. v. United States*, No. 18-00089, 2020 WL 1456531, at \*3 (CIT Mar. 24, 2020) (sustaining Commerce's uncontested remand results, in which Commerce decided to recalculate plaintiff's final net countervailing duty rate excluding the Export Buyer's Credit Program).

that the “completeness” principle is “an essential element of Commerce’s verification methodology,” . . . and without the allegedly “missing” information, the Department’s verification “would amount to looking for a needle in a haystack with the added uncertainty that Commerce might not even be able to identify the needle when it was found.” Therefore, Commerce continues to impute usage of the [Export Buyer’s Credit Program] based on the application of adverse facts available.

*Guizhou Tyre*, 43 CIT at \_\_, 415 F. Supp. 3d at 1341 (internal record citations omitted). The Court rejected Commerce’s explanation, noting that “[t]he Department’s (flawed) reasoning has remained unwavering” despite many opinions issued by the Court “urging Commerce to correct the repeated blatant deficiencies in its adverse facts available analyses of the [Export Buyer’s Credit Program].” *Id.* Specifically, the Court found that Commerce had failed to make a finding that a “gap” in the record existed with respect to the required statutory elements of a countervailing duty determination:

In its redetermination, Commerce again invoked the authority to use an adverse inference based on the finding that [China] did not act to the best of its ability in responding to the Department’s request for “the 2013 administrative rules, as well as other information concerning the operation of the [Export Buyer’s Credit Program].” Here, the Department’s investigation relates to whether the [Export Buyer’s Credit Program] provides a countervailable subsidy to Plaintiffs. Under the [countervailable duty] statute, this requires a finding that a specific financial contribution occurred, and a benefit was therefore conferred. *See* 19 U.S.C. § 1677(5). The gap then, must relate to either element of this inquiry. Just because Commerce resorted to adverse facts available “does not obviate the need for Commerce to affirmatively find that the elements of the statute have been satisfied.” [*Changzhou Trina Solar Energy Co. v. United States*, 43 CIT \_\_, \_\_, 359 F. Supp. 3d 1329, 1338 (2019)]. But as it currently stands, the Department has assumed the conclusion—that a gap in the record exists as a result of [China]’s failure to cooperate—without addressing what “constitutes a ‘gap’ in the record,” [*Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1347 (Fed. Cir. 2011)], and by pointedly closing its eyes on the evidence provided by Guizhou that would “fairly detract[ ]” from its ultimate conclusion, *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016). The law does not permit Commerce to circumvent the statutory requirements of

the [countervailable duty] statute just because a respondent fails to cooperate; nor is Commerce “relieve[d] [ ] from relying on *some* facts to make the requisite determinations to satisfy the elements of 19 U.S.C. § 1677(5).” *Changzhou Trina Solar Energy Co.*, 43 CIT [at] \_\_, 359 F. Supp. 3d at 1340 (emphasis added). Stripped away of its misconceptions surrounding the [adverse facts available] statute, the Department is left with the most compelling facts placed on the record: that Plaintiffs did not use the Program, and therefore, no specific benefit was conferred.

*Id.*, 43 CIT at \_\_, 415 F. Supp. 3d at 1342–43 (internal record citation omitted). The *Guizhou Tyre* Court found compelling that

[t]here is evidence in the record that squarely detracts from Commerce’s inference that Plaintiffs used and benefited from the [Export Buyer’s Credit Program]. Commerce may not simply declare that the evidence cannot be verified and therefore, a gap exists. That is not how it works. Commerce must attempt verification *in order to conclude* that a gap exists related to that inquiry.

*Id.*, 43 CIT at \_\_, 415 F. Supp. 3d at 1343. Accordingly, the Court remanded with instructions that Commerce “attempt verification of the submitted non-use declarations from Plaintiffs’ U.S. customers, using all reasonable tools at its disposal, including methods suggested by Plaintiffs and by this court;” and “detail its process in its remand redetermination as it relates to its verification of the non-use declarations.” *Id.*, 43 CIT at \_\_, 415 F. Supp. 3d at 1344.

After remands in the *Guizhou Tyre* case, as well as the *Changzhou* and *Jiangsu* lines of cases, Commerce ultimately determined (under protest<sup>13</sup>) that the Chinese respondents in each case had not used or benefitted from the Export Buyer’s Credit Program.

Here, Commerce’s duty was to determine whether the Export Buyer’s Credit Program provided a benefit to Heze. Under the statute, that determination required a finding as to whether “a specific financial contribution occurred, and a benefit was therefore conferred.” *Guizhou Tyre*, 43 CIT at \_\_, 415 F. Supp. 3d at 1342 (citing 19 U.S.C. § 1677(5)). Evidence pertinent to this inquiry was on the record. Heze’s declarations and questionnaire responses show that neither the company nor its customers used or benefitted from the program. Rather than attempt to verify this information, however, Commerce concluded it would be too onerous to do so without the information

<sup>13</sup> It is worth noting that, despite Commerce’s respectful protest, the United States elected not to file an appeal in any of the aforementioned cases.

withheld by China, and therefore it could not be used (creating a gap). In other words, Commerce did not analyze whether the missing information actually created a gap that mattered to Heze's case.

It is worth noting that in its questionnaire response, Heze has maintained that it did not "qualify for funding through the Export Buyer's Credit Program because the China Ex-Im Bank funds large capital projects and contracts for mechanical and electronic products, complete sets of equipment, and high-tech products and services that are valued at more than \$2 million." Heze's Br. 3. "Furthermore, [Heze] would have been required to purchase export credit insurance, which it did not." Heze's Br. 6 (record citations omitted). These statements are based on the requirements of the program found in information that China placed on the record in response to Commerce's questionnaires. For Heze, "[t]he Department is able to verify each of these criteria through its on-site verification methodologies that the Department describes in its [Remand Results]," but it unreasonably failed to do so. Heze's Br. 3.

As in *Guizhou Tyre*, Commerce used adverse facts available against a cooperative respondent to fill an alleged gap that it concluded existed without first attempting to verify the information pertinent to its "benefit" inquiry under the statute. Although Commerce, in the Remand Results, takes the court through why it wanted this information, as has been found in other cases in this Court, it is not clear that any of the missing information was "necessary" to Commerce's central statutory inquiry, *i.e.*, to determine whether the Export Buyer's Credit Program provided a benefit to Heze. Thus, it appears that, as in *Guizhou Tyre*, "the Department has assumed the conclusion—that a gap in the record exists as a result of [China's] failure to cooperate—without addressing what 'constitutes a "gap" in the record,' and by pointedly closing its eyes on the evidence provided by [Heze] that would 'fairly detract[ ]' from its ultimate conclusion." *Guizhou Tyre*, 43 CIT at \_\_\_, 415 F. Supp. 3d at 1342 (internal citations omitted). "The law does not permit Commerce to circumvent the statutory requirements of the [countervailable duty] statute just because a respondent fails to cooperate; nor is Commerce 'relieve[d] [ ] from relying on *some* facts to make the requisite determinations to satisfy the elements of 19 U.S.C. § 1677(5).'" *Id.* (citation omitted).

The Remand Results set out the steps of Commerce's usual non-use verification method. Remand Results at 7–8. The parties are instructed to confer and jointly devise a procedure, which may include modifications of the usual method, by which the Department can conduct verification of the declarations of non-use. Alternatively,

Commerce may find, based on the existing record evidence, that neither Heze nor its customers used or received a benefit under the program.

### CONCLUSION and ORDER

Based on the foregoing, it is hereby

**ORDERED** that the Remand Results are remanded to Commerce; it is further

**ORDERED** that, on remand, Commerce issue a revised redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

**ORDERED** that, on remand, the parties shall confer and agree upon a verification procedure to apply in this case; it is further

**ORDERED** that Commerce must either (1) verify Heze's claims of non-use and, based on the results of verification, determine whether Heze received a benefit under the program; or in the alternative, (2) find, based on the existing record evidence, that neither Heze nor its customers used or received a benefit under the program; and it is further

**ORDERED** that the revised redetermination shall be due ninety (90) days following the date of this Opinion and Order; any comments to the revised redetermination shall be due thirty (30) days following the filing of the revised redetermination; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.

Dated: October 8, 2020

New York, New York

*/s/ Richard K. Eaton*

RICHARD K. EATON, JUDGE

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