

# U.S. Customs and Border Protection

CBP Dec. 20-19



## COUNTRY OF ORIGIN MARKING OF PRODUCTS FROM THE WEST BANK AND GAZA

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

**ACTION:** General notice.

**SUMMARY:** This document notifies the public that, for country of origin marking purposes, imported goods produced in the West Bank, specifically in Area C under the Israeli-Palestinian Interim Agreement (the Oslo Accords), signed on September 28, 1995, and the area known as “H2” under the Israeli-Palestinian Protocol Concerning Redeployment in Hebron and Related Documents (the Hebron Protocol), signed January 17, 1997, must be marked to indicate their origin as “Israel,” “Product of Israel,” or “Made in Israel.” Goods produced in the West Bank, specifically in Areas A and B under the Oslo Accords and the area known as “H1” under the 1997 Hebron Protocol, must be marked to indicate their origin as “West Bank,” “Product of West Bank,” or “Made in West Bank.” Goods produced in Gaza must be marked to indicate their origin as “Gaza,” “Product of Gaza,” “Made in Gaza,” “Gaza Strip,” “Product of Gaza Strip,” or “Made in Gaza Strip.” Imported goods from any of these territorial areas must not include “West Bank/Gaza,” “West Bank/Gaza Strip,” “West Bank and Gaza,” or words of similar meaning.

**DATES:** The position set forth in this document is applicable as of December 23, 2020. A transition period will be granted for importers to implement marking consistent with this notice. Products from the West Bank or Gaza, when entered or withdrawn from warehouse for consumption into the United States after March 23, 2021, must be marked in accordance with the position set forth in this notice, for purposes of 19 U.S.C. 1304.

**FOR FURTHER INFORMATION CONTACT:** For legal matters, contact Yuliya A. Gulis, Chief, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, (202) 325-0042 or [yuliya.a.gulis@cbp.dhs.gov](mailto:yuliya.a.gulis@cbp.dhs.gov). For policy matters, contact Margaret

Gray, Chief, Trade Agreements Branch, Office of Trade, (202) 253-0927 or [FTA@cbp.dhs.gov](mailto:FTA@cbp.dhs.gov).

## **SUPPLEMENTARY INFORMATION:**

### **A. Background on Guidance from the Department of State**

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Failure to mark an article in accordance with the requirements of 19 U.S.C. 1304 shall result in the levy of a duty of ten percent *ad valorem*. Part 134 of title 19 of the Code of Federal Regulations (19 CFR part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

In Treasury Decision (T.D.) 95-25, published in the **Federal Register** on April 6, 1995 (60 FR 17607), the U.S. Customs Service (U.S. Customs and Border Protection's predecessor agency) discussed the proper country of origin marking for imported goods produced in the West Bank or Gaza Strip. Prior to the issuance of T.D. 95-25, the U.S. Customs Service had taken the position that, in order for the country of origin marking of a good which was produced in the West Bank or Gaza Strip to be considered acceptable, the word "Israel" must appear in the marking designation. However, by letter dated October 24, 1994, the Department of State advised the Department of the Treasury that, in view of certain developments, principally the Israeli-Palestine Liberation Organization (PLO) Declaration of Principles on Interim Self-Government Arrangements (the DOP), signed on September 13, 1993, the primary purpose of 19 U.S.C. 1304 would be best served if goods produced in the West Bank or Gaza Strip were permitted to be marked "West Bank" or "Gaza Strip." Accordingly, the U.S. Customs Service notified the public in T.D. 95-25 that, unless excepted from marking, goods produced in the West Bank or Gaza Strip shall be marked as "West Bank," "Gaza," or "Gaza Strip" in accordance with the requirements of 19 U.S.C. 1304 and 19 CFR part 134, and shall not contain the words "Israel," "Made in Israel," "Occupied Territories-Israel," or words of similar meaning.

Subsequently, by letter dated January 13, 1997, the Department of State advised the Department of the Treasury that the Palestinian Authority asked that the United States accept the country of origin marking "West Bank/Gaza" so as to reaffirm the territorial unity of the two areas. The Department of State further advised that it considers the West Bank and Gaza Strip to be one area for political,

economic, legal and other purposes. Accordingly, the Department of State requested that the U.S. Customs Service accept the country of origin markings “West Bank/Gaza” and “West Bank and Gaza” for products from those areas, and that the U.S. Customs Service continue to accept the markings “West Bank,” “Gaza,” and “Gaza Strip.” Based upon this advice, the U.S. Customs Service notified the public in T.D. 97–16, published in the **Federal Register** on March 14, 1997 (62 FR 12269), that acceptable country of origin markings for imported goods produced in the West Bank or Gaza Strip included the following: “West Bank/Gaza,” “West Bank/Gaza Strip,” “West Bank and Gaza,” “West Bank and Gaza Strip,” “West Bank,” “Gaza,” and “Gaza Strip.”

By letter dated December 1, 2020, the Department of State has now advised U.S. Customs and Border Protection (CBP) that there has been no further transfer of relevant authorities from Israel to the Palestinian Authority since issuance of the earlier guidance and Israel continues to exercise relevant authorities in areas of the West Bank. The Department of State further advised that it recognizes that Israel has disengaged from Gaza and that Gaza and the West Bank are politically and administratively separate and should be treated accordingly. In light of these developments, and consistent with the purposes of 19 U.S.C. 1304 of providing important information to U.S. purchasers, the Department of State recommends that the country of origin marking requirements for goods produced in the West Bank or Gaza be updated as set forth below in Section C of this notice.

## **B. Reliance upon Guidance From the Department of State**

In the past, CBP (formerly the U.S. Customs Service) has relied upon guidance received from the Department of State in making determinations regarding the “country of origin” of a good for marking purposes. As described in detail in Section A, the U.S. Customs Service relied on advice from the Department of State in issuing Treasury Decisions 95–25 and 97–16 pertaining to the country of origin marking of imported goods produced in the West Bank or Gaza. Accordingly, and consistent with prior decisions, CBP is relying upon advice from the Department of State for purposes of defining the term “country” within the meaning of 19 CFR 134.1(a).

## **C. New Guidance from the Department of State and Transition Period**

Pursuant to the recent guidance from the Department of State, this document notifies the public that, for purposes of 19 U.S.C. 1304, the

acceptable country of origin markings for imported goods produced in the territorial areas known as the West Bank or Gaza Strip consist of the following:

- Goods produced in the territorial areas of the West Bank where Israel continues to exercise relevant authorities—specifically Area C under the Oslo Accords and the area known as “H2” which is under Israeli administrative control consistent with the 1997 Hebron protocol—must be marked as “Israel,” “Product of Israel,” or “Made in Israel.”

- Goods produced in Areas A and B under the Oslo Accords, which are under the civilian oversight of the Palestinian Authority for these purposes, along with the area known as “H1” from the 1997 Hebron Protocol, must be marked as “West Bank,” “Product of West Bank,” or “Made in West Bank.”

- Goods produced in Gaza must be marked as “Gaza,” “Product of Gaza,” “Made in Gaza,” “Gaza Strip,” “Product of Gaza Strip,” or “Made in Gaza Strip.”

- Goods from any of these territorial areas must not be marked in conjunctive form, such as “West Bank/Gaza,” “West Bank/Gaza Strip,” “West Bank and Gaza,” or words of similar meaning.

Given commercial realities, affected parties may need a transition period to implement marking consistent with the position announced in this notice. Therefore, unless excepted from marking, goods produced in the territorial areas known as the West Bank or Gaza Strip, which are entered or withdrawn from warehouse for consumption into the United States after March 23, 2021, must be marked in accordance with the position set forth above, for purposes of 19 U.S.C. 1304.

Dated: December 18, 2020.

BRENDA B. SMITH,  
*Executive Assistant Commissioner,*  
*Office of Trade.*

[Published in the Federal Register, December 23, 2020 (85 FR 83984)]



## 19 CFR CHAPTER I

### **NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND MEXICO**

**AGENCY:** Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

**ACTION:** Notification of continuation of temporary travel restrictions.

**SUMMARY:** This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border. Such travel will be limited to “essential travel,” as further defined in this document.

**DATES:** These restrictions go into effect at 12 a.m. Eastern Standard Time (EST) on December 22, 2020 and will remain in effect until 11:59 p.m. EST on January 21, 2021.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

On March 24, 2020, DHS published notice of the Secretary’s decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document.<sup>1</sup> The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, the Secretary had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico posed a “specific threat to human life or national interests.” The Secretary later published a series of notifications continuing such limitations on travel until 11:59 p.m. EST on December 21, 2020.<sup>2</sup>

The Secretary has continued to monitor and respond to the COVID–19 pandemic. As of the week of December 8, there have been

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<sup>1</sup> 85 FR 16547 (Mar. 24, 2020). That same day, DHS also published notice of the Secretary’s decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document. 85 FR 16548 (Mar. 24, 2020).

<sup>2</sup> See 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020). DHS also published parallel notifications of the Secretary’s decisions to continue temporarily limiting the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel.” See 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020).

over 65 million confirmed cases globally, with over 1.5 million confirmed deaths.<sup>3</sup> There have been over 15.2 million confirmed and probable cases within the United States,<sup>4</sup> over 400,000 confirmed cases in Canada,<sup>5</sup> and over 1.1 million confirmed cases in Mexico.<sup>6</sup>

### Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico poses an ongoing “specific threat to human life or national interests.”

U.S. and Mexican officials have mutually determined that non-essential travel between the United States and Mexico poses additional risk of transmission and spread of the virus associated with COVID–19 and places the populace of both nations at increased risk of contracting the virus associated with COVID–19. Moreover, given the sustained human-to-human transmission of the virus, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),<sup>7</sup> I have determined that land ports

<sup>3</sup> WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (Dec. 8, 2020), available at <https://www.who.int/publications/m/item/weekly-epidemiological-update-8-december-2020>.

<sup>4</sup> CDC, COVID Data Tracker (accessed Dec. 10, 2020), available at <https://covid.cdc.gov/covid-data-tracker/>.

<sup>5</sup> WHO, COVID–19 Weekly Epidemiological Update (Dec. 8, 2020).

<sup>6</sup> *Id.*

<sup>7</sup> 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100–16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID–19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Mexico);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EST on

January 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.<sup>8</sup>

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

CHAD R. MIZELLE,  
*Senior Official*  
*Performing the Duties of the General Counsel,*  
*U.S. Department of Homeland Security.*

[Published in the Federal Register, December 22, 2020 (85 FR 83433)]



## 19 CFR CHAPTER I

### **NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND CANADA**

**AGENCY:** Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

**ACTION:** Notification of continuation of temporary travel restrictions.

**SUMMARY:** This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Canada into the United States at land ports

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<sup>8</sup> DHS is working closely with counterparts in Mexico and Canada to identify appropriate public health conditions to safely ease restrictions in the future and support U.S. border communities.

of entry along the United States-Canada border. Such travel will be limited to “essential travel,” as further defined in this document.

**DATES:** These restrictions go into effect at 12 a.m. Eastern Standard Time (EST) on December 22, 2020 and will remain in effect until 11:59 p.m. EST on January 21, 2020.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

On March 24, 2020, DHS published notice of the Secretary’s decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document.<sup>1</sup> The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, the Secretary had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada posed a “specific threat to human life or national interests.” The Secretary later published a series of notifications continuing such limitations on travel until 11:59 p.m. EST on December 21, 2020.<sup>2</sup>

The Secretary has continued to monitor and respond to the COVID–19 pandemic. As of the week of December 8, there have been over 65 million confirmed cases globally, with over 1.5 million confirmed deaths.<sup>3</sup> There have been over 15.2 million confirmed and

<sup>1</sup> 85 FR 16548 (Mar. 24, 2020). That same day, DHS also published notice of the Secretary’s decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document. 85 FR 16547 (Mar. 24, 2020).

<sup>2</sup> See 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of the Secretary’s decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel.” See 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

<sup>3</sup> WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (Dec. 8, 2020), available at <https://www.who.int/publications/m/item/weekly-epidemiological-update-8-december-2020>.

probable cases within the United States,<sup>4</sup> over 400,000 confirmed cases in Canada,<sup>5</sup> and over 1.1 million confirmed cases in Mexico.<sup>6</sup>

### Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada poses an ongoing “specific threat to human life or national interests.”

U.S. and Canadian officials have mutually determined that non-essential travel between the United States and Canada poses additional risk of transmission and spread of the virus associated with COVID–19 and places the populace of both nations at increased risk of contracting the virus associated with COVID–19. Moreover, given the sustained human-to-human transmission of the virus, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Canada, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),<sup>7</sup> I have determined that land ports of entry along the U.S.-Canada border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this

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<sup>4</sup> CDC, COVID Data Tracker (accessed Dec. 10, 2020), available at <https://covid.cdc.gov/covid-data-tracker/>.

<sup>5</sup> WHO, COVID–19 Weekly Epidemiological Update (Dec. 8, 2020).

<sup>6</sup> *Id.*

<sup>7</sup> 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100–16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Canada border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Canada in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Canada);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Canada, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Canada. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EST on January 21, 2020. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.<sup>8</sup>

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<sup>8</sup> DHS is working closely with counterparts in Mexico and Canada to identify appropriate public health conditions to safely ease restrictions in the future and support U.S. border communities.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

CHAD R. MIZELLE,  
*Senior Official*  
*Performing the Duties of the General Counsel,*  
*U.S. Department of Homeland Security.*

[Published in the Federal Register, December 22, 2020 (85 FR 83432)]



# U.S. Court of International Trade

Slip Op. 20–179

BIO-LAB, INC., CLEARON CORP., and OCCIDENTAL CHEMICAL CORP.,  
Plaintiffs, v. UNITED STATES, Defendant, and JUANCHENG KANGTAI  
CHEMICAL CO., LTD. and HEZE HUAYI CHEMICAL CO., LTD., Defendant-  
Intervenors.

Before: Richard K. Eaton, Judge  
Court No. 19–00158

[United States Department of Commerce’s Final Results are sustained.]

Dated: December 18, 2020

*James R. Cannon, Jr.* and *Ulrika K. Swanson*, Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for Plaintiffs.

*Sonia M. Orfield*, Trial Attorney, 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*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia McCarthy*, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Assistant Chief Counsel, Office of the Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

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

## OPINION

### Eaton, Judge:

Bio-Lab, Inc., Clearon Corp., and Occidental Chemical Corp. (“Plaintiffs”) are U.S. domestic producers of chlorinated isocyanurates<sup>1</sup> and the petitioners in this proceeding. They challenge the United States Department of Commerce’s (“Commerce” or the “Department”) final results published in *Chlorinated Isocyanurates From the People’s Republic of China*, 84 Fed. Reg. 37,627 (Dep’t Commerce Aug. 1, 2019) (“Final Results”), and the accompanying Issues and Decision Mem. (July 12, 2019), P.R. 74 (“Final IDM”); *see also Chlorinated Isocyanurates From the People’s Rep. of China*, 79 Fed. Reg. 67,424 (Dep’t Commerce Nov. 13, 2014) (“Order”).

In the Final Results, Commerce determined that Defendant-Intervenors and mandatory respondents Juancheng Kangtai Chemi-

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<sup>1</sup> Chlorinated isocyanurates, the subject chemicals, are “derivatives of cyanuric acid, described as chlorinated s-triazine triones” that are used for, among other things, water treatment. *See* Final IDM at 3; *Chlorinated Isocyanurates from the People’s Rep. of China*, 79 Fed. Reg. 67,424 (Dep’t Commerce Nov. 13, 2014) (countervailing duty order).

cal Co., Ltd. (“Kangtai”) and Heze Huayi Chemical Co., Ltd. (“Heze”), Chinese producers and exporters of the chemicals, received counter-  
available subsidies during the period of review, including through a  
loan program called the Export Buyer’s Credit Program.<sup>2</sup> It made this  
determination on the basis of adverse inferences, having found that  
the use of adverse facts available (“AFA”)<sup>3</sup> was warranted because the  
Government of China (“China”) (1) failed to provide necessary infor-  
mation about the operation of the Export Buyer’s Credit Program,  
and (2) failed to act to the best of its ability to cooperate with Com-  
merce’s requests for information about the program. *See* 19 U.S.C. §  
1677e(a), (b) (2012); Final IDM at 5–6.

It is worth noting that, while the Department found that the re-  
spondents benefitted from the Export Buyer’s Credit Program, based  
on AFA, the only evidence on the record regarding its use is that the  
respondents’ U.S. customers did not use the program. *See* Kangtai’s  
Sec. III Quest. Resp. – Part II (Apr. 2, 2018), C.R. 10–12, Ex. 15;  
Heze’s Sec. III Quest. Resp. – Part II (Apr. 2, 2018), C.R. 3–7, Ex. 13.

To determine an AFA rate for the Export Buyer’s Credit Program,  
Commerce used a hierarchy it developed for administrative reviews.  
*See* 19 U.S.C. § 1677e(d).<sup>4</sup> Applying step two of the hierarchy, the  
Department selected the rate of 0.87 percent *ad valorem* as a compo-  
nent of the final subsidy rate calculated for Kangtai and Heze. *See*  
Final IDM at 31. This 0.87 percent rate had previously been deter-  
mined in an earlier segment of the same proceeding for a Chinese  
government loan program called the Export Seller’s Credit Program.  
Commerce found the Export Seller’s Credit Program to be “similar” to  
the Export Buyer’s Credit Program because each conferred a similar

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<sup>2</sup> The Export Buyer’s Credit Program provides credit at preferential rates to foreign purchasers of goods exported by Chinese companies in order to promote exports. *See Clearon Corp. v. United States*, No. 17–00171, 2020 WL 5981373, at \*1 n.5 (CIT Oct. 8, 2020). The program has been the subject of several opinions by this Court. *See, e.g., id.* at \*9 nn.10–12 (collecting cases).

<sup>3</sup> Before Commerce may use AFA, it must make two separate findings. First, Commerce shall use facts available “[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . fails to provide . . . information [that has been requested by Commerce] . . . in the form and manner requested,” or “significantly impedes” a proceeding. 19 U.S.C. § 1677e(a)(1), (2)(B), (C). Second, if Commerce determines that the use of facts available is warranted, it must make the requisite additional finding that “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information” before it may use an adverse inference “in selecting from among the facts otherwise available.” *Id.* § 1677e(b)(1)(A).

<sup>4</sup> In pertinent part, this subsection provides that if Commerce “uses an inference that is adverse to the interests of a party under [19 U.S.C. § 1677e(b)(1)(A)] in selecting among the facts otherwise available,” Commerce “may . . . in the case of a countervailing duty proceeding . . . (i) use a countervailing subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or (ii) if there is no same or similar program, use a countervailing subsidy rate for a subsidy program from a proceeding that [Commerce] considers reasonable to use.” 19 U.S.C. § 1677e(d)(1).

benefit: access to government-subsidized loans. *See* Final IDM at 31; *see also* 19 U.S.C. § 1677e(d)(1)(A)(i) (emphasis added) (permitting Commerce to “use a countervailable subsidy rate applied for the same or *similar program* in a countervailing duty proceeding involving the same country”).

As in their challenges to prior reviews of the Order,<sup>5</sup> here, Plaintiffs do not question Commerce’s finding that the use of AFA was warranted. Nor do Plaintiffs dispute the lawfulness of the hierarchy that Commerce used to select an AFA rate for the Export Buyer’s Credit Program. Rather, they argue that the hierarchy, as applied here, resulted in a rate for the program that is “simply too low to induce” China to cooperate with Commerce’s requests for information in the future. *See* Pls.’ Reply Br. Supp. Mot. J. Admin. R., ECF No. 34, 6 (“Pls.’ Reply”). Thus, for Plaintiffs, the rate fails to satisfy the purpose of the AFA statute and, therefore, is contrary to law. *See* Pls.’ Mem. Supp. Mot. J. Admin. R., ECF No. 25–1, 3 (“Pls.’ Br.”); *see also* 19 U.S.C. § 1677e(b).

In addition, Plaintiffs claim that substantial record evidence does not support the finding that the Export Buyer’s Credit Program and the Export Seller’s Credit Program are “similar.” *See* Pls.’ Br. 4. Therefore, they ask the court to “remand [this case] to [Commerce] with instructions to reconsider [these] issues and address specifically the rationale for relying on a 0.87 percent subsidy rate rather than a higher rate and the reasons for finding that Export Buyer’s Credits and Export Seller’s Credits are ‘similar’ for purposes of applying adverse inferences pursuant to the statute.” Pls.’ Br. 21.

Defendant the United States (“Defendant”), on behalf of Commerce, and Defendant-Intervenors Kangtai and Heze ask the court to sustain the Final Results. *See* Def.’s Resp. Pls.’ Mot. J. Agency R., ECF No. 32 (“Def.’s Br.”); *see also* Def.-Ints.’ Resp., ECF No. 33.

Jurisdiction is found under 28 U.S.C. § 1581(c) (2012). As this Court held on a similar record in *Bio-Lab, Inc. v. United States*, 44 CIT \_\_\_, 435 F. Supp. 3d 1361 (2020), because Commerce’s selection of 0.87 percent as the AFA rate for the Export Buyer’s Credit Program is supported by substantial evidence and otherwise in accordance with law, the Final Results are sustained.

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<sup>5</sup> As Plaintiffs acknowledge in their brief, the issue raised in this lawsuit was also raised in *Bio-Lab, Inc. v. United States*, Court No. 18–00155 and *Clearon Corp. v. United States*, Consol. Court No. 17–00171. *See* Pls.’ Mem. Supp. Mot. J. Admin. R., ECF No. 25–1, 1 n.1. The court notes that not only are the issues the same, but most of the arguments that the plaintiff companies made in support of their motion for judgment on the agency record in *Bio-Lab, Inc. v. United States*, Court No. 18–00155, are presented here again, nearly verbatim.

## BACKGROUND

### I. The Administrative Review

In January 2018, at the request of Plaintiffs and Defendant-Intervenors, the Department commenced the third administrative review of the Order. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 83 Fed. Reg. 1329 (Dep't Commerce Jan. 11, 2018). The period of review was January 1, 2016, through December 31, 2016. *See Final IDM at 1*. As in the second administrative review, Kangtai and Heze, Chinese producers and exporters of the subject chemicals, were selected as the mandatory respondents.

Between February and October 2018, Commerce sent questionnaires to China,<sup>6</sup> as well as to Kangtai and Heze. The Department asked China to provide information about, among other things, the operation of the Export Buyer's Credit Program—a government loan program administered by the state-owned China Export Import Bank. From Kangtai and Heze, the Department sought information about their U.S. customers' use of the program during the period of review. *See Countervailing Duty Quest. for Third Admin. Rev.* (Feb. 15, 2018), P.R. 8.

Between April and November 2018, Commerce received timely responses to its questionnaires. Kangtai and Heze provided the information that Commerce asked for, including evidence that their U.S. customers did not obtain financing through the Export Buyer's Credit Program. *See Kangtai's Sec. III Quest. Resp. – Part II at 14–15*; *Heze's Sec. III Quest. Resp. – Part II at 14–16*. Consistent with its responses to questionnaires issued in the second administrative review, however, China responded that some of the information that the Department sought about the operation of the Export Buyer's Credit Program was “not applicable,” because the mandatory respondents' U.S. customers did not use the program. *See China's Initial Quest. Resp.* (Apr. 5, 2018), P.R. 25–28 at 24. In addition, China asserted that it was “unable” to provide the requested information, not because it did not have it, but because, in its view, the information was “not necessary” to Commerce's determination. *See China's Initial Quest. Resp. at 25*.

### II. Preliminary Results

On December 7, 2018, the preliminary results of the administrative review were published. *See Chlorinated Isocyanurates From the*

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<sup>6</sup> To send questionnaires to China, Commerce transmits them to the Embassy of the People's Republic of China, in Washington, DC. It did so here, addressing the questionnaire to the attention of the First Secretary in the Economic and Commercial Office. *See Countervailing Duty Quest. for Third Admin. Rev.* (Feb. 15, 2018), P.R. 8.

*People's Rep. of China*, 83 Fed. Reg. 63,159 (Dep't Commerce Dec. 7, 2018) ("Preliminary Results"), and accompanying Preliminary Decision Mem. (Nov. 30, 2018), P.R. 53 ("Prelim. Dec. Mem."). Commerce preliminarily determined that China failed to cooperate with its requests for information. In particular, Commerce found that China's questionnaire responses failed to provide necessary information regarding, *inter alia*: (1) whether the China Export Import Bank uses third-party banks to disburse or settle Export Buyer's Credits, (2) the interest rates it used during the period of review, and (3) whether, after the program was amended in 2013, the China Export Import Bank limited the provision of Export Buyer's Credits to business contracts exceeding \$2 million. *See* Prelim. Dec. Mem. at 11–12. Finding that it could not fully analyze the operation of the program without this information, the Department concluded that necessary information was missing from the record, and that the use of facts available was warranted. *See* 19 U.S.C. § 1677e(a).

Commerce also found that China had failed to act to the best of its ability to cooperate with its information requests, and used the adverse inference that, during the period of review, Kangtai and Heze received a countervailable benefit under the Export Buyer's Credit Program. *See* Prelim. Dec. Mem. at 12; *see also* 19 U.S.C. § 1677e(b).

Having found that Kangtai and Heze used and benefitted<sup>7</sup> from the Export Buyer's Credit Program, Commerce determined an AFA rate for the program using a hierarchical approach. *See* 19 U.S.C. § 1677e(d); *see also* Final IDM at 30–31. The selected rate—0.87 percent—was included in Commerce's calculation of preliminary individual countervailable subsidy rates for Kangtai and Heze. *See* Preliminary Results, 83 Fed. Reg. at 63,160.

### III. Final Results

On July 12, 2019, Commerce issued its Final IDM and found, as it had in the Preliminary Results, that Kangtai and Heze received countervailable subsidies at 0.87 percent *ad valorem* under the Export Buyer's Credit Program.<sup>8</sup> *See* Final IDM at 27 ("As AFA, we determine that [the Export Buyer's Credit Program] provides a financial contribution, is specific, and provides a benefit to the com-

<sup>7</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) (2018).

<sup>8</sup> Commerce calculates "an *ad valorem* subsidy rate by dividing the amount of the benefit allocated to the period of investigation or 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).

pany respondents within the meaning of [the statute].”). Kangtai’s and Heze’s final net subsidy rates, inclusive of the 0.87 percent rate, were 1.54 percent and 1.71 percent, respectively. *See* Final Results, 84 Fed. Reg. at 37,628. Complaining that these final rates were too low to induce China to cooperate with Commerce’s requests for information, and questioning whether the Export Buyer’s Credit Program and the Export Seller’s Program were “similar,” Plaintiffs commenced this action.

## 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

### I. Commerce’s Authority to Impose Countervailing Duties

If Commerce determines that a foreign government or public entity “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,” a duty will be imposed in an amount equal to the net countervailable subsidy. 19 U.S.C. § 1671(a). This “remedial measure . . . provides relief to domestic manufacturers by imposing duties upon imports of comparable foreign products that have the benefit of a subsidy from the foreign government.” *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1368 (Fed. Cir. 2014) (citation omitted). The countervailing duty statute applies equally when the imported merchandise is from a nonmarket economy country.<sup>9</sup> *See* 19 U.S.C. § 1671(f)(1); *see also* *TMK IPSCO v. United States*, 41 CIT \_\_, \_\_, 222 F. Supp. 3d 1306, 1313 (2017).

In its countervailability determinations, Commerce must assess the nature of a foreign government’s alleged financial contribution. *See* 19 U.S.C. § 1677(5). Thus, “Commerce often requires information from the foreign government allegedly providing the subsidy.” *Fine Furniture*, 748 F.3d at 1369–70 (citation omitted). This is because “normally, [foreign] governments are in the best position to provide information regarding the administration of their alleged subsidy

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<sup>9</sup> A “nonmarket economy country,” such as China, is “any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” 19 U.S.C. § 1677(18)(A).

programs, including eligible recipients.” *Id.* at 1370 (citation omitted). For the same reason, “Commerce sometimes requires information from a foreign government to determine whether a particular respondent received a benefit from an alleged subsidy.” *Id.*

## II. Commerce’s Authority to Use Adverse Inferences

Because Commerce lacks the power to subpoena documents and information, the law authorizes it to use an adverse inference to induce cooperation with its requests for information. *See* 19 U.S.C. § 1677e(b); *see also BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1295 (Fed. Cir. 2019) (quoting *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1338 (Fed. Cir. 2016)).

If adequate information is not forthcoming, Commerce may, under the right circumstances, apply an adverse inference. First, there must be a gap in the factual record. *See* 19 U.S.C. § 1677e(a). Thus, if a party to a proceeding fails to provide, in a timely fashion, information that Commerce has asked for, then “Commerce shall fill in the gaps with ‘facts otherwise available.’” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (quoting 19 U.S.C. § 1677e(a)).

Second, there must be a finding that an interested party has failed to cooperate to “the best of its ability” with Commerce’s request for information. *See* 19 U.S.C. § 1677e(b). “[I]f Commerce determines that an interested 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 a rate from these facts,” pursuant to 19 U.S.C. § 1677e(b).<sup>10</sup> *BMW*, 926 F.3d at 1295 (citation omitted).

The purpose of AFA is to provide respondents with an incentive to cooperate in Commerce’s investigations and reviews. *See Flli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (“*De Cecco*”). While Commerce may use adverse inferences to encourage future cooperation, it may not use AFA to punish respondents. *Id.* (citation omitted) (“[T]he purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.”).

A foreign government may be found to be an uncooperative party. AFA, then, may be applied to an otherwise cooperative respondent to induce, or encourage, a foreign government’s cooperation. *See Fine Furniture*, 748 F.3d at 1371 (“[O]n its face, the statute authorizes

<sup>10</sup> When using adverse inferences, Commerce may rely upon information derived from the petition, a final determination, any previous review or determination, or any other information placed on the record. *See* 19 U.S.C. § 1677e(b)(2)(A)-(D).

Commerce to apply adverse inferences when an interested party, including a foreign government, fails to provide requested information.”). That is, where a foreign government is uncooperative, respondent companies from that country may face an AFA rate, even if they themselves are cooperative. The rationale for permitting the application of AFA 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.” *Id.* at 1373. Though Commerce’s use of adverse inferences may adversely impact a cooperating party, Commerce must take into consideration a respondent’s status as a cooperating party and the statute’s primary purpose of determining accurate rates when assigning an AFA rate. *See Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1235 (Fed. Cir. 2014). Indeed, the cases indicate that, where a nonmarket economy respondent is cooperative, but the government of its country is not, the court should lean toward accuracy and away from deterrence. *See Changzhou Trina Solar Energy Co. v. United States*, No. 17–00246, 2018 WL 6271653, at \*5 (CIT Nov. 30, 2018) (“*Changzhou I*”) (citing *Mueller*, 753 F.3d at 1234).

### **III. Commerce’s Use of a Hierarchy to Determine an AFA Countervailable Subsidy Rate**

The adverse inferences statute, § 1677e, was amended in 2015 by the Trade Preferences Extension Act to add subsection (d). *See Trade Preferences Extension Act of 2015* § 502, Pub. L. No. 114–27, 129 Stat. 362 (June 29, 2015) (codified in 19 U.S.C. § 1677e(d) (Supp. III 2015)). Subsection (d) addresses subsidy rates in AFA determinations. In pertinent part, this subsection provides that if Commerce “uses an inference that is adverse to the interests of a party under [19 U.S.C. § 1677e(b)(1)(A)] in selecting among the facts otherwise available,” it may “in the case of a countervailing duty proceeding”:

- (i) use a countervailable subsidy rate applied for the *same or similar program* in a countervailing duty proceeding involving the same country; or
- (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that [Commerce] considers reasonable to use.

19 U.S.C. § 1677e(d)(1)(A) (emphasis added). For administrative reviews, Commerce has employed a four-step hierarchical method<sup>11</sup> in an effort to satisfy the statute’s “same or similar program” injunction:

The AFA hierarchy for reviews has four steps, applied in sequential order. The first step is to apply the highest non-*de minimis* rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding. If there is no identical program match within the proceeding, or if the rate is *de minimis*, the second step is to apply the highest non-*de minimis* rate calculated for a cooperating company for a similar program within any segment of the same proceeding. If there is no non-*de minimis* rate calculated for a similar program within [the] same proceeding, the third step is to apply the highest non-*de minimis* rate calculated for an identical or similar program in another countervailing duty proceeding involving the same country. If no such rate exists under the first through third steps, the fourth step is to apply the highest rate calculated for a cooperating company for any program from the same country that the industry subject to the investigation could have used.

Final IDM at 5.

This Court has reviewed with approval Commerce’s use of hierarchical methods to determine AFA subsidy rates.<sup>12</sup> *See, e.g., SolarWorld Americas, Inc. v. United States*, 41 CIT \_\_, \_\_, 229 F. Supp. 3d 1362, 1370 (2017) (upholding reasonableness of the hierarchy, stating “Commerce is entitled to devise a methodology to apply to all cases and the court cannot say that this methodology is unreasonable in general or as applied here.”); *see also Essar Steel Ltd. v. United States*, 753 F.3d 1368, 1373–74 (Fed. Cir. 2014).

## DISCUSSION

### I. Commerce Did Not Err by Using the Hierarchy to Determine an AFA Rate for the Export Buyer’s Credit Program

In the Final Results, Commerce determined that using facts available was warranted when determining a subsidy rate for the Export

<sup>11</sup> The four-step hierarchy has been developed over time as a practice or policy of Commerce. *See* Final IDM at 5 (“Otherwise, consistent with [19 U.S.C. § 1677e(d)] and our established practice of the hierarchal methodology for selecting an AFA rate in reviews, for certain of the programs . . . we selected as AFA the highest calculated rate for the same or a similar program.”).

<sup>12</sup> Commerce employs a different four-step hierarchy to determine AFA rates in countervailing duty *investigations*, which this Court has reviewed with approval. *See SolarWorld Americas, Inc. v. United States*, 41 CIT \_\_, \_\_, 229 F. Supp. 3d 1362, 1370 (2017).

Buyer's Credit Program because China failed to provide requested information about the operation of the program, and thus, necessary information was missing from the record. *See* Final IDM at 27; *see also* 19 U.S.C. § 1677e(a). Additionally, Commerce used an adverse inference because, it found, China had “failed to cooperate to the best of its ability” to comply with the Department’s requests for information. *See* Final IDM at 28; *see also* 19 U.S.C. § 1677e(b).

Having determined the use of AFA was warranted, Commerce then applied its hierarchy to select an AFA rate:

Because we have not calculated a rate for an identical program in this proceeding, we then determine, under step two of the hierarchy, if there is a calculated rate for a similar/comparable program (based on the treatment of the benefit) in the same proceeding, excluding *de minimis* rates. In the instant review, [China] reported that the Export Buyer’s Credit Program provides loan support through export buyer’s credits. Based on the description of the Export Buyer’s Credit Program as provided by [China], we continue to find that Export Seller’s Credit Program and the Export Buyer’s Credit Program are similar/comparable programs, as both programs provide access to loans. When Commerce selects a similar program, it looks for a program with the same type of benefit. For example, it selects a loan program to establish the rate for another loan program, or it selects a grant program to establish the rate for another grant program. Consistent with this practice, upon examination of the available above *de minimis* programs from the current review and the underlying investigation, Commerce selected the Export Seller’s Credit Program because it confers *the same type of benefit* as the Export Buyer’s Credit Program, as both programs are subsidized loans from the China Ex-Im Bank.

Final IDM at 31 (emphasis added). Thus, Commerce applied “the 0.87 percent *ad valorem* countervailable subsidy rate for the Export Seller’s Credit Program,” which had been previously determined in an earlier segment of the proceeding, as the AFA rate for the Export Buyer’s Credit Program. Final IDM at 31. Commerce has used this approach in other cases. *See, e.g., Bio-Lab*, 44 CIT at \_\_, 435 F. Supp. 3d at 1378 (sustaining Commerce’s selection of the 0.87 percent rate assigned to the Export Seller’s Credit Program during the investigation); *Clearon Corp. v. United States*, 43 CIT \_\_, 359 F. Supp. 3d 1344, 1361 (2019)<sup>13</sup> (same); *Changzhou I*, 2018 WL 6271653, at \*5.

<sup>13</sup> Plaintiffs here were also the plaintiffs in *Clearon*, where they challenged the final results of Commerce’s first administrative review of the Order. Relevant to this case, the *Clearon*

Kangtai's and Heze's final net subsidy rates, inclusive of the 0.87 percent rate, were 1.54 percent and 1.71 percent, respectively. *See* Final Results, 84 Fed. Reg. at 37,628. To arrive at Kangtai's rate, Commerce stated that it summed (1) 0.87 percent *ad valorem* for the Export Buyer's Credit Program; (2) 0.66 percent *ad valorem* for electricity provided at less than adequate remuneration; and (3) 0.17 percent *ad valorem* for self-reported grants.<sup>14</sup> *See* Final IDM at 6. Heze's 1.71 percent final net subsidy rate reflects the sum of three countervailable programs: (1) 0.87 percent *ad valorem* for the Export Buyer's Credit Program; (2) 0.75 percent *ad valorem* for electricity provided at less than adequate remuneration; and (3) 0.09 percent *ad valorem* for self-reported grants. *See* Final IDM at 6.

The domestic-producer Plaintiffs' main argument is that "Commerce's failure to apply an 'adverse' rate pursuant to 19 U.S.C. § 1677e(b) in its final determination was contrary to law":

The final determination by Commerce resulted in application of a net subsidy rate of only 0.87 percent to the Export Buyer's Credit Program, despite that Commerce had applied a rate of 10.54 percent to that program in prior cases and despite that 0.87 percent was manifestly inadequate to deter China from refusing to supply needed information. The use of adverse facts available is intended to have a deterrent effect and to incentivize participation by foreign governments and parties. The 0.87 percent rate selected by Commerce is inadequate to serve as a deterrent, and defeats the purpose of the statute.

Pls.' Br. 8. In other words, for Plaintiffs, if the 10.54 percent rate, that was selected for the program in a different proceeding, failed to deter non-cooperation by China, a 0.87 percent rate was sure to fail in this proceeding. Although they do not argue for a specific rate, Plaintiffs apparently seek a rate in excess of 10.54 percent since they note that that rate was not sufficient to induce China to cooperate. *See* Pls.' Br. 13.

Plaintiffs acknowledge that "[i]nducement is not the only purpose of the statute," and that Commerce must balance the dual objectives of inducement and accuracy. Pls.' Br. 12. They insist, however, that here,

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Court sustained the 0.87 percent AFA rate as supported by substantial evidence based on the record there, and in doing so, rejected many of the same arguments Plaintiffs make here. *Clearon*, 43 CIT at \_\_\_, 359 F. Supp. 3d at 1363 (sustaining in part and remanding on grounds not relevant to this case).

<sup>14</sup> Although the parties do not dispute Commerce's computation of Kangtai's final net subsidy rate of 1.54 percent *ad valorem*, it is not clear how the agency arrived at this figure because, together with the 0.87 percent rate for the Export Buyer's Credit Program, the sum of these figures equals 1.70 percent.

Commerce has ignored the deterrence objective. *See* Pls.’ Br. 12 (“Commerce must at least consider whether a particular AFA rate will be effective in encouraging cooperation.”).

In response, Commerce insists that its selection of the 0.87 percent rate as AFA was reasonable:

Commerce applied its long-established practice, codified in 2015, of using its AFA selection methodology specifically for countervailing duty administrative reviews. Applying its review methodology . . . , Commerce selected the rate for the Export Seller’s Credit Program calculated for Jiheng during the investigation, as a similar program to the Export Buyer’s Credit Program, because they are both loan programs and the rate was above *de minimis*. This methodology serves the dual goals of relevancy and inducement and provides predictability and transparency.

In addition, considering the facts at hand, Commerce determined that the 0.87 *ad valorem* rate was sufficient to encourage cooperation in the future because it accounts for more than 50 percent of Kangtai’s rate. This Court has sustained this same rate—selection of the AFA rate of 0.87 percent based upon Jiheng’s calculated rate for the Export Seller’s Credit Program from the investigation—in the litigation of the first administrative review. *Bio-Lab* cites no evidence in the record that would have required Commerce to depart from its established, codified, and judicially-approved administrative review methodology in this administrative review.

Def.’s Br. 7 (citations omitted). Thus, Commerce maintains that its “selection of an AFA rate of 0.87 percent *ad valorem*, based on a calculated rate for a similar program within the same proceeding, is supported by substantial evidence and otherwise in accordance with law.” Def.’s Br. 7.

Consistent with this Court’s holding in *Bio-Lab I*, the court finds that Commerce did not err by using its hierarchy to determine an AFA rate for the Export Buyer’s Credit Program in the Final Results. As observed in *Bio-Lab I*, this Court has rejected arguments similar to those raised by Plaintiffs. In particular, *Changzhou I*, which dealt with similar facts, is instructive.

Before the Court in *Changzhou I* were the final results of an administrative review of a countervailing duty order on solar products. There, as here, Commerce found that China had failed to cooperate to the best of its ability to provide necessary information about the Export Buyer’s Credit Program. As a result, Commerce found that the

use of AFA was warranted. *See* 19 U.S.C. § 1677e(a), (b). It further found, based on AFA, that the cooperating Chinese respondents had received a benefit under the program, notwithstanding their claims to the contrary. Commerce, thus, applied its hierarchy and, under step two, selected an AFA rate for the program of 0.58 percent—the rate that had been previously determined for another loan program in the same proceeding. *Changzhou I*, 2018 WL 6271653, at \*4.

SolarWorld Americas, Inc., the U.S. petitioner, argued that while Commerce was correct to find AFA warranted, its application of the hierarchy to determine the AFA rate for the program was not in accordance with law because the resulting rate—0.58 percent—was too low to achieve the statutory goal of deterrence:

[I]n using its established [hierarchy] methodology, Commerce arrived at an AFA rate too low to induce compliance in future proceedings. . . . SolarWorld argues that 19 U.S.C. § 1677e requires Commerce to set a rate high enough to encourage a party’s future compliance in administrative reviews. . . . SolarWorld details several proceedings in which a higher rate has failed to result in [China’s] future full compliance with Commerce’s reviews. . . . Based on this history of [China] noncompliance, SolarWorld argues that such a low rate of 0.58 percent will not encourage compliance.

*Id.* (internal citations omitted). The *Changzhou I* Court rejected this argument. Central to its reasoning was that the company that would receive the adverse rate was a cooperating respondent:

As the United States Court of Appeals for the Federal Circuit has stated “the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.” . . . What SolarWorld essentially argues is for Commerce to deviate from an established practice because the rate assessed was not high enough to be punitive. This argument fails. . . .

[E]ven if Commerce, on remand, finds that [China] refused to comply with Commerce’s requests such that a resort to AFA is warranted, SolarWorld fails to appreciate that [mandatory respondent] Trina is a *cooperating* respondent. When selecting a rate for a cooperating party, “the equities would suggest greater emphasis on accuracy” over deterrence.

*Id.* at \*4–5 (first quoting *De Cecco*, 216 F.3d at 1032; then quoting *Mueller*, 753 F.3d at 1234).

The *Changzhou I* Court relied on principles that are well-established in this Court and the Federal Circuit, including that

determining a rate that is relevant, *i.e.*, accurate, is a primary statutory objective:

[A]lthough encouraging compliance is a valid consideration in determining an AFA rate, it is not, as SolarWorld argues “inconsistent with the statute” for Commerce to weigh other factors, such as relevancy, which ultimately result in a presumably low AFA rate. . . . As the court in *Mueller* stated, “the primary objective [is] the calculation of an accurate rate.”

*Id.* at \*5 (quoting *Mueller*, 753 F.3d at 1235); *see also SolarWorld*, 41 CIT at \_\_, 229 F. Supp. 3d at 1366 (citing *De Cecco*, 216 F.3d at 1032) (“An AFA rate selected by Commerce must reasonably balance the objectives of inducing compliance and determining an accurate rate.”). The Federal Circuit’s opinion in *Mueller*, cited in *Changzhou I*, outlined principles that are applicable here:

This Court’s decision in [*De Cecco*, 216 F.3d at 1032], required that, even for a non-cooperating party, subsection [1677e](b) be applied to arrive at “a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to noncompliance.” *All the more so for a cooperating party, for which the equities would suggest greater emphasis on accuracy in the overall mix.* Moreover, this Court’s decision in *Changzhou* made clear that, *in the case of a cooperating party, Commerce cannot confine itself to a deterrence rationale and also must carry out a case-specific analysis of the applicability of deterrence and similar policies.* [*Changzhou Wujin Fine Chemical Factory Co. v. United States*, 701 F.3d 1367, 1379 (Fed. Cir. 2012)]. And those principles were in no way questioned in [*Fine Furniture*, 748 F.3d at 1370–71], which simply rejected a contention that a countervailing duty rate for a cooperating importer could not be based on adverse inferences drawn against a non-cooperating foreign country (about the country’s subsidizing of an input into the importer’s product).

*Mueller*, 753 F.3d at 1234 (emphasis added); *see also Changzhou Wujin*, 701 F.3d at 1378 (questioning the relevance of deterrence “where the ‘AFA rate’ only impacts cooperating respondents” and noting that “applying an adverse rate to cooperating respondents undercuts [with respect to respondents] the cooperation-promoting goal of the AFA statute”).

Finally, the *Changzhou I* Court found that the hierarchy was a reasonable way to put into effect the AFA statute. *See Changzhou I*,

2018 WL 6271653, at \*5; *see also* 19 U.S.C. § 1677e(d). The Court observed that departing from the hierarchy because the resulting rate was perceived as “too low” could itself be viewed as arbitrary:

[I]nsisting that Commerce deviate from this established practice because the rate is not seen to be a sufficient deterrent or perhaps, in this circumstance, not sufficiently punitive strikes the court as arbitrary. Commerce’s hierarchy establishes both some consistency and predictability in Commerce’s determinations and also attempts to guard against setting too low a rate by requiring the selected program to have a non-*de minimis* rate. In this specific instance, Commerce applied the *highest* non-*de minimis* rate for a similar program, further supporting its contention that Commerce attempted to strike a balance between relevancy and inducement.

*Changzhou I*, 2018 WL 6271653, at \*5. Ultimately, the Court “sustain[ed] Commerce’s use of its established hierarchy in assessing” the 0.58 percent rate for the Export Buyer’s Credit Program in that case. *Id.*

As in *Changzhou I*, Plaintiffs would elevate deterrence over accuracy and fairness even though Kangtai and Heze were cooperating respondents. The cases, however, indicate that the respondents’ status as cooperating respondents must be taken into account when determining an AFA rate. *See Clearon*, 43 CIT at \_\_, 359 F. Supp. 3d at 1362 (“[W]hether a rate is sufficient to encourage cooperation in the future is based on Commerce’s consideration of the facts.”). *Clearon* was a case that involved the same plaintiffs and a similar factual record. There too, Commerce used the 0.87 percent rate for the Export Buyer’s Credit Program. The plaintiffs argued there, as they do here, that if a 10.54 percent adverse subsidy rate, which was sustained by this Court in a separate case, had failed to deter non-cooperation by China, a 0.87 percent rate, likewise, would probably fail to encourage compliance. The Court rejected the argument that 0.87 percent was “unreasonably low to deter future non-cooperation,” and considered the rate’s impact on the accuracy of each cooperating respondent’s final net subsidy rate. *Id.*, 43 CIT at \_\_, 359 F. Supp. 3d at 1361. For example, noting that Heze’s final net subsidy rate, inclusive of the 0.87 percent rate for the Export Buyer’s Credit Program, was 1.91 percent, the *Clearon* Court observed that “even if the 0.87 percent rate might appear low in comparison to the 10.54 percent rate, its inclusion in the calculation of Heze’s rate increased its rate by approximately 100 percent to 1.91 percent.” *Id.*, 43 CIT at \_\_, 359 F. Supp. 3d at 1362.

Although the final net subsidy rates at issue in Clearon and those at issue here are different, the same reasoning applies—placing greater emphasis on accuracy over deterrence is not unreasonable when dealing with cooperating respondents. See *Changzhou I*, 2018 WL 6271653, at \*5 (quoting *Mueller*, 753 F.3d at 1234) (“When selecting a rate for a *cooperating* party, ‘the equities would suggest greater emphasis on accuracy’ over deterrence.”). Here, Kangtai’s and Heze’s final net subsidy rates, inclusive of the 0.87 percent rate, were 1.54 percent for Kangtai and 1.71 percent for Heze. See Final Results, 84 Fed. Reg. at 37,628. Thus, the 0.87 percent AFA rate for the Export Buyer’s Credit Program constitutes more than one-half of Kangtai’s 1.54 percent rate, and approximately one-half of Heze’s 1.71 percent rate. These rates reasonably emphasize accuracy over deterrence without undercutting the cooperation-promoting goal of the AFA statute. See *Changzhou Wujin*, 701 F.3d at 1378. Moreover, if Plaintiffs’ argument that a rate of 10.54 percent was too low to result in cooperation were taken seriously, a rate even higher and farther away from an accurately calculated rate would be required. In any event, Plaintiffs’ argument is not particularly well-developed. Although they argue for “a higher rate” for the Export Buyer’s Credit Program, they propose neither an alternative rate, nor an alternative method to determine one.

Finally, the primary purpose of the AFA statute is not to punish companies, but rather to calculate accurate rates. *De Cecco*, 216 F.3d at 1032; see also *Mueller*, 753 F.3d at 1235 (“[Commerce’s] primary objective [must be] the calculation of an accurate rate.”). So long as the AFA rate serves this objective, it is normally found to be within Commerce’s sound judgment. See, e.g., *Changzhou I*, 2018 WL 6271653, at \*5.

While Plaintiffs would prefer that Commerce depart from its hierarchy and select a higher rate, it was not unreasonable for Commerce to decline to do so. This is especially true because the situation that resulted in Commerce using AFA was created, not by the failure to cooperate by respondents Kangtai or Heze, but that of China. This distinction matters—Commerce must balance the policies of accuracy and deterrence, or risk potentially undercutting “the cooperation-promoting goal of the AFA statute.” *Changzhou Wujin*, 701 F.3d at 1378; see also *Mueller*, 753 F.3d at 1234 (citation omitted) (noting Commerce must consider, on a case-specific basis, “the applicability of deterrence and similar policies”). In other words, the normal purpose of AFA is to induce the respondents themselves to cooperate. Should

the respondents find that there is no benefit to their cooperation, they might well conclude that answering Commerce's questionnaires was not worth their while.

Accordingly, the court sustains Commerce's use of its hierarchy in determining an AFA rate for the Export Buyer's Credit Program.

## **II. Commerce's Selection of 0.87 Percent as the AFA Rate for the Export Buyer's Credit Program Is Supported by Substantial Evidence**

In the Final Results, Commerce selected an AFA rate for the Export Buyer's Credit Program using its four-step hierarchy. Under step two of the hierarchy, Commerce determined that the Export Buyer's Credit Program and the Export Seller's Credit Program were similar because both conferred a similar benefit—access to government-subsidized loans. Final IDM at 31 (“[U]pon examination of the available above *de minimis* programs from the current review and the underlying investigation, Commerce selected the Export Seller's Credit Program because it confers the same type of benefit as the Export Buyer's Credit Program, as both programs are subsidized loans from the China [Export Import] Bank.”). Thus, Commerce used the 0.87 percent *ad valorem* countervailable subsidy rate, which had previously been determined for the Export Seller's Credit Program in a prior segment of the proceeding, as the AFA rate for the Export Buyer's Credit Program. See Final IDM at 31.

Plaintiffs maintain that the 0.87 percent rate is not supported by substantial evidence because the record does not support Commerce's finding that the Export Buyer's Credit Program and the Export Seller's Credit Program are “similar”:

Commerce did not explain its decision that the Export Buyer's Credit was “similar” to China's Export Seller's Credit and cited no record evidence to support that decision. The *Buyer's* Credits are made to downstream foreign importers or their financial institutions and permit payment in U.S. dollars. The *Seller's* Credits are made in yuan, paid directly to the Chinese producers or exporters of the merchandise. Otherwise, because the Government of China failed to provide information requested by Commerce, there was no evidence with which to determine whether Export Buyer's and Export Seller's Credits were similar in terms and conditions, amount of the credits, interest rates, duration, or any other measurable criteria. As such, the determination that these credits were similar was not based on substantial evidence.

Pls.’ Br. 4. Put another way, for Plaintiffs, “similarity” requires more than a finding that the two programs are government-subsidized loan programs. They contend that Commerce has not demonstrated that seller’s credits are an “adverse proxy” for buyer’s credits. Pls.’ Reply 2 (“Commerce . . . failed to provide any reasonable basis for selecting the Export Seller’s Credit as an ‘adverse’ proxy for the Export Buyer’s Credit.”).

Based on the record, the court finds that Commerce has supported with substantial evidence, and adequately explained, its similarity finding. *See Bio-Lab*, 44 CIT at \_\_, 435 F. Supp. 3d at 1375 (sustaining “similarity” finding on a similar record); *Clearon*, 43 CIT at \_\_, 359 F. Supp. 3d at 1362 (same). Here, Commerce found, using information provided by China, that the Export Seller’s Credit Program “confers the same type of benefit as the Export Buyer’s Credit Program, as both programs are subsidized loans from the China [Export Import] Bank.” Final IDM at 31. There is no dispute that the record shows that both programs provide loans at preferential rates from China through the China Export Import Bank to support Chinese exports.

This Court has upheld Commerce’s finding that the Export Buyer’s Credit Program is “similar” to other programs that confer subsidized loans. In *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT \_\_, 352 F. Supp. 3d 1316 (2018) (“*Changzhou IP*”), the Court reviewed Commerce’s finding that the Export Buyer’s Credit Program and a preferential lending program aimed at the renewable energy industry (the “Lending Program”) were similar because both provided access to loans at preferential rates. *Changzhou II*, 42 CIT at \_\_, 352 F. Supp. 3d at 1328 (noting that “Commerce predicated [its] finding of similarity on both the [Export Buyer’s Credit Program’s] and the [Lending] Program’s distribution of loans.”). The Court reached its decision even though the plaintiffs argued that the program at issue here, the Export Seller’s Credit Program, was more similar to the Export Buyer’s Credit Program than the Lending Program. In other words, the plaintiffs in *Changzhou II* argued that Commerce erred by failing to examine whether the Export Seller’s Credit Program or the Lending Program was “more similar” to the Export Buyer’s Credit Program. Relying on the plain language of the statute, the Court rejected this argument: “Under Commerce’s established [hierarchy] methodology and consistent with the plain text of the statute, Commerce selects a *similar* program, not necessarily the *most similar* program.” *Changzhou II*, 42 CIT at \_\_, 352 F. Supp. 3d at 1329 (citing 19 U.S.C. § 1677e(d)(1)(A)(i)).

The *Changzhou II* holding applies equally here. To apply step two of its hierarchy, Commerce must select a program that is similar to the

one with respect to which information is missing from the record. To make this selection, Commerce is not required to compare multiple programs to determine which is the “most similar” to the program. *Id.*, 42 CIT at \_\_, 352 F. Supp. 3d at 1328–29. Selecting a program that is similar is enough to satisfy the statute.

The plaintiffs in *Changzhou II* also argued, as Plaintiffs do here, that Commerce had failed to explain adequately its rationale underlying its similarity finding. As summarized by the Court, Commerce stated how it arrived at its similarity finding:

After finding no program identical to the [Export Buyer’s Credit Program] in the same administrative review, Commerce identified a similar program in the same proceeding to use as a basis for calculating the rate for the [Export Buyer’s Credit Program] . . . Commerce calculated a rate of 5.46 percent *ad valorem*, for the [program] by utilizing the rate “calculated for company respondent Lightway Green New Energy Co., Ltd.’s usage of the [Lending Program] in the 2012 administrative review of this proceeding.” . . . Commerce explained that the [Lending Program] . . . was similar because both it and the Export Buyer’s Credit Program provided access to loans.

*Changzhou II*, 42 CIT at \_\_, 352 F. Supp. 3d at 1327 (record citations omitted). The Court found that Commerce was not required to provide a more detailed explanation of its similarity finding, and that substantial evidence supported its decision: “Although a more detailed description [of why the Export Buyer’s Credit Program and the Lending Program were “similar”] might be helpful, it is not required.” *Id.*, 42 CIT at \_\_, 352 F. Supp. 3d at 1329.

This Court also found adequate Commerce’s explanation of its similarity finding in *Solarworld Americas, Inc. v. United States*, 40 CIT \_\_, 182 F. Supp. 3d 1372 (2016), which again involved the Export Buyer’s Credit Program and the Lending Program. There, the parties disagreed as to whether Commerce had adequately explained its similarity finding. As summarized by the Court, Commerce stated the basis for its finding:

[N]oting that it lacked a calculated rate for the Export Buyer’s Credit Program from another responding company, Commerce applied the second level of its AFA rate selection hierarchy for administrative reviews. . . . Thus, it selected the rate calculated for the [Lending Program] in this same administrative review to the Export Buyer’s Credit Program after determining that the two programs were similar. . . . Commerce supported its determination that the programs were similar, noting that both pro-

grams call for financial institutions to provide *loans at preferential rates*.

*SolarWorld Americas*, 40 CIT at \_\_, 182 F. Supp. 3d at 1377–78 (emphasis added) (record citations omitted). The Court found that “Commerce’s logic in considering the programs similar [was] reasonably discernible because both loan programs perform similar functions in support of Chinese industry by offering lower interest rates on loans than would otherwise be available to these companies.” *Id.*, 40 CIT at \_\_, 182 F. Supp. 3d at 1377–78 n.8. Considering the similar purposes of the programs it is fair to presume that the subsidy provided would be about the same and that the benefit conferred by each program would be about the same.

As in *Changzhou II* and *SolarWorld*, Commerce’s rationale for finding that the Export Buyer’s Credit Program and the Export Seller’s Credit Program were similar is reasonably discernible. Plaintiffs point to the dearth of information on the record regarding the specific terms and conditions of the two programs, insisting that Commerce could not reasonably have compared them. While programmatic details might be useful, in this case what is needed is a way to find the size of the benefit that the respondents could reasonably be said to have received, so that a percentage can be added to the amount of the countervailing duty. Thus, the details of the program are less important than the magnitude of the benefit conferred. *See* Final IDM at 31 (“Commerce selected the Export Seller’s Credit Program because it confers the same type of benefit as the Export Buyer’s Credit Program, as both programs are subsidized loans from the China Ex-Im Bank.”); *see also Clearon*, 43 CIT at \_\_, 359 F. Supp. 3d at 1347 (discussing both programs).

As their names indicate, each program’s purpose is to support Chinese industry by promoting exports. *See* Heze’s Sec. III Quest. Resp. – Part II, Ex. 11 at Art. 2 (Rules Governing Export Buyers’ Credit, dated Nov. 20, 2000) (English trans.) (“The Export Buyer’s Credit refers to the medium and long-term credit offered by the [China Export Import] Bank to creditworthy foreign borrowers to support the export of Chinese capital goods, services.”); *Chlorinated Isocyanurates From the People’s Rep. of China*, 79 Fed. Reg. 10,097 (Dep’t Commerce Feb. 24, 2014), and accompanying Preliminary Decision Mem. (Feb. 11, 2014), subsec. XII.A.3 (“The purpose of [the Export Seller’s Credit Program] provided by [the China Export Import Bank] is to support the export of [Chinese] products and improve their competitiveness in the international market. The export seller’s credit [i]s a loan with a large amount, long maturity, and preferential interest rate.”). Given their common purpose, it is not unreasonable

to conclude that the interest rate charged for the loans would be about the same. That is, each is a program initiated by China to provide below-market-rate loans to benefit Chinese producers. While additional information, had it been provided by China, may have allowed Commerce to make a more detailed comparison of the two programs, Commerce's conclusions regarding the rate of subsidization (and hence the benefit conferred) are adequately supported by the record. *See Bio-Lab*, 44 CIT at \_\_, 435 F. Supp. 3d at 1378 (upholding the 0.87 percent rate as supported by substantial evidence); *Clearon*, 43 CIT at \_\_, 359 F. Supp. 3d at 1360–61 (same).

Accordingly, Commerce's selection of 0.87 percent as the AFA rate for the Export Buyer's Credit Program is sustained.

### CONCLUSION

Based on the foregoing, Commerce's use of its hierarchy and the resulting 0.87 percent rate for the Export Buyer's Credit Program are supported by substantial evidence and otherwise in accordance with law. Judgment shall be entered accordingly.

Dated: December 18, 2020

New York, New York

*/s/ Richard K. Eaton*  
RICHARD K. EATON, JUDGE

### Slip Op. 20–180

NTSF SEAFOODS JOINT STOCK COMPANY and VINH QUANG FISHERIES CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA, ALABAMA CATFISH INC., AMERICA'S CATCH, CONSOLIDATED CATFISH COMPANIES LLC, DELTA PRIDE CATFISH, INC., GUIDRY'S CATFISH, INC., HEARTLAND CATFISH COMPANY, MAGNOLIA PROCESSING, INC., and SIMMONS FARM RAISED CATFISH, INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge  
Court No. 19–00063

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results in the 2016–2017 administrative review of the antidumping duty order on certain frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: December 21, 2020

*Kenneth N. Hammer* and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington, D.C., argued for Plaintiffs NTSF Seafoods Joint Stock Company and Vinh Quang Fisheries Corporation. With them on the brief was *Robert G. Gosselink*.

*Kara M. Westercamp*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. 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 *Ian A. McInerney*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

*Jonathan M. Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for Defendant-Intervenors Catfish Farmers of America, Alabama Catfish Inc., America's Catch, Consolidated Catfish Companies LLC, Delta Pride Catfish, Inc., Guidry's Catfish, Inc., Heartland Catfish Company, Magnolia Processing, Inc., and Simmons Farm Raised Catfish, Inc. With him on the brief was *James R. Cannon*.

## OPINION AND ORDER

### Choe-Groves, Judge:

This case involves frozen fish fillets, including regular, shank, and strip fillets and portions thereof, of the species *Pangasius Bocourti*, *Panganius Hypophthalmus* (also known as *Pangasius Pangasius*) and *Pangasius Micronemus*. Plaintiffs NTSF Seafoods Joint Stock Company (“NTSF”) and Vinh Quang Fisheries Corporation (“Vinh Quang”) (collectively, “Plaintiffs”) bring this action challenging the final results of the U.S. Department of Commerce (“Commerce”) in the 2016–2017 administrative review of the antidumping duty order covering certain frozen fish fillets from the Socialist Republic of Vietnam (“Vietnam”). See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (“Final Results”)*, 84 Fed. Reg. 18,007 (Dep’t Commerce Apr. 29, 2019) (final results of antidumping duty administrative review; 2016–2017); see also *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Mem. for the Final Results of the Fourteenth Antidumping Duty Admin. Review: 2016–2017* (Dep’t Commerce Apr. 19, 2019), ECF No. 24–3, PD 547 (“Final IDM”).<sup>1</sup> Before the court are Plaintiffs’ Motion for Judgment on the Agency Record Pursuant to Rules 56.1 and 56.2, ECF Nos. 35, 36, and Response to Plaintiffs’ Motion for Judgment on the Agency Record and Motion to Partially Dismiss, ECF Nos. 44, 45 (“Def. Resp.”), filed by Defendant United States (“Defendant”). For the following reasons, the court sustains in part and remands in part the *Final Results* and denies the Motion to Partially Dismiss.

## ISSUES PRESENTED

The court reviews the following issues:

1. Whether Commerce’s selection of financial statements in its calculation of surrogate financial ratios is supported by substantial evidence;
2. Whether Commerce’s calculation of surrogate values for NTSF’s fingerlings is supported by substantial evidence; and

<sup>1</sup> Citations to the administrative record reflect public record (“PD”) and confidential record (“CD”) document numbers.

3. Whether Commerce’s denial of byproduct offsets for fish oil and fish meal is supported by substantial evidence.

### BACKGROUND

Commerce initiated the fourteenth administrative review of the antidumping duty order of frozen fish fillets from Vietnam for the period covering August 1, 2016 through July 31, 2017. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 48,051, 48,053 (Dep’t Commerce Oct. 16, 2017) (initiation notice). Commerce selected Hung Vuong Group and NTSF as mandatory respondents for individual examination.<sup>2</sup> *See* Fourteenth Admin. Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Second Selection of Resp’t for Individual Review at 4, PD 163 (Jan. 5, 2018); Fourteenth Admin. Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: 2nd Replacement Selection of Resp’t for Individual Review at 4, PD 209 (Feb. 7, 2018). Commerce selected Indonesia as the primary surrogate country. *See* Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Decision Mem. for the Prelim. Results, Prelim. Determination of No Shipments, and Partial Rescission of the 2016–2017 Antidumping Duty Admin. Review at 12, PD 478 (Dep’t Commerce Sept. 13, 2018) (“Prelim. DM”).

Commerce assigned weighted-average dumping margins of \$3.87 per kilogram to Hung Vuong Group, \$1.37 per kilogram to NTSF, and the all-others rate of \$1.37 per kilogram to Vinh Quang in the *Final Results* published on April 29, 2019. *Final Results*, 84 Fed. Reg. at 18,008. Commerce applied the all-others rate to the separate rate-eligible respondents not selected for individual examination based on NTSF’s calculated margin, including Vinh Quang. *See id.*; Final IDM at 49. In accordance with Commerce’s policy, the *Final Results* included a statement of Commerce’s “inten[t] to issue appropriate assessment instructions” to U.S. Customs and Border Protection (“Customs”) fifteen days after the date of publication. *Final Results*, 84 Fed. Reg. at 18,008.

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<sup>2</sup> Commerce selected Vinh Hoan Corporation and Bien Dong Seafood Company, Ltd. initially as mandatory respondents. Fourteenth Admin. Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Selection of Resp’ts for Individual Review at 6, PD 50 (Nov. 16, 2017). Both withdrew their requests for review. *See* Frozen Fish Fillets from the Socialist Republic of Vietnam: Withdraw of Request for Admin. Review – Vinh Hoan Corporation, PD 132 (Dec. 26, 2017); Frozen Fish Fillets from Vietnam – Withdrawal of Request for Admin. Review, PD 173 (Jan. 12, 2018) (withdrawal of Bien Dong Seafood Company, Ltd.); Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Partial Withdrawal of Request for Admin. Review, PD 118 (Dec. 22, 2017); Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Partial Withdrawal of Request for Admin. Review, PD 175 (Jan. 12, 2018). Commerce selected Hung Vuong Group and NTSF as replacement mandatory respondents.

Plaintiffs commenced this action on May 14, 2019. *See* Summons, ECF No. 1. The next day, Commerce issued liquidation instructions to Customs, sixteen days after publication of the *Final Results*. *See* Antidumping Duty Admin. Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Official R. Addendum Docs. – NTSF Liquidation Instrs., CD 561 (Dec. 11, 2019) (“Liquidation Instructions”). Customs issued three Notices of Action (Form CF-29): on May 29, 2019 as to one entry; on June 5, 2019 as to nineteen entries; and on June 5, 2019 as to forty-nine entries. *See* Mem. in Supp. of Mot. for J. Upon the Agency R. of Pls. NTSF Seafood Joint Stock Co. & Vinh Quang Fisheries Corp. Attachs. 1–3, ECF Nos. 35–2, 36–2 (“Pls. Br.”). All sixty-nine NTSF entries were liquidated on May 31, 2019, thirty-two days after publication of the *Final Results*. *Id.* Attach. 4. Commerce did not issue liquidation instructions for Vinh Quang’s entries. Defendant consented to Vinh Quang’s proposed order for a statutory injunction to enjoin liquidation of Vinh Quang’s entries. Form 24 Am. Order for Statutory Inj. Upon Consent, ECF No. 12. The court entered a statutory injunction enjoining liquidation of Vinh Quang’s entries pending resolution of this matter. Order for Statutory Inj. Upon Consent, ECF No. 13. The court issued a letter on August 26, 2020 requesting that Defendant consider restoring NTSF’s subject entries to unliquidated status. Letter, ECF No. 62. Defendant consented. Def.’s Resp. to the Court’s Letter, ECF No. 63. The court ordered that NTSF’s subject entries be restored to unliquidated status. Confidential Order, ECF No. 65; Order, ECF No. 66.

In the final results of administrative reviews, Commerce publishes a statement of intent to issue liquidation instructions to Customs fifteen days after publication. *Announcement Concerning Issuance of Liquidation Instrs. Reflecting Results of Admin. Reviews*, International Trade Administration (Nov. 9, 2010), <https://enforcement.trade.gov/download/liquidation-announcement-20101109.html> (last visited Dec. 21, 2020); *see* Def. Resp. at 28. Parties are afforded thirty days after publication of final results to file a summons and thirty days thereafter to file a complaint to trigger the jurisdiction of this Court. 19 U.S.C. § 1516a(a)(2). Because liquidation of entries is final and renders the administrative determination unreviewable by the Court, Commerce’s liquidation instruction policy has the potential to cut the time that parties have to file suit unreasonably short. The problem is not Commerce’s issuance of liquidation instructions, it is the timing of the resulting liquidations.

If Commerce were to act so quickly as to foreclose interested parties from obtaining judicial review, Commerce’s actions would be unreasonable, as would have occurred in this case absent the court’s inter-

vention requesting Defendant's consent to restoring unliquidated status. The Court determines whether Commerce acted unreasonably on a case-by-case basis. Commerce issued liquidation instructions for NTSF's entries sixteen days after publication of the *Final Results*. See Liquidation Instructions. NTSF's entries were liquidated thirty-two days after publication of the *Final Results*, before expiration of the statutory period for filing a complaint. See Pls. Br. Attach. 4. NTSF could potentially have been deprived of its right to obtain judicial review. Defendant consented, however, to restoring NTSF's entries to unliquidated status, and Plaintiffs were able to obtain judicial review of the antidumping determination. For these reasons, the court dismisses Defendant's Motion to Partially Dismiss as moot.

Because Commerce is best situated to consider the interests of all parties and avoid unreasonably quick liquidations, the court advises Commerce to consider adopting changes to the liquidation instruction policy to ensure that parties are not deprived of their right to judicial review.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

### I. Selection of Financial Statements in Calculation of Surrogate Financial Ratios

The court first addresses the issue of whether Commerce's selection of financial statements in its calculation of surrogate financial ratios is supported by substantial evidence. Plaintiffs challenge Commerce's selection of the financial statements of Japfa Comfeed Indonesia ("Japfa Comfeed") as not representing the best available information to use in calculating surrogate financial ratios. See Pls. Br. at 24–34. Commerce calculated surrogate financial ratios for Plaintiffs' profit, factory overhead, and selling, general, and administrative expenses based on the financial statements of two producers in the surrogate country of Indonesia, PT Dharma Samudera Fishing Industries ("DSFI") and Japfa Comfeed. Final IDM at 47–48; Prelim. DM at 16. Plaintiffs assert that DSFI, an Indonesian company that produced primarily fish fillets, was the most comparable producer and that only

DSFI's financial statements should have been used by Commerce as the best available information to calculate surrogate financial ratios. Pls. Br. at 25–26, 32–34.

Plaintiffs fault Commerce's selection of Japfa Comfeed's financial statements as non-comparable, based on Plaintiffs' argument that aquaculture activities were not a significant enough portion of Japfa Comfeed's overall operations. Pls.' Br. in Reply and in Resp. to Def.'s Partial Mot. to Dismiss at 13, ECF No. 52 ("Pls. Reply"); *see* Pls. Br. at 29–32. The court observes that Plaintiffs focus mainly on the assertion that aquaculture was a relatively small portion of Japfa Comfeed's overall businesses, even though Plaintiffs do not dispute that some portion of Japfa Comfeed's operations involved fish production and aquaculture. Plaintiffs argue that Commerce's use of Japfa Comfeed's financial statements was contrary to Commerce's practice of selecting financial statements from a producer of *primarily* comparable merchandise. Pls. Reply at 14; *see* Pls. Br. at 28–29. Plaintiffs acknowledge Commerce's practice of relying on financial statements from more than one producer to calculate surrogate financial ratios (and do not dispute Commerce's inclusion of DSFI's financial data), but Plaintiffs argue that Commerce's use of Japfa Comfeed's financial statements was unreasonable due to Commerce's failure to support with substantial evidence its inclusion of Japfa Comfeed's data. Pls. Br. at 30–34; Pls. Reply at 16.

Defendant and Defendant-Intervenors Catfish Farmers of America ("CFA"), Alabama Catfish Inc., America's Catch, Consolidated Catfish Companies LLC, Delta Pride Catfish, Inc., Guidry's Catfish, Inc., Heartland Catfish Company, Magnolia Processing, Inc., and Simmons Farm Raised Catfish, Inc. (collectively, "Defendant-Intervenors") respond that Commerce's inclusion of Japfa Comfeed's financial statements is supported by substantial evidence and in accordance with Commerce's standard practices because Japfa Comfeed had fish production businesses, including tilapia operations, during the relevant period of review. Def. Resp. at 18–20; Resp. Br. of the Catfish Farmers of America & Individual U.S. Catfish Processors at 16–18, ECF Nos. 46, 47 ("Def.-Intervs. Resp.").

Defendant asserts that the relevant statute allows Commerce to select data from companies that produce identical or comparable merchandise and that Commerce is not required to choose companies that *primarily* produce comparable merchandise. Def. Resp. at 20 (citing 19 U.S.C. § 1677b(c)(2)(A); 19 C.F.R. § 351.408(c)(4)). Defendant states that Commerce is not required to match the merchandise production of the comparison companies with the exact production

experience of Plaintiffs. *Id.* (quoting Final IDM at 48); see Def.-Intervs. Resp. at 18 (noting that Commerce has broad discretion in selecting the financial statements upon which to rely and that there is no minimum threshold of similar production experience required). Defendant notes that Commerce cited record evidence of Japfa Comfeed's articles of association, financial statements, and website to support Commerce's determination that Japfa Comfeed produced comparable merchandise and that its data was appropriate to use in the calculation of surrogate financial ratios. Def. Resp. at 18–19. Defendant argues that Commerce's selection of Japfa Comfeed's and DSFI's financial statements together, as a basis for the surrogate financial ratio calculations, was in accordance with Commerce's standard practices because Commerce prefers to rely on financial statements from multiple producers to normalize any potential distortions that may arise from using a single producer. *Id.* at 18, 21–22 (citing Final IDM at 47–48). Defendant contends that Commerce's use of Japfa Comfeed's financial statements fell within Commerce's wide discretion when selecting sources used to calculate surrogate financial ratios. *Id.* at 21.

In antidumping proceedings involving non-market economies, the relevant statute authorizes Commerce to calculate normal value using the best available information in a market economy country or countries considered to be appropriate by Commerce to value factors of production and other costs and expenses. 19 U.S.C. § 1677b(c)(4). When merchandise is exported from a non-market economy and Commerce determines that available information does not permit the normal value of subject merchandise to be determined using sales in the home market, Commerce determines normal value based on the value of the factors of production utilized in the production of the merchandise. *Id.* § 1677b(c)(1). The statute provides that Commerce shall value factors of production based on the best available information from a surrogate market economy country or countries. *Id.* When calculating surrogate financial ratios, Commerce “normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.” 19 C.F.R. § 351.408(c)(4); see *Weishan Hongda Aquatic Food Co. v. United States* (“*Weishan*”), 917 F.3d 1353, 1365 (Fed. Cir. 2019). The court notes that neither the statute nor the relevant regulations require that the comparable production be *primarily* similar; the inquiry focuses on whether the producers in the surrogate country produce identical or comparable merchandise. Commerce has broad discretion to determine what constitutes the best available information. *Weishan*, 917 F.3d at 1364–65.

The court finds that Commerce supported its selection of Japfa Comfeed's financial data with substantial evidence on the record. Commerce determined that both DSFI and Japfa Comfeed were producers of comparable merchandise, including fisheries operations and aquaculture. Final IDM at 47–48. Commerce cited evidence on the record, including Japfa Comfeed's articles of association, financial statements, and website, which indicated that Japfa Comfeed was involved in fisheries operations and produced comparable merchandise such as frozen tilapia fillets. *Id.* (citing Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: [Defendant-Intervenors'] Submission of Proposed Factor Values Ex. I-10F, PD 262–319 (Mar. 22, 2018) (“Def.-Intervs. Mar. 22, 2018 Letter”)) (stating that frozen tilapia deep skinned fillets were “available in ‘3–5, 5–7, 7–9, 9–11 oz.’ individually quick frozen (IQF) or vacuum pack”). Commerce noted that Japfa Comfeed's website stated that its “tilapia operation [was] . . . the largest of its kind in Indonesia.” *Id.* at 47. In addition, the evidence cited by Commerce indicated that Japfa Comfeed's aquaculture activities were its third highest revenue source among its lines of business. *See id.* n.337 (citing Def.-Intervs. Mar. 22, 2018 Letter Exs. I-10A, I-10F).

Plaintiffs do not contest that Japfa Comfeed produced comparable merchandise. *See* Pls. Br. at 25–32. Plaintiffs argue that Japfa Comfeed's financial statements were not the best available information for Commerce to use because Japfa Comfeed did not *primarily* produce comparable merchandise. *See id.* at 25–26; Pls. Reply at 13. As stated previously, Commerce is not required under the law to select financial statements from a producer that *primarily* produces comparable merchandise, but is required only to gather information from producers of identical or comparable merchandise in the surrogate country. *See* 19 U.S.C. § 1677b(c)(1); 19 C.F.R. § 351.408(c)(4); *see also* *Weishan*, 917 F.3d at 1365. The court concludes that Commerce's determination that Japfa Comfeed produced comparable merchandise in the business areas of fisheries operations and aquaculture is reasonable and supported by substantial evidence.

Plaintiffs argue that Commerce should have used only DSFI's financial statements, rather than a combination of DSFI's and Japfa Comfeed's information. Pls. Br. at 32–34. The parties agree that Commerce's standard practice is to use multiple financial statements to calculate surrogate financial ratios when possible. *See id.* at 32; Def. Resp. at 21. “Generally, if more than one producer's financial statements are available, Commerce averages the financial ratios derived from all the available financial statements.” *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1320 (Fed. Cir.

2010) (citing *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010)). Commerce explained that it prefers to use multiple financial statements in order to normalize any potential distortions that may arise from using the statements of a single producer. Final IDM at 48. In accordance with its standard practice, Commerce selected two producers of comparable merchandise, Japfa Comfeed and DSFI, and averaged their financial ratios. *See id.* at 47–48. The court concludes that Commerce’s use of Japfa Comfeed’s financial statements together with DSFI’s financial statements in order to normalize any potential distortions that could arise when calculating an average surrogate financial ratio is in accordance with the law.

Because the court concludes that Commerce’s determination that Japfa Comfeed’s financial statements should be included in the best available information is supported by substantial evidence, and Commerce’s calculation of average surrogate financial ratios using the financial statements of both DSFI and Japfa Comfeed is in accordance with the law, the court sustains Commerce’s use of Japfa Comfeed’s and DSFI’s financial statements together to calculate surrogate financial ratios for NTSF.

## **II. Calculation of Surrogate Values for NTSF’s Fingerlings**

The second issue considered by the court is whether Commerce’s surrogate value calculation for NTSF’s fish fingerlings is supported by substantial evidence. Commerce calculated surrogate values for NTSF’s fingerlings using data provided by the Indonesian Ministry of Marine Affairs and Fisheries (“IMMAF”). *See* Final IDM at 44–46; Fourteenth Admin. Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Surrogate Values for the Prelim. Results at 3, PD 487 (Dep’t Commerce Sept. 4, 2018) (“Prelim. Surrogate Values Mem.”).

Plaintiffs challenge Commerce’s selection of data provided by the IMMAF as not representing the best available information to use in calculating surrogate values for NTSF’s fingerlings. Pls. Br. at 11–21. Plaintiffs argue that the fingerlings per kilogram conversion ratio included in the 2012 data from the IMMAF (“2012 Data”) was inaccurate and contradicted by other record evidence. *Id.* at 16–18; Pls. Reply at 3–8. Plaintiffs assert that Commerce should have used different data, such as NTSF’s own data that it provided to Commerce, to calculate surrogate values. Pls. Br. at 16–18. Plaintiffs contend that Commerce’s application of a conversion ratio intended for 5–6 inch fingerlings to NTSF’s fingerlings larger than 6 inches conflicted with Commerce’s standard practice of using size-specific conversion ratios. *Id.* at 18–21; *see* Pls. Reply at 2, 9.

Defendant responds that mixing data from Vietnam, the location of NTSF's products, and from the surrogate country of Indonesia would result in distortions in the surrogate values. Def. Resp. at 15. Defendant argues that the 2012 Data is the best available information to calculate surrogate values for fingerlings over 5 inches and that Commerce's surrogate value calculation is supported by substantial evidence. *Id.* at 14.

Pursuant to 19 U.S.C. § 1677b(c), Commerce calculates normal value for subject merchandise using the best available information from surrogate countries to value production factors. 19 U.S.C. § 1677b(c). The court does not evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information. *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1379 (Fed. Cir. 2015).

Commerce used the 2016–2017 data from the IMMAF (“2016–2017 Data”) to calculate surrogate values for NTSF's fingerlings up to 5 inches in length.<sup>3</sup> See Prelim. Surrogate Values Mem. at 3. The 2016–2017 Data included the number of fingerlings per kilogram for fingerlings up to 6 inches but only stated a price for fingerlings up to 5 inches. See *id.* Attach. 1; Def.-Intervs. Mar. 22, 2018 Letter Ex. I-3C. Commerce applied the 2012 Data to calculate surrogate values for NTSF's fingerlings over 5 inches, because only the 2012 Data included a price for 5–6 inch fingerlings. Final IDM at 45; see Def.-Intervs. Mar. 22, 2018 Letter Ex. I-3C. Commerce used the most contemporaneous data from the surrogate country of Indonesia that provided both fingerlings per kilogram and corresponding prices from the period of review. See Prelim. Surrogate Values Mem. at 3, Attach. 1.

Plaintiffs do not challenge the source of the data, indicating that “use of [data provided by the IMMAF] is not in and of itself so problematic.” Final IDM at 45. Plaintiffs challenge the accuracy of the fingerling per kilogram conversion ratio within the 2012 Data and the application of the 2012 Data to fingerlings over 6 inches. Pls. Br. at

<sup>3</sup> To value fingerlings from 0.5 to 5 inches in length, Commerce used 2016–2017 pricing from an April 29, 2016 letter and 2017–2018 pricing from an August 1, 2018 letter from the IMMAF General Secretariat, Statistical Data and Information Center. Prelim. Surrogate Value Mem. at 3, Attach. 1; see also Def.-Intervs. Mar. 22, 2018 Letter Ex. I-3C, Attach. 2 (original letter listing 2014, 2015, and 2016 prices in various size bands ranging from 0.5–1.0 inch to 4–5 inches but not including information for fingerlings larger than 5 inches in length); Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: CFA's Pre-Preliminary Surrogate Value Submission Ex. 3, Attach. 2, PD 445–60 (Aug. 3, 2018) (“Def.-Intervs. Aug. 3, 2018 Letter”) (original letter listing 2016–2018 pricing in various size bands ranging from 0.5–1.0 inch to 4–5 inches but indicating that fingerlings larger than 5 inches in length are “rarely traded”).

15–16. The court observes that Plaintiffs’ essential argument is that Commerce should have used NTSF’s own data rather than the 2012 Data chosen by Commerce.

### A. Accuracy of the 2012 Data

Plaintiffs argue that Commerce’s use of the 2012 Data’s conversion ratio is unsupported by substantial evidence because there is differing data on the record regarding the number of 5–6 inch fingerlings per kilogram. *Id.* at 16–18. Plaintiffs point to no direct evidence, however, showing that the 2012 Data’s conversion ratio of 100 5–6 inch fingerlings per kilogram is inaccurate. *See id.* Plaintiffs cite merely to other record evidence indicating different numbers of 5–6 inch fingerlings per kilogram. *Id.*; *see also id.* at 15 (fifty-six 5–6 inch fingerlings per kilogram); Def.-Intervs. Aug. 3, 2018 Letter Ex. 3, Attach. 3 (fewer than seventy 5–6 inch fingerlings per kilogram); Def.-Intervs. Aug. 3, 2018 Letter Ex. 3, Attach. 2 (seventy 5–6 inch fingerlings per kilogram); Def.-Intervs. Mar. 22, 2018 Letter Ex. I-3C, Attach. 3 (one hundred 5–6 inch fingerlings per kilogram). The court observes that a number of factors can affect the exact ratio between length and weight. *See Certain Frozen Fish Fillets from Vietnam: Surrogate Values Attach. 4-F, PD 253–54 (Mar. 22, 2018)* (stating that factors such as food, water temperature, and disease can affect the fingerling length-to-weight ratio). As a result, the court recognizes that variances in the exact number of 5–6 inch fingerlings per kilogram can occur.

Defendant explains that Commerce chose the 2012 Data because it was the only data set from the surrogate country of Indonesia that contained both fingerlings per kilogram and price for 5–6 inch fingerlings. Def. Resp. at 14–15. Commerce stated that it selected data that included both quantity and price amounts to avoid potential distortions. Final IDM at 44–45. No data from Indonesia, other than the 2012 Data, included both quantity and price. *See Prelim. Surrogate Values Mem. at 3, Attach. 1.*

The court concludes that Commerce’s determination that the 2012 Data was the best available information to calculate surrogate values for NTSF’s 5–6 inch fingerlings is supported by substantial evidence, in light of Commerce’s explanation that it sought both quantity and price information to avoid potential distortions and the lack of contrary evidence from NTSF when viewing the record as a whole. The court sustains Commerce’s application of the 2012 Data to calculate surrogate values for NTSF’s 5–6 inch fingerlings.

## B. Application of 2012 Data to Fingerlings Over 6 Inches

Plaintiffs argue that Commerce’s application of the 2012 Data to NTSF’s fingerlings larger than 6 inches is unsupported by substantial evidence. Pls. Br. at 18–21. The record reflects that NTSF reported fingerling consumption data as fingerlings per kilogram. Frozen Fish Fillets from Vietnam – Resp. to Section D Suppl. Questionnaire at 1, PD 225 (Feb. 26, 2018) (“NTSF Suppl. Questionnaire Resp.”). NTSF converted this data to inches per piece, determining that NTSF’s fingerlings ranged from 5.866 to 7.008 inches in length. *See* Frozen Fish Fillets from Vietnam: Resp. to Req. for Surrogate Value Information Ex. SV-5, PD 320–33 (Mar. 22, 2018). For NTSF’s fingerlings that were 5–6 inches and larger, Commerce applied the 2012 Data to calculate surrogate values. Final IDM at 44.

The parties do not dispute that the number of fingerlings per kilogram decreases as the size of the fingerlings increases. “[T]he relationship between fingerling lengths and weights [is] not linear.” *Id.* at 45. Plaintiffs argue that Commerce’s use of the 2012 Data’s 5–6 inch conversion ratio was less accurate when applied to larger-sized fingerlings. *See* Pls. Br. at 18–21. Plaintiffs assert that the conversion rates provided in NTSF’s own data, by comparison, are more accurate and should have been used by Commerce instead of the 2012 Data. *Id.* at 19–20.

Commerce’s surrogate value determination need not be exact. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1407 (Fed. Cir. 1997)). Commerce explained that the 2012 Data was the best available information to apply to NTSF’s fingerlings that were 5–6 inches and larger because the 2012 Data contained critical information regarding fingerling length, fingerlings per kilogram, and corresponding price. Final IDM at 44–45. Commerce noted that it selected the 2012 Data for consistency, accuracy, and availability of conversion factors from the same credible government source, the IMMAF. *Id.* at 45. In addition, Commerce explained that mixing NTSF’s Vietnamese data with Indonesian surrogate values would be internally inconsistent and would “distort the ending value.” *Id.* at 44.

The court concludes that Commerce’s selection of the 2012 Data as the best available information to calculate surrogate values for NTSF’s fingerlings is supported by substantial evidence and reasonable in light of Commerce’s justifications of consistency, accuracy, and availability of comparable conversion factors from the same source

and surrogate country. The court sustains Commerce's application of the 2012 Data to calculate surrogate values for NTSF's fingerlings that were 5–6 inches and larger.

### III. Denial of Byproduct Offsets for Fish Oil and Fish Meal

The third issue considered by the court is whether Commerce's denial of byproduct offsets for fish oil and fish meal byproducts is supported by substantial evidence.

In calculating normal value for NTSF, Commerce granted offsets for fish head and bone byproducts generated during the period of review, but denied offsets for fish oil and fish meal byproducts. Final IDM at 52–53. Plaintiffs assert that the record evidence showed that NTSF produced fish oil and fish meal byproducts through a tolling contract with a processor and sold those byproducts. Pls. Br. at 23–24. Plaintiffs argue that Commerce's denial of offsets for fish oil and fish meal byproducts is unsupported by substantial evidence. *Id.* at 24. Defendant responds that Commerce denied byproduct offsets for fish oil and fish meal correctly because NTSF's processing contract was for a sale of goods and was not a tolling contract. Oral Arg. Tr. at 46; Def. Resp. at 17–18. Defendant argues that NTSF failed to provide enough information to warrant byproduct offsets for fish oil and fish meal and that Commerce's denial of byproduct offsets is supported by substantial evidence. Def. Resp. at 17–18.

Pursuant to 19 U.S.C. § 1677b(c), Commerce calculates normal value for subject merchandise using the best available information from surrogate countries to value production factors. 19 U.S.C. § 1677b(c). Commerce examines the quantities of raw materials employed by a company when calculating normal value. *See id.* § 1677b(c)(3)(B). As not all raw materials are incorporated into the final product, Commerce provides offsets for byproducts generated during the production process. *See Arch Chems., Inc. v. United States*, 33 CIT 954, 956 (2009); *Ass'n of Am. School Paper Suppliers v. United States*, 32 CIT 1196, 1205 (2008); *see also Tianjin Magnesium Int'l Co. v. United States*, 34 CIT 980, 993 (2010) (The antidumping statute does not prescribe a method for calculating byproduct offsets, instead leaving the decision to Commerce.). Commerce values byproduct offsets based on the best available information. *See* 19 U.S.C. § 1677b(c)(1); *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 41 CIT \_\_, \_\_, 203 F. Supp. 3d 1256, 1273 (2017). The producer bears the burden of substantiating any byproduct offsets and must present Commerce with sufficient information to support its claims for offsets.

See *Arch Chems.*, 33 CIT at 956. The producer must show that the byproduct of the production of the subject merchandise “is either resold or has commercial value and reenters the [producer’s] production process.” *Id.*; see *Am. Tubular Prods., LLC v. United States*, 38 CIT \_\_, \_\_, Slip Op. 14–116 at 17 (Sept. 26, 2014).

Defendant and Defendant-Intervenors emphasize that NTSF failed to demonstrate that NTSF actually sold fish oil and fish meal byproducts and that NTSF failed to reconcile its fish waste production to its byproduct sales. Def. Resp. at 17–18; Def.-Intervs. Resp. at 15–16; see also Final IDM at 52–53. The court observes, however, that record evidence may contradict Defendant’s assertion that NTSF failed to show that it sold fish oil and fish meal byproducts during the period of review. Specifically, the court notes NTSF’s assertion that it provided record evidence of fish oil and fish meal sales during the last three months of the period of review and that it reconciled the total value of byproduct sales to its sales ledger, trial balance, and audited financial statements. See, e.g., *Frozen Fish Fillets from Vietnam – Section D Resp. & Section D App. Resp.* at D-16, Ex. D-13, CD 92–95 (Jan. 18, 2018); *Frozen Fish Fillets from Vietnam – NTSF’s Resp. to the Department’s Suppl. Sections C & D Questionnaire* at Supp CD40, CD 179–97 (May 15, 2018) (“NTSF Suppl. Resp.”); Pls. Reply at 9–12.

Central to the parties’ dispute is whether NTSF’s contract with an unaffiliated processor to process fish head and bone byproducts into fish oil and fish meal (“Processing Contract”) was a sale of goods contract or a tolling contract. Oral Arg. Tr. at 46; see NTSF Suppl. Resp. Ex. Supp CD-47. The court does not opine whether NTSF’s Processing Contract was a sale of goods contract or a tolling contract, but notes generally that toll manufacturing is defined as “[a]n arrangement under which a customer provides the materials for a manufacturing process and receives the finished goods from the manufacturer. The same party owns both the input and the output of the manufacturing process.” *Toll Manufacturing*, Black’s Law Dictionary (11th ed. 2019); see *Atar, S.r.L. v. United States*, 35 CIT 849, 850 (2011) (citing *United States v. Eurodif S.A.*, 555 U.S. 305, 312–13 (2009)) (“In a tolling arrangement, a producer employs a subcontractor that provides processing services for, or material for incorporation into, the merchandise that is sold by the producer.”); see also *Mid Continent Steel & Wire, Inc. v. United States*, 42 CIT \_\_, \_\_, Slip Op. 18–56 at 4–6 (May 22, 2018).

The court concludes that Commerce’s denial of byproduct offsets for fish oil and fish meal is unsupported by substantial evidence in light of potentially contradictory evidence on the record and viewing the

record as a whole. The court remands for Commerce to explain its analysis of the record evidence cited by NTSF or otherwise change its determination.

### CONCLUSION

The court sustains Commerce's use of Japfa Comfeed's financial statements to calculate surrogate financial ratios and Commerce's use of the 2012 Data to calculate surrogate values. The court remands Commerce's denial of byproduct offsets for further consideration in accordance with this opinion.

Accordingly, it is hereby

**ORDERED** that Defendant's Motion to Partially Dismiss is denied; and it is further

**ORDERED** that the *Final Results* are remanded to Commerce for further proceedings consistent with this opinion; and it is further

**ORDERED** that Commerce shall afford the parties at least twelve (12) business days to comment on the draft remand results; and it is further

**ORDERED** that this action shall proceed according to the following schedule:

1. Commerce shall file the remand results on or before February 19, 2021;
2. Commerce shall file the administrative record on or before March 12, 2021;
3. Comments in opposition to the remand results shall be filed on or before April 9, 2021;
4. Comments in support of the remand results shall be filed on or before May 7, 2021; and
5. The joint appendix shall be filed on or before May 28, 2021.

Dated: December 21, 2020

New York, New York

*/s/ Jennifer Choe-Groves*  
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 20-181

SAHA THAI STEEL PIPE PUBLIC COMPANY LIMITED, Plaintiff, and THAI PREMIUM PIPE COMPANY LTD. and PACIFIC PIPE PUBLIC COMPANY LIMITED, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge  
Consol. Court No. 18-00214

[Remanding the U.S. Department of Commerce’s remand results in the 2016–2017 administrative review of the antidumping duty order covering circular welded carbon steel pipes and tubes from Thailand.]

Dated: December 21, 2020

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*Lizbeth R. Levinson, Ronald M. Wisla, and Brittney R. Powell*, Fox Rothschild LLP, of Washington, D.C., for Consolidated Plaintiff Pacific Pipe Public Company Limited.

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

*Roger B. Schagrin, Elizabeth J. Drake, Christopher T. Cloutier, and Luke A. Meisner*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Wheatland Tube Company.

## **OPINION AND ORDER**

### **Choe-Groves, Judge:**

Plaintiff Saha Thai Steel Pipe Public Company Limited (“Saha Thai”) and Consolidated Plaintiffs Thai Premium Pipe Company Limited (“Thai Premium”) and Pacific Pipe Public Company Limited (“Pacific Pipe”) (collectively, “Plaintiffs”) filed this consolidated action challenging the final results published by the U.S. Department of Commerce (“Commerce”) in the 2016–2017 administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes (“CWP”) from Thailand. *See Circular Welded Carbon Steel Pipes and Tubes From Thailand (“Final Results”)*, 83 Fed. Reg. 51,927 (Dep’t Commerce Oct. 15, 2018) (final results of antidumping duty administrative review; 2016–2017); *see also* Decision Mem. for the Final Results of Antidumping Duty Admin. Review; 2016–2017, PD 143 (Oct. 4, 2018) (“Final Decision Memorandum” or “Final IDM”).<sup>1</sup> Before the court are the Final Results of Redetermination Pursuant to Remand, ECF Nos. 62, 63 (“*Remand Results*”), which the court ordered in *Saha Thai Steel Pipe Public Co. v. United States (“Saha Thai I”)*, 43 CIT \_\_, 422 F. Supp. 3d 1363 (2019).

Plaintiffs argue that Commerce did not comply with the court’s remand order, which required Commerce to reconsider its unlawful particular market situation adjustment in accordance with the court’s opinion, noting the absence of a direct instruction from the

<sup>1</sup> Citations to the administrative record reflect the public record (“PD”) document numbers.

court for Commerce to reverse its particular market situation adjustment. [Thai Premium]’s Comments O’ppn Remand Redetermination at 5–6, ECF Nos. 65, 66 (“Thai Premium Cmts.”); Pl. Saha Thai’s Comments Commerce’s Redetermination Remand at 2–3, ECF No. 67 (“Saha Thai Cmts.”); Pl. Pacific Pipe’s Comments Commerce’s Remand Redetermination at 2–3, ECF No. 68 (“Pacific Pipe Cmts.”). Plaintiffs assert that Commerce’s *Remand Results* set forth an impermissible new justification for a particular market situation adjustment to the cost of production that is contrary to the court’s remand order, Commerce’s regulations, the applicable statute, and procedural fairness. Thai Premium Cmts. at 7, 9; Saha Thai Cmts. at 3; Pacific Pipe Cmts. at 3.

Thai Premium asserts that normal value for Thai Premium was based on constructed value in the *Final Results* and asks the court to address whether Commerce’s particular market situation adjustments in the *Final Results* were supported by substantial evidence. Thai Premium Cmts. at 3–4. In the Constructed Value Profit section of the *Remand Results*, Commerce noted Thai Premium’s assertion that in the *Final Results* “Commerce used [constructed value] as a basis for normal value for Thai Premium because Thai Premium did not have sales of the foreign like product in the ordinary course of trade . . . .” *Remand Results* at 22–23 (citing Thai Premium’s comments to the draft remand results). On remand, however, the basis for Thai Premium’s constructed value was not the lack of sales of the foreign like product in the ordinary course of trade but Commerce’s particular market situation determinations, which the court discusses below. *Id.* at 7–9. Because Commerce changed its methodology in the *Remand Results*, the issues of (1) whether Thai Premium’s normal value was properly based on constructed value due to the lack of sales of the foreign like product in the ordinary course of trade, and (2) whether Commerce’s subsequent particular market situation adjustments were supported by substantial evidence in the *Final Results* are not before the court at this time.

For the following reasons, the court remands the *Remand Results*.

## BACKGROUND

The court presumes familiarity with the facts and procedural history as set forth in its prior opinion and recounts the facts relevant to the court’s review of the *Remand Results*. See *Saha Thai I*, 43 CIT at \_\_\_, 422 F. Supp. 3d at 1365–67.

Defendant-Intervenor Wheatland Tube Company (“Wheatland”) submitted factual information alleging that a particular market situation in Thailand during the period of review distorted the costs of

hot-rolled steel coil. Wheatland Allegation Letter at 1, PD 69–71 (Feb. 5, 2018) (“Wheatland Allegation”). Wheatland alleged the existence of two independent particular market situations, either one of which was purportedly sufficient on its own to distort the cost of production of CWP: (1) the Royal Thai Government subsidized Thai producers of hot-rolled coil, enabling its sale at below-market prices to downstream producers of CWP, and (2) the prices for imports of hot-rolled coil into Thailand were distorted through dumping, subsidization, and global overcapacity. *Id.* at 4–5. Wheatland requested that Commerce “use an alternative calculation methodology to calculate constructed value under 19 U.S.C. § 1677b(e) in this proceeding.” *Id.* at 1. Commerce accepted Wheatland’s submission alleging the existence of a particular market situation as to cost of production under 19 C.F.R. § 351.301(c)(2)(v) and set a deadline for submissions to rebut, clarify, or correct the Wheatland Allegation. Commerce Deadline Mem. at 1–2, PD 81 (Mar. 21, 2018). Saha Thai and Pacific Pipe submitted rebuttal factual information. Saha Thai Rebuttal, PD 83 (Mar. 28, 2018); Pacific Pipe Rebuttal, PD 84–85 (Mar. 28, 2018).

In the *Final Results*, Commerce determined that a particular market situation distorted the acquisition cost of hot-rolled coil, a major CWP input, and applied an upward adjustment to the respondents’ reported cost of production.<sup>2</sup> Final IDM at 8–10. Commerce conducted the sales-below-cost test and disregarded certain of Saha Thai’s, Pacific Pipe’s, and Thai Premium’s home market sales made at prices below the cost of production. *See* Circular Welded Carbon Steel Pipes and Tubes from Thailand: Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review; 2016–2017 at 15–16, PD 87 (Apr. 3, 2018) (“Preliminary Decision Memorandum” or “Prelim. DM”). Commerce calculated normal value from the remaining above-cost home market sales and stated expressly that “[it] calculated [normal value] based on the price Pacific Pipe, Saha Thai, and Thai Premium reported for home market sales . . .” *Id.* at 16. “Where [Commerce] w[as] unable to determine [normal value] based on home market sale prices of comparable merchandise, . . . [Commerce] based [normal value] on constructed value (CV).” *Id.* Commerce did not state in the Preliminary Decision Memorandum or the Final Decision Memorandum that normal value for Thai Premium was based on constructed value. *See* Prelim. DM; Final IDM. Commerce calculated Plaintiffs’ weighted-average antidumping margins as 28% for Saha Thai, 30.61% for Pacific Pipe, and 30.98% for Thai Premium. *Final Results*,

<sup>2</sup> Saha Thai, Pacific Pipe, and Thai Premium were the only three producer-exporters covered by this administrative review. Final IDM at 2. All three were individually examined as mandatory respondents. *Remand Results* at 3.

83 Fed. Reg. at 51,928. The court concluded in *Saha Thai I* that Commerce’s cost-based particular market situation adjustment was unlawful and remanded to Commerce “for further consideration consistent with this opinion.” 43 CIT at \_\_\_, 422 F. Supp. 3d at 1371.

Commerce filed the *Remand Results* under respectful protest and stated that it disagreed with the court in *Saha Thai I. Remand Results* at 1, 6. Rather than reverse its particular market situation determination, Commerce maintained its determination that a particular market situation distorted the cost of production. *Id.* at 7–8. Commerce declined to conduct the sales-below-cost test because it explained that the sales-below-cost test would not be “meaningful” without an adjustment to the cost of production to account for the particular market situation. *Id.* Commerce instead made a particular market situation determination under 19 U.S.C. § 1677(15)(C), stating that the distorted cost of production prevented a proper comparison between home market sales and export prices, and disregarding all home market sales. *Id.* at 8. Commerce based normal value on constructed value for each respondent on remand. *Id.* at 1–2, 8–9. Commerce made a particular market situation determination under 19 U.S.C. § 1677b(e) as to cost of production and calculated constructed value with an adjustment to the cost of production as an alternative calculation methodology. *Id.* at 8–9. Commerce calculated constructed value profit for each respondent by the alternative method of using *Saha Thai*’s home market selling expense ratios and profit rate from the 2015–2016 administrative review. *Id.* at 9–11.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final results of an administrative review of an anti-dumping duty order. The court will uphold Commerce’s determinations unless they are unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The court also reviews determinations made on remand for compliance with the court’s remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT \_\_\_, \_\_\_, 992 F. Supp. 2d 1285, 1290 (2014), *aff’d*, 802 F.3d 1339 (Fed. Cir. 2015).

## DISCUSSION

### I. Governing Law

Commerce determines antidumping duties by calculating the amount by which the normal value of subject merchandise exceeds the export price or the constructed export price for the merchandise. 19 U.S.C. § 1673. When reviewing antidumping duties in an admin-

istrative review, Commerce must determine: (1) the normal value and export price or constructed export price of each entry of the subject merchandise, and (2) the dumping margin for each such entry. *Id.* § 1675(a)(1)(B), (a)(2)(A). The statute dictates the steps by which Commerce may calculate normal value “to achieve a fair comparison” with export price or constructed export price. *Id.* § 1677b(a).

First, the statute specifies the methodology for Commerce to determine which sales should be considered and disregarded in calculating normal value. Normal value is “the price at which the foreign like product is first sold . . . in the exporting country . . . in the ordinary course of trade.” *Id.* § 1677b(a)(1)(B)(i). Sales outside the ordinary course of trade are excluded from normal value. “Ordinary course of trade” is defined in Section 1677(15) as excluding: (1) sales made at less than the cost of production, and (2) sales that cannot be compared properly with the export price or constructed export price due to a particular market situation. *Id.* § 1677(15)(A), (C). To determine whether “sales . . . have been made at prices that represent less than the cost of production,” the statute directs Commerce to conduct the sales-below-cost test. *Id.* § 1677b(b)(1). The cost of production is defined by statute to include the cost of materials and processing, amounts for selling, general, and administrative expenses, and the cost of all containers and expenses incidental for shipment. *Id.* § 1677b(b)(3). Sales that Commerce determines, by application of the sales-below-cost test, were made at prices below the cost of production, or that Commerce determines were made in a particular market situation, are outside the ordinary course of trade and are disregarded from the calculation of normal value. *See id.* § 1677b(b)(1), (a)(1)(B)(i). “Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade.” *See id.* §§ 1677b(a)(1)(B)(i), (b)(1); 1677(15)(A), (C).

Second, when using market prices to determine normal value, Commerce may make certain adjustments to the remaining home market prices. The statute lists authorized adjustments for incidental shipping and delivery expenses, direct taxes, and differences between the subject merchandise and foreign like products in quantity, circumstances of sale, or level of trade. *Id.* § 1677b(a)(6), (7).

Third, if Commerce cannot determine the normal value of the subject merchandise based on home market sales, then Commerce may use qualifying third-country sales or constructed value as a basis for normal value. *Id.* § 1677b(a)(4), (a)(1)(B)(ii), (b)(1). 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 expenses, and for profits, in connection with the production and sales of a foreign like product, in the ordinary course of trade, for consumption in the foreign country; and (3) the cost of packing the subject merchandise. *Id.* § 1677b(e). When calculating constructed value, if Commerce determines that 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, [then] [Commerce] may use . . . any other calculation methodology.” *Id.*

## II. Particular Market Situation Allegation

Plaintiffs argue that Commerce made an impermissible “sales-based” particular market situation determination on remand, when no “sales-based” particular market situation allegation was submitted before the time period expired and interested parties were not permitted to submit rebuttal factual information. Thai Premium Cmts. at 8–9; Saha Thai Cmts. at 7–10; Pacific Pipe Cmts. at 3–5. Commerce asserted that it relied on remand on the same cost-based particular market situation determination it made in the *Final Results. Remand Results* at 15–16; see also Def.-Intervenor [Wheatland]’s Comments Commerce’s Redetermination Remand at 4–5, ECF No. 69 (“Wheatland Cmts.”).

The statute recognizes two types of particular market situations. The first is a particular market situation that prevents a proper comparison between home market sales and the export price or constructed export price under Section 1677(15)(C). 19 U.S.C. § 1677(15)(C). The second is a particular market situation that prevents “the cost of materials and fabrication or other processing of any kind” from “accurately reflect[ing] the cost of production in the ordinary course of trade . . . .” *Id.* § 1677b(e).

The applicable regulation provides that “allegations regarding market viability or the exceptions in paragraph (c)(2) of this section, must be filed, with all supporting factual information, in accordance with § 351.301(d)(1).” 19 C.F.R. § 351.404(d). One exception provided in paragraph (c)(2) specifies that “[t]he Secretary may decline to calculate normal value in a particular market . . . [if] a particular market situation exists that does not permit a proper comparison with the export price or constructed export price . . . .” *Id.* § 351.404(c)(2)(i). Section 351.301 does not have a subsection (d), but subsection (c) provides that “[a]llegations regarding market viability in an anti-dumping investigation or administrative review, including the exceptions in § 351.404(c)(2), are due, with all supporting factual

information, 10 days after the respondent interested party files the response to the relevant section of the questionnaire, unless the Secretary alters this time limit.” *Id.* § 351.301(c)(2)(i); *see* Final IDM at 5 (recognizing that subsection (c) sets the deadline for allegations as to market viability, including the exceptions in Section 351.404(c)(2)). No deadline is specified for the submission of “factual information in support of other allegations not specified in paragraphs (c)(2)(i)–(iv) of this section,” but if Commerce accepts such factual submission, Commerce must “issue a schedule providing deadlines for submission of factual information to rebut, clarify or correct the factual information.” 19 C.F.R. § 351.301(c)(2)(v).

Here, Commerce properly accepted the Wheatland Allegation and afforded interested parties the opportunity to submit information to rebut, clarify, or correct the allegation. Wheatland alleged the existence of a particular market situation that distorted the cost of hot-rolled steel coil. Wheatland Allegation at 1, 4–5. The Wheatland Allegation did not pertain to market viability or a particular market situation that did not permit a proper comparison with the export price or constructed export price, which would have fallen under 19 C.F.R. § 351.404(d) as one of the exceptions identified in 19 C.F.R. § 351.404(c)(2). The deadline for factual submissions under 19 C.F.R. § 351.404(d) did not apply to the Wheatland Allegation. Instead, the Wheatland Allegation fell under 19 C.F.R. § 351.301(c)(2)(v) for “Other allegations,” for which there was no specified time limit. *See* Wheatland Allegation at 1, 4–5; *Remand Results* at 15. The type of particular market situation alleged in the Wheatland Allegation and the applicable submission deadline were not altered by Commerce’s subsequent actions. The court concludes that Commerce’s actions in accepting the Wheatland Allegation under 19 C.F.R. § 351.301(c)(2)(v) and setting a deadline for interested parties to submit information to rebut, clarify, or correct the Wheatland Allegation were consistent with its regulations, and the Wheatland Allegation regarding a particular market situation distorting the cost of hot-rolled steel coil was not time-barred as argued by Plaintiffs.

### **III. Unauthorized Particular Market Situation Determinations**

Plaintiffs assert that Commerce based normal value on constructed value without disregarding home market sales as outside the ordinary course of trade by any of the statutorily mandated methods. Thai Premium Cmts. at 9–12; Saha Thai Cmts. at 3–13; Pacific Pipe Cmts. at 5–7. Plaintiffs argue also that Commerce must show that a particular market situation prevented a proper comparison with the export price or constructed export price before it may disregard home

market sales as being outside the ordinary course of trade under 19 U.S.C. § 1677(15)(C). Thai Premium Cmts. at 9–11; Saha Thai Cmts. at 12–13; *see* Pacific Pipe Cmts. at 6–7. Saha Thai contends that Commerce did not follow the applicable statutory requirement of 19 U.S.C. § 1677b(b)(1), which requires Commerce to first show that home market sales were made at prices below the cost of production by conducting the sales-below-cost test to determine which sales should be disregarded as outside the ordinary course of trade. Saha Thai Cmts. at 11–12.

In the *Final Results*, Commerce determined that a particular market situation existed that distorted the cost of production and conducted the sales-below-cost test with an adjustment to the cost of production. Final IDM at 9–10. Commerce disregarded the below-cost home market sales and based normal value on the remaining home market sales. Prelim. DM at 16. The court concluded in *Saha Thai I* that Commerce was not permitted to “apply a cost-based particular market situation adjustment in the context of a sales-based comparison.” 43 CIT at \_\_, 422 F. Supp. 3d at 1371.

Commerce maintained the same particular market situation determination on remand that it made in the *Final Results*. *Remand Results* at 16. “Commerce relied on the cost-based [particular market situation] finding made in the *Final Results* in the Draft Results of Remand Redetermination, with no change to [its] determination that a cost-based [particular market situation] existed during the period of review.” *Id.* Commerce asserted that a particular market situation in Thailand distorted the acquisition cost of hot-rolled steel coil, a major input for the subject merchandise, such that the respondents’ cost of production of the subject merchandise did not reflect accurately the cost of production of the subject merchandise in the ordinary course of trade. *Id.* at 19–20.

Commerce did not conduct the sales-below-cost test on remand. *Id.* at 7–8. Commerce declared that conducting the sales-below-cost test would not be “meaningful” without an adjustment to the cost of production—which the court prohibited in *Saha Thai I*—to account for the particular market situation and to compare “home market sale prices to a cost of production that does not accurately reflect production costs in the ordinary course of trade fails to accomplish the intent of the sales-below-cost test, which is to determine whether the respondents’ home market sales were made in the ordinary course of trade.” *Id.*; *see also id.* at 19; Wheatland Cmts. at 2. Commerce noted that “without being able to make a [particular market situation] adjustment in calculating the respondents’ cost of production and perform an accurate sales-below-cost test, . . . the [particular market

situation] in Thailand which distorted the acquisition cost of [hot-rolled coil] has resulted in each respondent's home market sales being outside of the ordinary course of trade." *Remand Results* at 15.

Commerce's exclusion of home market sales due to distortions in the cost of production is not authorized by the statute. Congress provided specifically in Section 1677(15)(A) for Commerce to consider sales outside the ordinary course of trade when sales are below the cost of production. The path specified by Congress to determine that sales are below the cost of production is for Commerce to first conduct the sales-below-cost test set forth in Section 1677b(b)(1) to affirmatively confirm that sales are made below the cost of production as calculated according to Section 1677b(b)(3). Section 1677b(b)(1) provides:

Whenever the administering authority has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production. If the administering authority determines that sales made at less than the cost of production—

(A) have been made within an extended period of time in substantial quantities, and

(B) were not at prices which permit recovery of all costs within a reasonable period of time,

such sales may be disregarded in the determination of normal value. Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade. If no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value of the merchandise.

19 U.S.C. § 1677b(b)(1). The statute directs Commerce to compare the reported home market sales prices to the cost of production calculated by adding the component costs and expenses listed in Section 1677b(b)(3). *Id.* § 1677b(b)(1), (3); *see also* Prelim. DM at 15. After conducting the sales-below-cost test, Commerce shall disregard those reported home market sales prices that are less than the calculated cost of production as outside the ordinary course of trade. 19 U.S.C. § 1677(15)–(15)(A).

Here, Commerce did not follow the specified method when it disregarded as outside the ordinary course of trade sales made purportedly at prices below the cost of production, without confirming that the

sales were in fact made below the cost of production by conducting the sales-below-cost test. The statute requires Commerce to conduct the sales-below-cost test set forth in Section 1677b(b)(1) before disregarding below-cost sales as outside the ordinary course of trade under Section 1677(15)(A). Nothing in the statute grants Commerce authority to bypass the sales-below-cost test, and the specificity of the sales-below-cost test leaves no ambiguity. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”). The court concludes that Commerce’s exclusion of home market sales due to distortions in the cost of production without conducting the sales-below-cost test to determine whether those sales were in fact outside the ordinary course of trade is contrary to law.

Commerce’s exclusion of below-cost sales is not redeemed by invoking Section 1677(15)(C) with a determination that the distorted cost of production created a particular market situation preventing a proper comparison between reported home market sales prices and export price. Section 504 of the Trade Preferences Extension Act of 2015 (“TPEA”), Pub. L. No. 11427, 129 Stat. 362, added a particular market situation provision to the list of sales and transactions outside the ordinary course of trade. The amended provision provides:

(15) Ordinary course of trade. 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) [19 USCS § 1677b(b)(1)].

...

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

19 U.S.C. § 1677(15). The statute defines “situations” narrowly as “sales and transactions” by directing Commerce to consider “sales and transactions . . . to be outside the ordinary course of trade [including] . . . [s]ituations in which [Commerce] determines that the particular market situation prevents a proper comparison with the export price or constructed export price.” *See id.*

Commerce did not explain how a particular market situation affecting sales and transactions in the home market prevented a proper comparison between reported home market sales prices and export prices. In fact, Commerce conceded in the *Remand Results* that “[it] ha[d] not considered whether a [particular market situation] existed in the home market for the sale of the foreign like product such that home market sales cannot be used as the basis for normal value.” *Remand Results* at 15. No allegation that a particular market situation affecting sales and transactions in the home market and preventing a proper comparison between reported home market sales prices and export prices was submitted.

Commerce determined instead “that the [particular market situation] with respect to the cost of production of circular pipes and tubes prevent[ed] a proper comparison of normal value based on the respondents’ home market sale prices with the respondents’ export prices or constructed export prices.” *Id.* at 8, 19–20; *see also* Def.’s Resp. Comments Remand Redetermination at 12–13, ECF No. 70 (“Def. Resp.”). Commerce did not explain how a particular market situation affecting the cost of production prevented a comparison between the reported home market sales prices and the export prices. Commerce merely repeated its conclusory determination that the particular market situation as to cost of production prevented a proper comparison:

[S]ection [1677](15)(C) of the Act states that Commerce shall consider situations in which we determine that a particular market situation prevents a proper comparison of normal value with the export price or constructed export price, to be outside the ordinary course of trade. On this basis, we find that the existence of the [particular market situation] concerning the cost of production of circular pipes and tubes in Thailand precludes a proper comparison of normal value with U.S. price, pursuant to section [1677](15)(C) of the Act.

*Remand Results* at 19–20.

The statute cannot be read to authorize Commerce to make a particular market situation determination under Section 1677(15)(C) on the basis of distorted cost of production. Congress provided a separate mechanism under Section 1677(15)(A) for Commerce to consider sales and transactions outside the ordinary course of trade when the cost of production of that merchandise is implicated. Because Congress specified in Sections 1677(15)(A) and 1677b(b) the method by which Commerce may disregard below-cost sales, Congress obviated consideration of a particular market situation affect-

ing the cost of production from Section 1677(15)(C). An alternative reading would render impermissibly superfluous Sections 1677(15)(A) and 1677b(b). *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 538 (2015) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (“[T]he Court will avoid a reading which renders some words altogether redundant.”)). The distinction between exclusions of sales as below the cost of production under Section 1677(15)(A) and exclusions of sales due to a particular market situation preventing proper comparison under Section 1677(15)(C) “makes a great deal of sense.” See *Husteel Co. v. United States*, 44 CIT \_\_, \_\_, 426 F. Supp. 3d 1376, 1388 (2020). A particular market situation that affects the cost of production would presumably affect prices for domestic sales and export sales alike and thus would have no preclusive effect on the comparison between the two. See *id.* The court concludes that Commerce’s cost-based particular market situation determination to disregard sales as outside the ordinary course of trade under Section 1677(15)(C) is contrary to law.

In response to Pacific Pipe’s and Saha Thai’s argument that Commerce cannot exclude home market sales based on a cost-based particular market situation determination, Defendant asserts:

Because the term “ordinary course of trade” is contained in 19 U.S.C. § 1677b(e), Commerce acted in accordance with the statute when it “found that a cost-based [particular market situation] existed in Thailand which distorted the acquisition cost of [hot-rolled coil], the primary input used in the production of circular pipes and tubes, [and, as a result] . . . that the respondents’ cost of materials and fabrication or other processing do not accurately reflect the cost of production of circular pipes and tubes in the ordinary course of trade.

Def. Resp. at 9–10 (alterations in original). Defendant also argues that “Commerce’s determination that it could not use the respondent’s [sic] home market sales as the basis for normal value because they are outside of the ordinary course of trade” was lawful. *Id.* at 12. Defendant apparently argues that Commerce can disregard sales as outside the ordinary course of trade due to distortions in the cost of production based on Section 1677b(e)’s reference to the ordinary course of trade.

Commerce cannot invoke Section 1677b(e) as its authority to exclude home market sales and base normal value on constructed value. Section 504 of the TPEA amended the statutory provisions governing constructed value. The amendment provided for Commerce to deter-

mine whether a particular market situation distorted the cost of production when computing constructed value. The amended language provides:

[F]or purposes of paragraph (1) [in reference to calculating constructed value] if 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 [Commerce] may use another calculation methodology under this subtitle or any other calculation methodology.

19 U.S.C. § 1677b(e). Section 1677b(e) only applies if the precondition “for purposes of paragraph (1)” is met. *Id.* Paragraph (1) lists the costs to be added to calculate constructed value. *Id.* § 1677b(e)(1). Commerce must meet the precondition of calculating constructed value before it can rely on Section 1677b(e) to make a cost-based particular market situation determination. Here, Commerce had not met the precondition of calculating constructed value when it made a particular market situation determination based on distorted cost of production. Contrary to Defendant’s assertion, Commerce was not authorized to make a cost-based particular market situation determination under Section 1677b(e), when the precondition of calculating constructed value was not yet satisfied.

Defendant’s argument conflates the language in Section 1677(15) (“the following sales and transactions, among others, to be outside the ordinary course of trade”) with the language in Section 1677b(e) (“the cost of production in the ordinary course of trade”) based on the common phrase “ordinary course of trade.” *See id.* §§ 1677b(e); 1677(15). The statutory framework sets forth a sequence of steps, as explained above, that Commerce must follow in determining anti-dumping duties. Sections 1677b(a)(1)(B)(i) and 1677(15) provide that the home market sales price excludes sales and transactions made outside the ordinary course of trade. *Id.* §§ 1677b(a)(1)(B)(i); 1677(15). If the conditions to base normal value on constructed value are met, Section 1677b(e) provides that Commerce may consider whether the cost of production is reflected accurately in the ordinary course of trade. *Id.* § 1677b(e). The fact that the phrase “ordinary course of trade” is found in Section 1677b(e) does not insert “distorted cost of production” into Section 1677(15)’s list of sales and transactions outside the ordinary course of trade. Defendant’s interpretation is “untenable in light of [the statute] as a whole.” *Dep’t of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 343 (1994) (citing *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by

the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law . . . ”).

Commerce did not follow the statutory framework in this case. Commerce’s determination that the cost of production is not reflected accurately in the ordinary course of trade is not interchangeable with a determination that sales are outside the ordinary course of trade.

The court concludes that Commerce’s exclusion of home market sales is not in accordance with the law because Commerce unlawfully excluded purported below-cost sales without conducting the sales-below-cost test and Commerce unlawfully determined that a particular market situation existed under Section 1677(15)(C) based on distortions to the cost of production. The court concludes that Commerce’s application of an alternative calculation methodology is not in accordance with the law because Commerce was not authorized to conduct a cost-based particular market situation analysis under Section 1677b(e) without a statutory ground for calculating constructed value. The court directs Commerce to remove the particular market situation determinations under Sections 1677(15)(C) and 1677b(e) as to the cost of production on second remand and recalculate the respondents’ weighted-average dumping margins without disregarding home market sales from the calculation of normal value on that basis.

### CONCLUSION

The court concludes that Commerce’s cost-based particular market situation determinations are not in accordance with the law.

Accordingly, it is hereby

**ORDERED** that the *Remand Results* are remanded for Commerce to remove the cost-based particular market situation determinations and recalculate the relevant margins without a particular market situation adjustment; and it is further

**ORDERED** that Commerce shall afford the parties at least twelve (12) business days to comment on the draft second remand results; and it is further

**ORDERED** that this case shall proceed according to the following schedule:

- (1) Commerce shall file the second remand results on or before February 16, 2021;
- (2) Commerce shall file the administrative record on or before March 2, 2021;
- (3) Comments in opposition to the second remand results shall be filed on or before April 2, 2021;

(4) Comments in support of the second remand results shall be filed on or before May 3, 2021; and

(5) The joint appendix shall be filed on or before May 17, 2021.

Dated: December 21, 2020

New York, New York

*/s/ Jennifer Choe-Groves*  
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 20–182

SHANDONG YONGTAI GROUP CO., LTD., Plaintiff, and QINGDAO SENTURY TIRE CO., LTD., SENTURY TIRE USA INC., SENTURY (HONG KONG) TRADING CO., LIMITED, PIRELLI TYRE CO., LTD., PIRELLI TYRE S.P.A., and PIRELLI TYRE LLC, Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge  
Consol. Court No. 18–00077

[Sustaining in part and remanding in part the remand results of the U.S. Department of Commerce in the antidumping duty administrative review of certain passenger vehicle and light truck tires from the People's Republic of China.]

Dated: December 21, 2020

*Jordan C. Kahn* and *Ned H. Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, N.Y. and Washington, D.C., for Plaintiff Shandong Yongtai Group Co., Ltd.

*Ned H. Marshak*, *Dharmendra N. Choudhary*, and *Jordan C. Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, N.Y. and Washington, D.C., for Consolidated Plaintiffs Qingdao Sentury Tire Co., Ltd., Sentury Tire USA Inc., and Sentury (Hong Kong) Trading Co., Limited.

*Daniel L. Porter*, *James P. Durling*, and *Tung A. Nguyen*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for Consolidated Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tyre LLC.

*Ashley Akers*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. 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 *Ayat Mujais*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

**OPINION AND ORDER**

**Choe-Groves, Judge:**

Before the court are the Final Results of Redetermination Pursuant to Remand, ECF Nos. 71, 72 (“*Remand Results*”), which the court ordered in *Shandong Yongtai Group Co. v. United States* (“*Shandong Yongtai*”), 43 CIT \_\_, 415 F. Supp. 3d 1303 (2019).

The court assumes familiarity with the underlying facts and procedural history of this case. *See id.* at \_\_\_, 415 F. Supp. 3d at 1306–17. This action arises from the administrative review by the U.S. Department of Commerce (“Commerce”) of certain passenger vehicle and light truck tires from the People’s Republic of China (“China”). *Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China (“Final Results”)*, 83 Fed. Reg. 11,690 (Dep’t Commerce Mar. 16, 2018) (final results of antidumping duty administrative review and final determination of no shipments; 2015–2016); *see* *Certain Passenger Vehicle and Light Truck Tires from People’s Republic of China: Issues and Decision Mem. Final Results 2015–2016 Antidumping Duty Admin. Review*, PD 502 (Mar. 9, 2018) (“Final IDM”); *see also* *Decision Mem. Prelim. Results Antidumping Duty Admin. Review: Certain Passenger Vehicle and Light Truck Tires from People’s Republic of China*, PD 420 (Aug. 31, 2017) (“Prelim. IDM”).

Commerce filed the *Remand Results* in response to the court’s opinion in *Shandong Yongtai. Remand Results* at 1. Plaintiff Shandong Yongtai Group Co., Ltd. (“Shandong Yongtai” or “Plaintiff”) filed comments in partial support of the *Remand Results*. Shandong Yongtai’s Comments Supp. Remand, ECF No. 82 (“Pl. Cmts.”). Consolidated Plaintiffs Qingdao Sentury Tire Co., Sentury (Hong Kong) Trading Co., and Sentury Tire USA Inc. (collectively, “Sentury”) filed comments in partial opposition to the *Remand Results*. Sentury’s Comments Opp’n Remand, ECF No. 77 (“Sentury Opp’n Cmts.”). Sentury filed additional comments in partial support of the *Remand Results*. Sentury’s Comments Supp. Remand, ECF No. 83 (“Sentury Supp. Cmts.”). Consolidated Plaintiffs Pirelli Tyre Co., Pirelli Tire LLC, and Pirelli Tyre S.p.A. (collectively, “Pirelli”) filed comments in opposition to the *Remand Results*. Comments Consol. Pls. Pirelli Tyre Commerce’s Redetermination Remand, ECF Nos. 78, 79 (“Pirelli’s Comments” or “Pirelli Cmts.”).<sup>1</sup> Defendant United States (“Defendant”) filed a reply to all comments in opposition to the *Remand Results*. Def.’s Resp. Pls.’ Comments Dep’t Commerce’s Remand Results, ECF Nos. 84, 85 (“Def. Resp.”).

For the reasons that follow, the court sustains in part and remands in part the *Remand Results* to Commerce for further consideration.

<sup>1</sup> Pirelli’s Comments identify only two Consolidated Plaintiffs, Pirelli Tyre Co. and Pirelli Tire LLC, but the docket lists a third Consolidated Plaintiff, Pirelli Tyre S.p.A. in all of Pirelli’s filings in this case. *See* Mot. J. on the Agency R., ECF Nos. 22, 23, 24; Reply Br. Consol. Pls. Pirelli Tyre Co., Pirelli Tyre S.p.A., and Pirelli Tire LLC, ECF No. 46; Mot. Oral Arg., ECF No. 51. The docket lists Pirelli S.p.A. in Pirelli’s latest filings (Pirelli Cmts., ECF Nos. 78, 79) and Commerce reviewed Pirelli S.p.A. in its *Remand Results*, so the court lists all three Consolidated Plaintiffs. *See Remand Results* at 2; *see also* Pirelli Cmts.

## ISSUES PRESENTED

This case presents the following issues:

1. Whether Commerce's deduction of a value-added-tax ("VAT") from Sentury's export price is in accordance with the law and supported by substantial evidence;
2. Whether Commerce's assignment of the China-wide entity rate to Pirelli is supported by substantial evidence;
3. Whether Commerce's determination to make an export subsidy adjustment for the Export Buyer's Credit Program ("EBCP") is in accordance with the law; and
4. Whether Commerce's determination that Plaintiff is the successor-in-interest to Shandong Yongtai Chemical Co., Ltd. ("Shandong Yongtai Chemical") is supported by substantial evidence.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). The court will hold unlawful any determination found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

### I. Commerce's Deduction of Irrecoverable VAT

The first issue considered by the court is whether Commerce's calculation of a VAT deduction to Sentury's export price is in accordance with the law and supported by substantial evidence. In the *Final Results*, Commerce determined that Sentury's irrecoverable VAT was an "other charge imposed" by China pursuant to 19 U.S.C. § 1677a(c)(2)(B). *See Shandong Yongtai*, 43 CIT at \_\_, 415 F. Supp. 3d at 1312–13; *see also* Final IDM at 15–16. Commerce reduced Sentury's export price<sup>2</sup> by using a two-step methodology to (1) determine the irrecoverable VAT on subject merchandise, and (2) reduce Sentury's export price by the amount determined in step one. Final IDM at 16. The court remanded to Commerce for further explanation of how

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<sup>2</sup> Commerce calculated Sentury's export price through the average-to-transaction method. Prelim. IDM at 25–26. The average-to-transaction method of comparison directs Commerce to compare the weighted average of "normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise." 19 CFR § 351.414(b)(3); *see also* Prelim. IDM at 22–24. Under this methodology, Commerce determined Sentury's dumping margin by comparing both export price transactions and constructed export price transactions against normal values. *See* Prelim. IDM at 25–26. Commerce determined Sentury's dumping margin by reviewing both Sentury's export prices and constructed export prices. *Id.* Commerce did not alter this methodology in its *Final Results*. *Cf. Final Results*, 83 Fed. Reg. at 11,694.

Sentury's irrecoverable VAT was properly the subject of a downward adjustment to Sentury's export price pursuant to 19 U.S.C. § 1677a(c)(2)(B). *Shandong Yongtai*, 43 CIT at \_\_, 415 F. Supp. 3d at 1313–14.

Commerce used the same methodology on remand and determined that Sentury's irrecoverable VAT was an other charge imposed by China pursuant to 19 U.S.C. § 1677a(c)(2)(B). *Remand Results* at 9–20. Commerce asserted that it was authorized to deduct Sentury's irrecoverable VAT from the export price because Commerce could deduct the amount, if included in the price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States under 19 U.S.C. § 1677a(c)(2)(B). *Id.* at 10–16. Sentury opposed Commerce's methodology as contrary to law by contradicting the plain meaning of the statute and legislative history, and as unsupported by substantial evidence. *Sentury Opp'n Cmts.* at 2–12, 25–29.

When calculating export price or constructed export price of the subject merchandise, Commerce is directed by statute to make certain additions to, and deductions from, the starting prices used for determining the export price or constructed export price of the subject merchandise. 19 U.S.C. § 1677a(c), (d). Some of these adjustments are made to achieve a tax-neutral comparison between the export price or the constructed exported price and normal value. *See* 19 U.S.C. §§ 1677a(c) (adjustments to be made when determining export price and constructed export price); 1677b(a)(6) (adjustments to be made when determining normal value); *see also China Mfrs. All., LLC v. United States*, 43 CIT \_\_, \_\_, 357 F. Supp. 3d 1364, 1370 (2019); *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1580 (Fed. Cir. 1995); *Jiangsu Senmao Bamboo & Wood Indus. Co. v. United States*, 44 CIT \_\_, \_\_, 435 F. Supp. 3d 1278, 1289 (2020).

Upward tax-related adjustments to the export price or the constructed export price are made to reduce a dumping margin and account for any import duties imposed by the country of exportation that have been rebated, or not collected, by reason of the exportation of the subject merchandise to the United States. *See* 19 U.S.C. § 1677a(c)(1)(B). Such duties are added to the export price or the constructed price to allow a tax-neutral comparison with the home market price of the foreign like product. If import duties are irrecoverable, i.e., not rebated or avoided by reason of the exportation, the duties are included presumably in the export price or constructed export price, and no upward or downward adjustment is made because the price comparison is already tax-neutral. The Tariff Act treats domestic VATs of an exporting country similar to its treatment

of import duties imposed by an exporting country: i.e., a dumping margin potentially may be reduced for VATs imposed on a finished good, or the materials used to produce it, if those taxes are refunded or avoided due to the exportation of the good. Under the statute, a domestic VAT, whether or not refunded or avoided by reason of the exportation of the finished good, does not increase a dumping margin.

Downward tax-related adjustments to the export price or the constructed export price are made to increase a dumping margin and to account for an export tax, duty, or other charge imposed on the exportation of the subject merchandise to the United States, if included in the export price or the constructed export price. 19 U.S.C. § 1677a(c)(2)(B). A domestic VAT is presumed to be included in the price of the subject merchandise and also in the price of the foreign like product. Thus, 19 U.S.C. § 1677a(c)(2)(B) does not permit any downward adjustments to the export price or the constructed export price for domestic VAT, as no such adjustment is necessary or appropriate to achieve tax-neutrality.

Commerce stated that the record showed that the total domestic VAT applied to tires during the period of review was 17% and the alleged VAT refund rate was 9%. *Remand Results* at 19. Commerce determined that Sentury's irrecoverable VAT was 8%. *Id.* Commerce calculated Sentury's export price by deducting 8% of Sentury's export sales value, which lowered Sentury's export price and increased Sentury's dumping margin. *Id.* at 20 (“[W]e have continued to use the same methodology for calculating Sentury's irrevocable [sic] VAT as a downward adjustment to [Sentury's export] price under [19 U.S.C. § 1677a(c)(2)(B)].”); *see also* Final IDM at 16. Commerce defined irrecoverable VAT as the amount of “[t]ax which may not be exempted or offset” when calculating the total amount of a VAT refund. *Remand Results* at 15 (citation omitted). Commerce asserted that according to this definition, Sentury's irrecoverable VAT fell within the category of “other charge imposed by the exporting country on the exportation of the subject merchandise to the United States” under 19 U.S.C. § 1677a(c)(2)(B) because it was a cost that arose as a result of export sales. *Id.* at 10–11.

Commerce explained its interpretation by contrasting a typical VAT system with the Chinese VAT system. *Id.* at 11–16. Commerce noted that VAT is an indirect consumption tax that is paid by the buyer at purchase, and then collected by the seller. *Id.* at 11. Commerce added that input VAT is paid upon the “purchases of production inputs and raw materials” as defined by Commerce, and output VAT is collected upon the sale of a completed product. *Id.* Commerce stated that in a typical VAT system, input VAT is the burden of the producer of a good,

while output VAT is the burden of the buyer of a good. *Id.* at 11–12. Commerce explained that an exporter is relieved of any output VAT burden upon exportation of the good (by refund or lack of collection). *Id.* at 12.

Commerce asserted that under Chinese law, producers such as Sentury are not refunded the total paid input VAT upon exportation. *Id.* at 12–14. Commerce explained its view that Chinese law provides for a “VAT refund rate,” which is applied to Chinese producers upon export. *Id.* at 14. Commerce alleged that within the Chinese VAT system, the VAT refund rate functions as the amount an exporter is rebated or refunded for the input VAT paid during production. *Id.* at 14–15. Commerce determined that under Chinese law, the input VAT paid during production and not rebated or refunded on exportation is irrecoverable VAT. *Id.* Commerce made a downward adjustment to Sentury’s export price under section 1677a(c)(2)(B) of the Tariff Act. *Id.* at 20.

The court regards Commerce’s downward adjustment to Sentury’s export price as an improperly deducted irrecoverable VAT from Sentury’s export price. Defendant argues that “[t]he statute does not define ‘export tax, duty, or other charge imposed’ on the exportation of merchandise,” but does not explain how the phrase “by the exporting country on the exportation of the subject merchandise to the United States” does not modify “export tax, duty, or other charge imposed.” Def. Resp. at 16; *Remand Results* at 10.

The relevant provision provides:

(c) Adjustments for export price and constructed export price. The price used to establish export price and constructed export price shall be—

...

(2) reduced by—

...

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 771(6)(C) [19 U.S.C. § 1677(6)(C)].

19 U.S.C. § 1677a(c)(2)(B). The phrase “export tax, duty, or other charge imposed by the exporting country” is modified by the phrase “on the exportation of the subject merchandise to the United States.” *Id.* In combination, the two phrases “export tax, duty, or other charge imposed by the exporting country” and “on the exportation of the

subject merchandise” do not describe VAT or irrecoverable VAT. Irrecoverable or not, VAT is incurred by materials used in the domestic production of a good. See *Qingdao Qihang Tyre Co. v. United States*, 42 CIT \_\_, \_\_, 308 F. Supp. 3d 1329, 1339 (2018). Even if VAT is entirely unrefunded upon the exportation of a good, VAT is not “imposed” on exportation. See *id.* (“[A]lthough the term ‘tax, duty, or other charge’ is broader than the word ‘tax,’ the provision requires that any such ‘charge’ be imposed . . . on the exportation’ of the good . . . . A previously-incurred tax on materials used in domestic production would not seem to satisfy this requirement.”).

It is clear to the court that the statutory language of “the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States” does not cover the type of internal domestic tax demonstrated in this case. See 19 U.S.C. § 1677a(c)(2)(B). In order to achieve the result that Commerce seeks, a legislative amendment would be required, such as eliminating the current statutory requirement of “imposed by the exporting country on the exportation.”

Commerce noted certain prior decisions of this Court that allowed downward adjustments of export price or constructed export price for irrecoverable VAT as a reasonable interpretation of 19 U.S.C. § 1677a(c)(2)(B). *Remand Results* at 17. Commerce cited *Jacobi Carbons AB v. United States* (“*Jacobi I*”), 41 CIT at \_\_, \_\_, 222 F. Supp. 3d 1159, 1186–87 (2017), and proffered that the phrase “other charge imposed” is a catchall phrase that includes irrecoverable VAT. *Id.* The court in *Jacobi I* analyzed 19 U.S.C. § 1677a(c)(2)(B) and found that the phrase “of any export tax, duty, or other charge imposed by the exporting country” was ambiguous. *Jacobi I*, 41 CIT at \_\_, 222 F. Supp. 3d at 1186. The court in *Jacobi I* interpreted 19 U.S.C. § 1677a(c)(2)(B) as: “(1) ‘the amount, if included in such price,’ (2) ‘of any export tax, duty, or other charge imposed by the exporting country’ (3) ‘on the exportation of the subject merchandise to the United States.’” *Id.* The *Jacobi I* court explained that the phrase “‘other charge’ capture[d] any financial obligation” provided that such charge was “‘imposed by the exporting country on the exportation of the subject merchandise.’” *Id.* at \_\_, 222 F. Supp. 3d at 1186–87. Thus, *Jacobi I* held that irrecoverable VAT was permissibly construed as an “other charge” under 19 U.S.C. § 1677a(c)(2)(B) regardless of whether China explicitly labelled irrecoverable VAT as pertaining to exports or not. *Id.* at \_\_, 222 F. Supp. 3d at 1187; see also *Aristocraft of Am., LLC v. United States*, 41 CIT \_\_, \_\_, 269 F. Supp. 3d 1316, 1324–25 (2017)

(citation omitted) (“It is reasonable to describe an input VAT not fully recouped on export sales as a cost imposed on the exportation of the subject merchandise.”).

The court is unable to agree that Commerce’s interpretation of the export VAT provision, as ruled upon in *Jacobi I*, is permissible. The court agrees with the reasoning by the court in *Jiangsu Senmao Bamboo & Wood Indus. Co. v. United States*, 44 CIT \_\_, \_\_, 435 F. Supp. 3d 1278, 1298 (2020), that the premise that the statute is ambiguous as to whether the statute applies to assessments imposed solely upon export sales or assessments imposed upon sales at the time of export, “addresses only the language of the export tax provision without considering the other tax-related provisions in the Tariff Act that lend the export tax provision meaning and context.” *Id.*

Even if the court were to agree that the export tax provision is ambiguous as described in *Jacobi I*, this court does not read the phrase “of any export tax, duty, or other charge imposed by the exporting country” in isolation. *See Duncan v. Walker*, 533 U.S. 167, 174 (citation omitted) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’”). The meaning of “other charge” is not so ambiguous as to change the meaning of “on the exportation of the subject merchandise to the United States” in 19 U.S.C. § 1677a(c)(2)(B). 19 U.S.C. § 1677a(c)(2)(B); *see also Guizhou Tyre Co. v. United States*, 44 CIT \_\_, \_\_, 389 F. Supp. 3d 1350, 1366–70 (2019) (“[W]hether or not recovered by reason of exportation, the [VAT] imposed by [China], as Commerce itself describes it, cannot lawfully be deemed a tax ‘on the exportation of the subject merchandise’ . . .”).

This court does not agree with the interpretation that the “other charge imposed by the exporting country” language provides sufficient leeway to avoid the plain meaning of the whole statute. *See* 19 U.S.C. § 1677a(c)(2)(B). A previously-incurred tax that is charged on materials used in domestic production, such as VAT, does not satisfy the requirement of the phrase “on the exportation of subject merchandise” because the internal domestic tax is not imposed by China on the exportation of subject merchandise. *See id.* A partial refund of 9% from Sentury’s sales price out of 17% of Sentury’s total input VAT is not equivalent to a charge of 8% on Sentury’s sales price imposed on the exportation of Sentury’s subject merchandise. Therefore, the court concludes that Commerce’s interpretation of irrecoverable VAT as an “other charge imposed . . . on the exportation of [] subject merchandise” is unreasonable and contrary to the plain meaning of the statute. *See id.*

There is no record evidence in this case demonstrating that China imposed an export tax or any similar tax on the subject merchandise upon exportation. The record shows that Chinese VAT was incurred by a tire producer in China by the inclusion of this tax in the prices of materials used in domestic production, regardless of whether the finished tire was sold for domestic consumption or export. *Remand Results* at 19. The record establishes that at least some of that tax was rebated, refunded, or avoided if the tire was sold for export. *Id.* The fact that a domestic VAT incurred on materials used in producing tires in China might not be fully refunded by reason of exportation of the finished tire did not convert any unrefunded portion of such a tax from a domestic VAT into an export tax.

The court concludes that Commerce's deduction of irrecoverable VAT from Sentury's export price is contrary to the plain meaning of the statute and conflicts with the purpose of tax-neutrality in the Tariff Act. The court holds that Commerce's downward adjustment to Sentury's export price pursuant to 19 U.S.C. § 1677a(c)(2)(B) is not in accordance with the law. The court concludes also that Commerce's irrecoverable VAT calculation is not supported by substantial evidence. The court remands for Commerce to eliminate the adjustments made for Sentury's irrecoverable VAT in accordance with this opinion and to recalculate Sentury's export price.

## **II. Commerce's Assignment of the China-Wide Entity Rate to Pirelli**

The second issue considered by the court is whether Commerce's assignment of the China-wide entity rate to Pirelli is supported by substantial evidence. Commerce denied separate rate status to Pirelli in the *Final Results*, asserting that Pirelli failed to rebut the presumption of de facto or de jure Chinese government control of its operations. *See Shandong Yongtai*, 43 CIT at \_\_, 415 F. Supp. 3d at 1317; *see also* Final IDM at 27–28. The court remanded for Commerce to address in more detail the criteria for de jure and de facto governmental control of Pirelli. *Shandong Yongtai*, 43 CIT at \_\_, 415 F. Supp. 3d at 1317.

On remand, Commerce continued to deny separate rate status to Pirelli due to Commerce's determination of de facto governmental control. *Remand Results* at 29. Commerce examined evidence on the record pertaining to Pirelli's ownership and organization, noting that Chinese government-owned entities had majority ownership of Pirelli. *Id.* at 40. Commerce determined that Pirelli failed to rebut the presumption of government control. *Id.* at 29; 40–41. Pirelli filed comments in opposition. Pirelli Cmts.

Commerce has statutory authority to determine if a country is a non-market economy pursuant to 19 U.S.C. § 1677(18). 19 U.S.C. § 1677(18); *see also Sigma Corp. v. United States*, 117 F.3d 1401, 1404–06 (Fed. Cir. 1997). In proceedings involving a non-market economy, such as China, a rebuttable presumption exists that all companies within the country are subject to government control and should be assigned a single, country-wide antidumping duty rate. *See Sigma Corp.*, 117 F.3d at 1405. An exporter will receive the country-wide rate by default, unless it demonstrates affirmatively that the exporter maintains both de jure and de facto independence from the government and deserves to receive separate rate status. *See id.* The burden of rebutting the presumption of government control rests with the exporter. *See id.* at 1405–06.

The de jure criteria are: (1) an absence of restrictive stipulations associated with an individual exporter’s business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT 1085, 1090 n.21 (2013) (citation omitted).

The de facto criteria are: (1) whether the export prices are set by or are subject to the approval of a government authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See id.*

The U.S. Court of Appeals for the Federal Circuit has sustained Commerce’s application of the rebuttable presumption of government control for non-market economies. *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1311 (Fed. Cir. 2017); *see also Changzhou Haud Flooring Co. v. United States*, 848 F.3d 1006, 1009 (Fed. Cir. 2017). All four factors of the de facto test must be satisfied to rebut the presumption of government control. *See Yantai CMC Bearing Co. v. United States*, 41 CIT \_\_, \_\_, 203 F. Supp. 3d 1317, 1326 (2017); *see also Advanced Tech. & Materials Co. v. United States*, 37 CIT 1487, 1493–94 (2013), *aff’d*, 581 F. App’x 900 (Fed. Cir. 2014) (per curiam) (“[E]ach of the de facto prongs must be satisfied for a company to get a separate rate.”). The de facto test is therefore conjunctive, and an exporter must satisfy all four factors to rebut the presumption of government control. *See Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 42 CIT \_\_, \_\_, 350 F. Supp. 3d 1308, 1321 (2018).

Commerce determined that Pirelli failed to satisfy the third criterion of the de facto test, whether the respondent has autonomy from the government in making decisions regarding the selection of management, because evidence on the record regarding Pirelli's organization and ownership structure indicated that a majority of Pirelli's owners were Chinese government entities who had control over Pirelli's selection of management. *Remand Results* at 25–29, 40–41. Commerce examined documents on the record, including Pirelli's articles of association, purchase agreements, board of directors meeting minutes, resolutions, and company financial statements, to determine what role Chinese-owned government entities had in Pirelli's operations and selection of management. *Id.* at 28. Commerce determined, based on its review of the record, that Chinese government-owned entities owned a majority of Pirelli and had control of its management through Pirelli's board, intermediary and interconnected layers of ownership and interests, and high concentrations of Chinese government ownership within Pirelli's organizational structure. *Id.* at 28, 40–41.

Commerce determined that documents placed on the record by Pirelli showed that Chinese government-owned entities exercised control throughout the Pirelli companies' ownership structure and management. *Id.* at 25–26, 40–41. These documents showed, for example, that: the Pirelli companies shared common board membership and management; all of the various Pirelli companies were intertwined with controlling interests in each other; Pirelli China was controlled and majority owned by Chinese government-owned entities; the acquisition of Pirelli's companies in Italy by China National Chemical Corporation ("Chem China") gave rise to the presumption of government control of Pirelli China; and Chinese government-owned entities

retain actual or potential control and influence throughout the Pirelli companies' ownership structure and management, including Pirelli [Tyre Co.]'s board, which in turn selects Pirelli [Tyre Co.]'s management. Notwithstanding the layers of intermediate ownership, by having decision making power and influence over the choice of Pirelli [Tyre Co.]'s management, [the Chinese government-owned entities] also have control over the day-to-day operations of the company since it is management's job to oversee the daily functions of Pirelli [Tyre Co.]

*Id.* at 25–28, 39–41.

Pirelli argues that Commerce failed to apply the de facto test properly and that the agency's determination was not supported by the record. Pirelli Cmts. at 3, 7–12. To the contrary, the court notes

that Commerce does not need to analyze all four factors of the de facto criteria, because the failure to meet any one of the factors based on substantial evidence can determine dispositively that an entity is under de facto government control. See *Yantai CMC Bearing Co.*, 42 CIT at \_\_, 203 F. Supp. 3d at 1325–26 (“Yantai CMC failed to meet the third factor of the test. Given that all four factors must be satisfied, Commerce had no further obligation to continue with the analysis.”).

The court concludes that substantial evidence supports Commerce’s determination that Pirelli lacked autonomy and that the Chinese government had decision-making control regarding the selection of Pirelli’s management. Because Pirelli failed to rebut the presumption of government control, the court sustains Commerce’s assignment of the China-wide entity rate to Pirelli.

### III. Commerce’s Adjustment for the Export Buyer’s Credit Program

The third issue considered by the court is whether Commerce’s determination to make an export subsidy adjustment for the EBCP is in accordance with the law. In the *Final Results*, Commerce declined to adjust Sentury’s export price upward according to 19 U.S.C. § 1677a(c)(1)(C). See *Shandong Yongtai*, 43 CIT at \_\_, 415 F. Supp. 3d at 1314. Commerce determined that because the counterpart countervailing duty investigation only determined the EBCP to be countervailable based on adverse facts available (“AFA”), the credit that Sentury received through the EBCP was not an export subsidy within the meaning of 19 U.S.C. § 1677a(c)(1)(C). *Id.* The court found that Commerce’s determination to decline an adjustment for the EBCP was not supported by substantial evidence. *Id.* at \_\_, 415 F. Supp. 3d at 1315. The court remanded for Commerce to reconsider Sentury’s export price adjustments. *Id.*

On remand, Commerce increased Sentury’s export price by the amount of the countervailable duty Sentury received due to the EBCP. *Remand Results* at 20–23. Sentury filed comments in support of Commerce’s determination. Sentury Supp. Cmts.

A subsidy is countervailable when an authority provides a financial contribution to a person, a benefit is conferred, and the subsidy is specific, as described in 19 U.S.C. § 1677(5). 19 U.S.C. § 1677(5)(A)–(D). A subsidy is specific if it is an export subsidy, an import substitution subsidy, or a domestic subsidy under 19 U.S.C. § 1677(5A)(A)–(D). Under 19 U.S.C. § 1677(5A)(B), an export subsidy is a subsidy that is, in law or in fact, contingent upon export performance, alone or as one of two or more conditions. *Id.* § 1677(5A)(B). Commerce is required to increase the price used to establish export

price or constructed export price by “the amount of any countervailing duty imposed on the subject merchandise . . . to offset an export subsidy.” *Id.* § 1677a(c)(1)(C).

In the counterpart countervailing duty investigation for certain passenger vehicle and light truck tires, Commerce determined the EBCP to be a countervailing duty based on AFA. *See* Decision Mem. Certain Passenger Vehicle and Light Truck Tires at 22–24, C-570–017 (Aug. 31, 2017), *available at* <https://enforcement.trade.gov/frn/summary/prc/2017–18997–1.pdf> (last visited December 21, 2020). After the court’s remand, Commerce reconsidered its approach to Sentury’s antidumping duty margin calculation, and pursuant to 19 U.S.C. § 1677a(c)(1)(C), adjusted Sentury’s export price upward by the amount of the countervailing duty rate applied to the EBCP in the companion countervailing duty passenger tire cases. *Remand Results* at 21–23; *see also* 19 U.S.C. § 1677a(c)(1)(C).

Commerce cited the countervailable duty imposed because of the EBCP in the counterpart countervailing duty investigation and other investigations before this Court to explain its reconsideration of the upward adjustment for the EBCP. *Remand Results* at 21–22. The court concludes that Commerce’s determination that the EBCP was a countervailable duty and adjustment of Sentury’s export price upward pursuant to 19 U.S.C. § 1677a(c)(1)(C) is reasonable and supported by the counterpart countervailing duty investigation, based on Commerce’s previous determination of specificity in the counterpart CVD administrative review that necessarily included an export subsidy determination. The court sustains Commerce’s upward EBCP adjustment to Sentury’s export price pursuant to 19 U.S.C. § 1677a(c)(1)(C) as in accordance with the law.

#### **IV. Commerce’s Successor-in-Interest Determination**

The fourth issue before the court is whether Commerce’s determination that Plaintiff is the successor-in-interest to Shandong Yongtai Chemical is supported by substantial evidence. Commerce denied separate rate status to Plaintiff’s former entity, Shandong Yongtai Chemical. *See Shandong Yongtai*, 43 CIT at \_\_, 415 F. Supp. 3d at 1310–11; *see also* Final IDM at 25. The court remanded for Commerce to reconsider Shandong Yongtai Chemical’s separate rate status. *Shandong Yongtai*, 43 CIT at \_\_, 415 F. Supp. 3d at 1311.

On remand, Commerce solicited more information from Plaintiff to determine whether it was the successor-in-interest to Shandong Yongtai Chemical. *Remand Results* at 7. After considering the submitted supplemental information, Commerce noted that Plaintiff had

previously identified itself as Shandong Yongtai Chemical and that the two companies shared the same business registration number, address, legal representation, business scope, and management. *Id.* at 7–9. Commerce determined that Plaintiff “met the criteria to be considered the successor-in-interest to [Shandong] Yongtai Chemical.” *Id.* at 8. Plaintiff filed comments in support of Commerce’s determination but noted its concern about a potential ministerial error in the *Remand Results*. Pl. Cmts. at 2–3.

The court issued a letter to the parties concerning this issue. *See* Nov. 13, 2020 Letter, ECF No. 90. The court asked the parties to address the ministerial error and to clarify whether Plaintiff should be identified as “Shandong Yongtai Group Co., Ltd. formerly known as Shandong Yongtai Chemical Co., Ltd.” in the liquidation instructions to be issued to U.S. Customs and Border Protection. *Id.*

The parties filed a joint response on November 18, 2020. *See* Joint Resp. Court’s Nov. 13, 2020 Letter, ECF No. 91. Plaintiff and the Government confirmed the ministerial error in the *Remand Results* concerning Plaintiff’s designation. *Id.* The parties clarified that the correct designation is “Shandong Yongtai Group Co., Ltd. formerly known as Shandong Yongtai Chemical Co., Ltd.,” and that Plaintiff will be identified correctly in the liquidation instructions issued to U.S. Customs and Border Protection. *Id.*

Based on Commerce’s review of supplemental evidence on the record and the clarification of the ministerial error provided by the parties, the court sustains Commerce’s determination regarding Plaintiff as the successor-in-interest to Shandong Yongtai Chemical in the *Remand Results*.

## CONCLUSION

The court remands Commerce’s calculation of Sentury’s export price based on a VAT deduction and instructs Commerce to eliminate the adjustments made for Sentury’s irrecoverable VAT in accordance with this opinion and to recalculate Sentury’s export price.

The court sustains Commerce’s assignment of the China-wide entity rate to Pirelli, Commerce’s upward adjustment of Sentury’s export price, and Commerce’s successor-in-interest determination.

Accordingly, it is hereby

**ORDERED** that the *Remand Results* are remanded to Commerce for further proceedings consistent with this opinion; and it is further

**ORDERED** that Commerce shall afford the parties at least twelve (12) business days to comment on the draft second remand results; and it is further

**ORDERED** that this action shall proceed according to the following schedule:

1. Commerce shall file the second remand results on or before February 19, 2021;
2. Commerce shall file the administrative record on or before March 5, 2021;
3. Comments in opposition to the second remand results shall be filed on or before April 9, 2021;
4. Comments in support of the second remand results shall be filed on or before May 7, 2021; and
5. The joint appendix shall be filed on or before May 21, 2021.

Dated: December 21, 2020  
New York, New York

*/s/ Jennifer Choe-Groves*  
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 20–183

LINYI CHENGEN IMPORT and EXPORT Co., LTD., Plaintiff, and CELTIC Co., LTD., et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR FAIR TRADE OF HARDWOOD PLYWOOD, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge  
Consol. Court No. 18–00002

[Sustaining in part and remanding in part the second remand results of the U.S. Department of Commerce, following the final determination in the antidumping duty investigation of certain hardwood plywood products from the People's Republic of China.]

Dated: December 21, 2020

*Gregory S. Menegaz, J. Kevin Horgan, and Alexandra H. Salzman, deKieffer & Horgan, PLLC, of Washington, D.C., for Plaintiff Linyi Chengen Import and Export Co., Ltd., Consolidated Plaintiffs Far East American, Inc. and Shandong Dongfang Bayley Wood Co., Ltd., and Consolidated Plaintiffs and Plaintiff-Intervenors Celtic Co., Ltd., Jiaxing Gsun Import & Export Co., Ltd., Anhui Hoda Wood Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Linyi Evergreen Wood Co., Ltd., Linyi Glary Plywood Co., Ltd., Linyi Hengsheng Wood Industry Co., Ltd., Linyi Huasheng Yongbin Wood Co., Ltd., Linyi Jiahe Wood Industry Co., Ltd., Linyi Linhai Wood Co., Ltd., Linyi Mingzhu Wood Co., Ltd., Linyi Sanfortune Wood Co., Ltd., Qingdao Good Faith Import and Export Co., Ltd., Shandong Qishan International Trading Co., Ltd., Shanghai Futuwood Trading Co., Ltd., Suining Pengxiang Wood Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., Xuzhou Andefu Wood Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Xuzhou Pinlin International Trade Co., Ltd., Xuzhou Shengping Import and Export Co., Ltd., and Xuzhou Timber International Trade Co., Ltd.*

*Jeffrey S. Neeley and Stephen W. Brophy, Husch Blackwell LLP, of Washington, D.C., for Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co., Ltd., Highland Industries Inc., Jiashan Dalin Wood Industry Co., Ltd., Happy Wood Industrial Group Co., Ltd., Jiangsu High Hope Arser Co., Ltd., Suqian Yaorun Trade Co., Ltd.,*

Yangzhou Hanov International Co., Ltd., G.D. Enterprise Limited, Deqing China-Africa Foreign Trade Port Co., Ltd., Pizhou Jin Sheng Yuan International Trade Co., Ltd., Xuzhou Shuiwangxing Trading Co., Ltd., Cosco Star International Co., Ltd., Linyi City Dongfang Jinxin Economic & Trade Co., Ltd., Linyi City Shenrui International Trade Co., Ltd., Jiangsu Qianjiuren International Trading Co., Ltd., and Qingdao Top P&Q International Corp.

*Jeffrey S. Grimson and Jill A. Cramer*, Mowry & Grimson, PLLC, of Washington, D.C., for Consolidated Plaintiffs Taraca Pacific, Inc., Canusa Wood Products, Ltd., Concannon Corporation d/b/a Concannon Lumber Company, Fabuwood Cabinetry Corporation, Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, and US-PLY, LLC.

*Sonia M. Orfield*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Savannah Rose Maxwell*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

*Timothy C. Brightbill, Jeffrey O. Frank, Stephanie M. Bell, and Elizabeth S. Lee*, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor Coalition for Fair Trade of Hardwood Plywood.

## **OPINION AND ORDER**

### **Choe-Groves, Judge:**

This action concerns the import of hardwood and decorative plywood and certain veneered panels into the United States from the People's Republic of China ("China"), subject to the final affirmative determination in an antidumping duty investigation by the U.S. Department of Commerce ("Commerce"). *See Certain Hardwood Plywood Products from the People's Republic of China*, 82 Fed. Reg. 53,460 (Dep't Commerce Nov. 16, 2017) (final determination of sales at less than fair value), PR 882, *as amended*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (amended final determination of sales at less than fair value), PR 894 (collectively, "*Final Determination*"); *see also* Issues and Decision Mem. for the Final Determination of the Anti-dumping Duty Investigation of Certain Hardwood Plywood Products from People's Republic of China, ECF No. 25–7, PR 871 (Nov. 6, 2017) ("*Final IDM*").

Before the court are the Final Results of Redetermination Pursuant to Court Remand, ECF Nos. 113–1, 114–1 ("*Second Remand Results*"), which the court ordered in *Linyi Chengen Import & Export Co. v. United States*, 44 CIT \_\_, 433 F. Supp. 3d 1278 (2020) ("*Linyi Chengen II*"). Plaintiff Linyi Chengen Import & Export Co. ("Linyi Chengen" or "Plaintiff") filed comments in support of the *Second Remand Results*. Pl.'s Resp. Comments in Supp. Second Remand Redetermination, ECF No. 125 ("Pl. Cmts."). Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co. ("Dehua TB"), Celtic Co. ("Celtic"), and Taraca Pacific, Inc. ("Taraca") each filed comments in opposition to

the *Second Remand Results*. Shandong Dongfang Bayley Wood Co. (“Bayley”), a Consolidated Plaintiff and mandatory respondent, did not file comments in response to the *Second Remand Results*. See Final IDM at 2.

Dehua TB filed comments collectively on behalf of itself and Highland Industries, Inc., Jiashan Dalin Wood Industry Co., Happy Wood Industrial Group Co., Jiangsu High Hope Arser Co., Suqian Yaorun Trade Co., Yangzhou Hanov International Co., G.D. Enterprise, Ltd., Deqing China-Africa Foreign Trade Port Co., Pizhou Jin Sheng Yuan International Trade Co., Xuzhou Shuiwangxing Trading Co., Cosco Star International Co., Linyi City Dongfang Jinxin Economic & Trade Co., Linyi City Shenrui International Trade Co., Jiangsu Qianjiuren International Trading Co., and Qingdao Top P&Q International Corp. Comments in Opp’n to Remand Redetermination on Behalf of Consolidated Pls. Zhejiang Dehua TB Import & Export Co., ECF Nos. 116, 117 (“Dehua TB Cmts.”).

Celtic filed comments collectively on behalf of itself and Anhui Hoda Wood Co., Far East American, Inc., Jiaxing Gsun Import & Export Co., Jiaxing Hengtong Wood Co., Linyi Evergreen Wood Co., Linyi Glary Plywood Co., Linyi Jiahe Wood Industry Co., Linyi Linhai Wood Co., Linyi Hengsheng Wood Industry Co., Linyi Huasheng Yongbin Wood Co., Linyi Mingzhu Wood Co., Linyi Sanfortune Wood Co., Qingdao Good Faith Import & Export Co., Shanghai Futuwood Trading Co., Shandong Qishan International Trading Co., Suining Pengxiang Wood Co., Suqian Hopeway International Trade Co., Suzhou Oriental Dragon Import & Export Co., Xuzhou Andefu Wood Co., Xuzhou Jiangyang Wood Industries Co., Xuzhou Longyuan Wood Industry Co., Xuzhou Pinlin International Trade Co., Xuzhou Shengping Import & Export Co., and Xuzhou Timber International Trade Co. Consolidated Separate Rate Pls.’ Comments in Opp’n to Second Remand Redetermination, ECF No. 118 (“Celtic Cmts.”).

Taraca filed comments collectively on behalf of itself and Canusa Wood Products, Ltd., Concannon Corp. d/b/a Concannon Lumber Co., Fabuwood Cabinetry Corp., Holland Southwest International, Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, and USPLY, LLC. Consolidated Pls. Taraca Pacific, Inc., Canusa Wood Products, Ltd., Concannon Corp. d/b/a Concannon Lumber Co., Fabuwood Cabinetry Corp., Holland Southwest International, Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, and USPLY, LLC Comments on Final Remand Redetermination, ECF No. 119 (“Taraca Cmts.”).

The court refers collectively to the non-examined parties that filed Dehua TB Cmts., Celtic Cmts., and Taraca Cmts. as “Separate Rate Plaintiffs.” The court also refers collectively to the non-examined parties that filed separate rate applications in the preliminary proceedings and were assigned the all-others separate rate as “separate rate respondents.” See Final IDM at 2–3; *Second Remand Results* at 3, 49.

Defendant-Intervenor Coalition for Fair Trade of Hardwood Plywood (“Defendant-Intervenor”) filed comments and reply comments in opposition to the *Second Remand Results*. Def.-Interv. Coal. Fair Trade Hardwood Plywood’s Comments in Opp’n to Remand Redetermination, ECF Nos. 121, 122, 123 (“Def.-Interv. Cmts.”); Def.-Interv. Coal. Fair Trade Hardwood Plywood’s Resp. to Comments in Opp’n to Remand Redetermination, ECF No. 127 (“Def.-Interv. Reply Cmts.”). Defendant United States (“Defendant”) filed a reply to all comments in opposition to the *Second Remand Results*. Def.’s Resp. to Comments on Remand Redetermination, ECF Nos. 128, 129 (“Def. Resp.”).

For the reasons discussed below, the court sustains in part and remands in part Commerce’s *Second Remand Results*.

### ISSUES PRESENTED

The court reviews the following issues:

1. Whether Commerce’s revised dumping margin for Linyi Chengen is supported by substantial evidence; and
2. Whether Commerce’s revised dumping margin for the Separate Rate Plaintiffs is supported by substantial evidence.

### BACKGROUND

The court assumes familiarity with the underlying facts and procedural history of this case as set forth in *Linyi Chengen Import & Export Co. v. United States*, 43 CIT \_\_, \_\_, 391 F. Supp. 3d 1283, 1287–92 (2019) (“*Linyi Chengen I*”) and *Linyi Chengen II*, 433 F. Supp. 3d at 1280–84.

In the *Final Determination*, Commerce applied its intermediate input methodology to value Linyi Chengen’s log inputs after determining that Linyi Chengen’s log volume reporting methods were inherently imprecise. 82 Fed. Reg. at 53,461; Final IDM at 23, 25 (valuing veneers, instead of logs, as the input used to produce hardwood plywood). Commerce stated that it was unable to verify Linyi Chengen’s reported log consumption against any third-party sources, such as supplier invoices. Final IDM at 25. Based on Commerce’s application of the intermediate input methodology, Linyi Chengen’s margin calculation changed from 0% to a final dumping margin cal-

calculation of 183.36%. *Final Determination*, 82 Fed. Reg. at 53,462. Commerce applied Linyi Chengen's rate to the Separate Rate Plaintiffs. *Id.*; Final IDM at 48. The court remanded the *Final Determination* for Commerce to reconsider the accuracy of Linyi Chengen's log consumption calculations. *Linyi Chengen I*, 391 F. Supp. 3d at 1294. Because Commerce applied Linyi Chengen's 183.36% dumping margin to the Separate Rate Plaintiffs, the court also directed Commerce to reconsider the rates applied to the Separate Rate Plaintiffs if Commerce changed Linyi Chengen's margin on remand. *Id.* at 1297.

Commerce continued to determine on remand that Linyi Chengen's log volumes were unreliable because the record failed to show that the conversion table and formula used by Linyi Chengen reflected the Chinese National Standard and failed to demonstrate accurate log volumes. Final Results of Redetermination Pursuant to Court Remand at 24, ECF Nos. 88–1, 891 (“*Remand Results*”). Commerce disregarded Linyi Chengen's log consumption data based on Linyi Chengen's purported failure to provide third-party documentation supporting its reported log volumes, even though Commerce rejected the documents offered by Linyi Chengen at verification. *Id.* at 24–32, 60. Commerce determined that it could not verify the accuracy of Linyi Chengen's reported log volumes because the value-added tax invoices and warehouse-in tickets provided by Linyi Chengen could not be confirmed by third-party documentation. *Id.* at 25–26, 49–54. The court again remanded for Commerce to reconsider its application of the intermediate input methodology and to accept the log volume conversion documents presented by Linyi Chengen at verification. *Linyi Chengen II*, 433 F. Supp. 3d at 1286. The court directed Commerce to make appropriate adjustments to the rate applied to the Separate Rate Plaintiffs if Commerce changed Linyi Chengen's margins. *Id.*

Commerce accepted Linyi Chengen's verification documents on second remand and determined that Linyi Chengen's reported log volumes were accurate. *Second Remand Results* at 10. Commerce refrained from applying the intermediate input methodology to calculate Linyi Chengen's dumping margins and instead applied its normal methodology to value all factors of production used in each stage of production. *Id.* at 26. Because Commerce determined that Linyi Chengen's reported log volumes were accurate, Commerce did not apply adverse facts available (“AFA”) to Linyi Chengen. *Id.* at 40. Commerce revised Linyi Chengen's dumping margin from 183.36% to 0%. *Id.* at 8. Commerce determined that the other mandatory respondent, Bayley, was a China-wide entity and imposed a revised rate of

114.72%. *Id.* at 15. Commerce recalculated the Separate Rate Plaintiffs' dumping margin by averaging Linyi Chengen's 0% rate and Bayley's 114.72% rate. *Id.* at 16. The Separate Rate Plaintiffs were assigned a revised dumping margin rate of 57.36%. *Id.*

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c). The court will uphold Commerce's antidumping determinations unless they are unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The court also reviews determinations made on remand for compliance with the court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT \_\_, \_\_, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

## DISCUSSION

### A. Commerce's Revised Dumping Margin for Linyi Chengen

The first issue considered by the court is whether Commerce's revised dumping margin for Linyi Chengen is supported by substantial evidence. Defendant-Intervenor contends that Commerce's determination of Linyi Chengen's revised dumping margin is not supported by substantial evidence because Linyi Chengen's reported log volumes are inaccurate and Commerce should have used the intermediate input methodology. Def.-Interv. Cmts. at 2–24. Defendant-Intervenor argues that Commerce should have applied AFA to Linyi Chengen. *Id.* at 25–27. Defendant defends Commerce's revision of Linyi Chengen's dumping margin by citing the accuracy of Linyi Chengen's reported log volumes and Commerce's determination that the facts do not merit the use of the intermediate input methodology. Def. Resp. at 9–10; *see also Second Remand Results* at 26.

In antidumping proceedings involving non-market economy countries, Commerce calculates normal value based on the factors of production used to produce the subject merchandise and other costs and expenses. 19 U.S.C. § 1677b(c)(1). Commerce examines the quantities of raw materials employed by a company in its review of factors of production to calculate normal value. *See id.* § 1677b(c)(3)(B). Under certain circumstances, Commerce will modify its standard factors of production methodology and may choose to apply a surrogate value to an intermediate input instead of the individual factors of production used to produce that intermediate input. *See Final IDM* at 23. Commerce rarely applies this intermediate input methodology unless there are questions about the accuracy and validity of reported

factors of production. *See id.* at 23–24. Commerce has used the intermediate input methodology: (1) when a “respondent may report factors used to produce an intermediate input that accounts for an insignificant share of the total output,” (2) when the burden associated with calculating each factor outweighs the potential increase of calculation accuracy, or (3) when valuing the factors of production associated with producing the intermediate input would result in inaccurate calculations because Commerce is unable to value a significant cost in the overall factors buildup. Final IDM at 23; *see, e.g., Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 4986–93 (Dep’t Commerce Jan. 31, 2003) (applying the intermediate input methodology due to problems with upstream data from respondents, such as misreported or unreported factors of production); *Honey from the People’s Republic of China*, 71 Fed. Reg. 34,893 (Dep’t Commerce June 16, 2006) (valuing the raw honey consumed as opposed to the factors of production used to produce the raw honey because of respondent’s inability to accurately record and substantiate the complete costs associated with production); *Fresh Garlic from the People’s Republic of China*, 71 Fed. Reg. 26,329 (Dep’t Commerce May 4, 2006) (resorting to the intermediate input methodology because respondents were unable to record accurately and substantiate the costs of growing garlic).

On second remand, Commerce verified the reliability of Linyi Chengen’s conversion table and the accuracy of Linyi Chengen’s reported factors of production and financial statements based on a review of the record. *Second Remand Results* at 27–29. Commerce rejected purported discrepancies raised by Defendant-Intervenor and verified the overall accuracy of Linyi Chengen’s reported log volumes, including Linyi Chengen’s log-to-veneer conversion and reported grade of veneers. *Id.* at 29–36. Commerce determined that minor typographical errors in Linyi Chengen’s conversion table did not impact the reliability of the table overall. *Id.* at 21. After Commerce replaced the obvious typographical errors in the conversion table with the expected sequence, Commerce verified that the formula produced correct results. *Id.* Commerce determined that the conversion table reflected a correct application of the Chinese National Standard formula to Linyi Chengen’s reported log volumes and factors of production. *Id.*

Commerce verified Linyi Chengen’s reported factors of production by reviewing numerous business documents placed on the record by Linyi Chengen. *Id.* at 27–28. Commerce also verified Linyi Chengen’s cost of goods sold by confirming consistent audited financial state-

ments and log value accounting. *Id.* at 28–29. Commerce determined based on its review of the record that Linyi Chengen’s log-to-veneer volume conversion was accurate because it reflected Linyi Chengen’s core veneer production, which allowed for cracks, holes, stains, and knots, and yielded more veneer per log. *Id.* at 27–30. Commerce determined that even though Linyi Chengen did not record its grade of veneers consumed, the practice did not give Linyi Chengen any productive benefit because the surrogate value used did not account for grades of veneers. *Id.* at 32–35. After reviewing Linyi Chengen’s factors of production and confirming their accuracy, Commerce determined that Linyi Chengen’s reported log volumes represented the accurate volume of logs purchased and consumed by Linyi Chengen. *Id.* at 10. Commerce determined that the facts did not merit a departure from Commerce’s normal methodology. *Id.* at 38. Commerce revised Linyi Chengen’s dumping margin to 0% after using the normal methodology in lieu of the intermediate input methodology. *Id.* at 16.

The court observes that Commerce supported its determination and application of the chosen methodology by verifying the accuracy of Linyi Chengen’s conversion table, reported factors of production with related financial statements, reported log volumes, and relevant log-to-veneer volume conversion, and by addressing minor discrepancies raised by Defendant-Intervenor. Because Commerce had no questions about the accuracy or validity of Linyi Chengen’s factors of production, it was reasonable for Commerce to apply its normal methodology to calculate Linyi Chengen’s normal value instead of the intermediate input methodology. *See* 19 U.S.C. § 1677b(c)(3)(B). The court sustains Commerce’s revised dumping margin for Linyi Chengen as reasonable and supported by substantial evidence.

## **B. Commerce’s Revised Dumping Margin for the Separate Rate Plaintiffs**

The second issue considered by the court is whether Commerce’s revised dumping margin for the Separate Rate Plaintiffs is supported by substantial evidence. The Separate Rate Plaintiffs argue that Commerce erred by averaging Linyi Chengen’s *de minimis* dumping margin and Bayley’s China-wide entity dumping margin. *Dehua TB Cmts.* at 3–11; *Celtic Cmts.* at 2–5; *Taraca Cmts.* at 2–11. Defendant maintains that Commerce applied an average of Linyi Chengen’s and Bayley’s rates properly because the exception in 19 U.S.C. § 1673d(c)(5)(B) allows Commerce to use “any reasonable method” to calculate the all-others separate rate. *Def. Resp.* at 17; *see also Second Remand Results* at 14–15, 43.

Commerce is authorized by statute to calculate and impose a dumping margin on imported subject merchandise after determining it is sold in the United States at less than fair value. 19 U.S.C. § 1673. Under § 1673d(c)(5)(A), Commerce determines an all-others rate assigned to non-examined companies by calculating the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely on the basis of facts available, including adverse facts available. *Id.* § 1673d(c)(5)(A); see *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1351 (Fed. Cir. 2016). If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis, or are determined entirely under 19 U.S.C. § 1677e, Commerce may invoke an exception to establish a separate rate for exporters and producers not individually investigated. 19 U.S.C. § 1673d(c)(5)(B). The Statement of Administrative Action provides guidance that when the dumping margins for all individually examined respondents are determined entirely on the basis of the facts available or are zero or de minimis, the “expected method” of determining the all-others rate is to weight-average the zero and de minimis margins and margins determined pursuant to the facts available, provided that volume data is available. Uruguay Round Agreements Act, Statement of Administrative Action (“SAA”), H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201. Commerce may depart from the “expected method” and use “any reasonable method,” but only if Commerce reasonably concludes that the expected method is not feasible or results in an average that would not be reasonably reflective of potential dumping margins. See 19 U.S.C. § 1673d(c)(5)(B); *Navneet Publ’ns (India) Ltd. v. United States*, 38 CIT \_\_, \_\_, 999 F. Supp. 2d 1354, 1358 (2014) (“[T]he following hierarchy [is applied] when calculating all-others rates—(1) the ‘[g]eneral rule’ set forth in § 1673d(c)(5)(A), (2) the alternative ‘expected method’ under § 1673d(c)(5)(B), and (3) any other reasonable method when the ‘expected method’ is not feasible or does not reasonably reflect potential dumping margins.”); see also SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201; *Albemarle Corp.*, 821 F.3d at 1351–52 (quoting SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201). Commerce must determine that the expected method is not feasible or would not be reasonably reflective of the potential dumping margins for non-investigated exporters or producers based on substantial evidence. *Albemarle Corp.*, 821 F.3d at 1352–53; see also *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1012 (Fed. Cir. 2017).

The exception in 19 U.S.C. § 1673d(c)(5)(B) applies expressly to market economy proceedings but has been extended to non-market economy proceedings as well. *Albemarle Corp.*, 821 F.3d at 1352 n.6; *see also Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1374 (Fed. Cir. 2013) (“*Bestpak*”).

On second remand, Commerce noted that “because there are no calculated rates for individually-investigated respondents other than zero or rates based on total AFA, we have applied the simple average of the revised AFA rate of 114.72[%] and the [0%] rate calculated for [Linyi] Chengen as a reasonable method to determine the rate assigned to the producer/exporter combinations that are party to this litigation and that have been found to be eligible for a separate rate.” *Second Remand Results* at 44. To justify its departure from the expected method, Commerce stated that the expected method of weight-averaging the zero and de minimis margins and margins determined pursuant to the facts available (i.e., using the 0% rate assigned to Linyi Chengen) would not be reasonably reflective of the potential dumping margins for the Separate Rate Plaintiffs. *Id.*

Commerce attempted to identify several facts supporting its methodology of departing from the expected method. First, Commerce explained that the mandatory respondents in this investigation, Linyi Chengen and Bayley, were not representative of the Separate Rate Plaintiffs because Bayley was ultimately determined to be a China-wide entity due to Bayley’s failure to provide essential information regarding Bayley’s ownership and management during the investigation. *See id.* at 48–49. After noting Bayley’s designation as a China-wide entity, Commerce stated that, “[b]ased on that conclusion, we cannot presume that [Linyi] Chengen’s rate, who is only one of two mandatory respondents in this investigation, is reasonably reflective of the potential dumping margins for the non-investigated companies.” *Id.* at 49.

Second, Commerce asserted that “additional record evidence indicates that affirmative dumping potentially existed during the [period of investigation], such that the 0% rate calculated for [Linyi] Chengen would not be representative of the estimated dumping margins for the non-investigated companies.” *Id.* Commerce cited evidence of actual price quotes for subject merchandise exported from China to United States customers during the period of investigation by an exporter other than Linyi Chengen, which was alleged in the Petition. *Id.* Commerce determined that based on the margins of 114.72% and 104.06% contained in the Petition, “record evidence demonstrates that potential dumping by the separate rate companies existed during the [period of investigation] far in excess of the 0% rate calculated

for [Linyi] Chengen.” *Id.* Commerce determined that Linyi Chengen’s 0% dumping margin would not reflect the potential dumping margins of the Separate Rate Plaintiffs because the record did not support a de minimis rate for Bayley and a “cursory analysis indicate[d] that Bayley’s reported data [were] widely divergent from [Linyi] Chengen’s data.” *Id.* at 50.

Commerce is required to support its departure from the expected method by demonstrating that Linyi Chengen’s 0% dumping margin rate would not be reasonably reflective of the Separate Rate Plaintiffs’ potential dumping margins based on substantial evidence. *Albemarle Corp.*, 821 F.3d at 1352–53; *see also Changzhou Hawd*, 848 F.3d at 1012.

With respect to the first purported fact asserted by Commerce, that Bayley’s designation as a China-wide entity supports the conclusion that Linyi Chengen’s 0% rate is not reasonably reflective of the potential dumping margins for the non-investigated companies, the court notes that Commerce’s assertion is merely that, a bald assertion without any citations to evidence on the record. Commerce merely concluded, without any evidentiary support, that Bayley’s lack of cooperation and designation as a China-wide entity led to the logical conclusion that the Separate Rate Plaintiffs’ potential dumping margin rate was different than Linyi Chengen’s dumping rate of 0%. Commerce failed to provide any evidence showing how the Separate Rate Plaintiffs’ potential dumping margin was different than Linyi Chengen’s dumping margin. Commerce also failed to provide any evidence showing what the Separate Rate Plaintiffs’ potential dumping margin might be. As noted in *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370 (Fed. Cir. 2013), Commerce creates its own problems when it selects only two mandatory respondents and has minimal information on the record to support its assertions regarding the potential dumping margins of separate rate respondents. *Bestpak*, 716 F.3d at 1376–79 (citing *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 35 CIT 948, 955 n.4 (2011) (“Commerce put itself in a precarious situation when it selected only two mandatory respondents.”)).

With respect to the second purported fact asserted by Commerce, that the margins of 114.72% and 104.06% contained in the Petition were record evidence demonstrating that potential dumping by the separate rate companies existed during the period of investigation far in excess of the 0% rate calculated for Linyi Chengen, this is the only evidentiary assertion in the *Second Remand Results*. Plaintiffs argue that Bayley’s AFA rate of 114.72% was not based on economic reality or the company’s actual sales or factors of production and is “simply

an estimated rate from the petition that is totally unconnected to Bayley's actual antidumping margin." Dehua TB Cmts. at 8. In addition, Plaintiffs assert that Commerce's "reasoning has nothing to do with the record facts concerning the separate rate companies themselves." Celtic Cmts. at 5. The court finds that the margins of 114.72% and 104.06% contained in the Petition do not provide support for the assertion that the Separate Rate Plaintiffs' dumping margins are different than Linyi Chengen's 0% rate because the margins in the Petition are "untethered" to the actual dumping margins of the Separate Rate Plaintiffs. *See Bestpak*, 716 F.3d at 1379. Commerce cited no credible economic evidence on the record showing that the Separate Rate Plaintiffs' dumping margins are different than Linyi Chengen's 0% rate or connecting the Separate Rate Plaintiffs' dumping margins with the rate of 57.36% that was derived from the average of Linyi Chengen's 0% rate and Bayley's AFA rate of 114.72%.

The court concludes that Commerce's explanations, without citations to any credible record documents, do not rise to the level of substantial evidence required to support Commerce's departure from the expected method and apply the "any reasonable method" exception in 19 U.S.C. § 1673d(c)(5)(B). Commerce's mere assertions without substantial evidence do not serve the purpose of calculating dumping margins as accurately as possible. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). The court remands the *Second Remand Results* for Commerce to provide more evidence, or otherwise change its determination in accordance with this opinion.

## CONCLUSION

For the reasons set forth above, the court sustains Commerce's *Second Remand Results* with respect to Commerce's revised dumping margin for Linyi Chengen, and remands Commerce's determination of the dumping margin for the Separate Rate Plaintiffs.

Accordingly, it is hereby

**ORDERED** that the *Second Remand Results* are remanded to Commerce to provide more evidence, or otherwise change its determination regarding the dumping margin for the Separate Rate Plaintiffs; and it is further

**ORDERED** that Commerce shall afford the parties at least twelve (12) business days to comment on the draft third remand results; and it is further

**ORDERED** that this case shall proceed according to the following schedule:

- (1) Commerce shall file the third remand results on or before February 5, 2021;

- (2) Commerce shall file the administrative record on or before February 19, 2021;
- (3) Comments in opposition to the third remand results shall be filed on or before March 19, 2021;
- (4) Comments in support of the third remand results shall be filed on or before April 16, 2021; and
- (5) The joint appendix shall be filed on or before April 30, 2021.

Dated: December 21, 2020  
New York, New York

*/s/ Jennifer Choe-Groves*  
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 20–184

ADEE HONEY FARMS, et al., Plaintiffs, v. UNITED STATES, et al.,  
Defendants.

Before: Timothy C. Stanceu, Chief Judge  
Consol. Court No. 16–00127

[Granting in part and denying in part plaintiffs’ motion to strike the administrative record by ordering defendants to supplement that record with materials relevant to a decision reached upon the 2001 promulgation of an agency regulation]

Dated: December 21, 2020

*Cameron R. Argetsinger, Paul C. Rosenthal, Michael J. Coursey, John M. Herrmann II, and Jennifer E. McCadney, Kelley Drye & Warren LLP, of Washington, D.C., for all plaintiffs except Monterey Mushrooms, Inc.*

*Louis S. Mastriani, Adduci, Mastriani & Schaumberg, LLP, of Washington, D.C., for plaintiffs in consolidated case 16–00131, A&S Crawfish v. United States.*

*Justin R. Miller, Attorney-in-Charge, International Trade Field Office, and Beverly A. Farrell, Trial Attorney, of New York, NY, for defendants. With them on the brief were Jeffrey Bossert Clark, Acting Assistant Attorney General, and Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, of Washington, D.C., U.S. Department of Justice.*

## OPINION AND ORDER

### Stanceu, Chief Judge:

Plaintiffs, who qualified as “affected domestic producers” under the Controlled Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c (“CDSOA”), contested a decision of U.S. Customs and Border Protection (“Customs” or “CBP”) not to include “delinquency” interest, i.e., post-liquidation interest paid on antidumping and countervailing duties according to 19 U.S.C. § 1505(b), in the distributions that plaintiffs received from Customs under the CDSOA. A prior

Opinion and Order of this Court, *Adee Honey Farms v. United States*, 44 CIT , 450 F. Supp. 3d 1365 (2020) (“*Adee Honey I*”), dismissed the majority of plaintiffs’ claims as untimely, allowing to proceed only the claims pertaining to CDSOA distributions that occurred within the two-year statute of limitations period. Following the issuance of *Adee Honey I*, defendants submitted as the administrative record pursuant to USCIT Rule 73.3 certain information from CDP’s revenue department pertaining to those distributions for which this Court held plaintiffs to have made timely claims.

Plaintiffs move to strike the administrative record filed by defendants and also move for leave to file a reply to defendants’ opposition to their motion. For the reasons discussed below, the court declines to order the striking of the administrative record as previously filed but orders defendants to supplement that record. The court grants plaintiffs’ motion to file a reply.

## I. BACKGROUND

Background is set forth in *Adee Honey I*, with which the court presumes familiarity. *Adee Honey I*, 450 F. Supp. 3d at 1367–70. Plaintiffs moved to strike the administrative record on September 15, 2020, filing a revised motion the next day. Mot. to Strike the Admin. R. (Sept. 16, 2020), ECF Nos. 94, 95 (“Motion to Strike” or “Pls.’ Mot.”). Defendants opposed the motion on October 16, 2020. Defs.’ Resp. to Pls.’ Mot to Strike the Admin. R. and Mot. for a Stay of Proceedings (Oct. 16, 2020), ECF No. 99 (“Defs.’ Resp.”). Plaintiffs then moved for leave to file a reply in support of their Motion to Strike. Mot. for Leave to File Reply in Supp. of Pls.’ Mot. to Strike the Admin. R. (Oct. 21, 2020), ECF No. 100. On November 12, 2020, defendants opposed the granting of leave to reply. Defs.’ Resp. in Opp’n To Pls.’ Mot. for Leave to File a Reply in Supp. of their Mot. to Strike the Admin. R. (Nov. 12, 2020), ECF No. 101 (“Defs.’ Resp. to Mot. for Leave”).

## II. DISCUSSION

### A. The Contents of a Complete Administrative Record

This cause of action arose under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* In cases arising under the APA, the court is to review an “agency action” on the basis of “the whole record or those parts of it cited by a party.” *Id.* § 706. As a general matter, the record is to consist of “(A) a copy of the contested determination and the findings or report upon which such determination was based; (B) a copy of any reported hearings or conferences conducted by the

agency; and (C) any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action." 28 U.S.C. § 2635(d)(1); *see also* USCIT R. 73.3(a).

In the specific instance in which a party contests a rule or regulation that an agency promulgated according to notice-and-comment rulemaking, the record consists of the information the agency considered at the time the contested decision was made. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (ordering the District Court to consider "the full administrative record that was before the Secretary at the time he made his decision"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). In this litigation, the contested rule (the "Final Rule") was published in 2001. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (Dept. Treas. Customs Serv. Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–64, 178 (2002)) ("Final Rule"). In the Final Rule, Customs made a final determination to exclude delinquency interest from CDSOA distributions. *See Adeo Honey I*, 450 F. Supp. 3d at 1369.

As with agency action in general, a presumption of regularity applies to the compilation of the administrative record as filed and certified by the government. *See, e.g., Deukmejian v. Nuclear Regul. Comm'n*, 751 F.2d 1287, 1325 (D.C. Cir. 1987) ("Were courts cavalierly to supplement the record ..... [t]he accepted deference of court to agency would be turned on its head") *vacated in part and rehearing en banc granted on other grounds, San Luis Obispo Mothers for Peace v. NRC*, 760 F.2d 1320 (D.C. Cir. 1985). The Court of Appeals for the Federal Circuit has counseled that "supplementation of the record should be limited to cases in which the omission of extra-record evidence precludes effective judicial review." *Agusta Westland N. Am., Inc. v. United States*, 880 F.3d 1326, 1331 (Fed. Cir. 2018).

Here, plaintiffs object that the current record is inadequate in three ways: first, that it does not contain the documents before Customs when Customs made the decision in 2001 to promulgate the Final Rule; second, that it is improperly certified, as the certification is by an officer of a division of Customs other than the Office of Regulations and Rulings, which promulgated the Final Rule; and, third, that it contains documents that post-date the promulgation of the Final Rule and, therefore, could not constitute the record of what the agency considered when making the 2001 promulgation decision. Pls.' Mot. 4–5. The court considers these objections to be variations of a single argument, which is that the administrative record must be that record, and only that record, which pertains to the decision by Customs to promulgate the Final Rule.

## **B. The Holdings of *Adee Honey I***

Plaintiffs claim in this litigation that CBP's refusal to distribute delinquency interest was unlawful as contrary to the CDSOA. Defendants, in moving to dismiss, argued that all of plaintiffs' claims were untimely under the two-year statute of limitations because the agency decision not to distribute delinquency interest was made in 2001 and plaintiffs did not assert any claims until 2016. Rejecting this argument, *Adee Honey I* held, first, that the agency's decision not to pay delinquency interest, as made upon the promulgation of the Final Rule, is the decision being contested in this litigation and, second, that plaintiffs may raise a substantive challenge to the Final Rule whenever they receive a CDSOA distribution, although the scope of relief is limited to those CDSOA distributions made within two years of the commencement of the action. *See* 450 F.Supp.3d at 1376–78 (plaintiffs may raise a substantive challenge to a regulation each time it is applied to them and each CDSOA distribution constitutes a separate application of the regulation contested in this litigation).

Contrary to defendants' position in opposing plaintiffs' Motion to Strike, *Adee Honey I* did not limit the issue to be litigated to whether the regulations were properly applied to those distributions within the two-year limitations period. *Contra* Defs.' Resp. 3 (“[T]he application of the regulation to the distributions is the only determination available for plaintiffs to challenge.”). *Adee Honey I* held, rather, that plaintiffs may challenge the substance of the Final Rule as not in accordance with law but also that any potential remedy is limited to the CDSOA distributions that occurred within the limitations period.

## **C. The Need for a Complete Administrative Record**

The record as currently filed consists of documentation relating to those CDSOA distributions made to plaintiffs within the limitations period. To answer the question of the legality of CBP's decision not to distribute delinquency interest, the court must review “the full administrative record” that was before the agency at the time of the decision. *Overton Park*, 401 U.S. at 420. Here, the full record that was before Customs when the regulatory decision on delinquency interest was made is not now before the court.

Defendants argue that the proposed rule, public comments, and the Final Rule, which already are included in the administrative record, are the only documents that “could possibly be relevant.” Defs.' Resp. 6. It is true that the principal issue before the court is one of statutory interpretation, i.e., whether the CDSOA requires Customs to include delinquency interest in CDSOA distributions. But this issue is part of

the larger inquiry as to whether the decision made in the Final Rule to exclude delinquency interest was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

Contrary to defendants’ assertion that no additional documents could be relevant to the court’s inquiry, plaintiffs’ motion papers indicate that Customs could possess records potentially relevant to the court’s inquiry of whether the regulation is lawful. Plaintiffs attached to their Motion to Strike a 2016 letter from then-Commissioner Kerlikowske to Senator Charles Grassley, Pls.’ Mot. Ex. 2, which, while addressing CBP’s interpretation of Section 605 of the Trade Facilitation and Trade Enforcement Act of 2015, also indicates that Customs possessed documents relevant to congressional intent that could constitute legislative history of the CDSOA. In the letter, Commissioner Kerlikowske refers to technological “gaps” preventing the automated distribution by Customs of delinquency interest. *Id.* at 2. Referring to CBP’s “internal analysis,” the letter asserts that “Congress seems to have been aware of these gaps in technological capabilities when the CDSOA was enacted.” *Id.* Customs must now supplement the record before the court with all documents and information relevant to the agency’s decision to exclude delinquency interest from CDSOA distributions, a decision later embodied in the Final Rule.

Plaintiffs request that the currently filed record be struck, not that it be supplemented. The current record before the court, while not pertaining to the initial agency decision to exclude delinquency interest, may yet be relevant to issues in this litigation, should plaintiffs ultimately prevail and the court is to order specific monetary relief. The court sees no prejudice to any party arising from the presence of these documents on the record. For these reasons, the court is ordering defendants to supplement the record but will not order the striking of the material already submitted.

#### **D. Plaintiffs’ Motion to File a Reply**

Defendants oppose, on various grounds, plaintiffs’ motion to file a reply. Defs.’ Resp. to Mot. for Leave. The court notes that in their response to plaintiffs’ motion, defendants incorrectly assert that “the decision-making in drafting and announcing 19 C.F.R. § 159.64 and, specifically, section 159.64(e) [provisions in the Final Rule], cannot be the ‘contested decision’ because plaintiffs are time-barred from challenging it.” *Id.* at 5 (quoting *Adee Honey I*, 450 F. Supp. 3d at 1375 (“Plaintiffs have no valid claims other than those relating to application of the regulation to their individual distributions.”)). Defendants

misstate the holding of *Adee Honey I*. Plaintiffs are not time-barred from challenging the substance of CBP's regulation. The sentence they quote from this Court's opinion and order in *Adee Honey I* related to the application of the statute of limitations (specifically, to the time at which the claims accrued), not to the substantive decision that may be challenged in this litigation. Defendants disregard that later in the opinion and order is the statement that "these plaintiffs may challenge *the substance of CBP's regulations* as applied to them with each CDSOA distribution they received within two years prior to the commencement of their respective actions on July 15, 2016." *Adee* 450 F. Supp. 3d at 1377 (emphasis added). The misstatement in defendants' response, with which plaintiffs rightfully take issue in their proposed reply brief, is reason enough for the court, in its discretion, to allow the reply brief to be filed.

### III. CONCLUSION AND ORDER

For the reasons discussed above, the court grants in part and denies in part plaintiffs' motion to strike the administrative record. Deferring to the agency's decision upon a presumption of regularity and a conclusion that the previously-filed documents potentially may be relevant to a remedy, the court declines to strike those documents but orders defendants to supplement that record with all materials and information relevant to the decision by Customs, later embodied in the Final Rule, not to distribute delinquency interest. The court also grants plaintiffs' motion for leave to file a reply. Therefore, upon all review of all the papers herein, and upon due deliberation, it is hereby

**ORDERED** that plaintiffs' Motion to Strike (September 16, 2020), ECF No. 95, be, and hereby is, granted in part and denied in part; it is further

**ORDERED** that defendants, within sixty (60) days of the date of this Opinion and Order, shall supplement the administrative record with the materials relevant to the decision by Customs, later effectuated in the Final Rule, not to distribute delinquency interest; it is further

**ORDERED** that plaintiffs' Motion for Leave to File Reply (October 21, 2020), ECF No. 100, be, and hereby is, granted, and plaintiffs' proposed Reply in Support of Plaintiffs' Motion to Strike the Administrative Record is deemed filed; it is further

**ORDERED** that due dates for the filing of further briefing in this litigation are stayed pending the filing of the supplement to the administrative record; and it is further

**ORDERED** that the parties shall consult and, within fifteen (15) days of the filing of the supplement to the administrative record, submit a joint proposal for the schedule that will govern the remainder of this litigation.

Dated: December 21, 2020  
New York, New York

/s/ *Timothy C. Stanceu*

TIMOTHY C. STANCEU  
CHIEF JUDGE

Slip Op. 20–185

AMERICAN DREW, et al., Plaintiffs, v. UNITED STATES, et al., Defendants.

Before: Timothy C. Stanceu, Chief Judge  
Court No. 17–00086

[Granting plaintiffs’ motion to correct, supplement and/or strike the administrative record by ordering defendants to supplement that record with materials relevant to a decision reached upon the 2001 promulgation of an agency regulation]

Dated: December 21, 2020

*J. Michael Taylor, Jeffrey M. Telep, and Neal J. Reynolds*, King & Spalding LLP, of Washington, D.C., for plaintiffs.

*Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, and *Beverly A. Farrell*, Trial Attorney, of New York, NY, for defendants. With them on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, of Washington, D.C., U.S. Department of Justice.

## OPINION AND ORDER

### Stanceu, Chief Judge:

Plaintiffs, who qualified as “affected domestic producers” under the Controlled Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c (“CDSOA”), contested a decision of U.S. Customs and Border Protection (“Customs” or “CBP”) not to include “delinquency” interest, i.e., post-liquidation interest paid on antidumping and countervailing duties according to 19 U.S.C. § 1505(b), in the distributions that plaintiffs received from Customs under the CDSOA. A prior Opinion and Order of this Court, *American Drew v. United States*, 44 CIT, 450 F. Supp. 3d 1378 (2020) (“*American Drew I*”), dismissed the majority of plaintiffs’ claims as untimely, allowing to proceed only the claims pertaining to CDSOA distributions that occurred within the two-year statute of limitations period. Following the issuance of *American Drew I*, defendants submitted as the administrative record pursuant to USCIT Rule 73.3 certain information from CDP’s revenue department pertaining to those distributions for which this Court held plaintiffs to have made timely claims.

Plaintiffs move to correct, supplement and/or strike the administrative record filed by defendants. For the reasons discussed below, the court declines to order the striking of the administrative record as previously filed but orders defendants to supplement that record.

## I. BACKGROUND

Background is set forth in *American Drew I*, with which the court presumes familiarity. *American Drew I*, 450 F. Supp. 3d at 1380–82. Plaintiffs filed their motion to “correct, supplement, and/or strike” the administrative record, and to stay briefing, on September 22, 2020. Mot. to Correct, Suppl., and/or Strike the Admin. R. and Mot. to Stay Briefing (Sept. 22, 2020), ECF No. 67 (“Motion to Correct” or “Pls.’ Mot.”). Defendants opposed the motion on October 16, 2020. Defs.’ Resp. to Pls.’ Mot to Correct, Suppl., and/or Strike the Admin. R. and Mot. to Stay Briefing (Oct. 16, 2020), ECF No. 70 (“Defs.’ Resp.”).

## II. DISCUSSION

### A. The Contents of a Complete Administrative Record

This cause of action arose under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* In cases arising under the APA, the court is to review an “agency action” on the basis of “the whole record or those parts of it cited by a party.” *Id.* § 706. As a general matter, the record is to consist of “(A) a copy of the contested determination and the findings or report upon which such determination was based; (B) a copy of any reported hearings or conferences conducted by the agency; and (C) any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency’s action.” 28 U.S.C. § 2635(d)(1); *see also* USCIT R. 73.3(a).

In the specific instance in which a party contests a rule or regulation that an agency promulgated according to notice-and-comment rulemaking, the record consists of the information the agency considered at the time the contested decision was made. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (ordering the District Court to consider “the full administrative record that was before the Secretary at the time he made his decision”), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). In this litigation, the contested rule (the “Final Rule”) was published in 2001. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (Dept. Treas. Customs Serv. Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–64, 178 (2002)) (“Final Rule”). In the Final Rule, Customs made a final determination to exclude delinquency interest from CDSOA distributions. *See American Drew I*, 450 F. Supp. 3d at 1382.

As with agency action in general, a presumption of regularity applies to the compilation of the administrative record as filed and certified by the government. *See, e.g., Deukmejian v. Nuclear Regul. Comm'n*, 751 F.2d 1287, 1325 (D.C. Cir. 1987) (“Were courts cavalierly to supplement the record . . . [t]he accepted deference of court to agency would be turned on its head”), *vacated in part and rehearing en banc granted on other grounds, San Luis Obispo Mothers for Peace v. NRC*, 760 F.2d 1320 (D.C. Cir. 1985). The Court of Appeals for the Federal Circuit has counseled that “supplementation of the record should be limited to cases in which the omission of extra-record evidence precludes effective judicial review.” *Agusta Westland N. Am., Inc. v. United States*, 880 F.3d 1326, 1331 (Fed. Cir. 2018).

Here, plaintiffs object that the current record is inadequate in three ways: first, that it does not contain the documents before Customs when Customs made the decision in 2001 to promulgate the Final Rule; second, that it is improperly certified, as the certification is by an officer of a division of Customs other than the Office of Regulations and Rulings, which promulgated the Final Rule; and, third, that it does not contain correspondence between Senators Charles Grassley and John Thune and Customs Commissioner Kerlikowske regarding the failure to distribute delinquency interest. Pls.’ Mot. 2–3. The court considers the first two objections to be variations of the same argument, which is that the administrative record must be that record, and only that record, which pertains to the decision by Customs to promulgate the Final Rule. Regarding the third objection, the record is required to include, as a general matter, “any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency’s action.” 28 U.S.C. § 2635(d)(1)(C); USCIT R. 73.3(a). Additionally, the court is mindful that it is the agency’s responsibility to compile and certify the complete record in the first instance. *See Fl. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“[A]gencies typically compile records in the course of informal agency action.”). The court considers it premature to order the inclusion or exclusion of any specific document at this stage of the litigation (but also notes that the correspondence in question already is before the court).

## **B. The Holdings of *American Drew I***

Plaintiffs claim in this litigation that CBP’s refusal to distribute delinquency interest was unlawful as contrary to the CDSOA. Defendants, in moving to dismiss, argued that all of plaintiffs’ claims were untimely under the two-year statute of limitations because the

agency decision not to distribute delinquency interest was made in 2001 and plaintiffs did not assert any claims until 2016. Rejecting this argument, *American Drew I* held, first, that the agency's decision not to pay delinquency interest, as made upon the promulgation of the Final Rule, is the decision being contested in this litigation and, second, that plaintiffs may raise a substantive challenge to the Final Rule whenever they receive a CDSOA distribution, although the scope of relief is limited to those CDSOA distributions made within two years of the commencement of the action. *See* 450 F.Supp.3d at 1388–90 (plaintiffs may raise a substantive challenge to a regulation each time it is applied to them and each CDSOA distribution constitutes a separate application of the regulation contested in this litigation).

Contrary to defendants' position in opposing plaintiffs' Motion to Correct, *American Drew I* did not limit the issue to be litigated to whether the regulations were properly applied to those distributions within the two-year limitations period. *Contra* Defs.' Resp. 3 (“[T]he application of the regulation to the distributions is the only determination available for plaintiffs to challenge.”). *American Drew I* held, rather, that plaintiffs may challenge the substance of the Final Rule as not in accordance with law but also that any potential remedy is limited to the CDSOA distributions that occurred within the limitations period.

### **C. The Need for a Complete Administrative Record**

The record as currently filed consists of documentation relating to those CDSOA distributions made to plaintiffs within the limitations period. To answer the question of the legality of CBP's decision not to distribute delinquency interest, the court must review “the full administrative record” that was before the agency at the time of the decision. *Overton Park*, 401 U.S. at 420. Here, the full record that was before Customs when the regulatory decision on delinquency interest was made is not now before the court.

Defendants argue that the proposed rule, public comments, and the Final Rule, which already are included in the administrative record, are the only documents that “could possibly be relevant.” Defs.' Resp. 6. It is true that the principal issue before the court is one of statutory interpretation, i.e., whether the CDSOA requires Customs to include delinquency interest in CDSOA distributions. But this issue is part of the larger inquiry as to whether the decision made in the Final Rule to exclude delinquency interest was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

Contrary to defendants' assertion that no additional documents could be relevant to the court's inquiry, plaintiffs' motion papers indicate that Customs could possess records potentially relevant to the court's inquiry of whether the regulation is lawful. Plaintiffs attached to their Motion to Correct a 2016 letter from then-Commissioner Kerlikowske to Senator Charles Grassley, Pls.' Mot. Ex. 2, which, while addressing CBP's interpretation of Section 605 of the Trade Facilitation and Trade Enforcement Act of 2015, also indicates that Customs possessed documents relevant to congressional intent that could constitute legislative history of the CDSOA. In the letter, Commissioner Kerlikowske refers to technological "gaps" preventing the automated distribution by Customs of delinquency interest. *Id.* at 2. Referring to CBP's "internal analysis," the letter asserts that "Congress seems to have been aware of these gaps in technological capabilities when the CDSOA was enacted." *Id.* Customs must now supplement the record before the court with all documents and information relevant to the agency's decision to exclude delinquency interest from CDSOA distributions, a decision later embodied in the Final Rule. Regarding the 2016 letter itself, it is for Customs in the first instance to determine if it is part of that record.

Plaintiffs request that the currently filed record be either corrected, supplemented, or struck. The current record before the court, while not pertaining to the initial agency decision to exclude delinquency interest, may yet be relevant to issues in this litigation, should plaintiffs ultimately prevail and the court is to order specific monetary relief. The court sees no prejudice to any party arising from the presence of these documents on the record. For these reasons, the court is ordering defendants to supplement the record but will not order the striking of the material already submitted.

### III. CONCLUSION AND ORDER

For the reasons discussed above, the court grants plaintiffs' motion to correct, supplement and/or strike the administrative record. Deferring to the agency's decision upon a presumption of regularity and a conclusion that the previously-filed documents potentially may be relevant to a remedy, the court declines to strike those documents but orders defendants to supplement that record with all materials and information relevant to the decision by Customs, later embodied in the Final Rule, not to distribute delinquency interest. Therefore, upon all review of all the papers herein, and upon due deliberation, it is hereby

**ORDERED** that plaintiffs' Motion to Correct, Supplement and/or Strike the Administrative Record (September 22, 2020), ECF No. 67, be, and hereby is, granted; it is further

**ORDERED** that defendants, within sixty (60) days of the date of this Opinion and Order, shall supplement the administrative record with the materials relevant to the decision by Customs, later effectuated in the Final Rule, not to distribute delinquency interest; it is further

**ORDERED** that due dates for the filing of further briefing in this litigation are stayed pending the filing of the supplement to the administrative record; and it is further

**ORDERED** that the parties shall consult and, within fifteen (15) days of the filing of the supplement to the administrative record, submit a joint proposal for the schedule that will govern the remainder of this litigation.

Dated: December 21, 2020  
New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU  
CHIEF JUDGE

Slip Op. 20–186

HILEX POLY Co., LLC, et al., Plaintiffs, v. UNITED STATES, et al.,  
Defendants.

Before: Timothy C. Stanceu, Chief Judge  
Court No. 17–00090

[Granting plaintiffs' motion to correct, supplement and/or strike the administrative record by ordering defendants to supplement that record with materials relevant to a decision reached upon the 2001 promulgation of an agency regulation]

Dated: December 21, 2020

*J. Michael Taylor, Jeffrey M. Telep, and Neal J. Reynolds*, King & Spalding LLP, of Washington, D.C., for plaintiffs.

*Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, and *Beverly A. Farrell*, Trial Attorney, of New York, NY, for defendants. With them on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, of Washington, D.C., U.S. Department of Justice.

## OPINION AND ORDER

### Stanceu, Chief Judge:

Plaintiffs, who qualified as “affected domestic producers” under the Controlled Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c (“CDSOA”), contested a decision of U.S. Customs and Border Protection (“Customs” or “CBP”) not to include “delinquency” interest, i.e., post-liquidation interest paid on antidumping and counter-

vailing duties according to 19 U.S.C. § 1505(b), in the distributions that plaintiffs received from Customs under the CDSOA. A prior Opinion and Order of this Court, *Hilex Poly Co. v. United States*, 44 CIT , 450 F. Supp. 3d 1390 (2020) (“*Hilex Poly I*”), dismissed the majority of plaintiffs’ claims as untimely, allowing to proceed only the claims pertaining to CDSOA distributions that occurred within the two-year statute of limitations period. Following the issuance of *Hilex Poly I*, defendants submitted as the administrative record pursuant to USCIT Rule 73.3 certain information from CDP’s revenue department pertaining to those distributions for which this Court held plaintiffs to have made timely claims.

Plaintiffs move to correct, supplement and/or strike the administrative record filed by defendants. For the reasons discussed below, the court declines to order the striking of the administrative record as previously filed but orders defendants to supplement that record.

## I. BACKGROUND

Background is set forth in *Hilex Poly I*, with which the court presumes familiarity. *Hilex Poly I*, 450 F. Supp. 3d at 1392–94. Plaintiffs filed their motion to “correct, supplement, and/or strike” the administrative record, and to stay briefing, on September 22, 2020. Mot. to Correct, Suppl., and/or Strike the Admin. R. and Mot. to Stay Briefing (Sept. 22, 2020), ECF No. 67 (“Motion to Correct” or “Pls.’ Mot.”). Defendants opposed the motion on October 16, 2020. Defs.’ Resp. to Pls.’ Mot to Correct, Suppl., and/or Strike the Admin. R. and Mot. to Stay Briefing (Oct. 16, 2020), ECF No. 70 (“Defs.’ Resp.”).

## II. DISCUSSION

### A. The Contents of a Complete Administrative Record

This cause of action arose under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* In cases arising under the APA, the court is to review an “agency action” on the basis of “the whole record or those parts of it cited by a party.” *Id.* § 706. As a general matter, the record is to consist of “(A) a copy of the contested determination and the findings or report upon which such determination was based; (B) a copy of any reported hearings or conferences conducted by the agency; and (C) any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency’s action.” 28 U.S.C. § 2635(d)(1); *see also* USCIT R. 73.3(a).

In the specific instance in which a party contests a rule or regulation that an agency promulgated according to notice-and-comment rulemaking, the record consists of the information the agency consid-

ered at the time the contested decision was made. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (ordering the District Court to consider “the full administrative record that was before the Secretary at the time he made his decision”), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). In this litigation, the contested rule (the “Final Rule”) was published in 2001. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (Dept. Treas. Customs Serv. Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–64, 178 (2002)) (“Final Rule”). In the Final Rule, Customs made a final determination to exclude delinquency interest from CDSOA distributions. *See Hillex Poly I*, 450 F. Supp. 3d at 1394.

As with agency action in general, a presumption of regularity applies to the compilation of the administrative record as filed and certified by the government. *See, e.g., Deukmejian v. Nuclear Regul. Comm’n*, 751 F.2d 1287, 1325 (D.C. Cir. 1987) (“Were courts cavalierly to supplement the record . . . [t]he accepted deference of court to agency would be turned on its head”), *vacated in part and rehearing en banc granted on other grounds, San Luis Obispo Mothers for Peace v. NRC*, 760 F.2d 1320 (D.C. Cir. 1985). The Court of Appeals for the Federal Circuit has counseled that “supplementation of the record should be limited to cases in which the omission of extra-record evidence precludes effective judicial review.” *AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1331 (Fed. Cir. 2018).

Here, plaintiffs object that the current record is inadequate in three ways: first, that it does not contain the documents before Customs when Customs made the decision in 2001 to promulgate the Final Rule; second, that it is improperly certified, as the certification is by an officer of a division of Customs other than the Office of Regulations and Rulings, which promulgated the Final Rule; and, third, that it does not contain correspondence between Senators Charles Grassley and John Thune and Customs Commissioner Kerlikowske regarding the failure to distribute delinquency interest. Pls.’ Mot. 2–3. The court considers the first two objections to be variations of the same argument, which is that the administrative record must be that record, and only that record, which pertains to the decision by Customs to promulgate the Final Rule. Regarding the third objection, the record is required to include, as a general matter, “any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency’s action.” 28 U.S.C. § 2635(d)(1)(C); USCIT R. 73.3(a). Additionally, the court is mindful that it is the agency’s responsibility to compile and certify the com-

plete record in the first instance. *See Fl. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“[A]gencies typically compile records in the course of informal agency action.”). The court considers it premature to order the inclusion or exclusion of any specific document at this stage of the litigation (but also notes that the correspondence in question already is before the court).

### **B. The Holdings of *Hilex Poly I***

Plaintiffs claim in this litigation that CBP’s refusal to distribute delinquency interest was unlawful as contrary to the CDSOA. Defendants, in moving to dismiss, argued that all of plaintiffs’ claims were untimely under the two-year statute of limitations because the agency decision not to distribute delinquency interest was made in 2001 and plaintiffs did not assert any claims until 2016. Rejecting this argument, *Hilex Poly I* held, first, that the agency’s decision not to pay delinquency interest, as made upon the promulgation of the Final Rule, is the decision being contested in this litigation and, second, that plaintiffs may raise a substantive challenge to the Final Rule whenever they receive a CDSOA distribution, although the scope of relief is limited to those CDSOA distributions made within two years of the commencement of the action. *See* 450 F.Supp.3d at 1400–02 (plaintiffs may raise a substantive challenge to a regulation each time it is applied to them and each CDSOA distribution constitutes a separate application of the regulation contested in this litigation).

Contrary to defendants’ position in opposing plaintiffs’ Motion to Correct, *Hilex Poly I* did not limit the issue to be litigated to whether the regulations were properly applied to those distributions within the two-year limitations period. *Contra* Defs.’ Resp. 3 (“[T]he application of the regulation to the distributions is the only determination available for plaintiffs to challenge.”). *Hilex Poly I* held, rather, that plaintiffs may challenge the substance of the Final Rule as not in accordance with law but also that any potential remedy is limited to the CDSOA distributions that occurred within the limitations period.

### **C. The Need for a Complete Administrative Record**

The record as currently filed consists of documentation relating to those CDSOA distributions made to plaintiffs within the limitations period. To answer the question of the legality of CBP’s decision not to distribute delinquency interest, the court must review “the full administrative record” that was before the agency at the time of the decision. *Overton Park*, 401 U.S. at 420. Here, the full record that was before Customs when the regulatory decision on delinquency interest was made is not now before the court.

Defendants argue that the proposed rule, public comments, and the Final Rule, which already are included in the administrative record, are the only documents that “could possibly be relevant.” Defs.’ Resp. 6. It is true that the principal issue before the court is one of statutory interpretation, i.e., whether the CDSOA requires Customs to include delinquency interest in CDSOA distributions. But this issue is part of the larger inquiry as to whether the decision made in the Final Rule to exclude delinquency interest was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

Contrary to defendants’ assertion that no additional documents could be relevant to the court’s inquiry, plaintiffs’ motion papers indicate that Customs could possess records potentially relevant to the court’s inquiry of whether the regulation is lawful. Plaintiffs attached to their Motion to Correct a 2016 letter from then-Commissioner Kerlikowske to Senator Charles Grassley, Pls.’ Mot. Ex. 2, which, while addressing CBP’s interpretation of Section 605 of the Trade Facilitation and Trade Enforcement Act of 2015, also indicates that Customs possessed documents relevant to congressional intent that could constitute legislative history of the CDSOA. In the letter, Commissioner Kerlikowske refers to technological “gaps” preventing the automated distribution by Customs of delinquency interest. *Id.* at 2. Referring to CBP’s “internal analysis,” the letter asserts that “Congress seems to have been aware of these gaps in technological capabilities when the CDSOA was enacted.” *Id.* Customs must now supplement the record before the court with all documents and information relevant to the agency’s decision to exclude delinquency interest from CDSOA distributions, a decision later embodied in the Final Rule. Regarding the 2016 letter itself, it is for Customs in the first instance to determine if it is part of that record.

Plaintiffs request that the currently filed record be either corrected, supplemented, or struck. The current record before the court, while not pertaining to the initial agency decision to exclude delinquency interest, may yet be relevant to issues in this litigation, should plaintiffs ultimately prevail and the court is to order specific monetary relief. The court sees no prejudice to any party arising from the presence of these documents on the record. For these reasons, the court is ordering defendants to supplement the record but will not order the striking of the material already submitted.

### III. CONCLUSION AND ORDER

For the reasons discussed above, the court grants plaintiffs’ motion to correct, supplement and/or strike the administrative record. De-

ferring to the agency's decision upon a presumption of regularity and a conclusion that the previously-filed documents potentially may be relevant to a remedy, the court declines to strike those documents but orders defendants to supplement that record with all materials and information relevant to the decision by Customs, later embodied in the Final Rule, not to distribute delinquency interest. Therefore, upon all review of all the papers herein, and upon due deliberation, it is hereby

**ORDERED** that plaintiffs' Motion to Correct, Supplement and/or Strike the Administrative Record (September 22, 2020), ECF No. 67, be, and hereby is, granted; it is further

**ORDERED** that defendants, within sixty (60) days of the date of this Opinion and Order, shall supplement the administrative record with the materials relevant to the decision by Customs, later effectuated in the Final Rule, not to distribute delinquency interest; it is further

**ORDERED** that due dates for the filing of further briefing in this litigation are stayed pending the filing of the supplement to the administrative record; and it is further

**ORDERED** that the parties shall consult and, within fifteen (15) days of the filing of the supplement to the administrative record, submit a joint proposal for the schedule that will govern the remainder of this litigation.

Dated: December 21, 2020

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU

CHIEF JUDGE

Slip Op. 20–187

CALGON CARBON CORPORATION and CABOT NORIT AMERICAS, INC.,  
Plaintiffs, and CARBON ACTIVATED TIANJIN CO., LTD. and CARBON  
ACTIVATED CORPORATION, et al., Consolidated Plaintiffs, v. UNITED  
STATES, Defendant, and CARBON ACTIVATED TIANJIN CO., LTD. and  
CARBON ACTIVATED CORPORATION, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge  
Consol. Court No. 18–00232

[Remanding the remand redetermination in the tenth administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China.]

Dated: December 21, 2020

*David A. Hartquist, R. Alan Luberda, John M. Herrmann, II, and Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, DC, for Plaintiffs/Defendant-Intervenors Calgon Carbon Corp. and Cabot Norit Americas, Inc.

*Francis J. Sailer, Dharmendra N. Choudhary, and Jordan C. Khan*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for Consolidated Plaintiffs/Defendant-Intervenors Carbon Activated Tianjin Co., Ltd., Carbon Activated Corporation, Datong Juqiang Activated Carbon Co., Ltd., and Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd.

*Antonia R. Soares*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Jeffrey B. Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades*, Assistant Director. Of counsel on the brief was *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

### OPINION AND ORDER

#### Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce’s (“Commerce” or “the agency”) redetermination pursuant to court remand in the tenth administrative review (“AR10”) of the antidumping duty order on certain activated carbon from the People’s Republic of China for the period of review April 1, 2016, through March 31, 2017 (“the POR”). See Final Results of Redetermination Pursuant to Court Remand (“Remand Results”), ECF No. 75–1;<sup>1</sup> see generally *Calgon Carbon Corp. v. United States*, 44 CIT \_\_\_, 443 F. Supp. 3d 1334 (2020) (“*Calgon (AR10) I*”); *Certain Activated Carbon From the People’s Republic of China*, 83 Fed. Reg. 53,214 (Dep’t Commerce Oct. 22, 2018) (final results of antidumping duty admin. review; 2016–2017) (“*Final Results*”), ECF No. 29–4, and accompanying Issues and Decision Mem., A-570–904 (Oct. 16, 2018) (“I&D Mem.”), ECF No. 29–5, as amended by *Certain Activated Carbon From the People’s Republic of China*, 83 Fed. Reg. 58,229 (Dep’t Commerce Nov. 19, 2018) (am. final results of antidumping duty admin. review; 2016–2017).<sup>2</sup>

<sup>1</sup> The administrative record filed in connection with the *Final Results* is divided into a Public Administrative Record (“PR”), ECF No. 29–1, and a Confidential Administrative Record (“CR”), ECF No. 29–2. Parties submitted public and confidential joint appendices containing record documents cited in their briefs. See Non-Confidential J.A., ECF Nos. 55–1 (Vol. I), 55–2 (Vol. II), 55–3 (Vol. III); Confidential J.A. (“CJA”), ECF Nos. 54–1 (Vol. I), 54–2 (Vol. II), 54–3 (Vol. III). The administrative record associated with the Remand Results is contained in a Public Remand Record, ECF No. 76–2, and a Confidential Remand Record, ECF No. 76–3. Parties submitted public and confidential joint appendices containing record documents cited in their briefs on the Remand Results. See Public Index to Remand J.A., ECF No. 83; Confidential Index to Remand J.A. (“RCJA”), ECF No. 82. Citations are to the confidential joint appendices unless stated otherwise.

<sup>2</sup> The court’s opinion in *Calgon (AR10) I* resolved substantive issues concerning the *Final Results* and provides additional factual background; familiarity with that opinion is presumed.

On June 7, 2017, Commerce initiated AR10. *See Initiation of Anti-dumping and Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 26,444, 26,445 (Dep't Commerce June 7, 2017), PR 14, CJA (Vol. I) Tab 6. For the *Final Results*, and relevant to this discussion, Commerce valued Respondents' factor of production ("FOP") for carbonized material using Thai import data under Harmonized Tariff Schedule ("HTS") subheading 4402.90.1000. *See I&D Mem.* at 14. The surrogate data included imports from France and Japan into Thailand. *Id.* at 15–16. In the *Final Results*, Commerce also revised its preliminary decision to rely on Thai financial statements to value financial ratios and, instead, relied on financial statements of a Romanian company. *See id.* at 25–28. Commerce then made several adjustments to the Romanian company's financial statements. *See Calgon (AR10) I*, 443 F. Supp. 3d at 1351.

Plaintiffs Calgon Carbon Corporation and Cabot Norit Americas, Inc. filed a motion for judgment on the agency record challenging certain aspects of the *Final Results*. *See id.* at 1338. Consolidated Plaintiffs Carbon Activated Tianjin Co. Ltd. ("Carbon Activated"), Carbon Activated Corporation ("CAC"), Datong Juqiang Activated Carbon Co., Ltd. ("DJAC"), and Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. (collectively, "Carbon Activated Group")<sup>3</sup> also filed a motion for judgment on the agency record challenging various aspects of the *Final Results*. *See id.* at 1338–39.

In *Calgon (AR10) I*, the court remanded the *Final Results*: (1) to allow the agency to reconsider or revise its decision to include imports from France and Japan in the carbonized material surrogate data, *id.* at 1349–50; and (2) to provide "an opportunity to address [Respondents'] objections to the adjustments to [the] financial statements," *id.* at 1354. In the Remand Results, Commerce made certain adjustments to the surrogate financial statements. Remand Result at 7–13, 23. With respect to surrogate data for carbonized material, Commerce excluded the Japanese imports, *id.* at 5–7, 22, and continued to include the French imports, *id.* at 4–5, 17–22.

Before the court, Carbon Activated Group challenges Commerce's continued inclusion of French imports in the Thai data. *See* Consol. Pls.' Cmts. in Opp'n to Remand Redetermination ("CAG's Opp'n Cmts."), ECF No. 77. Defendant United States ("the Government") filed comments supporting Commerce's Remand Results. *See* Def.'s Reply in Supp. of the Dep't of Commerce's Remand Redetermination ("Gov't's Reply"), ECF No. 81. No party challenges Commerce's deci-

<sup>3</sup> Consistent with *Calgon (AR10) I*, the court refers to Consolidated Plaintiffs as "Carbon Activated Group." The court refers to those Consolidated Plaintiffs that participated in the underlying administrative proceedings—CAC, Carbon Activated, and DJAC—together, as "Respondents."

sion to exclude Thai import prices from Japan or the adjustments made to the surrogate financial statements<sup>4</sup> and they appear to be consistent with the court’s remand instructions; therefore, the court affirms those aspects of the Remand Results. However, for the following reasons, the court remands the Remand Results for Commerce to reconsider its inclusion of French imports in the Thai data in accordance with this opinion.

## **JURISDICTION AND STANDARD OF REVIEW**

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018), and 28 U.S.C. § 1581(c) (2018). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed for compliance with the court’s remand order.” *SolarWorld Ams., Inc. v. United States*, 41 CIT \_\_\_, \_\_\_, 273 F. Supp. 3d 1314, 1317 (2017) (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT \_\_\_, \_\_\_, 968 F. Supp. 2d 1255, 1259 (2014)).

## **DISCUSSION**

### **I. Commerce’s Inclusion of French Import Data**

#### **A. Legal Framework**

“When valuing factors of production in the nonmarket economy context, the statute directs that Commerce’s decision ‘shall be based on the *best available information* regarding the values of such factors in a market economy country or countries.’” *SolarWorld Ams., Inc. v. United States*, 910 F.3d 1216, 1222 (Fed. Cir. 2018) (quoting 19 U.S.C. § 1677b(c)(1)). Because the statute does not define “best available information,” Commerce has broad discretion in selecting surrogate data. *See, e.g., QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011).

#### **B. Factual and Procedural History**

In the eighth and ninth administrative reviews (“AR8” and “AR9,” respectively), Commerce selected Thai import data under HTS sub-heading 4402.90.1000 to value carbonized material but excluded im-

<sup>4</sup> Carbon Activated Group also filed comments in support of Commerce’s adjustments to the surrogate financial statement and exclusion of the Japanese imports from the surrogate data for carbonized material. *See* Consol. Pls.’ Cmts. in Supp. of Remand Redetermination, ECF No. 80.

ports from France into Thailand because it determined that the imports consisted of wood-based charcoal—a material that is not specific to the input in question. *See* Issues and Decision Mem. for the Final Results of [AR8], A-570-904, (Aug. 31, 2016) (“AR8 IDM”) at 30–33, available at <https://enforcement.trade.gov/frn/summary/prc/2016-21660-1.pdf> (last visited Dec. 21, 2020); Issues and Decision Mem. for the Final Results of [AR9], A-570-904, (Nov. 1, 2017) (“AR9 IDM”) at 24–26, available at <https://enforcement.trade.gov/frn/summary/prc/2017-24184-1.pdf> (last visited Dec. 21, 2020).

For the *Final Results* of this review, Commerce again valued carbonized material using Thai import data under HTS subheading 4402.90.1000. I&D Mem. at 14–16; Prelim. Surrogate Value Mem. (May 3, 2017), Attach. 1 (“SV Spreadsheet”) at 75–76, PR 215–18, RCJA ECF pp. 17–155.<sup>5</sup> The Thai data include monthly quantities imported from France from May 2016 to January 2017. SV Spreadsheet at 75. Record evidence indicates that quantities imported in certain months were wood-based charcoal. *See* I&D Mem. at 15.

Specifically, a 2016 sales summary indicates that quantities imported in May, July, and August 2016 were, upon importation, classified under HTS subheading 4402.90.1000 (coconut charcoal). *See* First Surrogate Value Cmts. by DJAC and [Carbon Activated] (Sept. 15, 2017) (“Respondents’ SV Cmts.”), Ex. 4A at ECF p. 10, PR 116–21, RCJA ECF pp. 4–16. However, at the time of exportation from France, these same quantities were classified under HTS subheading 4402.90.00 (wood-based charcoal).<sup>6</sup> *See id.* at ECF pp. 13–14. Additionally, an email from an affiliate of another company subject to this review refers to the quantities imported for all months as “wood charcoal.” *Id.* at ECF p. 8; *see also* I&D Mem. at 1 & n.3 (noting that Jacobi Carbons AB and Jacobi Carbons, Inc. comprise a separate rate respondent company for purposes of this review). The record does not contain evidence concerning the composition of import quantities from France from September 2016 to January 2017. *See* I&D Mem. at 15 (noting that record evidence concerning French-origin imports into Thailand only covers part of the POR).

In *Calgon (AR10) I*, the court remanded Commerce’s inclusion of imports from France in the Thai data because Commerce recognized “that the Thai data contain French imports (wood-based charcoal) for

<sup>5</sup> The documents submitted in the RCJA were not assigned tab or document numbers. For ease of identification, the court identifies the location of the documents within the RCJA using the applicable ECF page ranges. Pin citations are to the internal page numbers provided in the documents when possible but are otherwise to the ECF page numbers.

<sup>6</sup> The sales summary classifies quantities under HTS subheading 4402.90.00 as “unspecified charcoal.” Respondents’ SV Cmts., Ex. 4A at ECF p. 12–14. The Parties and Commerce accept that quantities classified under this subheading are wood-based charcoal. *See, e.g.*, Remand Results at 21 & n.63 (citation omitted); Gov’t’s Reply at 9.

part of the POR,” thereby contradicting “its finding that the record lacks information that demonstrates that French imports under HTS 4402.90.1000 were indeed wood-based charcoal.” 443 F. Supp. 3d at 1349 (citation omitted). In light of this contradiction, the court could not discern the path of Commerce’s reasoning. *See id.*

In the redetermination, Commerce continued to include the French imports in the Thai data. Remand Results at 4–5, 17–22. The agency explained:

While these data indicate that some of the exports from France to Thailand during the [POR] were comprised of wood-based charcoal, the data fail to fully account for the entire quantity of French imports under HTS 4402.90.1000 during the POR because the French sales data placed on the record by the mandatory respondents only cover *a part* of the POR (April 2016–July 2016).

*Id.* at 5. The agency went on to acknowledge implicitly that quantities imported in May, July, and August 2016 (i.e., quantities considered to be wood-based charcoal upon exportation from France and coconut charcoal upon importation into Thailand) were, in fact, wood-based charcoal. *See id.* at 21 & n.63 (citing Respondents’ SV Cmts., Ex. 4A at ECF p. 14 (showing all imports from France during those months to be French exports of wood-based charcoal)). Commerce did not differentiate its treatment of French imports in this review from AR8 or AR9.<sup>7</sup>

Commerce stated that Respondents bore the burden “to demonstrate that all of the data under consideration [were] unreliable.” *Id.* at 21 (citation omitted). Because Respondents did not provide evidence that French imports for *every* month during the relevant period were wood-based charcoal, Commerce concluded that there was not a basis to exclude the French imports. *See id.* at 21–22.

### C. Parties Contentions

Carbon Activated Group contends that substantial evidence does not support the agency’s inclusion of the French imports because the imports are aberrant and render the Thai data unreliable. *See* CAG’s Opp’n Cmts. at 9–10. Carbon Activated Group further contends that Commerce’s decision to include the French imports improperly deviates from agency’s treatment of the French imports in AR8 and AR9. *See id.* at 21. Finally, Carbon Activated Group attempts to distinguish authority relied on by Commerce, *id.* at 10–14, and cites case law and

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<sup>7</sup> Commerce acknowledged Respondents’ argument that in AR9 the agency excluded the French imports from the Thai data, *see* Remand Results at 15–16, but did not respond to it.

agency determinations that, in its view, demonstrate the unreasonableness of including the French imports, *see id.* at 18–22.

The Government contends that Carbon Activated Group failed to carry its burden of establishing that all of the French imports were wood-based charcoal. *See Gov't's Reply* at 8–11. According to the Government, although Commerce has excluded entire country-specific datasets from its surrogate value calculation in other reviews, Carbon Activated Group has not shown that such treatment is appropriate for the portion of the Thai dataset at issue. *See id.* at 11–14. The Government asserts that Commerce's exclusion of the French imports in AR9 did not require Commerce to exclude the French imports in this review. *Id.* at 16.

#### **D. Commerce's Inclusion of the French Imports in the Thai Surrogate Data is Unsupported by Substantial Evidence**

Although interested parties bear “the burden of creating an adequate record,” “Commerce must, nonetheless, support its decision with substantial evidence.” *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 847 (Fed. Cir. 2020) (citations omitted). Substantial evidence “must do more than create a suspicion of the existence of the fact to be established.” *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). Here, Commerce failed to support with substantial evidence its conclusion that the Thai data inclusive of the French imports were the best available information to value carbonized material.

Commerce acknowledged that the May, July, and August 2016 import quantities (i.e., quantities classified as coconut charcoal upon importation) were, in fact, wood-based charcoal. *See Remand Results* at 21 & n.63 (citing Respondents' SV Cmts., Ex. 4A at ECF p. 14). In so doing, Commerce's finding aligned with its findings in AR8 and AR9 that all Thai imports from France during the relevant periods consisted of wood-based charcoal, notwithstanding their classification as coconut-based charcoal. *Compare* Respondents' SV Cmts., Ex. 4A at ECF p. 8 (email from Raphael Bro-Capron and Isabelle Laidin stating that the quantities are “wood charcoal”), *with* AR9 IDM at 25 (referring to an affidavit by Raphael Bro-Capron and Isabelle Laidin attesting that the French imports were wood-based charcoal), *and* AR8 IDM at 32–33 (same).

Commerce did not identify evidence indicating that any quantity imported during any subsequent month was something other than wood-based charcoal. Indeed, the court afforded the Government an additional opportunity “to clarify whether the record contains any positive evidence that any other imports of charcoal into Thailand

from France differed from the prior imports and, in fact, consisted of coconut-based charcoal or other non-wood[-]based charcoal.” Order (Dec. 4, 2020), ECF No. 84. The Government responded by providing excerpts from Exhibit 4A to Respondents’ SV Comments. *See* Ltr. From Antonia R. Soares to the Court (Dec. 11, 2020), ECF No. 85. These documents were consistent with Commerce’s findings that Respondents failed to provide evidence affirmatively indicating that all Thai imports from France during the POR consisted of wood-based charcoal. Remand Results at 4–5. However, the documents also do not provide affirmative evidence that anything had changed with respect to the Thai imports from France to suggest that it was reasonable for Commerce to find that after more than two years of shipping only wood-based charcoal to Thailand, France was suddenly shipping coconut-based charcoal. While each administrative review is a separate exercise of Commerce’s authority and allows for different conclusions based on different facts in the record, the record before the court does not contain such different facts. Because the record as informed by AR8 and AR9 does not support a finding that the French imports into Thailand were anything other than wood-based charcoal, Commerce’s inclusion of the French imports is not supported by substantial evidence and, thus, unlawful.

The Government attempts to avoid this outcome by faulting Carbon Activated Group for not providing evidence that the French data were wood-based charcoal for every month during the relevant period. *See* Gov’t’s Reply at 9–10 (citing Remand Results at 21). This contention is unavailing. As discussed above, evidence in this review combined with Commerce’s findings in AR8 and AR9 create a reasonable inference that all French imports were wood-based charcoal. Commerce failed to cite any evidence—much less substantial evidence—rebutting that inference and, thus, failed to provide a reasoned explanation for its decision to use the Thai data inclusive of the French imports. Under these circumstances, the issue is not that Carbon Activated Group failed to develop the record, but that Commerce failed its statutory directive to support its decision that the Thai data inclusive of French imports was the “best available information” with which to value carbonized material with substantial evidence. *See SeAH Steel*, 950 F.3d at 847 (citations omitted).<sup>8</sup>

<sup>8</sup> The Parties also dispute the applicability of *Calgon Carbon Corp. v. United States*, 35 CIT 234 (2011) (“*Calgon (ARI)*”). *See* CAG’s Opp’n Cmts. at 20; Gov’t’s Reply at 17. The Government contends that *Calgon (ARI)* is distinguishable because, here, the issue is whether a country-specific dataset within overall import data is reliable. *See* Gov’t’s Reply at 17. Such a factual distinction does not diminish the relevance of the court’s statement in *Calgon (ARI)* that “Commerce must do more than erect roadblocks to respondents’ fair arguments” and “must select the best available information and substantially support its decisions.” 35 CIT at 248.

For the foregoing reasons, the court remands Commerce's selection of Thai data inclusive of French imports to determine the surrogate value for carbonized material.<sup>9</sup>

### CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

**ORDERED** that Commerce's Remand Results, are remanded; it is further

**ORDERED** that, on remand, Commerce shall, consistent with this Opinion, reconsider its surrogate value for carbonized material; it is further

**ORDERED** that Commerce shall file its remand redetermination on or before March 22, 2021; it is further

**ORDERED** that subsequent proceedings shall be governed by US-CIT Rule 56.2(h); and it is further

**ORDERED** that any comments or responsive comments must not exceed 4,000 words.

Dated: December 21, 2020

New York, New York

*/s/ Mark A. Barnett*  
MARK A. BARNETT, JUDGE

Slip Op. 20–188

PLEXUS CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge  
Court No. 13–00343

[Granting defendant's motion to dismiss as to one entry for lack of subject matter jurisdiction, denying plaintiff's Rule 56 motion for summary judgment and denying defendant's Rule 56 cross-motion for summary judgment, granting partial summary judgment on the issues addressed below, and directing the parties to submit within 30 days of the date of this opinion a proposed scheduling order that includes (1) a date for submission of the order governing preparation for trial, (2) a date for the submission of the pretrial order, (3) a date for the pretrial conference, and (4) a proposed trial date on or before March 1, 2021, on the issue of the principal use of the subject merchandise.]

Dated: December 22, 2020

*Myron P. Barlow*, Barlow & Company, LLC, of Washington, DC, argued for plaintiff Plexus Corp.

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<sup>9</sup> The court need not reach the Parties' arguments concerning whether Commerce has a practice of not disaggregating surrogate data and whether such a practice was warranted in this case, *see* CAG's Opp'n Cmts. at 4–8; Gov't's Reply at 11–14, because substantial evidence does not support Commerce's inclusion of the French imports—in whole or in part.

her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch and Offices of Foreign Litigation and International Legal Assistance, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. Of Counsel was *Michael W. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection.

## OPINION

### Reif, Judge:

At issue in this case is the correct classification of printed circuit board assemblies (“PCBAs”) and chassis imported into the United States by plaintiff Plexus Corp. (“Plexus” or “plaintiff”). Before the court are cross-motions for summary judgment and defendant’s motion to dismiss as to one entry for lack of subject matter jurisdiction. See Pl.’s Mot. for Summ. J., ECF No. 42 (“Pl. Br.”); Def.’s Cross-Mot. for Summ. J. and Mot. to Diss., ECF No. 53 (“Def. Br.”); see also Pl.’s Reply & Resp. to Def. Cross-Mot. for Summ. J. & Resp. Consent. to Def.’s Mot. to Diss., ECF No. 61 (“Pl. Rep. Br.”); Def.’s Reply in Supp. of Cross-Mot. for Summ. J., ECF No. 66 (“Def. Rep. Br.”). Plaintiff challenges a decision by United States Customs and Border Protection (“Customs” or “defendant”) to classify the PCBAs and chassis under subheadings 8529.90.13 and 8529.90.83, respectively, of the Harmonized Tariff Schedule of the United States (“HTSUS”).<sup>1</sup> Subheading 8529.90.13 covers “Parts suitable for use solely or principally with the apparatus of headings 8525 to 8528: Other: Printed Circuit assemblies: Of television apparatus: Other: Other” and carries a 2.9% *ad valorem* duty. Subheading 8529.90.83 covers “Parts suitable for use solely or principally with the apparatus of headings 8525 to 8528: Other: Other parts of articles of headings 8525 and 8527: Of television apparatus: Other” and carries a 2.9% *ad valorem* duty. In reaching this classification, Customs first determined that the subject merchandise is used as constituent parts in the finished merchandise described in Heading 8525, which includes “transmission apparatus for radio-broadcasting or television.” See Customs’ Headquarters Ruling Letter (“HQ”) H193879 (Jun. 5, 2013) (Def. Ex. 1) at 11.

Plaintiff argues that the correct classification of the products is under subheading 8517.70.00, which covers “Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than

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<sup>1</sup> All citations to the HTSUS, including Chapter Notes and General Notes, are to the 2012 edition, as the relevant HTSUS provisions remained identical from 2010 to 2012, during which time Plexus entered the subject merchandise.

transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Parts” and is duty free.

The question presented is whether the imported items are “[p]arts” under Heading 8529 “suitable for use solely or principally with” “[t]ransmission apparatus for radio-broadcasting or television” under Heading 8525, or parts for “other apparatus for the transmission . . . of voice, images or other data . . .” under Heading 8517.

The court determines, as elaborated below, that factual issues regarding the principal use of the subject merchandise remain unresolved. Consequently, the court does not reach a conclusion as to whether the proper classification of the subject merchandise is Heading 8529, which is comprised of parts suitable for use solely or principally with the apparatus of Heading 8525, or Heading 8517. Accordingly, plaintiff’s motion for summary judgment and defendant’s cross-motion for summary judgment must be denied. Rather, the court grants partial summary judgment in favor of defendant on issues relating to the proper meaning of the terms in Heading 8517, and Headings 8525 and 8529. Partial summary judgment is denied for defendant in all other respects.

Defendant also moves to dismiss all claims relating to Entry No. UPS-8221052-5, alleging that the claims are based on an untimely, and, therefore, invalid, protest. For the reasons set out below, the court grants defendant’s motion to dismiss as to Entry No. UPS-8221052-5.

## BACKGROUND

### I. The Imported Merchandise

USCIT Rule 56(a) requires that the court grant summary judgment if a moving party can show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Movants should present material facts as short and concise statements, in numbered paragraphs and cite to “particular parts of materials in the record” as support. USCIT Rule 56(c)(1)(A). The opponent must, in response, “include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant.” USCIT Rule 56.3(b).

The parties submitted separate statements of facts with their respective summary judgment motions. *See generally* Pl.’s Statement of Material Facts as to Which There Are No Genuine Issues to be Tried, ECF No. 54-1 (“Pl. Stmt. Facts”); Def.’s Statement of Material Facts as to Which There Are No Genuine Issues to be Tried, ECF No. 53-14 (“Def. Stmt. Facts”). The majority of the responses to plaintiff’s and defendant’s statements, respectively, were admissions, but many re-

sponses included additional claims. *See generally* Def.'s Response to Pl.'s Statement of Material Facts, ECF No. 57 ("Def. Resp. Pl. Stmt. Facts"); Pl.'s Response to Def.'s Statement of Material Facts, ECF No. 61–3 ("Pl. Resp. Def. Stmt. Facts"). Upon the court's review of the parties' respective statements of facts and supporting documents, the court determines that the following material facts regarding the subject merchandise and the Harmonic EMRs are undisputed.

From 2010 to 2012, plaintiff imported the subject merchandise into the United States through ports in California, Washington, Ohio and Kentucky. Pl. Br. at 6; Def. Br. at 1–2. There were 392 entries covered by 32 protests. Def. Br. at 1. The subject articles are printed circuit board assemblies (PCBAs) and chassis, used in encoders, multiplexers and remultiplexers designed and marketed by Harmonic, Inc. ("Harmonic EMRs"). Joint Stmt. Facts ¶¶ 1, 2, 5, 6. Harmonic, Inc. ("Harmonic") and Plexus entered into a contract under which Plexus manufactured products designed and marketed by Harmonic. *Id.* ¶ 1. Based on Section XVI, Note 2(b) of the HTSUS, discussed *infra*, proper classification of the PCBAs and chassis depends on the classification of the machines with which they are used.

The subject PCBAs and chassis are used in Harmonic EMRs that are identified by the following model names and numbers: Audio Encoder (encoder), DiviCom Electra 1000 (encoder), DiviCom Electra 5000 (encoder), DiviCom Electra 5400 (encoder), DiviCom Electra 7000 (encoder), DiviCom Electra 8000 (encoder), DiviCom Ion (encoder), ProStream 1000 (multiplexer), ProStream 1000 with ACE (remultiplexer). *Id.* ¶ 10. The function of encoders is to compress audio and video digital data representing images and sound, including voice. *Id.* ¶ 11. Encoders are used so that the data that are compressed by the encoder occupy less space in storage and less bandwidth during transmission. *Id.* ¶ 12. The data output from the Harmonic encoders goes to switches and routers and/or to multiplexers. *Id.* ¶ 13. Multiplexers take output data from multiple encoders and combine them into a single stream so that more data can be transmitted with the available bandwidth. *Id.* ¶ 14. Remultiplexers fulfill an identical purpose for data from multiple multiplexers. *Id.* ¶ 15.

Harmonic EMRs are not necessary for the transmission of a data signal. Pl. Stmt. Facts ¶ 20; Def. Resp. Pl. Stmt. Facts ¶ 20. However, Harmonic customers could not provide data signals in a cost-effective manner without the use of Harmonic EMRs. Transcript of Oral Argument ("Tr. Oral Arg.") at 72–73. The Harmonic EMRs do not themselves send signals to reception devices for listening and viewing by people; however, they are used in the networks that send signals out

to viewing devices for listening and viewing. Pl. Stmt. Facts ¶ 19; Def. Resp. Pl. Stmt. Facts ¶ 19. A *DICTIONARY OF COMPUTER SCIENCE* (7th ed. 2016) defines “network” as a “system that consists of terminals, nodes, and interconnection media that can include lines or trunks, satellites, microwave, medium- and long-wave radio, etc. In general, a network is a collection of resources used to establish and switch communication paths between its terminals.”

Harmonic EMRs are used in communication networks and networks that may be configured as public switched telephone networks, local area networks, metropolitan area networks and wide area networks. Pl. Stmt. Facts ¶ 18; Def. Resp. Pl. Stmt. Facts ¶ 18. Data compressed by Harmonic EMRs may be heard through and viewed on smartphones, personal computers and other devices in addition to television screens. Pl. Stmt. Facts ¶ 21; Def. Resp. Pl. Stmt. Facts ¶ 21. The data that are compressed and multiplexed by Harmonic EMRs may consist of video conferencing and audio-video content other than television or radio programming. Pl. Stmt. Facts ¶ 21; Def. Resp. Pl. Stmt. Facts ¶ 21.

The compression that Harmonic EMRs perform is “[p]rimarily about reducing the bandwidth of video, the amount of space it would occupy on a storage device or the amount of bandwidth it would occupy as the video is transmitted for a T.V. service.” Def. Stmt. Facts ¶ 20 (citing Def. Ex. 3 (Deposition of Eric Armstrong) (“Armstrong Dep.”) at 18). Plaintiff notes that the data compression function of Harmonic EMRs may be used also in the transmission of data for non-television and non-radio content. Pl. Resp. Def. Stmt. Facts ¶ 20.

Harmonic EMRs are not necessary for the transmission of a data signal, Pl. Stmt. Facts ¶ 20, but “permit the delivery of the best possible quality for the minimal bandwidth thereby saving money and reducing expenses in providing channels for viewing.” Def. Resp. Pl. Stmt. Facts ¶ 20. For this reason, purchasers of Harmonic EMRs would not provide data signals without them. Tr. Oral Arg. at 71–73.

Harmonic EMRs do not actually transmit the signal to the final receiving device (such as a television); they are part of the chain of equipment that allows for transmission of the signal. Pl. Stmt. Facts ¶ 19; Def. Resp. Pl. Stmt. Facts ¶ 19.

## **II. Subject Matter Jurisdiction**

This Court has jurisdiction under 28 U.S.C. § 1581(a) (2012), which provides that “[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under 19 U.S.C. § 1515.” The Court’s determination of subject matter jurisdiction is a threshold inquiry.

*Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 94–95 (1998). “It is fundamental that the existence of a jurisdictional predicate is a threshold inquiry in which plaintiff bears the burden of proof.” *CR Industries v. United States*, 10 CIT 561, 562 (1986). “When a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the [claim] in its entirety.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

Plexus brought this this action on October 4, 2013 by filing a complaint that covered 392 entries. Plexus claims that the court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(a). Compl. ¶ 1, ECF No. 5. Under section 1581(a), this Court has “exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part,” pursuant to 19 U.S.C. § 1515. Section 1515 requires an aggrieved party to file a protest under 19 U.S.C. § 1514.

Pursuant to 19 U.S.C. §§ 1514(a) and 1514(c)(3), certain decisions of Customs become final and conclusive as to all persons unless a protest is filed within 180 days after the date of liquidation. “The court lacks jurisdiction over protests that do not satisfy the requirements of 19 U.S.C. § 1514(c)(1) and 19 C.F.R. § 174.13(a).” *Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908 (Fed. Cir. 1999). Therefore, a prerequisite to this Court’s jurisdiction is a timely-filed protest — specifically, one filed within 180 days of liquidation.

Defendant objects to the court’s subject matter jurisdiction over Entry No. UPS-8221052–5, because the protest covering this entry was filed more than 180 days after liquidation. *See* Def. Mot. to Dismiss, ECF No. 53. The entry was liquidated on March 18, 2011; however, the protest covering this entry was filed on September 19, 2011, 185 days later. *See* Def. Ex. 2 (Protest No. 2720–11–100481). A valid protest was not timely filed for this entry so the court lacks subject matter jurisdiction for the entry.<sup>2</sup> Therefore, plaintiff’s claim as to this entry is dismissed.

The protests for the other 391 entries were timely filed and the timeliness of those entries has not been disputed by defendant. Def. Br. at 2.

## STANDARD OF REVIEW

The court will grant summary judgment if “the movant shows that there is no genuine dispute as to any material fact and the movant is

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<sup>2</sup> In plaintiff’s Reply Brief, plaintiff consents to defendant’s motion to dismiss this entry. Pl. Rep. Br. at 4 (“Plaintiff agrees that entry number UPS-8221052–5 should be dismissed for lack of jurisdiction because it was protested more than 180 days after liquidation.”).

entitled to judgment as a matter of law.” USCIT Rule 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering whether material facts are in dispute, the court must consider evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2. When, as here, cross-motions for summary judgment are before the court, “each party carries the burden on its own motion to show entitlement to judgment as a matter of law after demonstrating the absence of any genuine disputes over material facts.” *Am. Fiber & Finishing, Inc. v. United States*, 39 CIT \_\_, \_\_, 121 F. Supp. 3d 1273, 1279 (2015) (quoting *Massey v. Del Labs.*, 118 F.3d 1568, 1573 (Fed. Cir. 1997)). “A genuine factual dispute is one potentially affecting the outcome under the governing law.” *Anderson*, 477 U.S. at 248.

“The court may not resolve or try factual issues on a motion for summary judgment.” *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988) (citation omitted), *aff’d*, 867 F.2d 1404 (Fed. Cir. 1989). Further, “summary judgment in a classification case is appropriate only if ‘the material facts of what the merchandise is and what it does are not at issue.’” *Roche Vitamins, Inc. v. United States*, 34 CIT 1553, 1557, 750 F. Supp. 2d 1367, 1372 (2010) (citing *Diachem Indus. Ltd. v. United States*, 22 CIT 889, 892 (1998)).

The Court reviews classification cases *de novo*, *see* 28 U.S.C. § 2640(a)(1), and on “the basis of the record made before the court.” *Id.* § 2640(a).

“The plaintiff has the burden of establishing that the government’s classification of the subject merchandise was incorrect . . . .” *Lerner New York, Inc. v. United States*, 37 CIT 604, 607, 908 F. Supp. 2d 1313, 1317–18 (2013). “[Plaintiff] does not bear the burden of establishing the correct classification; instead, it is the court’s independent duty to arrive at ‘the correct result’ . . . .” *Id.* (citations omitted).

“The ultimate question in a classification case is whether the merchandise is properly classified under one or another classification heading,” which is “a question of law.” *Bausch & Lomb v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Every new entry of goods into the United States constitutes a new cause of action because every classification involves both the interpretation of the relevant statute as well as questions of fact regarding the merchandise. *United States v. Mercantil Distribuidora, S.A.*, 45 CCPA 20, 23–24, C.A.D. 667 (1957).

Merchandise is to be classified based on the condition in which it is imported. *See Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). A two-step process guides the court in determining

the proper classification of merchandise. *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). First, the court must “ascertain[] the proper meaning of specific terms within the tariff provision.” *BenQ America Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). This is a question of law. Second, the court must determine “whether the merchandise at issue comes within the description of such terms as properly construed.” *Id.* This is a question of fact. “[W]hen there is no dispute as to the nature of the merchandise, then the two-step classification analysis ‘collapses entirely into a question of law.’” *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965–66 (Fed. Cir. 2014) (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)). In this case, there are material facts in dispute such that summary judgment is not appropriate. See *Bausch & Lomb*, 148 F.3d at 1365 (holding summary judgment is proper only “when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is.”). Cf. *Jedwards Int’l, Inc. v. United States*, 40 CIT \_\_, \_\_, 161 F. Supp. 3d 1354, 1357 (2016) (“This is such a case, and summary judgment is appropriate.”).

### LEGAL FRAMEWORK

The HTSUS is codified at 19 U.S.C. § 1202 and has the force of statutory law. *Aves. In Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005). The General Rules of Interpretation (“GRIs”) of the HTSUS govern the proper classification of merchandise entering the United States. The GRIs “are applied in numerical order.” *ABB, Inc. v. United States*, 421 F.3d 1274, 1276 (Fed. Cir. 2005). The GRIs consist of six rules, but “if an earlier rule resolves the classification question, the court does not look to subsequent rules.” *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011).

“The HTSUS is designed so that most classification questions can be answered by GRI 1.” *Telebrands Corp. v. United States*, 36 CIT 1231, 1235, 865 F. Supp. 2d 1277, 1280 (2012), *aff’d* 522 Fed. Appx. 915 (Fed. Cir. 2013). GRI 1 states that “classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes.” GRI 1. Therefore, “a court first construes the language of the heading, and any section or chapter notes in question.” *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). Pursuant to GRI 1, proper classification of the subject merchandise is in the heading that describes the product at issue completely and specifically.

Absent contrary legislative intent, HTSUS terms are construed according to their common and commercial meanings. *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). When

interpreting a tariff term, the court may rely on its own understanding of the term and on secondary sources such as scientific authorities and dictionaries. *North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001) (citing *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)).

For additional direction on the scope and meaning of tariff headings and chapter and section notes, the court may also consult the Explanatory Notes to the Harmonized Commodity Description and Coding System (“ENs”), developed by the World Customs Organization (WCO). ENs are not legally binding on the court but may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision. *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (citing *Motorola, Inc. v. United States*, 436 F.3d 1357, 1361 (Fed. Cir. 2006)). However, “the Explanatory Notes are persuasive authority for the court when they specifically include or exclude an item from a tariff heading.” *H.I.M. / Fathom Inc. v. United States*, 21 CIT 776, 779, 981 F. Supp. 610, 613 (1997); see also *BASF Corp. v. United States*, 30 CIT 227, 232, F. Supp. 2d 1200, 1205 (2006), *aff’d*, 497 F.3d 1309 (Fed. Cir. 2007).

Similarly, opinions published by the WCO may also provide guidance. A WCO opinion is not binding and is entitled, at most, to “respectful consideration.” *Cummins*, 454 F.3d at 1366. It is not a proxy for independent analysis. *Id.*

## DISCUSSION

### I. Competing Tariff Provisions

The HTSUS does not provide a specific classification for the subject merchandise, *viz.*, PCBAs and chassis imported by Plexus. Pl. Br. at 22. As stated by defendant, based on Section XVI, Note 2(b) of the HTSUS, “the proper classification of the PCBAs and chassis hinges on the classification of the encoders, multiplexers and remultiplexers with which they are used.” Def. Br. at 4.

Section XVI, Note 2(b) provides:

2. Subject to note 1 to this section, note 1 to chapter 84 and to note 1 to chapter 85, parts of machines (not being parts of the articles of heading [sic] 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:

...

(b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are

to be classified with the machines of that kind or in heading [sic] 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are *equally* suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517.

(Emphasis supplied). The tariff provisions at issue are Headings 8517 and 8529. The latter first requires classification as constituent parts for use solely or principally with the apparatus described in Heading 8525.

Heading 8517 provides, in relevant part:

8517 Telephone sets, including telephones for cellular networks or for other wireless networks; **other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network)**, other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof:

Telephone sets, including telephones for cellular networks or for other wireless networks:

8517.70 Parts

(Emphasis supplied). Headings 8525 and 8529, in turn, provide, in relevant parts:

8525 Transmission apparatus for radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras, digital cameras and video camera recorders: . . . .

8529 *Parts* suitable for use solely or principally with the apparatus of headings 8525 to 8528:

8529.90 Other: Printed Circuit Assemblies: Of television apparatus:

8529.90.13 Other

Of radar, radio navigational aid or radio remote control apparatus

8529.90.83 Other

(Emphasis supplied).

In the present case, classification in Heading 8529 first requires classification in Heading 8525, which covers, in relevant part, “Transmission apparatus for radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus . . . .” Heading 8517 covers, in relevant part, “apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network).”

## II. Positions of the Parties

Plaintiff seeks classification of the PCBAs and chassis under subheading 8517.70.00, as “parts” of articles of Heading 8517. Pl. Br. at 22. As such, plaintiff argues that the Harmonic EMRs with which the PCBAs and chassis are used are properly classified in Heading 8517, rather than in Heading 8525. *See id.* at 15.

Plaintiff first argues that the term “*transmission apparatus* for radio-broadcasting or television” in Heading 8525 (emphasis supplied) has a different meaning than the term “*apparatus for the transmission* or reception of voice, images or other data” in Heading 8517 (emphasis supplied). *Id.* Specifically, plaintiff argues that the former refers to “equipment that *sends signals out* to radios and televisions,” *Id.* (emphasis supplied), while the latter “includes equipment that performs a function *that is not the sending out of signals but that supports transmission.*” *Id.* (emphasis supplied). The distinction, in plaintiff’s view, is one between “products that ‘transmit,’ meaning [they] send signals to other locations, and products that do not ‘transmit’ but that do something that supports transmission.” Pl. Br. at 29–30. Plaintiff states that it reached this conclusion “[b]ased upon the common, commercial and technical meaning” of the words of Heading 8525. *Id.*

On this basis, plaintiff concludes that the Harmonic EMRs with which the PCBAs and chassis are used cannot be classified in Heading 8525 because they “do not send signals to radios or televisions.” *Id.* at 15. Rather, according to plaintiff, the Harmonic EMRs are properly classified in Heading 8517 “[b]ecause the [Harmonic EMRs] shrink the size of digital audio video data in order to enhance the storage and eventual transmission of that [sic] data by other equipment.” *Id.* Classification in Heading 8517 is further supported, plaintiff adds, by the Explanatory Notes and a WCO Classification Opinion. *See id.*

Defendant argues that the PCBAs are classifiable in subheading 8529.90.13, and the chassis are classifiable in subheading 8529.90.83. *See* Def. Br. at 2. Classification at Heading 8529, as urged by defendant, first requires classification of the Harmonic EMRs in Heading 8525. Defendant asserts that the common meaning of “*transmission apparatus for television*” supports classification of the Harmonic EMRs in Heading 8525. *See id.* at 13. According to defendant, “*transmission* means to convey or transfer information, signals, or data from one location to another.” *Id.* at 6 (internal citations omitted). Because the data signals that enter the Harmonic EMRs “do not reside there in perpetuity,” *id.* at 16, but rather, are “move[d] . . . along the transmission path,” the Harmonic EMRs can be described as

“transmission apparatus” within the meaning of Heading 8525. *Id.* at 13, 15. In brief, defendant argues that the scope of “[H]eading 8525 is not limited to a device that is an actual transmitter.” *Id.* at 16.

In addition, defendant argues that the Harmonic EMRs are properly classified in Heading 8525 because “there is no dispute that [EMRs] are used in the process that results in the transmission of television programming.” *Id.* at 12. Moreover, the exclusion in Heading 8517 of “transmission or reception apparatus of heading . . . 8525” from Heading 8517 suggests that “when television signal [sic] are involved, heading 8525 controls.” *Id.* at 17.

Further, defendant disagrees with plaintiff’s proposed interpretation of Heading 8525 as equipment that transmits, and of Heading 8517 as equipment that supports transmission. *See id.* Defendant contends that “as a matter of sentence structure and grammar, a phrase ‘transmission apparatus for television’ has the same meaning as ‘apparatus for the transmission of television.’” *Id.* at 17. Lastly, in addressing plaintiff’s arguments, defendant points out that the WCO Classification Opinion to which plaintiff refers is not binding, and that plaintiff’s reliance on the Explanatory Notes to bolster its classification argument is misplaced. *See id.* at 18–19.

### **III. Classification of the Subject Merchandise**

To assess whether the court may determine the appropriate classification of the subject merchandise, the court first considers six key issues raised by the parties concerning the meaning of Headings 8517 and 8525: (1) the definitions of the terms “transmission,” “apparatus” and “television”; (2) the appropriateness of a principal use analysis with respect to the headings at issue; (3) the relevance of Explanatory Note (G) to Heading 8517; (4) the meaning of the 2007 amendments to Heading 8517; (5) Customs’ transmission path theory and deference to prior ruling letters; and, (6) the relevance of the Court of Customs and Patent Appeals’ decision in *United States v. Ampex Corp.*, 59 CCPA 134, 138, 460 F.2d 1086, 1088 (1972). After determining the answers to these six key issues, the court then turns to the classification issue at hand in light of the meaning of the headings and makes an assessment as to whether there is a genuine dispute as to any material fact. The court concludes that there is and, therefore, denies plaintiff’s Rule 56 motion for summary judgment, denies defendant’s Rule 56 cross-motion for summary judgment, and grants partial summary judgment on the issues addressed below.

#### **A. Meaning of Headings 8517 and 8525**

To understand and apply properly the language of Headings 8517 and 8525, the court begins by defining the terms in each heading.

Both headings contain the words “apparatus” and “transmission”; however, as noted above, the headings use the words differently and the parties dispute the context and meaning of the words in the respective headings.

## 1. Definitions of Key Terms — Transmission, Apparatus and Television

### a. Transmission and Apparatus

The court begins with the word “transmission.” The HTSUS does not define “transmission.” Therefore, the court turns to dictionary definitions to determine the proper meaning. When interpreting a tariff term, the court may rely on its own understanding of the term and on secondary sources such as scientific authorities and dictionaries. *North Am. Processing Co.*, 236 F.3d at 698 (citing *Carl Zeiss*, 195 F.3d at 1379).

Dictionaries on which both parties rely define the term “transmission” as follows: “1: the process of transferring a signal, message, picture, or other form of intelligence from one location to another location by means of wire lines, radio, light beams, infrared beams, or other communications systems”, MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS (5th ed. 1994); “1: Conveyance or transfer from one person or place to another 2: Conveyance or passage through a medium, as of light, heat, sound, etc. Also *spec.*, the sending out of electronic signals or electromagnetic waves; the broadcasting of radio or television programs; . . .”, SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (6th ed. 2007); “4. The sending of a signal, picture or other information from a transmitter,” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011); “2. The passage of radio waves in the space between transmitting and receiving stations; *also*: the act or process of transmitting by radio or television.” MERRIAM-WEBSTER ONLINE DICTIONARY. Pl. Br. at 26; Def. Br. at 14–15. In sum, dictionary definitions indicate that a transmission product sends a signal from one location to another location.

Similarly, the HTSUS does not define “apparatus”; however, the Court has construed that term on a number of occasions. *See, e.g., Photonetics, Inc. v. United States*, 33 CIT 1549, 659 F. Supp. 2d 1317 (2009); *ITT Thompson Industries, Inc. v. United States*, 3 CIT 36, 537 F. Supp. 1272 (1982); *In re Alappat*, 33 F.3d 1526 (Fed. Cir. 1994). In *ITT Thompson*, the court concluded that the term is “intended to encompass a group of devices or a collection or set of materials, instruments or appliances to be used for a particular purpose or a

given end.” *ITT Thompson*, 537 F. Supp. at 1277. Plaintiff does not offer any definitions of “apparatus,” while defendant provides three dictionary definitions. Those definitions are similar to the one used by the court in *ITT Thompson*. See Def. Rep. Br. at 5–6.<sup>3</sup> Therefore, the common meaning of the terms “transmission” and “apparatus” indicates devices designed for the purpose of sending signals from one location to another.

Plaintiff argues that “transmission apparatus” in Heading 8525 refers to equipment that sends signals out to a *final* reception device, which, for Heading 8525, would be either a radio or a television. Pl. Br. at 15. Plaintiff maintains that, in contrast, the meaning of the term “apparatus for the transmission” in Heading 8517 encompasses products that *support* transmission. See Pl. Br. at 29–30.

This argument is not supported by the text of the HTSUS. First, there is no indication in the text, Explanatory Notes or other interpretative materials that the use of the two nearly-identical terms — “transmission apparatus” in Heading 8525 and “apparatus for the transmission” in Heading 8517 — was intended to convey different meanings. Second, the common meaning of the term “transmission apparatus” does not require, as plaintiff would have it, that the subsequent location be the *final* reception device. See dictionary definitions discussed *supra* p. 18–19. Similarly, there is no indication from the text that “transmission apparatus” reflects the narrow definition that plaintiff seeks to impose on it.<sup>4</sup> In fact, the dictionary definitions cited above by both parties support a common meaning of “transmission” that “means to convey or transfer information, signals, or data from one location to another.” See Pl. Rep. Br. at 8, 25; Def. Br. at 6. Finally, the use of the more general term “transmission” also contrasts with the word “transmitter”, which is not used in Heading 8525 and connotes a narrower meaning along the lines of that offered by plaintiff. Def. Br. at 16.<sup>5</sup>

<sup>3</sup> Defendant presents the following definitions: “a set of materials or equipment designed for a particular use,” MERRIAM-WEBSTER ONLINE DICTIONARY; “The technical equipment or machinery needed for a particular activity or purpose,” LEXICO; “a group or combination of instruments, machinery, tools, materials, etc., having a particular function or intended for a specific use,” DICTIONARY.COM. These definitions indicate that “apparatus” refers generally to a device designed for a particular use or purpose.

<sup>4</sup> Plaintiff cites Explanatory Note (A) to Heading 8525 as support for its narrow definition of “transmission apparatus” as “the apparatus that performs the act of sending a signal out.” Pl. Br. at 28. Explanatory Note (A) provides a list of exemplars of merchandise that meet this definition, which “share the common purpose of performing the act of sending signals from one location to another.” Pl. Br. at 27. Plaintiff then makes the logical leap that, “[i]n contrast, the Harmonic products do not send signals out to another location.” *Id.*

<sup>5</sup> Plaintiff also relies on an opinion of the World Customs Organization (WCO) that classified digital encoders, multiplexers and remultiplexers in Heading 8517. Pl. Br. at 21–22.

In addition to including the terms “transmission [] apparatus” and “apparatus for the transmission,” the plain language of Heading 8517 provides that, when television signals are involved, Heading 8525 controls. Heading 8517; *see also* Def. Br. at 17. Based on this text, the drafters of the HTSUS apparently recognized that items may be classifiable in both Headings 8517 and 8525, among others, regardless of the construction of the words “transmission” and “apparatus.” Were it otherwise, the drafters would not have expressly excluded television signals from Heading 8517.

Plaintiff maintains that Heading 8517 covers only items that support transmission, while Heading 8525 encompasses only items that function as actual transmitters. Pl. Br. at 29. This argument is incorrect. Explanatory Note (G) to Heading 8517 names “transmitters” as an example of line equipment related to multiplexers. EN 85.17(G)(7). If Heading 8517 consisted only of items that *support* transmission, rather than items that actually *transmit* signals, “transmitters” would not be listed in the Explanatory Notes. Heading 8517, therefore, describes both devices that actually transmit and ones that support transmission.

Plaintiff next argues that Explanatory Note (A) makes clear that Heading 8525 applies only to actual transmitters, thereby excluding the subject Harmonic EMRs at issue in this case. The core premise of plaintiff’s argument is that Explanatory Note (A) to Heading 8525 should be interpreted based on the principle of *ejusdem generis* such that it includes only devices that actually perform the act of sending signals from one location to another. Pl. Br. at 26–27. Defendant argues that the principle of *ejusdem generis* does not apply to the provision and that plaintiff’s proffered interpretation would improperly narrow the plain meaning of Heading 8525.

Explanatory Note (A) to Heading 8525 provides:

“this group [of transmission apparatus for radio-broadcasting or television] *includes*:

“(1) Transmitter for radio-broadcasting or television.

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According to plaintiff, the WCO opinion determined that the items are classified in Heading 8517 and not in Heading 8525 because they do not perform the function of transmitting signals. *Id.* at 21. Plaintiff argues that the WCO opinion thus provides guidance “that Heading 8525 ‘transmission apparatus’ covers items that transmit a signal and that Heading 8517’s ‘apparatus for the transmission’ covers items that do not transmit but that perform a function in support of transmission.” *Id.* As noted above, the language of the HTSUS does not support this conclusion. *See* discussion *supra* Section III.A. Accordingly, the WCO opinion is entitled to “respectful consideration” by the court; however, the court does not find the opinion persuasive. *Cummins*, 454 F.3d at 1366.

(2) Relay apparatus used to pick up a broadcast for transmission and retransmit it to and so increase the range (including television relay apparatus for mounting in aircraft).

(3) Relay television transmitters for transmission, by means of an aerial and parabolic reflector, from the studio or site of an outside broadcast to the main transmitter.

(4) Television transmitters for industrial use (e.g., for reading instruments at a distance, or for observation in dangerous localities). With this apparatus the transmission is often by line.”

Explanatory Note (A) to Heading 8525 (emphasis supplied).

Generally, *ejusdem generis* analysis is a “canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.” BLACK’S LAW DICTIONARY (11th ed. 2019). See also MERRIAM-WEBSTER LAW DICTIONARY (defining *ejusdem generis* as “a rule of construction: general words (as in a statute) that follow specific words in a list must be construed as referring only to the types of things identified by the specific words.”). Specifically, “In classification cases, *ejusdem generis* requires that, for any imported merchandise to fall within the scope of the general term or phrase, the merchandise must possess the same essential characteristics or purposes that unite the listed exemplars preceding the general term or phrase.” *Avenues In Leather, Inc. v. United States*, 423 F.3d 1326, 1332 (Fed. Cir. 2005). These definitions, therefore, buttress the definition of “*ejusdem generis*” argued by defendant.

The list in question is not an exhaustive list with a catch-all term; rather, it is list of exemplars introduced by the word “including.” The meaning of the word “including” varies with context. In a statute, it may serve to: (1) connote an illustrative application of the general description without limiting the general description, rather than to provide an all-embracing definition; (2) “add products to the heading that fall outside the general description”; (3) arrest any doubt as to whether the exemplars are included within the class; or, (4) “demarcate the boundary between what falls within the general class from that which falls without thereby limiting the scope of the general class.” *Cummins Inc. v. United States*, 29 CIT 525, 533, 377 F. Supp. 2d 1365, 1372–73 (2005).

To decide which, if any, of these possibilities applies in the instant case, “the [c]ourt needs to read the ‘including’ language in light of the context and purpose of its use or as the legislative history may suggest.” *Id.* (internal citations omitted). In this case, the most appropriate interpretation of the use of “including” for Explanatory

Note (A) to Heading 8525 is the first interpretation. A structural analysis of Explanatory Note (A) to Heading 8525 suggests that the list in the Explanatory Note is illustrative. The Explanatory Note begins by describing the types of transmissions for which the apparatus is used, that fall into the heading. The Explanatory Note states that the “apparatus for radio-broadcasting falling in this group must be for the transmission of signals by means of electro-magnetic waves transmitted through the ether without any line connection. On the other hand, television apparatus falls here whether the transmission is by electro-magnetic waves or by line.” HTSUS, EN 8525(A). Explanatory Note (A) proceeds to list what “this group” includes. *Id.* Therefore, this structure indicates an intent to provide examples without limiting the general description.

Additionally, BLACK’S LAW DICTIONARY (9th ed. 2009) supports this interpretation by stating “[t]he participle including typically indicates a partial list.” This definition of “including” is accepted in many court decisions. *E.g.*, *Bloate v. United States*, 559 U.S. 196 (2010); *Amanda Foods (Vietnam) Ltd. v. United States*, 36 CIT 754, 647 F. Supp. 2d 1368 (2012).

This Court does not apply the principle of *ejusdem generis* to an illustrative list without a general “catch-all” term. Indeed, all four cases cited by plaintiff in support of its argument apply *ejusdem generis* to lists that end with such a general term. *See Otter Prod., LLC v. United States*, 834 F.3d 1369, 1376 (Fed. Cir. 2016) (“and similar containers”); *Victoria’s Secret Direct, LLC v. United States*, 769 F.3d 1102, 1107 (Fed. Cir. 2014) (“and similar articles”); *Avenues in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999) (“similar containers” and “similar articles”); *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994) (“household articles not specifically provided for”). Therefore, none of the cases presented by plaintiff is apposite to the current case.

The court therefore determines based on the language of Explanatory Note (A) to Heading 8525 that the *ejusdem generis* principle does not apply.

Even, assuming *arguendo*, that *ejusdem generis* were to apply to the list in Explanatory Note (A), plaintiff’s argument on this point would fail. That is because plaintiff here attempts to use an EN to Heading 8525 to define “transmission apparatus” more narrowly than the plain meaning of the words in the heading. This Court and the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) have rejected similar attempts to use ENs to interpret a heading as narrower than its plain meaning interpretation. *See Rubie’s Costume Co. v. United States* 337 F.3d 1350, 1359 (Fed. Cir. 2003); *Apple Inc. v.*

*United States*, 43 CIT , 375 F. Supp. 3d 1288 (2019), *aff'd*, 964 F.3d 1087 (Fed. Cir. 2020). For example, in *Rubie's Costume*, the Federal Circuit rejected such an interpretation, stating that “[a]lthough the examples in the ENs are probative and sometimes illuminating, we shall not employ their limiting characteristics, to the extent there are any, to narrow the language of the classification heading itself.” 337 F.3d at 1359. Accordingly, the court rejects plaintiff’s two-part argument concerning the application of Explanatory Note (A) to Heading 8525.

### b. Television

The court turns next to the meaning of the term “television” in Heading 8525. The HTSUS does not define the term “television” in Heading 8525. The Court has defined television as “vision at a distance; hence, the transmission and reproduction of a view or scene, esp. [sic] a view of persons or objects in motion, by any device which converts light rays into electrical waves and reconverts these into visible light rays.” *Sears Roebuck & Co. v. United States*, 16 CIT 305, 307, 790 F. Supp. 299, 301 (1992) (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1961)).

To determine the correct meaning of television, the court consults the same dictionaries that the court used to clarify the definition of “transmission”. These dictionaries define “television” as follows: “A system for converting a succession of visual images into corresponding electric signals and transmitting these signals by radio or over wires to instant receivers at which the signals can be used to reproduce the original images.” MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 5th ed. 1994). Similarly, the SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (6th ed. 2007) defines television as a: “1: A system for reproducing on a screen visual images transmitted (usu. with sound) by radio signals; 2: The medium, art form, or occupation of broadcasting on television; (with specifying word) a particular television service or company. Now also, televised entertainment, the content of television programmes . . . 3: A device with a screen for receiving television signals.”<sup>6</sup>

<sup>6</sup> See also, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE: “1.a. An electronic broadcast system in which special providers transmit a continuous program of video content to the public or subscribers by way of antenna, cable, or satellite dish, often on multiple channels: . . . b. Video content, especially short programs, created for or distributed through such a system: . . . c. An electronic device for viewing television programs and movies, consisting of a display screen and speakers: ..... 2. The industry of producing and broadcasting television programs: . . .”; and, MERRIAM-WEBSTER ONLINE DICTIONARY: “1: an electronic system of transmitting transient images of fixed or moving objects together with sound over a wire or through space by apparatus that converts light and sound into

Heading 8525 provides “transmission apparatus for television or radio-broadcasting, whether or not incorporating reception apparatus or sound reproducing apparatus.” The qualifier in Heading 8525 describes items in Heading 8517 and Note 2(b) of Section XVI of the HTSUS states that a product that is *equally* classifiable in both Heading 8525 and Heading 8517 should be classified in Heading 8517. Therefore, classification under Heading 8525 is proper only for instances in which a product is *primarily* classifiable in Heading 8525 by way of its principal use in television or radio-broadcasting.

## 2. Principal Use Analysis

The court considers next whether a principal use analysis is appropriate in the instant case. Heading 8529 is a use provision, as it includes parts that are “suitable for *use solely or principally* with the apparatus of headings 8525 to 8528.” (Emphasis supplied). *See Samsung Int’l, Inc. v. United States*, 36 CIT 1531, 1556, 887 F. Supp. 2d 1330, 1350 (2012), *aff’d*, 546 F. App’x 961 (Fed. Cir. 2013) (confirming Heading 8529 is a use provision). Relevant in the present case, Heading 8529 covers, among other things, parts of “transmission apparatus for radio-broadcasting or television” under Heading 8525.

Because Heading 8529 is a use provision, whether the subject PCBAs and chassis are correctly classified under this heading depends on whether the Harmonic EMRs with which they are used are correctly classified under Heading 8525 or Heading 8517. Accordingly, the court must determine if the subject merchandise is principally used as a constituent part of merchandise that are “transmission apparatus for radio-broadcasting or television” under Heading 8525, or instead “other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network” under Heading 8517. Therefore, the ways in which Harmonic customers use Harmonic EMRs are relevant to classifying the subject PCBAs and chassis.

Defendant asserts that the most frequent purchasers of the subject Harmonic EMRs from 2010 to 2012 were television content providers that used them for the transmission of data signals for television content. Def. Stmt. Facts ¶ 20 (citing Def. Ex. 3 (Armstrong Dep.) at 18). Plaintiff does not address directly the question of the most frequent purchasers. Harmonic testified that its customers buy their EMRs because Harmonic offers digital cable and delivers more channels over the same bandwidth previously used to transmit analogue channels. Def. Ex. 3 (Armstrong Dep.) at 19.

electrical waves and reconverts them into visible light rays and audible sound; 2: a television receiving set; 3a: the television broadcasting industry; b: television as a medium of communication; c: programming distributed over the Internet that is designed to be viewed in the same format as broadcast television.”

However, having conceded that the Harmonic EMRs perform these functions, plaintiff argues that Heading 8525 does not describe these products because they have “capability that is *greater than* just supporting TV and radio programming.” Tr. Oral Arg. at 39 (emphasis supplied). Further, plaintiff contends that “the wide range of audio/video content that is compressed by Harmonic EMRs is not described by the language ‘for radio broadcasting or TV.’” *Id.* Plaintiff cites GRI 1 as supporting the interpretation that “a device that has a use *and capability*” different than that described by Heading 8525 should not be classified in Heading 8525. *Id.* (emphasis supplied).

The record demonstrates a growing trend in the transmission of compressed data to devices other than televisions. Pl. Ex. F (Written Report by Expert Dan Schonfeld) (“Schonfeld Expert Report”) at 4–5. This report explains the digitalization of communication systems, including telephone and television networks, into multimedia communication networks offering telephone, television and Internet services. *Id.* at 5. Similarly, the report describes the rise of computers as multimedia platforms. *Id.* Harmonic EMRs have the capability to be used in these multimedia communication systems.

Further, it is correct that Harmonic encoders are suited for compressing any image (in addition to sound). *See* Pl. Ex. A (Joint Stmt. of Facts Not in Dispute) at ¶ 10 (“The Harmonic encoders compress audio and video digital data representing images and sounds including voice”); *see also* Pl. Ex. E (Declaration of Eric Armstrong) at ¶ 5 (“Harmonic encoders are designed and used solely for the compression of digital data and representing sounds and images.”). The multiplexers and remultiplexers further compress these data outputs of images and sound. *Id.* at ¶¶ 14–15.

The “[s]usceptibility, capability, adequacy, or adaptability of the import to the common use of the class is not controlling.” *USR Optonix, Inc. v. United States*, 29 CIT 229, 247, 362 F. Supp. 2d 1365, 1381 (2005) (citing *U.S. v. the Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373, 377 (1976)).<sup>7</sup> The Court in *Optonix* also applied Additional U.S. Rule of Interpretation 1(a), which “provides that ‘[i]n the absence of special language or context which otherwise requires — a

<sup>7</sup> When making a principal use determination, the court makes “a determination as to the group of goods that are commercially fungible with the imported goods.” *BenQ Am. Corp. v. United States*, 646 F.3d at 1380 (internal quotation marks and citation omitted). In doing so, the court may examine the *Carborundum* factors, which include: “(1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels of trade in which the merchandise moves; (4) the environment of the sale (*e.g.*, the manner in which the merchandise is advertised and displayed or the accompanying accessories); (5) the usage of the subject merchandise and whether that use corresponds to the use of class-defining merchandise; (6) the economic practicality of using the import in that manner; and (7) the recognition in the trade of this use.” *Optonix*, 362 F.Supp.2d at 1381 (citing *Carborundum*, 536 F.2d at 377).

tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation.” *Optonix*, 29 CIT at 247; see also Additional U.S. Rule of Interpretation 1(a), HTSUS. The Rule further clarifies that “the controlling use is the principal use.” *Id.*<sup>8</sup> Principal use analysis “considers a variety of factors, including actual use, ‘to classify particular merchandise according to the ordinary use of such merchandise, even though particular imported goods may be put to some atypical use.’” *Apple Inc. v. United States*, 964 F.3d 1087, 1094–95 (Fed. Cir. 2020) (citing *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1313–14 (Fed. Cir. 2012) (internal quotation marks and citation omitted)).

In this case, there is a genuine factual dispute between the parties as to the principal use of the subject Harmonic EMRs from 2010 to 2012. Defendant asserts that the principal users of the subject merchandise were television content providers that used Harmonic EMRs to transmit data signals for television content. Def. Stmt. Facts ¶ 20 (citing Def. Ex. 3 (Armstrong Dep.) at 18). By contrast, plaintiff centers its arguments on the *suitability* and increasing use of the Harmonic EMRs for non-television-related uses. Pl. Br. at 30–31; Tr. Oral Arg. at 25–27. See also Pl. Resp. Def. Stmt. Facts ¶ 20. Accordingly, genuine issues of material fact remain as to whether the PCBAs and chassis at issue here are constituent parts of merchandise principally used “for radio-broadcasting or television” or for the “reception of voice, images, or other data . . . in a wired or wireless network.” See *Roche Vitamins*, 750 F.Supp.2d at 1377–78.

### 3. The Relevance of Explanatory Note (G) to Heading 8517

Plaintiff also asks the court to consider Explanatory Note (G) to Heading 8517 as persuasive authority for the proposition that the subject merchandise should be classified in that heading. For the reasons elaborated below, the court concludes that the persuasive authority of Explanatory Note (G) is limited.

Explanatory Note (G) states that equipment of Heading 8517 includes apparatus for the transmission of “speech or other sounds, images or other data” within “communication networks . . . that may be configured as public switched telephone networks, Local Area Networks (LANs), Metropolitan Area Networks (MANs) and Wide

<sup>8</sup> The full text of Additional U.S. Rule of Interpretation 1(a) reads: “1. In the absence of special language or context which otherwise requires - (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. . . .”

Area Networks (WANs).” Explanatory Note (G) then provides a list of what this group may include. Explanatory Note (G)(4) specifically lists multiplexers, one of the three products that comprise the Harmonic EMRs at issue. Explanatory Note (G)(5) also lists “codecs” and describes codecs as “data compressors/decompressors”. The encoders of the Harmonic equipment compress data, so Explanatory Note (G)(5) describes their function.

Defendant responds to this argument in three ways. Defendant argues that rather than demonstrating that the subject merchandise provides “for the connection to a wired or wireless communication network or reception of speech or other sounds, images, or other data within such a network,” as required by Explanatory Note (G), the subject merchandise is “primarily used” by TV providers to compress data to relay to consumer televisions. Def. Br. at 19; *see also* Def. Rep. Br. at 3, 12–13. Defendant also argues that plaintiff’s reliance on the ENs is “misplaced” because (1) they are not legally binding, and (2) plaintiff is using *ejusdem generis* to limit impermissibly the meaning of the heading based on a non-exhaustive list. Def. Rep. Br. at 11–12. Finally, defendant notes that Congress specifically excluded “transmission apparatus” that fall under Heading 8525 from Heading 8517. In sum, defendant argues that the multiplexers and codecs listed in Explanatory Note (G) might be properly classified at Heading 8517, but that these products could also fall under Heading 8525 (as the subject merchandise specifically warrants). Def. Rep. Br. at 12.

When the ENs “specifically include or exclude an item from a tariff heading,” they serve as persuasive authority for the court. *H.I.M. / Fathom, Inc. v. United States*, 981 F. Supp. at 613 (1997). However, notably, the ENs to Heading 8517 do not specifically name either encoders or remultiplexers. Further, Explanatory Note (G)(5) lists “codecs . . . which have the capability of transmission and reception of digital information.” At oral argument, plaintiff conceded that Explanatory Note (G)(5) does not reflect fully the subject Harmonic encoders because, according to plaintiff, the encoders included in the subject merchandise “do not transmit.” Tr. Oral Arg. at 8. Therefore, the persuasive authority of Explanatory Note (G) is limited.

#### 4. Meaning of the 2007 Amendments

Plaintiff also argues that the 2007 amendments to Heading 8517 support plaintiff’s interpretative positions.

In 2007, Heading 8517 was amended in two significant respects.<sup>9</sup> First, Congress amended Heading 8517 to include the language “ap-

<sup>9</sup> The 2007 amendments to HTSUS 8517 at issue here were made pursuant to Proclamation No. 8097, 72 Fed. Reg. 453 (Jan. 4, 2007). The superseding language to 8517 is listed in

paratus for the transmission.” Second, Congress added exclusionary language clarifying that any apparatus for transmission or reception that is properly classified under Heading 8525 is excluded from Heading 8517.

Plaintiff argues that the first amendment demonstrates an intention “to cover equipment such as the Harmonic encoders, multiplexers and remultiplexers that did not exist in 1970.” Pl. Rep. Br. at 15. Defendant’s position is that this interpretation would have the effect of incorporating into Heading 8517 items described in other headings, including Heading 8525. Tr. Oral Arg. at 74. Defendant adds that the excluding language in Heading 8517 is meant to address this potential conflict. *Id.*

The pre-amendment text of Heading 8517 was: “Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones; parts thereof.” Post amendment, the text of Heading 8517 still begins with a focus on telephones, providing: “Telephone sets, including telephones for cellular networks or for other wireless networks; other *apparatus for the transmission* or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), *other than* transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof.” Heading 8517 (emphasis supplied). In addition, Congress added new subheading language at 8517.61–69 for “other apparatus for transmission or reception of voice, images or other data” and “machines for the reception, conversion and transmission or regeneration of voice, images or other data.”

Interestingly, neither party addresses expressly the addition of exclusionary language in the 2007 amendments; however, both parties address the exclusion in more general terms. Defendant mentions that “the 2007 language did not do anything” to remove the exclusion “so the exclusion still stands.” Tr. Oral Arg. at 74. However, an examination of the archived pre-2007 amendments text of Heading 8517 makes clear that this exclusion was *added* in 2007; it did not simply go unchanged.<sup>10</sup>

Defendant argues that, but for the exclusionary clause, “transmission apparatus for television” could potentially be considered an “ap-

Modifications to the Harmonized Tariff Schedule of the United States Under Section 1206 of the Omnibus Trade and Competitiveness Act of 1998, USITC Pub. 3898 (Dec. 2006).

<sup>10</sup> The language prior to the 2007 amendments, which did not contain the exclusionary language, is included in the preliminary version of the 2007 HTSUS. See HTSUS 8517 (Prelim. 2007). The exclusionary clause first appeared after the 2007 amendments in the basic edition. See HTSUS 8517 (2007). This suggests that the exclusionary language was added between the publication of the Preliminary and Basic editions of the 2007 HTSUS.

paratus for the transmission of voice, images or other data” under Heading 8517. Thus, defendant argues that “the plain language of heading [sic] 8517 establishes that, when television signal [sic] are involved, heading [sic] 8525 controls.” Def. Br. at 17.

Plaintiff seeks to buttress its argument with respect to the impact of the 2007 amendments on the language of Heading 8517 by noting that new subheading language was also inserted at subheading 8517.61–69 for “other apparatus for transmission or reception of voice, images or other data” and “machines for the reception, conversion and transmission or regeneration of voice, images or other data.” Pl. Br. at 19–20.

Pursuant to GRI 1, when making classification decisions, the court takes a top-down approach, beginning “as it must, with the language of the headings” and ending with the language of the subheadings. *Orlando Food Corp.*, 140 F.3d at 1440. As the Federal Circuit stated in that case: “[W]hen determining which heading is the more specific, and hence the more appropriate for classification, a court should compare only the language of the headings and not the language of the subheadings . . . . Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise.” *See also Gerson Co. v. United States*, 41 CIT \_\_, \_\_, 254 F. Supp. 3d 1271, 1273 (2017), *aff’d*, 898 F.3d 1232 (Fed. Cir. 2018 (citing *Orlando Food Corp.*, 140 F.3d at 1440)).

In this regard, plaintiff’s proffered interpretation of the 2007 amendments to Heading 8517 is inconsistent with both the exclusionary clause added by those amendments and principles of statutory interpretation. Under the pre-2007 amendment text of Heading 8517, the court clarified that “Heading 8517 covers telegraphic functions.” *David W. Shenk & Co. v. United States*, 21 CIT 284, 288, 960 F. Supp. 363, 367 (1997). Given this history, the preservation of a focus on telephones in the post-2007 amendment text, and the addition of language that expressly excludes merchandise classifiable under Heading 8525, plaintiff’s interpretation is not apt.

## **5. Customs’ Transmission Path Theory and Deference to Prior Ruling Letters**

Plaintiff next argues that Customs’ HQ H193879 (Def. Ex. 1), which concerned the classification of the subject merchandise, is unpersuasive and, therefore, should not be given deference by this court. *See*

Pl. Br. at 16.<sup>11</sup> In particular, plaintiff challenges the use by Customs in HQ H193879 of a classification approach that Customs has labeled the “transmission path theory”, as unfounded and inconsistently applied. *Id.* at 16–18.

The court determines that the “transmission path theory” used by Customs in its HQ H193879 letter (Def. Ex. 1) is persuasive and deserving of deference in relation to the context of the instant case. However, the court reserves judgment as to the applicability of these ruling letters to the present case pending the resolution of the issue of principal use.

As noted, the court reviews classification cases *de novo*. See 28 U.S.C. § 2640(a)(1). Customs’ ruling letters, as explanations of classification decisions, are entitled to a level of “respect proportional to their power to persuade.” *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Factors that influence the persuasive power of a ruling letter include the agency’s thoroughness, logic and expertness, and consistency with prior interpretations. *Mead Corp.*, 533 U.S. at 235. Consistency, in particular, in Customs’ interpretation of a provision “enhances the persuasive power of that interpretation.” *Dell Prods. LP v. United States*, 642 F.3d 1055, 1060 (Fed. Cir. 2011). The reverse also applies. A lack of consistency in the use of an approach “indicates that Customs has not thoroughly considered a particular classification and undermines the persuasive power of its conclusions.” *Sony Elecs., Inc. v. United States*, 37 CIT 1748, 1755 (2013).

Customs’ transmission path theory, in brief, suggests that products related to television transmission systems “which lie in the transmission path . . . are classified in heading 8525, HTSUS, as transmission apparatus [for radio-broadcasting or television].” Pl. Br. at 17 n.26. Plaintiff implies that in the past, Customs considered the classification of products that were arguably “in the transmission path” and thus should have been classified in Heading 8525; instead, plaintiff argues, Customs classified those products in other headings such as Heading 8517, as “apparatus for the transmission or reception of voice, images, or other data.” See *id.* at 18.

For example, plaintiff discusses previous Customs’ ruling letters, HQ 967631 (Dec. 14, 2005) and New York Ruling Letter (“NY”) N179936 (Aug. 25, 2011), which classified Cisco switches under Head-

<sup>11</sup> Defendant does not seek deference for Customs’ Ruling Letter HQ H193879. Pl Rep. Br. at 6; see also Def. Rep. Br. at 4 (“Plexus appears to suggest that some meaning should be ascribed to our decision not to seek deference for Customs’ Ruling Letter HQ H193879. No such meaning exists. As we demonstrated in our briefing, Customs’ classification of the imported merchandise is the correct one . . . the dispute remaining, here, is the correct statutory meaning of ‘transmission apparatus for . . . television’ in Heading 8525, which is subject to this Court’s *de novo* review.”).

ing 8517. *Id.* at 18 n.27. In these letters, Customs did not state that the Cisco switches lie “in the transmission path,” even though the Cisco switches were placed between Harmonic’s encoders and multiplexers. *Id.* at 18; *see also* Pl. Ex. B (Harmonic Graphic). Plaintiff contends that Customs should have found the Cisco switches also to have been “in the transmission path,” and that Customs’ failure to do so is an example of inconsistent application of the transmission path theory. Pl. Br. at 18.

Similarly, plaintiff points to Customs’ failure to use its transmission path theory to classify products in Heading 8525 in the following seven ruling letters as further evidence of the lack of consistency in the application of the transmission path theory: (1) HQ 084703 (Sept. 13, 1989); (2) NY M87074 (Oct. 13, 2006); (3) HQ H118695 (Sept. 2, 2010); (4) NY N285326 (May 3, 2017); (5) HQ H097678 (June 3, 2010); (6) NY N301903 (Dec. 12, 2018); and, (7) NY R02506 (Sept. 8, 2005). *Id.* at 18–19 n.28.

Customs responds that “Plexus’ claims of inconsistent application are unfounded.” Def. Br. at 17. Customs first quotes from HQ H193879 (Def. Ex. 1), in which Customs made the following statement:

CBP has a longstanding line of decisions which have [sic.] determined that components of television transmission systems which lie in the transmission path, receive a signal and the output of which is relayed or fed further in the transmission system for eventual final reception and display, are classified in heading [sic] 8525, HTSUS, as transmission apparatus.

The ruling letters on which Customs relied for support in the instant case are: (1) HQ 955309 (Dec. 21, 1993); (2) HQ 958422 (Feb. 1, 1996); (3) HQ 962919 (Apr. 10, 2000); (4) HQ H005123 (Dec. 29, 2008); and, (5) HQ H068675 (Oct. 16, 2009). *See* Def. Ex. 1.

To determine the extent to which Customs’ transmission path theory is well-founded and consistently applied, and, therefore, the extent to which the court considers the prior practice to be persuasive in this case, the court first examines the ruling letters cited by plaintiff. In regard to HQ 967631 and NY N179936 concerning the Cisco switches, plaintiff’s argument is flawed because the Cisco switches included in Harmonic EMRs differ from the ones that Customs considered in those decisions. For plaintiff’s argument to be correct, the Cisco switches to which plaintiff refers that are used in Harmonic EMRs and the Cisco switches at issue in HQ 967631 and NY N179936 would need to be the same, or at least relatively similar. However, they are neither. In particular, the Cisco switches in Harmonic EMRs appear to be from the 3850 Series and 2960 Series,

whereas the ones considered in HQ 967631 and NY N179936 were the Cisco Catalyst 4000 Series Switches for Internet Protocol (IP) telephony. See Pl. Ex. B; HQ 967631 at 2, 4; NY N179936. Moreover, unlike the Cisco switches used in Harmonic EMRs, the switches at issue in HQ 967631 and NY N179936 operated in products that did not serve the function of television signal transmission and, therefore, do not provide an appropriate comparison. *Id.*

Specifically, in HQ 967631, the issue was whether a line card (printed circuit assembly) used exclusively in Cisco Catalyst 4000 Series Switches for Internet Protocol (IP) telephony was properly classified under Heading 8517 as an electrical apparatus for line telephony and line telegraphy. See HQ 967631 at 2, 4. In that case, Customs classified the product in Heading 8517, because the product's sole use was in switches for IP telephony, and the line card was specifically provided for in subheading 8517.90.4400, HTSUS. *Id.* at 5. Similarly, in NY N179936, Customs determined that Cisco Catalyst 3750 Series Switches described as "computer network hosting equipment" were provided for in subheading 8517.62.0050, HTSUS. See NY N179936. In sum, in both HQ 967631 and NY N179936, the products at issue were specifically identified in Heading 8517. Accordingly, in both cases, Customs' transmission path theory, which is used to classify products related to television transmission systems in Heading 8525, was not relevant.

As to the remaining seven ruling letters cited by plaintiff, none of the letters indicates that Customs has applied its transmission path theory in an inconsistent manner. In HQ 084703, which concerned video editing equipment, plaintiff is correct in noting that Customs did not mention the transmission path theory. As Customs explained in a more recent decision, HQ H118695, which concerned a 3D image processor, the video editing process occurs outside of the television transmission path and thus does not fall under Heading 8525. See HQ H118695 at 4.

Similarly, NY M87074 does not support plaintiff's inconsistent usage argument because in that case the product at issue was a mobile collaboration device that did not broadcast to a large enough population to be considered a television device. See NY M87074 at 1. In other words, Customs did not need to apply its transmission path theory because Customs had already determined that the nature of the product precluded classification under Heading 8525. *Id.*

Additionally, NY N285326 does not provide guidance in the present case because that ruling relied on application of a different statutory instruction, GRI 3(c). In that letter, Customs determined that audio/

video production units were not *prima facie* classifiable under Heading 8525 as the heading does not cover the editing function of the production units. See NY N28526 at 3. Customs ultimately classified the products using GRI 3(c). *Id.* Under GRI 3(c), the question is not whether the product is *prima facie* classifiable under the language of a particular heading as in GRI 1, but rather which of two or more possible headings occurs last in numerical order. Therefore, NY N285326 is inapposite because it concerned the application of a different GRI in a different context.

Further, the remaining three letters also do not provide guidance in this case with respect to Customs' use of the transmission path theory. In HQ H097678, which involved coaxial cables, Customs did not need to apply its transmission path theory to classify the product in Heading 8525 because Heading 8544 specifically provides for coaxial cables. See HQ H097678 at 4. Similarly, in NY N301903, Customs did not need to apply its transmission path theory because the product at issue, a video conferencing system, was *prima facie* classifiable under Heading 8517. See NY N301903 at 1. Likewise, NY R02506 can be distinguished because the product at issue was principally used for voice and data transmission, and thus fell under Heading 8517. See HQ H005123 at 6 (distinguishing the merchandise in NY R02506 from Plexus encoders because the former was capable of transmitting telephonic data signals).

In sum, plaintiff has failed to establish that Customs' transmission path theory is either unfounded or inconsistently applied. The court next considers the five ruling letters cited by Customs in its foundational ruling letter on the transmission path theory. See HQ H193879 (Def. Ex. 1).

The ruling letters cited by Customs provide strong support for Customs' transmission path theory. In HQ 955309, for example, Customs determined that a component of a digital satellite system that is used for television is properly classified in Heading 8525, noting that the product is "in the transmission path, but it is not at the end of the transmission path where final reception and viewing takes [sic] place." HQ 955309 at 2 (quoting HQ 088255 at 4 (Dec. 17, 1990)). Similarly, in HQ 958422, Customs determined that a component of a television satellite dish should be classified in Heading 8525 because, as in the case of the digital satellite system considered in HQ 955309, it "lies in the transmission path" and receives signals and relays them for final reception and display. HQ 958422 at 4–5.

In HQ 962919, Customs considered the classification of encoders that are used to compress signals for eventual television transmission — much like the Harmonic EMRs at issue in the present case — and

determined that they are covered under Heading 8525. There, Customs cited another ruling letter, HQ 088746 (May 13, 1991), in support of its conclusion. See HQ 962919 at 3. In HQ 088746, Customs classified a type of signal processor under Heading 8525 while noting that the product is “in the transmission path, but it is not at the end of the transmission path where final reception and viewing takes place.” HQ 088746 at 4.

Further, in HQ H005123, a previous Plexus ruling, Customs found that the encoders at issue were apparatus for television transmission in Heading 8525. See HQ H005123 at 6–7. There, the key inquiry involved the type of signal being transmitted. *Id.* at 6. Customs found that the encoders did not transmit telephonic data signals and therefore did not fit under Heading 8517. *Id.*

Finally, in HQ H068675, Customs observed that filters that alter cable television transmission “lie in the transmission path, receive a signal, and relay . . . signals further in the transmission system for eventual final reception and . . . display.” HQ H068675 at 4.

Taken as a whole, these ruling letters cited by Customs indicate that Customs has consistently applied its transmission path theory to classify television transmission equipment that lies in the transmission path, receives a signal, and relays an output further down the transmission system, and, for those reasons, is properly classified in Heading 8525. Contrary to plaintiff’s assertions, Customs has shown consistency in its application of the “transmission path theory” to classify components of television transmission systems under Heading 8525. The court reserves judgment as to the applicability of these ruling letters to the present case pending the resolution of the issue of principal use. However, the court determines that the “transmission path theory” used by Customs in its HQ H193879 letter (Def. Ex. 1) is persuasive and deserving of deference in relation to the context of the instant case.

## 6. Relevance of the CCPA *Ampex* Decision

Finally, defendant urges the court to look to a decision of the U.S. Court of Customs and Patent Appeals (“CCPA”) that interpreted apparatus of television transmission to “perform any of a wide variety of functions in connection with television transmission and reception” in the classification of television camera cables. *United States v. Ampex Corp.*, 59 CCPA 134, 138, 460 F.2d 1086, 1088 (1972). As discussed below, the court considers the CCPA’s characterization in *Ampex* of “television transmission apparatus” instructive, albeit not persuasive.

Plaintiff argues that *Ampex* should not apply to the present case for three reasons. First, because the appeals court analyzed *Ampex*

under the Tariff Schedule of the United States (“TSUS”) rather than the HTSUS, its analysis does not provide guidance. Pl. Rep. Br. at 14. Second, because the CCPA applied the rule of “relative specificity,” which has since been codified in HTSUS at GRI 3, the *Ampex* court’s analysis is inapplicable to the present action because it involves classification pursuant to GRI 1. *Id.* Third, because the *Ampex* court derived its meaning of “transmission apparatus” from a single lexicographic source from 50 years ago, its interpretation is inapplicable. *Id.*

The Federal Circuit has held that the CCPA’s prior determination of a common meaning of a term, based on an interpretation of a tariff provision under the TSUS, is not controlling as to a determination under the HTSUS. Where the language of the provisions of the TSUS and the HTSUS is identical, decisions interpreting the TSUS may be instructive, but they are not dispositive. *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1354–55 (Fed. Cir. 2000).

The relevant portion of Heading 685.20, TSUS, refers to “radio-broadcasting and television transmission and reception apparatus.” The relevant portion of Heading 8525, HTSUS, states “transmission apparatus for radio-broadcasting and television.” Although the two provisions are not identical, their difference as pertaining to the issues in this case is only in the order of the terms.

The court finds plaintiff’s second reason unconvincing. The CCPA’s interpretation of “transmission apparatus” comes before and is separate entirely from the CCPA’s application of “relative specificity.” Here, the court is concerned only with the CCPA’s interpretation of a tariff term. Defendant’s reliance on *Ampex* is more limited than plaintiff ascribes. Defendant relies on *Ampex* only as persuasive authority to support a broad interpretation of “transmission apparatus for radio-broadcasting or television.” Def. Rep. Br. at 8. Defendant does not rely on arguments relating to CCPA’s discussion of “relative specificity.” As a consequence, plaintiff’s arguments are unsuccessful in undermining defendant’s citation of *Ampex*.

The court also considers plaintiff’s third reason unconvincing. In *Ampex*, the appeals court recalls a chapter on Television Systems Fundamentals in a book entitled *Television Broadcasting* in arriving at the court’s definition of “television transmission.” *Ampex*, 460 F.2d at 1088. There is no indication that the understanding of the terms “transmission” or “television” have changed significantly since the CCPA published this opinion. Therefore, to deny the characterization of “transmission apparatus” provided by an industry-specific source on which the court relied would be arbitrary.

In sum, the court considers the CCPA's characterization in *Ampex* of "television transmission apparatus" instructive, albeit not persuasive. The interpretation by the appeals court of the terms as to "perform any of a wide variety of functions in connection with television transmission and reception" supports the interpretation of "transmission apparatus for television," discussed *supra* section III.A, as devices designed for the purpose of sending signals from one location to another for the eventual transmission of viewing television content. The *Ampex* court's interpretation is consistent also with the description of "transmission path" as stated in and applied by previous Customs ruling letters to be components of television transmission systems that lie in the transmission path and receive a signal, the output of which is relayed to or fed further into the transmission system for eventual final reception and display.

Heading 8525 covers apparatus whose principal function is to send signals from one location to another within the transmission path ultimately for television viewing or radio-broadcasting. Further, the plain language of the heading indicates that it does not limit classification to items that directly transmit radio and television data to the receiving device.

## **B. Application of Headings 8517 and 8525 to the Subject Merchandise**

Heading 8517 expressly excludes products classified in Heading 8525. Accordingly, the court's inquiry begins with whether the subject merchandise is properly classified in Heading 8525. *Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009). As noted above and as elaborated below, the court determines that factual issues regarding the principal use of the subject merchandise remain unresolved. Consequently, the court does not reach a conclusion as to whether the proper classification of the subject merchandise is Heading 8529, which is comprised of parts suitable for use solely or principally with the apparatus of Heading 8525, or Heading 8517.

### **1. Heading 8525**

The relevant language in Heading 8525 describes properly classified products as "transmission apparatus for . . . television." Whether Heading 8525 covers the Harmonic EMRs that are the subject of this case depends specifically on whether the equipment sends data that will be used principally for viewing television content as opposed to videoconferencing or other content.

Plaintiff relies on the Schonfeld Expert Report to support the argument that "[t]he data that is [sic] compressed and multiplexed by the Harmonic encoders, multiplexers and remultiplexers ultimately

can be listened to and watched on smart phones, personal computers and other devices not limited to televisions or radios, and can consist of video conferencing and other audio video content that is not television or radio programming.” Pl. Stmt. Facts ¶ 21 (citing Pl. Ex. F (Schonfeld Expert Report) at 18, 39; Pl. Ex. I (Deposition of Dan Schonfeld) (“Schonfeld Dep.”) at 48, 133).

The Schonfeld Expert Report and deposition do not support plaintiff’s conclusion. Schonfeld in his testimony described how encoders, multiplexers and remultiplexers are *generally* used, and how the Harmonic EMRs *can* be used. However, Schonfeld made clear that he was not familiar with Harmonic’s business or the customers for the subject merchandise. Pl. Ex. I (Schonfeld Dep.) at 128. For example, when asked if he knew whether the Harmonic EMRs “are used over the Internet, whether they’re used with a cable system or used some other way,” Schonfeld responded: “I do not know.” *Id.* When asked if there is “a way to tell by looking at kind of [sic] the description of the specifications to see if that would tell us how a particular device is being used,” he responded that there is “no way to tell exactly how it’s being used.” *Id.* Later, when asked if he did not “know with specificity how Harmonic is using their particular finished products,” Schonfeld responded: “That’s right. I do not know.” *Id.* at 158.

Expert witness Eric Armstrong is Harmonic’s Vice President of SaaS Solutions. Unlike Schonfeld, Armstrong was familiar with the ways in which Harmonic’s customers used the EMRs. Def. Ex. 3 (Armstrong Dep.) at 10. After being asked to describe the nine products that comprise the subject merchandise, Armstrong described them as being “used in [Harmonic’s] customers’ infrastructure. Their *primary purpose* is video and audio compression and multiplexing,” *Id.* at 18 (emphasis supplied), with the term compression being “[p]rimarily about reducing the bandwidth of video, the amount of space it would occupy on a storage device or the amount of bandwidth it would occupy as the video is transmitted *for a T.V. service.*” *Id.* (emphasis supplied).

Armstrong expressed the view that Harmonic’s *customers* are primarily television service providers. *Id.* at 27–29, 31–33, 46–47, and 87; *see also* Def. Br. at 12. Similarly, Harmonic’s Director of Product Line Management for Compression and Stream Processing, Neil Brydon, also declared that “Harmonic’s encoders, multiplexers and remultiplexers are optimized for use in cable, satellite, IPTV and terrestrial applications.” Pl. Ex. D (Declaration of Neil Brydon) (“Brydon Declaration”) at ¶ 4. Finally, at oral argument, defendant

declared that Verizon uses the subject merchandise to provide television content and not telephony, which is covered by Heading 8517. Tr. Oral Arg. at 9.

Again, the record indicates a lack of agreement between plaintiff, which argues that customers such as Verizon may use the products that comprise the subject merchandise in a variety of ways, Pl. Br. at 30, while defendant asserts that to the extent telephone providers such as Verizon use those products, the providers use them primarily to provide “IP T.V.” services. Def. Ex. 3 (Armstrong Dep.) at 27, 29, 46, 54–56.

The court next considers whether Heading 8525 is the appropriate classification in respect of the language of “transmission” in the heading. For example, Brydon clarified in a declaration that the Harmonic EMRs “deliver” a signal. He stated that “in cable or satellite delivery applications modulation and transmission equipment is required after the encoder, multiplexer or remultiplexer to enable the signal to be delivered over the access medium. Similarly, in an IPTV application *the encoder, multiplexer or remultiplexer delivers the signal* to a DSLAM (Digital Subscriber Line Access Multiplexer) that then transmits the signal to multiple subscribers over the telephone network to the consumer reception equipment.” Pl. Ex. D (Brydon Declaration) at ¶ 6 (emphasis supplied).

In sum, the parties do not dispute the conclusion that Harmonic EMRs send signals to other equipment within the path of transmission, such as a modulator, while not sending signals to a final receiving device. *See* Def. Ex. 3 (Armstrong Dep.) at 26–28; *see also* Pl. Rep. Br. at 9–10. This type of activity meets the established interpretation of “transmission apparatus” because the Harmonic EMRs are “apparatus that send a signal out to another location.” *See* discussion of dictionary definitions and common meaning of “transmission,” *supra* p. 16–19.

However, the parties dispute the principal use of the subject merchandise, a material fact that affects the outcome of this case. *See Anderson*, 477 U.S. at 248. USCIT Rule 56(a) provides that the court grant summary judgment only if a moving party can show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Accordingly, since plaintiff has failed to meet its burden in this respect, the court does not reach a conclusion as to whether the subject merchandise is properly classified at Headings 8529 and 8525.

## 2. Heading 8517

The relevant part of Heading 8517 describes properly classified items as “other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading . . . 8525.” Plaintiff argues that the Harmonic EMRs are properly classified in Heading 8517 because the devices are used for a variety of purposes, including non-television. Plaintiff relies on the Schonfeld Expert Report to support this assertion. Tr. Oral Arg. at 26, 28. The report states that the “Harmonic encoders, multiplexers, and remultiplexers were intended for use in . . . multimedia *communication* networks.” Pl. Ex. F (Schonfeld Expert Report) at 5. Earlier, the report describes multimedia communication networks as providing “a variety of digital services to their customers, including telephony, television, and Internet services.” *Id.* The report also states that “[t]he strong relationship between multimedia compression standards adopted for multimedia storage, video telephony and other networked applications such as videoconferencing is a clear indication of the confluence of many of the technologies used for these very different multimedia applications.” *Id.* at 8.

However, as noted, Mr. Schonfeld stated during his deposition that he does not know how Harmonic EMRs are *actually* used. *See* Pl. Ex. I (Schonfeld Dep.) at 128, 158. In light of this statement, the explanation in the Schonfeld Expert Report about multimedia compression standards does not support plaintiff’s argument that the Harmonic EMRs that incorporate the subject merchandise are used *principally* for telephone and Internet networks. Rather, this statement conveys that the technology used to compress data for movie and television viewing is similar to that used for video telephony and videoconferencing. As a consequence, the Schonfeld Expert Report leaves unclear the principal use to which the Harmonic EMRs, with which the imported merchandise is used, are put: namely, for television or non-television purposes.

## CONCLUSION

Much has been written about the “Golden Era of Television.” The court is not in a position to offer a judgment on when, exactly, that era may have started and ended.

However, without question, one of the greatest shows in television history, punctuated by the use of a Shoe Phone, appropriately, was the comedy-action-adventure series *Get Smart*, created by the extraordinary Mel Brooks and Buck Henry, as a spoof of the James

Bond movies. The show featured a memorable series of gadgets, which included the Shoe Phone (Agent Maxwell Smart, played by Don Adams, had to remove his shoe and hold the bottom of it up to his cheek and ear) and the Cone of Silence (comprised of two clear, semi-circular sheets of translucent plastic that descended from the ceiling to create a 1960s version of a Sensitive Compartmentalized Information Facility (“SCIF”). Smart insisted on using it to convey the most rudimentary and useless information to his superior — known simply as “The Chief,” played to comic perfection by Edward Platt — and it invariably malfunctioned, bonking Smart or the Chief on the head or causing other problems).<sup>12</sup>

The show also included catchphrases that caught on quickly at the time and were widely repeated. There was “the old [fill-in-the-blank] trick” catchphrase, as in: “The old Professor Peter Peckinpah all-purpose anti-personnel Peckinpah pocket pistol under the toupee trick.”<sup>13</sup>

And, then there was the “would you believe” catchphrase, as in one instance in which an evil character known as Mr. Big captures Smart and his partner, Agent 99, played by Barbara Feldon:

Smart: “At the moment, seven Coast Guard cutters are converging on us. Would you believe it?”

Mr. Big: “I find that hard to believe.”

Smart: “Would you believe six?”

Mr. Big: “I don’t think so.”

Smart: “How about two cops in a rowboat?”<sup>14</sup>

As Mel Brooks said at the time: “I was sick of looking at all those nice, sensible situation comedies. They were such distortions of life. No one had ever done a show about an idiot before. I decided to be the first.”<sup>15</sup>

The court trusts that its analysis will be considered to be neither idiotic nor a distortion of the facts and law in this case. For the foregoing reasons, the court grants defendant’s motion to dismiss for lack of subject matter jurisdiction as to Entry No. UPS-8221052–5, and judgment will be entered accordingly. With respect to all other entries at issue in this action, the court denies plaintiff’s Rule 56 motion for summary judgment and denies defendant’s Rule 56 cross-motion for summary judgment. Instead, the court grants partial sum-

<sup>12</sup> *Get Smart*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Get\\_Smart](https://en.wikipedia.org/wiki/Get_Smart) (last visited Dec. 16, 2020).

<sup>13</sup> Catchphrases, WOULDYOUBELIEVE.COM, <http://www.wouldyoubelieve.com/phrases.html> (last visited Dec. 16, 2020).

<sup>14</sup> *Get Smart: Mr. Big* (NBC television broadcast Sept. 18, 1965).

<sup>15</sup> Smart Money, TIME MAGAZINE, Oct. 15, 1965, at 109.

mary judgment in favor of defendant on issues relating to the proper meaning of the terms in Heading 8517 and Heading 8525. The parties shall submit within 30 days of the date of this opinion a proposed scheduling order that includes (1) a date for submission of the order governing preparation for trial, (2) a date for the submission of the pretrial order, (3) a date for the pretrial conference, and (4) a proposed trial date on or before March 1, 2021, on the issue of the principal use of the subject merchandise.

Dated: December 22, 2020  
New York, New York

*/s/ Timothy M. Reif*  
TIMOTHY M. REIF, JUDGE

Slip Op. 20–189

YC RUBBER CO. (NORTH AMERICA) LLC and SUTONG TIRE RESOURCES, INC., Plaintiffs, and KENDA RUBBER (CHINA) CO., LTD., Plaintiff-Intervenor, and MAYRUN TYRE (HONG KONG) LIMITED and ITG VOMA CORPORATION, Consolidated-Plaintiffs, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge  
Consol. Court No. 19–00069

[Sustaining the U.S. Department of Commerce’s final results in the second administrative review of the antidumping duty order covering certain passenger vehicle and light truck tires from the People’s Republic of China.]

Dated: December 22, 2020

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*Nicholas R. Sparks*, Hogan Lovells US LLP, of Washington, DC, argued for Consolidated Plaintiff ITG Voma Corporation. With him on the brief were *Jonathan T. Stoel* and *Craig A. Lewis*.

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*Ashley Akers*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. 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 *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

## OPINION

### **Barnett, Judge:**

This matter is before the court following the U.S. Department of Commerce’s (“Commerce” or “the agency”) final results in the second administrative review (“AR2”) of the antidumping duty order covering certain passenger vehicle and light truck tires (“passenger tires”) from the People’s Republic of China (“the PRC” or “China”) for the period of review August 1, 2016, through July 31, 2017 (“the POR”). *See Certain Passenger Vehicle and Light Truck Tires From the People’s Republic of China*, 84 Fed. Reg. 17,781 (Dep’t Commerce Apr. 26, 2019) (final results of antidumping duty admin. review and final determination of no shipments; 2016–2017) (“*Final Results*”), ECF No. 24–4, and accompanying Issues and Decision Mem., A-570–016 (Apr. 19, 2019) (“I&D Mem.”), ECF No. 24–5.<sup>1</sup>

Plaintiffs challenge Commerce’s determinations to rely on a single mandatory respondent’s rate as the rate for non-individually examined respondents qualifying for separate rate status (hereinafter, “the separate rate respondents”); to reject the withdrawal requests of certain non-individually examined respondents; and to exclude certain import data from surrogate value data. *See Confidential Mot. for J. on the Agency R.*, ECF No. 35, and accompanying Confidential Mem. of P & A in Supp. of Pls.’ and Consol. [Pl.’s] Mot. for J. on the Agency R. (“Pls.’ Mem.”), ECF No. 35–1; Pls.’ and Consol. Pl. ITG Voma’s Reply in Supp. of Mot. for J. on the Agency R. (“Pls.’ Reply”), ECF No. 44.

Consolidated Plaintiff Mayrun Tyre (Hong Kong) Ltd. (“Mayrun”) also contests Commerce’s decisions to rely on a single mandatory respondent’s rate as the dumping margin for the separate rate respondents and to reject Mayrun’s withdrawal request. *See Consol. Pl. [Mayrun’s] Rule 56.2 Mot. for J. on the Agency R.*, ECF No. 39, and accompanying Mem. of Law in Supp. of Pl. [Mayrun’s] Rule 56.2 Mot.

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<sup>1</sup> The administrative record associated with the *Final Results* is divided into a Public Administrative Record (“PR”), ECF No. 24–2, and a Confidential Administrative Record (“CR”), ECF No. 24–3. Parties submitted joint appendices containing record documents cited in their Rule 56.2 briefs. *See Public J.A.*, ECF No. 47; *Confidential J.A. (“CJA”)*, ECF No. 46. Plaintiffs YC Rubber Co. (North America) LLC and Sutong Tire Resources, Inc., together with Consolidated Plaintiff ITG Voma Corporation (collectively, “Plaintiffs”), physically filed two native exhibits (CR 45 and CR 307). *See Certification of Filing and Service of Physical Ex. or Item*, ECF No. 46. The court references the confidential version of the relevant record documents, unless otherwise specified.

for J. on the Agency R. (“Mayrun’s Mem.”), ECF No. 39–2; Reply Br. in Supp. of Pl. [Mayrun’s] Rule 56.2 Mot. for J. on the Agency R., ECF No. 45.<sup>2</sup>

Defendant United States (“the Government”) filed a response supporting Commerce’s *Final Results*. See Def.’s Mem. in Opp’n to Pls.’ Rule 56.2 Mots. for J. Upon the Agency R. (“Gov’t’s Resp.”), ECF No. 41.

For the following reasons, the court denies Plaintiffs’ and Mayrun’s motions for judgment on the agency record and sustains Commerce’s *Final Results*.

### BACKGROUND

On August 1, 2017, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on passenger tires from China. See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 82 Fed. Reg. 35,754, 35,755 (Dep’t Commerce Aug. 1, 2017) (opportunity to request admin. review), PR 1, CJA Tab 1. Review requests were submitted by several foreign exporters and producers and by certain domestic companies. Respondent Selection Mem. (Apr. 12, 2018) (“Selection Mem.”) at 2 & n.3, 7, PR 140, CR 47, CJA Tab 24 (citations omitted). On October 16, 2017, Commerce initiated AR2. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 48,051, 48,055 (Dep’t Commerce Oct. 16, 2017) (“Initiation Notice”).

On April 12, 2018, Commerce selected Shandong Haohua Tire Co., Ltd (“Haohua”) and Zhaoqing Junhong Co., Ltd. (“Junhong”) as mandatory respondents. Selection Mem. at 1. Two weeks later, on April 28, 2018, Haohua informed Commerce that it was withdrawing from participation in the administrative review. Haohua Withdrawal from Admin. Review (Apr. 26, 2018), PR 150, CJA Tab 29.

Commerce issued the *Preliminary Results* without selecting a respondent to replace Haohua. See Decision Mem. for the Prelim. Results (Sept. 4, 2018) (“Prelim. Decision Mem.”) at 12, PR 224, CJA Tab 32; *Certain Passenger Vehicle and Light Truck Tires From the People’s Republic of China*, 83 Fed. Reg. 45,893, 45,895 (Dep’t Commerce Sept. 11, 2018) (prelim. results of antidumping duty admin. review, prelim. determination of no shipments, and rescission, in part; 2016–2017) (“*Prelim. Results*”), PR 225, CJA Tab 33. Consistent with 19 U.S.C. § 1673d(c)(5)(A), Commerce relied on Junhong’s rate of 73.63 percent to establish the rate for the separate rate respondents. Prelim. Decision

<sup>2</sup> Plaintiff-Intervenor Kenda Rubber (China) Co., Ltd. filed a statement incorporating by reference Plaintiffs’ and Consolidated Plaintiff’s Rule 56.2 motions in lieu of filing a motion of its own. See Pl.-Int.’s Notice, ECF No. 37.

Mem. at 11–12; *see also Prelim. Results*, 83 Fed. Reg. at 45,895. To value Junhong’s factors of production, Commerce selected Thailand as the primary surrogate country, Prelim. Decision Mem. at 15, but disregarded values from countries providing non-industry specific export subsidies, *id.* at 20.

Following the *Preliminary Results*, several respondents—including Plaintiffs, Shandong Hengyu Science and Technology Co., Ltd. (“Hengyu”), Winrun Tyre Co., Ltd. (“Winrun”), and Shandong Linglong Tyre Co., Ltd. (“Linglong”)—sought to withdraw their review requests and separately filed case briefs challenging certain aspects of the *Preliminary Results*. I&D Mem. at 2 & nn.3–4 (citations omitted); *see also* Case Br. of [Hengyu] (Nov. 6, 2018) (“Hengyu Case Br.”), PR 256, CJA Tab 42; GDLSK Clients’ Case Br. (Nov. 8, 2018) (“YCR & Sutong Case Br.”) at ECF pp. 606–14, PR 258, CJA Tab 43; Case Br. of [Winrun] (Nov. 8, 2018) (“Winrun Case Br.”), PR 262, CR 309, CJA Tab 44; Case Br. of Shandong Wanda Boto Tyre Co. Ltd. and ITG Voma Corp. (Nov. 8, 2018), PR 263, CJA Tab 45; [Mayrun’s] Cmts. in Lieu of Case Br. (Nov. 8, 2018) at 1–6, PR 265, CJA Tab 46.

For the *Final Results*, Commerce rejected the withdrawal requests submitted after the *Preliminary Results*, I&D Mem. at 8–9, and continued to disregard import values from countries providing non-industry specific export subsidies, *id.* at 18–19. Commerce calculated a rate of 64.57 percent for Junhong and relied on that margin as the separate rate respondents’ margin. *Final Results*, 84 Fed. Reg. at 17,782–83.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018)<sup>3</sup> and 28 U.S.C. § 1581(c) (2018). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

The court’s review of Commerce’s statutory interpretation is guided by the two-prong *Chevron* framework. *See Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1337, 1344 (Fed. Cir. 2017); *see generally Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). First, the court must determine “whether Congress has directly spoken to the precise question at issue.” *Apex Frozen Foods*, 862 F.3d at 1344 (quoting *Chevron*, 467 U.S. at 842). If Congress’s intent is clear, “that is the end of the matter,” and the court “must give effect to the unambiguously expressed intent of Congress.” *Id.* (quot-

<sup>3</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2018 edition.

ing *Chevron*, 467 U.S. at 842–43). However, “if the statute is silent or ambiguous,” the court must determine whether the agency’s action “is based on a permissible construction of the statute.” *Id.* (quoting *Chevron*, 467 U.S. at 843).

## DISCUSSION

### I. Commerce’s Reliance on Junhong as the Sole Mandatory Respondent

#### A. Legal Framework

For purposes of the antidumping duty laws, China is a non-market economy country; therefore, Commerce begins with a “rebuttable presumption that all companies within China are subject to government control and, thus, should be assessed a single weighted-average dumping margin.” Prelim. Decision Mem. at 8–9. However, if an exporter or producer can demonstrate the absence of government control, Commerce will calculate a separate rate for the company. *See id.* at 9.

Section 1677f-1(c) contains a general rule and an exception with respect to Commerce’s selection of respondents. In relevant part, the statute provides:

(1) General Rule

In determining weighted average dumping margins under section 1673b(d), 1673d(c), or 1675(a) of this title, [Commerce] shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.

(2) Exception

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, [Commerce] may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—

. . .

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

19 U.S.C. § 1677f-1(c).

When Commerce utilizes the exception and selects a subset of respondents for individual examination, it refers to the selected respondents as “mandatory” respondents, distinguishing them from

any voluntary respondents that may provide questionnaire responses based on the possibility that Commerce will have the resources to examine them. *Cf.* 19 C.F.R. § 351.204(c)–(d) (discussing Commerce’s treatment of individually-examined (i.e., mandatory) and voluntary respondents). Non-selected respondents that demonstrate their eligibility for a separate rate (i.e., the separate rate respondents) receive an all-others rate determined using the methodology provided in section 1673d(c)(5). *See Soc Trang Seafood Joint Stock Co. v. United States*, 42 CIT \_\_\_, \_\_\_, 321 F. Supp. 3d 1329, 1346 (2018) (discussing the relevant statutory provisions for determining the all-others rate). Section 1673d(c)(5) provides that the all-others rate generally is the weighted average of the individually-investigated exporters’ and producers’ dumping margins, excluding any margins that are *de minimis*, zero, or determined entirely based on facts otherwise available. 19 U.S.C. § 1673d(c)(5)(A).

### B. Additional Background

Commerce selected Haohua and Junhong as mandatory respondents pursuant 19 U.S.C. § 1677f-1(c)(2) because they accounted for the largest volume of subject merchandise imported during the POR that Commerce determined it could reasonably examine. Selection Mem. at 1, 7.<sup>4</sup> Haohua, by withdrawing from participation, failed to establish its eligibility for a separate rate and was considered part of the “China-wide entity.” Unpublished Prelim. Results (Sept. 5, 2018), app. 2, PR 223, CJA Tab 31. The other mandatory respondent, Junhong, participated in the review and responded to Commerce’s questionnaires. *See* Prelim. Decision Mem. at 3–4. Commerce found that Junhong, along with several other companies, qualified for separate rate status because they exercised “both *de facto* and *de jure* control of [their] operations.” *Id.* at 11; *see also* Prelim. Separate Rate Status Mem. (Sept. 4, 2018) at 1, PR 231, CR 298, CJA Tab 35.

For the *Preliminary Results*, Commerce relied on Junhong’s rate for the separate rate respondents because that was the only calculated rate in the review. Prelim. Decision Mem. at 12; *see also* 19 U.S.C. § 1673d(c)(5)(A). In the administrative briefing, several respondents challenged Commerce’s reliance on Junhong’s rate for the separate rate respondents. *See, e.g.,* Hengyu Case Br; YCR & Sutong Case Br. at ECF pp. 606–14; Winrun Case Br.

<sup>4</sup> Commerce used data from U.S. Customs and Border Protection (“CBP”) to select respondents and invited interested parties to comment on that data. U.S. Customs Entries (Nov. 30, 2017), PR 119, CR 44–45, CJA Tab 22. Petitioner United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“USW”) urged Commerce to examine three respondents. Pet’s Respondent Selection Cmts. (Dec. 7, 2017) at 5, PR 120, CR 46, CJA Tab 23. Commerce declined USW’s request and selected Junhong and Haohua. Selection Mem. at 7.

For the *Final Results*, Commerce continued to rely on Junhong's rate to determine the rate for the separate rate respondents. I&D Mem. at 11. Commerce construed the statute as not requiring it to use multiple rates to determine the separate rate respondents' rate. *Id.* at 14; *see also id.* at 11 ("Nothing in the statutory framework requires Commerce to calculate the all-others rate using multiple rates, nor precludes Commerce from relying on a single rate."). Citing *Soc Trang*, 321 F. Supp. 3d at 1347–48, Commerce stated that "it is not an unforeseeable occurrence for Commerce . . . to be left with only one [mandatory] respondent" at the end of a review or an investigation. *Id.* at 14 & n.65.

Commerce acknowledged that, in other reviews, including the prior administrative review, it has "selected a [replacement] respondent when a prior-selected mandatory respondent [did] not participate in the proceeding." *Id.* at 14; *see also id.* 16 & n.79 (citation omitted). The agency noted, however, that the separate rate respondents did not comment on Commerce's examination of one respondent until after the *Preliminary Results*, at which point "it was not feasible to select an additional respondent." *Id.* at 14; *see also id.* at 16. Further, Commerce explained, no respondent requested treatment as a mandatory respondent after Haohua withdrew. *Id.* at 15–16.

### C. Parties' Contentions

Plaintiffs and Mayrun challenge Commerce's reliance on Junhong's rate to determine the margin for the separate rate respondents on two grounds.<sup>5</sup>

First, they contend that Commerce's construction of the statute is unlawful under both prongs of the *Chevron* analysis. *See* Pls.' Mem. at 17–23, 26–27; Mayrun's Mem. at 27–28. With respect to the first prong of *Chevron*, Plaintiffs and Mayrun assert that the plain language of the statute obligates Commerce to examine more than one respondent. Pls.' Mem. at 18–19; Mayrun's Mem. at 27. With respect to the second prong of *Chevron*, Plaintiffs argue that 19 U.S.C. § 1677f-1(c)(2)—as an exception to the general rule provided in section 1677f-1(c)(1)—is to be construed narrowly. Pls.' Mem. at 23. Plaintiffs aver that permitting Commerce to examine only a single respondent in a review would unreasonably broaden Commerce's authority to utilize the exception, thereby undermining the general rule. *Id.*

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<sup>5</sup> Mayrun asserts that it was unreasonable for Commerce to examine only a single respondent and that Junhong is not a representative producer in support of its argument that Commerce should have granted its withdrawal request. *See* Mayrun's Mem. at 22–24. The court construes these arguments as challenging Commerce's examination of Junhong as the sole mandatory respondent.

Second, Plaintiffs and Mayrun contend that Junhong's rate is not representative of the separate rate respondents' pricing based on Junhong's import volume. *Id.* at 28–29; Mayrun's Mem. at 23. Plaintiffs also assert that Junhong's rate is not representative because it is significantly higher than the rates determined in prior segments of this proceeding. Pls.' Mem. at 28.

The Government contends that if Congress intended to bar Commerce from examining only one respondent it would have done so through a specific statutory provision. Gov't's Resp. at 24. The Government also cites 1 U.S.C. § 1 (“the Definitions Act”) and *Soc Trang*, 321 F. Supp. 3d at 1347–48, in support of its argument that the plural terms “exporters and producers” should be interpreted to include the singular (i.e., one exporter or producer). *Id.* at 24–25. The Government further argues that Commerce did not have the resources to investigate more than two respondents when it selected respondents and no party requested treatment as a voluntary respondent. *Id.* at 25–26.

Regarding representativeness, the Government contends that having selected respondents pursuant to 19 U.S.C. § 1677f-1(c)(2)(B), no further representativeness examination is required and there is no evidence suggesting that Junhong's rate is not representative. *Id.* at 28–29.

## D. Analysis

### 1. Commerce's Construction of the Statute is Lawful Under *Chevron*

According to Plaintiffs and Mayrun, Commerce's statutory interpretation fails both prongs of the *Chevron* analysis. They assert that when Commerce limits the number of exporters or producers it examines pursuant to 19 U.S.C. § 1677f-1(c)(2), Commerce must replace any respondent that withdraws from participation in the administrative review to ensure that the number of mandatory respondents is greater than one. *See* Pls.' Mem. at 17–23; Mayrun's Mem. at 26–28. For the reasons that follow, the statute does not speak directly to this issue and the agency's construction of the statute is permissible.

#### a. *Chevron* Prong One

When examining an issue of statutory interpretation, the court must “carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable.” *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). That inquiry involves an examination of “the statute's text, structure, and legislative history,” applying, if necessary, “the rel-

evant canons of interpretation.” *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) (quoting *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012)).

As an initial matter, this case does not require the court to address whether 19 U.S.C. § 1677f-1(c)(2)(B) permits Commerce to select only one respondent for examination. Commerce initially selected two mandatory respondents and no party has challenged that decision before Commerce or the court. *See* I&D Mem. at 14–15. Nevertheless, Plaintiffs and Mayrun now assert that Congress’s use of the plural terms “exporters and producers” in section 1677f-1(c)(2)(B) creates a continuing obligation for Commerce to examine more than one company. *See* Pls.’ Mem. at 18–19; Mayrun’s Mem. at 27; Oral Arg. at 6:20–7:20 (time stamp from oral argument) *available at* <https://www.cit.uscourts.gov/sites/cit/files/082620-19-00069-MAB.mp3.mp3> (last accessed December 22, 2020). In other words, Plaintiffs and Mayrun argue, Commerce was statutorily required to select a replacement respondent when Haohua withdrew its participation.

Section 1677f-1(c)(2)(B) permits Commerce, when certain conditions are met, to “limit[] its examination to” those “exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the [agency] determines can be reasonably examined.”<sup>6</sup> In the Definitions Act, Congress prescribed that, “unless the context indicates otherwise— . . . words importing the plural include the singular.” 1 U.S.C. § 1. Plaintiffs argue that relevant context is provided by 19 U.S.C. § 1673d(c)(5), such that “it is impossible to ‘average’ the margins assigned to a single party.” Pls.’ Reply at 5; *see also* Pls.’ Mem. at 19–21 (arguing that 19 U.S.C. § 1673d(c)(5) provides context demonstrating that Commerce must examine more than one respondent pursuant to section 1677f-1(c)(2)(B)). Plaintiffs’ argument is not persuasive.

Section 1673d(c)(5) governs Commerce’s calculation of the all-others rate in investigations, is utilized by Commerce in reviews, and provides relevant context for the terms “exporters and producers” as used in the statute. Subsection (c)(5)(A) provides that Commerce is to determine the all-others rate (for exporters and producers not individually investigated) using the “amount equal to the weighted aver-

<sup>6</sup> The legislative history of 19 U.S.C. § 1677f-1(c) is silent with respect to the number of respondents Commerce must examine. The Statement of Administrative Action (“SAA”) states that, when Commerce limits its examination pursuant to 19 U.S.C. § 1677f-1(c), the agency “either limits its examination to those firms accounting for the largest volume of exports to the United States or employs sampling techniques.” Uruguay Round Trade Agreements, SAA, H.R. Doc. No. 103–316, vol. 1, at 872 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4200. “[T]he authority to select samples rests exclusively with Commerce . . . .” *Id.* at 872, *reprinted in* 1994 U.S.C.C.A.N. at 4201. Thus, the SAA does not speak to the instant issue.

age of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely [on the basis of the facts otherwise available].” 19 U.S.C. § 1673d(c)(5)(A). If, however, “any one or all three of those circumstances occur, Commerce can be left with only one” rate suitable for use in determining the all-others rate. *Soc Trang*, 321 F. Supp. 3d at 1347; see also I&D Mem. at 11–12 (construing the use of the plural terms “exporters” and “producers” in the statute as providing “for the possibility of Commerce having multiple [calculated] rates at the end of a given investigation or review” but not as necessitating “the calculation of a separate rate using multiple respondents’ rates”).<sup>7</sup>

While Plaintiffs argue that the statutory reference to an “average” in section 1673d(c)(5)(A) requires more than one rate, see Pls.’ Mem at 21, there is no requirement for multiple data points to determine an average. An average is simply the aggregate of  $x$  data points divided by  $x$ . See, e.g., OXFORD ENGLISH DICTIONARY, <https://oed.com/view/Entry/13684> (last visited Dec. 22, 2020) (defining “average” as “dividing the aggregate of a series by the number of its units”); MIKE HAMMETT, DICTIONARY OF INT’L TRADE FINANCE 33 (2001) (providing that “[t]he average of  $n$  values is the sum of the values divided by  $n$ ”). While it may be common for an average to be based on more than one data point, the mechanical process of determining a weighted average is the same whether there is a single data point or multiple data points. In the case of a single data point, both the simple average and the weighted average will be the same as the single data point. See, e.g., *Soc Trang*, 321 F. Supp. 3d at 1347 (the statute “does not necessitate the calculation of an all-others rate using multiple respondents’ rates at the end of every investigation or review”).

Plaintiffs’ interpretation of section 1673d(c)(5)(A), on the other hand, is untenable. Plaintiffs suggest that when Commerce selects multiple respondents for individual investigation and, nevertheless, ends up with a single above-*de minimis*, non-facts-available, calculated rate, the agency would be required to restart the process and select another respondent to investigate in order to have more than one rate to average to determine the all-others rate. See, e.g., Pls.’ Reply at 5 (stating that it is “impossible to ‘average’ the margin[]

<sup>7</sup> Plaintiffs contend that *Soc Trang* is distinguishable because, in that case, Commerce rescinded the review with respect to one of two mandatory respondents more than four months after publishing the preliminary results. Pls.’ Mem. at 22. The *Soc Trang* court did not suggest that the timing of the respondent’s withdrawal was relevant to its interpretation of the statute. 321 F. Supp. 3d at 1346–48. Moreover, Plaintiffs’ and Mayrun’s reliance on *Schaeffler Italia S.R.L. v. United States*, 35 CIT 725, 729, 781 F. Supp. 2d 1358, 1362–63 (2011), is inapposite. See Mayrun’s Mem. at 27; Pls.’ Reply at 4. *Schaeffler* is not binding on this court and its reasoning is not persuasive because it did not address the Definitions Act or the statutory framework of 19 U.S.C. § 1677f-1(c), including 19 U.S.C. § 1673d(c)(5).

assigned to a single party”). Such a circular approach is difficult to reconcile with the statutory deadlines Congress made applicable to antidumping proceedings. Plaintiffs would avoid this scenario by asserting that Commerce could resort to the exception provided for in 19 U.S.C. § 1673d(c)(5)(B), which allows the agency to use “any reasonable method” to establish the all-others rate. *See* Pls.’ Mem. at 31–32 (arguing that Commerce should have used “an alternative methodology to assign a reasonable separate rate”). Plaintiffs’ argument fails, however, because the plain language of the statute limits this exception to situations when the margins established for “all exporters and producers individually investigated” are found to be zero, *de minimis*, or based entirely on facts available. 19 U.S.C. § 1673d(c)(5)(B) (emphasis added); *see also Fine Furniture (Shanghai) Ltd. v. United States*, 42 CIT \_\_\_, \_\_\_, 353 F. Supp. 3d 1323, 1356 (2018) (noting that section 1673d(c)(5) “leaves little room for discretion” with respect to applying the general rule). Thus, the exception would be unavailable when Commerce calculated a non-*de minimis* rate for one mandatory respondent.

For these reasons, Plaintiffs and Mayrun fail to persuade the court that the statutory text or context unambiguously requires Commerce to maintain at least two respondents for individual investigation pursuant to section 1677f-1(c)(2)(B) after a respondent withdraws its participation in the review. Simply put, section 1677f-1(c)(2) is silent as to the consequences when one or more of the selected respondents withdraws from the proceeding or otherwise ceases to participate following Commerce’s decision to limit its examination. Accordingly, the court turns to *Chevron* prong two in order to consider whether Commerce’s statutory construction is permissible.

### **b. *Chevron* Prong Two**

To determine whether an agency’s statutory construction is permissible, a court considers whether the construction is reasonable, consistent with statutory goals, and reflects agency practice. *Apex Exps. v. United States*, 777 F.3d 1373, 1379 (Fed. Cir. 2015). “The agency’s construction need not be the only reasonable interpretation or even the most reasonable interpretation.” *Changzhou Trina Solar Energy Co. v. United States*, 975 F.3d 1318, 1326 (Fed. Cir. 2020).

Here, Commerce explained that it is not required to select “a [replacement] mandatory respondent[] once a previously selected mandatory respondent refuses to participate.” I&D Mem. at 14. Commerce further noted that when Haohua withdrew, none of the exporters or producers subject to the review “requested individual examination, treatment as a voluntary respondent, or that Commerce

select an additional respondent.” *Id.* at 15–16. In fact, none of the separate rate respondents requested Commerce to select another mandatory respondent “until *after* Commerce calculated Junhong’s allegedly ‘aberrational’ margin [for] the *Preliminary Results*.” *Id.* at 14.

On these facts, Commerce’s interpretation of the requirements placed upon the agency by section 1677f-1(c)(2)(B) is reasonable. The separate rate respondents had the opportunity to comment on Commerce’s respondent selection when Commerce released the CBP data and when Haohua withdrew from participation in the review in late April 2018. *Id.* at 14. Instead of seizing these opportunities, the separate rate respondents waited until after the agency issued the *Preliminary Results* in September 2018 to comment, at which point “it was not feasible to select an additional respondent.” *Id.*<sup>8</sup>

Plaintiffs argue that the separate rate respondents’ failure to request voluntary respondent status does not excuse Commerce’s failure to select an additional respondent. Pls.’ Mem. at 25–26. Plaintiffs suggest that it was unreasonable for Commerce not to replace Haohua when Commerce had previously decided that it had the resources to examine two mandatory respondents. *See id.* at 26 (arguing that because “Commerce had the time and ability to investigate two or more mandatory respondents, the legal duty to do so exists independent of any filings or requests by respondents”). As discussed above, however, the statute places no such explicit obligation on Commerce. Commerce’s declination to select another mandatory respondent is reasonable given the separate rate respondents’ failure to take timely action in this regard. The court, however, need not and does not address whether it would have been reasonable for Commerce to decline a timely request to replace Haohua as a mandatory respondent.

Plaintiffs also argue that Commerce’s interpretation of section 1677f-1(c)(2)(B) allows this exception, whereby Commerce selects only the largest exporters or producers for individual examination, to undermine the general rule of determining an individual margin for each known exporter and producer. Pls.’ Mem. at 23 (citing *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 1730, 662 F. Supp. 2d 1337,

<sup>8</sup> While the court does not find that the doctrine of laches bars Plaintiffs and Mayrun from arguing that Commerce was obligated to select a replacement respondent, the court’s conclusion cannot be divorced from the fact that the separate rate respondents waited at least five months, until it was too late as a practical matter, to ask Commerce to add another mandatory respondent. *See Kokusai Elec. Co. v. United States*, 10 CIT 166, 171, 632 F. Supp. 23, 27–28 (1986) (rejecting the plaintiff’s argument for failure to exhaust administrative remedies but stating that laches would bar the plaintiff’s argument because the “plaintiff slept on its rights”).

1344 (2009)); *see also* Oral Arg. at 43:32–45:30 (arguing that Commerce’s examination of one respondent is contrary to the statutory purpose).<sup>9</sup> Notably, however, Plaintiffs do not challenge Commerce’s decision to select a subset of exporters and producers for individual investigation, *see* Pls.’ Mem. at 18, nor do they offer any argument as to why Commerce’s use of the respondent selection exception in this case undermines the general rule.<sup>10</sup> Thus, Plaintiffs fail to provide a basis to disturb Commerce’s determination.

Lastly, Plaintiffs and Mayrun have not shown that Commerce’s conduct is demonstrably inconsistent with agency practice. *See* Pls.’ Reply at 8–9; Mayrun’s Mem. at 22. Commerce acknowledged that it has in some cases, including the first administrative review (“AR1”) of this antidumping duty order, selected a replacement respondent when a mandatory respondent does not participate in a proceeding. I&D Mem. at 14, 16. Citing four administrative reviews, Plaintiffs aver that Commerce has a practice of replacing a mandatory respondent when necessary to ensure examination of two mandatory respondents when a respondent withdraws its request for review, all requests for review of that respondent are withdrawn, or the respondent fails to respond to Commerce’s questionnaire. *See* Pls.’ Reply at 8–9; [Pls.’] Resp. to the Court’s Request (Aug. 28, 2020), ECF No. 55. Commerce, however, treats “each segment as an isolated proceeding in the absence of relevant evidence of similarities between proceedings.” I&D Mem. at 16. In light of the numerous possible differences in demands on the agency’s resources, timing of the withdrawal or decision not to participate, and degrees of expressed interest in participating as a voluntary or replacement respondent, Plaintiffs have not shown that the circumstances of the administrative reviews they cite are similar to this case.

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<sup>9</sup> In *Carpenter Technology*, Commerce found that it was unable to examine more than two companies and resorted to 19 U.S.C. § 1677f-1(c)(2)(A) to limit its review. 33 CIT at 1727, 662 F. Supp. 2d at 1342. The court construed Commerce’s determination as an implicit interpretation of the phrase “large number of exporters and producers” to mean “any number larger than two.” 33 CIT at 1727, 662 F. Supp. 2d at 1342; *see also* 19 U.S.C. § 1677f-1(c)(2)(B) (premising Commerce’s invocation of the exception on situations when there are a “large number of exporters or producers involved in the investigation or review”). The court rejected the agency’s construction of the statute under *Chevron* prong one and remanded for the agency to reconsider the number of respondents it practically may examine. *Carpenter Tech.*, 33 CIT at 1727–32, 662 F. Supp. 2d at 1342–46. *Carpenter Technology* is distinguishable because, in that case, the court addressed Commerce’s decision to invoke the exception, which decision Plaintiffs do not challenge here.

<sup>10</sup> Plaintiffs argue that Commerce had the time and resources to select an additional (i.e., a replacement) mandatory respondent. Pls.’ Mem. at 23–25; Oral Arg. at 45:45–46:23. While Plaintiffs make out a case that it would have been reasonable for Commerce to have selected a replacement respondent for investigation when Haohua withdrew from participation and, as noted above, Commerce has done so in other cases, Plaintiffs do not make the case that taking such action is the only reasonable interpretation of the statute.

Accordingly, the court finds that Commerce’s construction of section 1677f1(c)(2)(B) is permissible under the *Chevron* analysis and the court will defer to the agency’s interpretation of the statute.

## 2. Commerce Properly Relied on Section 1673d(c)(5)(A) to Determine the Separate Rate Respondents’ Rate

Plaintiffs and Mayrun contend that Junhong’s rate is unrepresentative of any dumping by the separate rate respondents and, therefore, substantial evidence does not support Commerce’s determination of the rate for the separate rate respondents. These Parties do not, however, identify any legal authority that requires Commerce to evaluate the representativeness of a calculated rate determined pursuant to the general rule provided in 19 U.S.C. § 1673d(c)(5)(A).

Plaintiffs rely on the U.S. Court of Appeals for the Federal Circuit’s (“the Federal Circuit”) discussion of “representativeness” in *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345 (Fed. Cir. 2016), to make their argument that Junhong’s rate must be representative of their level of dumping in order to be assigned to them and that substantial evidence does not support such a finding.<sup>11</sup> See Pls.’ Mem. at 27, 32. *Albemarle* speaks to the application of section 1673d(c)(5)(B)—the exception to the general rule provided for in section 1673d(c)(5)(A)—which is used when the rates for all mandatory respondents are *de minimis*, zero, or based entirely on facts otherwise available. 821 F.3d at 1351–53; see also 19 U.S.C. § 1673d(c)(5)(B). Conversely, in this case, Commerce determined the all-others rate by applying the general rule in 19 U.S.C. § 1673d(c)(5)(A) (i.e., averaging the rate calculated in the review). See I&D Mem. at 13. Commerce’s use of the general rule is consistent with the statute because Junhong’s calculated rate was not zero, *de minimis*, or based on the facts available. See *Fine Furniture*, 353 F. Supp. 3d at 1356 (affirming Commerce’s determination of the separate rate based on the rate calculated for a single mandatory respondent); *Mid Continent Steel & Wire, Inc. v. United States*, 42 CIT \_\_\_, \_\_\_, 321 F. Supp. 3d 1313, 1321 (2018) (same). Plaintiffs fail to articulate any basis for avoiding the

<sup>11</sup> In *Albemarle*, the Federal Circuit rejected Commerce’s decision to “carry forward” rates determined for the non-individually examined respondents in lieu of using “the expected method” discussed in the SAA (the weighted average of the zero rates, *de minimis* rates, and rates determined entirely on the facts otherwise available) when the expected method would have resulted in averaging the *de minimis* rates calculated for the individually examined respondents. 821 F.3d 1349–51; see also SAA at 873, reprinted in 1994 U.S.C.C.A.N. at 4201. The Federal Circuit relied on the SAA to find that Commerce could not avoid using the expected methodology without first determining that the result of that method would not be representative of the level of dumping of the separate rate respondents. *Albemarle*, 821 F.3d at 1353–54.

results of the general rule. Thus, Plaintiffs' reliance on *Albemarle* is mistaken.

Moreover, notwithstanding *Albemarle*'s lack of direct relevance to this case, some of the reasoning invoked by the Federal Circuit undermines Plaintiffs' and Mayrun's position. The *Albemarle* court found that the statutory authority to limit a proceeding to the largest exporters and producers suggests that the selected respondents "can be viewed as representative of all exporters." 821 F.3d at 1353. Similarly, in *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1012 (Fed. Cir. 2017), the Federal Circuit rejected Commerce's deviation from the expected method because mandatory respondents "are assumed to be representative" of non-individually examined respondents "unless evidence shows otherwise." That reasoning, coupled with the absence of clear discretion in applying the general rule, supports Commerce's reliance on Junhong's rate here.

While Plaintiffs and Mayrun have not established that Commerce was required to consider evidence they assert undermines the representativeness of Junhong's rate for the separate rate respondents, their arguments nevertheless fail to impeach Commerce's determination. Plaintiffs and Mayrun contend that Junhong's rate is aberrationally high compared to the rates determined in previous segments of this proceeding. *See* Pls.' Mem. at 28; Mayrun's Mem. at 24. Commerce considered this argument and determined that although Junhong's rate "was relatively higher than margins calculated in previous [segments of this] proceeding[]," it was "not automatically . . . inaccurate or inappropriate for use as the rate for the non-selected companies." I&D Mem. at 12.

Plaintiffs' and Mayrun's argument before the court provides no legal basis for disregarding Junhong's rate even if it is higher than previous administrative reviews. Otherwise, their "mere disagreement with Commerce's weighing of the evidence[] . . . mistakes the function of the court, which is to determine whether the [*Final Results*] are supported by substantial evidence, not to 'reweigh the evidence or . . . reconsider questions of fact anew.'" *Haixing Jingmei Chem. Prods. Sales Co. v. United States*, 42 CIT \_\_\_, \_\_\_, 335 F. Supp. 3d 1330, 1346 (2018) (quoting *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015)).

Next, Plaintiffs and Mayrun argue that Junhong's import volume demonstrates that its dumping margin is not representative of the separate rate respondents' pricing. *See* Pls.' Mem. at 28–29; Mayrun's Mem. at 23.<sup>12</sup> It is undisputed that Junhong is one of the largest

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<sup>12</sup> Unlike Plaintiffs, Mayrun relies on 19 U.S.C. § 1677f-1(c)(2)(B) to argue that Junhong is not representative because its import volume did not account for the "largest volume of the

exporters by volume of subject merchandise in this review according to CBP data. Selection Mem. at 7, Attach. 1; *see also* I&D Mem. at 14 (Commerce may limit its examination to exporters accounting for the largest volume of subject merchandise imported during the period of review). No Party explains the legal relevance of this argument to the application of the general rule and, as discussed above with respect to *Albemarle*, Commerce’s statutory authorization to select the largest exporters supports Commerce’s reliance on that rate for the separate rate respondents. Bald assertions that Junhong’s import volume resulted in an unrepresentative margin are unavailing.

Plaintiffs also seek to rely on *Diamond Sawblades Manufacturers’ Coalition v. United States*, 43 CIT \_\_\_, 359 F. Supp. 3d 1374 (2019), and *Baoding Mantong Fine Chemistry Co. v. United States*, 39 CIT \_\_\_, 113 F. Supp. 3d 1332 (2015), in support of their argument that Junhong’s rate is unrepresentative. *See* Pls.’ Mem. at 29–30. Those cases do not provide a basis to remand Commerce’s determination.

In *Baoding*, the court found that a respondent’s calculated rate, 453.79 percent, was “so prohibitive a dumping margin” that it was difficult to comprehend as a remedial measure. 113 F. Supp. at 1338. *Baoding* is simply inapposite because it addresses Commerce’s calculation of a mandatory respondent’s own rate, not the application of that rate, pursuant to the general rule of 19 U.S.C. § 1673d(c)(5)(A), to the separate rate respondents.

In *Diamond Sawblades*, Commerce originally determined rates for two exporters: “Weihai” and “Jiangsu.” 359 F. Supp. 3d at 1376. The court remanded the final results for Commerce to reconsider its denial of a request to withdraw the review of Weihai. *Id.* On remand, Commerce accepted the withdrawal request, and “rescinded its review of Weihai leaving only a single mandatory respondent—Jiangsu.” *Id.* at 1377. Commerce used Jiangsu’s rate as the all-others rate, resulting in an increase to the all-others rate from 29.76 percent in the final results to 56.67 percent in the remand results. *See id.*

The court found that substantial evidence did not support Commerce’s reliance on Jiangsu’s rate to determine the all-others rate in the remand results, explaining that:

This case is *sui generis* for several reasons. On remand Commerce was in the unique position of deciding whether or not to rescind the administrative review of Weihai after it had already completed a full individual examination of Weihai. This is sig-

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subject merchandise from the exporting country that can be reasonably examined.” Mayrun’s Mem. at 23 (quoting 19 U.S.C. § 1677f-1(c)(2)(B)). As discussed above, however, Mayrun does not challenge the initial respondent selection determination and fails to establish that the statute contains a continuing obligation to re-evaluate respondent selection throughout the review.

nificant, in part, because the resulting rate for Weihai was drastically different from that of . . . Jiangsu.

*Id.* at 1381 (footnote omitted). The *Diamond Sawblades* court appeared to find that the prior calculation of an antidumping duty margin for Weihai and its inclusion in the determination of the rate for the separate rate respondents created a basis to further consider whether Jiangsu's individual rate should be assigned to the separate rate respondents once Weihai was excluded from the review on remand. *See id.* at 1381–82. Here, there are no facts on the record, comparable to those which existed in *Diamond Sawblades*, to suggest that the general rule, as written by Congress, should not be applied. Thus, Plaintiffs' reliance on *Diamond Sawblades* is inapposite.

For these reasons, Commerce's reliance on Junhong's rate for the separate rate respondents is in accordance with law and supported by substantial evidence.

## **II. Commerce's Decisions to Deny the Untimely Requests for Withdrawal and Rescission**

### **A. Legal and Factual Background**

While the antidumping duty statute provides for annual administrative reviews upon request, the statute does not provide for what happens if a request, once made, is withdrawn. *Glycine & More, Inc. v. United States*, 880 F.3d 1335, 1337 (Fed. Cir. 2018). Commerce has promulgated a regulation, which states:

The [agency] will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The [agency] may extend this time limit if the [agency] decides that it is reasonable to do so.

19 C.F.R. § 351.213(d)(1).

On October 16, 2017, Commerce initiated the underlying review and, in the *Initiation Notice*, advised the parties that the agency did “not intend to extend the 90-day deadline [to request withdrawal from the administrative review] unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request.” 82 Fed. Reg. at 48,052. Commerce would determine whether to extend the 90-day deadline “on a case-by-case basis.” *Id.* The 90-day period to withdraw a review request pursuant to 19 C.F.R. § 351.213(d)(1) therefore expired on January 15, 2018. I&D Mem. at 8.

On January 23, 2018, the Federal Circuit decided *Glycine*. The Federal Circuit held that Commerce’s statement of general policy that required “extraordinary circumstances” to support an untimely request to withdraw a review request was inconsistent with the regulation. 880 F.3d at 1345. Nevertheless, Commerce has discretion “to apply a reasonableness test in making the decision whether to extend the deadline for filing a withdrawal notice.” *Id.* at 1345. The Federal Circuit also noted the history of Commerce’s regulation, recognizing the relevance to a party of knowing the results of the immediately preceding review, if any, to a party’s decision to withdraw its review request. *See id.* at 1339.

On March 9, 2018, after the 90-day deadline, Commerce issued the final results in AR1. *See Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China*, 83 Fed. Reg. 11,690 (Dep’t Commerce Mar. 16, 2018) (final results of antidumping duty admin. review and final determination of no shipments; 2015–2016).

On September 4, 2018, Commerce issued the *Preliminary Results*, announcing a 73.63 percent margin for the separate rate respondents. 83 Fed. Reg. at 45,895. Subsequently, in October and November 2018, several respondents attempted to withdraw their review requests and asked Commerce to rescind their respective administrative reviews. I&D Mem. at 2 & n.3 (citation omitted). Relevant to this discussion, Winrun, Linglong, Hengyu, and Mayrun submitted withdrawal and rescission requests. *See Withdrawal of Request for AD Admin. Review and Request for Rescission* (Oct. 2, 2018), PR 239, CR 306–07, CJA Tab 37; *Ext. of Time to File Withdraw[all] of Request for AD Admin. Review and Request for Rescission* (Oct. 9, 2018) (“Mayrun Withdrawal Request”), PR 245, CJA Tab 38; *GDLSK Respondents’ Request to Extend Time to File Withdrawal of Review Requests and Request for Rescission of Review* (Oct. 25, 2018), PR 251, CJA Tab 39; *Withdrawal of Request for Admin. Review and Request for Rescission* (Nov. 6, 2018), PR 254, CJA Tab 41.

In the *Final Results*, Commerce denied the requests for withdrawal filed by separate rate respondents after the *Preliminary Results*. I&D Mem. at 8–9. Commerce noted that the requests were made approximately nine months after the expiration of the 90-day deadline and six months after the publication of the final results in AR1. *Id.* at 9. Commerce further explained that the agency

has expended considerable resources in the preliminary phase of this review, including but not limited to, the selection of mandatory respondents, the analysis of extensive information regarding separate rate eligibility for 16 companies, the evaluation of company-specific information regarding ownership, sales

processes, financial statements, and factors of production, and the selection of surrogate country and surrogate values. Moreover, the petitioner objected to the separate rate respondents' request to withdraw their requests for review.

*Id.*

Commerce acknowledged that, pursuant to *Glycine*, it cannot require "extraordinary circumstances" to support an untimely withdrawal request, but that the agency maintains discretion to deny untimely requests. *Id.* Commerce further found that this case raised concerns that it could devote "considerable time and resources in the review, and then the party withdraws its request[] once it ascertains that the results of the review are not likely to be in its favor." *Id.*

## B. Parties' Contentions

Plaintiffs and Mayrun contend that a series of factors weighed in favor of granting the withdrawal requests. First, Plaintiffs and Mayrun contend that Commerce should have granted the withdrawal requests because the AR1 final results were not announced until two months after the 90-day deadline. Pls.' Mem. at 37; Mayrun's Mem. at 20. Second, Plaintiffs and Mayrun argue that Commerce did not expend significant resources investigating the separate rate respondents but instead "improperly bootstrapped *all* of its administrative efforts" in support of its conclusion that it expended significant time and resources reviewing the respondents at issue. Pls.' Mem. at 38–39; *see also* Mayrun's Mem. at 16. Third, Plaintiffs argue that Commerce inappropriately relied on USW's objection to the withdrawal requests. Pls.' Mem. at 40. Fourth, Mayrun argues that the agency's delay in selecting mandatory respondents prejudiced Mayrun by delaying its withdrawal request. *See* Mayrun's Mem. at 20–21.<sup>13</sup>

Plaintiffs also contend that although Commerce stated it did not rely on the "extraordinary circumstances" standard struck down in *Glycine*, the agency applied an equivalent standard by not allowing the parties to withdraw. Pls.' Reply at 16, 18.

The Government contends that the separate rate respondents did not submit withdrawal requests until nine months after the 90-day deadline expired and the *Preliminary Results* had been issued. Gov't's Resp. at 15. The Government contends that the separate rate respondents sought to withdraw their review requests over six months after

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<sup>13</sup> Mayrun also argues that Commerce unreasonably denied its withdrawal request because it only reviewed one respondent, *see* Mayrun's Mem. at 21–23, and that respondent's rate was not representative, *see id.* at 23–24. The court has previously addressed the substance of these arguments. Moreover, they bear no logical connection to Mayrun's arguments against Commerce's denial of Mayrun's untimely withdrawal request.

Commerce published the final results in AR1, compared to *Glycine*, in which Commerce published the results of the prior administrative review one day before the parties sought to withdraw. *Id.* at 17.

According to the Government, Commerce was not required to quantify the resources allocated to individual respondents to support its conclusion that the agency had expended significant time and resources in this review. *Id.* at 18–19. In the Government’s view, the separate rate respondents had sufficient information to decide whether to withdraw in December 2017 (after Commerce had placed CBP data “for respondent selection on the record”) or in April 2018 (when Commerce “published its respondent selection memorandum”) such that Commerce’s delay in selecting mandatory respondents did not prejudice Mayrun’s decision to request withdrawal. *Id.* at 20–21.

Finally, the Government contends that, in *Glycine*, the Federal Circuit affirmed that Commerce has “wide discretion” in determining whether to extend the 90-day deadline. *Id.* at 14. The Government argues that the Federal Circuit did not truncate Commerce’s discretion to assess the reasonableness of an untimely withdrawal request. *Id.*

### **C. Commerce’s Denial of the Untimely Withdrawal Requests was Reasonable**

The regulations provide that Commerce may extend the time limit to request the withdrawal of a review request beyond 90 days if “it is reasonable to do so.” 19 C.F.R. § 351.213(d)(1). Here, Commerce explained why it determined that it was not reasonable to grant an extension of approximately nine months.

First, Commerce considered the relationship of the withdrawal requests to the timing of the final results in AR1 and concluded that, because those final results preceded the requests by six months, they were too attenuated to weigh in favor of granting the requests. *See* I&D Mem. at 9. Indeed, Plaintiffs and Mayrun do not address how the AR1 final results, published in March 2018, support the reasonableness of extending the withdrawal deadline by an additional six months beyond the issuance of those results. *Cf. id.* (noting that “the withdrawal requests were filed . . . approximately six months after publication of the final results for [AR1]”).

Second, Commerce’s delay in selecting mandatory respondents similarly fails to support Mayrun’s argument for extending the time for it to withdraw its review request. *See* Mayrun’s Mem. at 20–21. As with the previous argument, Mayrun has not articulated how Commerce’s delayed selection of mandatory respondents, which occurred on April 12, 2018, supports granting Mayrun an extension until October 2018 to withdraw its review request.

Third, Commerce noted that USW objected to the withdrawal requests favored denying the requests. See I&D Mem. at 9. While Plaintiffs are correct that USW did not request that these respondents be reviewed in the first instance, see Pls.' Mem. at 39–40, Commerce simply noted USW's objection at the end of a list of reasons for rejecting the late request and nothing suggests that USW's objection was decisive in the matter.

Fourth, Plaintiffs argue that Commerce was required to identify the resources expended for each respondent to support rejecting a particular withdrawal request, see Pls.' Mem. at 38, and Mayrun argues that all investigative efforts with respect to Mayrun took place prior to the 90-day deadline, see Mayrun's Mem. at 18–19. Nothing in the statute or regulations requires Commerce to measure the reasonableness of a withdrawal request against the resources spent investigating the individual requesting respondent, particularly over the course of that respondent's lengthy delay prior to submitting the withdrawal request. Cf. *GODACO Seafood Joint Stock Co. v. United States*, 44 CIT \_\_\_, \_\_\_, 435 F. Supp. 3d 1342, 1358 (2020) ("Reasonableness, as set out in 19 C.F.R. § 351.213(d)(1), is the only legally applicable standard that Commerce may apply in determining whether to extend the time limit for parties to file withdrawal requests of administrative reviews.") (citation omitted).

Finally, Plaintiffs contend that Commerce effectively applied the "extraordinary circumstances" standard that the Federal Circuit found unlawful in *Glycine*. Pls.' Reply at 16, 18. To the contrary, Commerce acknowledged the inapplicability of that higher standard and provided a reasoned basis for declining to extend the time period to withdraw. See I&D Mem. at 9. The agency also articulated its policy concern, that being the same concern it articulated when adopting the regulation: Commerce must have the ability to prevent a party from requesting a review and then withdrawing the request "once it ascertains that the results of that review are not likely to be in its favor." *Id.*; see also *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,317 (Dep't Commerce May 19, 1997) (final rule). Having waited not only for the final results of the immediately preceding review, but also for the preliminary results of the instant review, the separate rate respondents in this case were in a much different position than the respondents at issue in *Glycine*.

For all of these reasons, the court sustains Commerce's denials of the untimely withdrawal requests as reasonable.

### III. Commerce's Decision to Exclude Certain Data in Determining Surrogate Values

#### A. Legal Framework

The statute provides that, in valuing factors of production, Commerce may “disregard price or cost values without further investigation if the [agency] has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price or cost values or if those price or cost values were subject to an antidumping order.” 19 U.S.C. § 1677b(c)(5).

#### B. Additional Background

Commerce preliminarily selected Thailand as the primary surrogate country. *See* Prelim. Decision Mem. at 15. However, “in calculating the import-based [surrogate values],” Commerce disregarded import prices from India, Indonesia, and South Korea because the agency had previously determined that these countries maintain “broadly available, non-industry specific export subsidies.” *Id.* at 20 & n.71 (citations omitted).

For the *Final Results*, Commerce continued to exclude import prices from India, Indonesia, and Korea in determining surrogate values. I&D Mem. at 18. Citing 19 U.S.C. § 1677b(c)(5) and *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367 (Fed. Cir. 2016), Commerce explained that it may disregard import values from certain countries “without further investigation if [the agency] has determined that broadly available export subsidies existed.” *Id.* at 19 & n.92. Commerce stated that the court has previously found its “presumption-based approach” is not unreasonable. *Id.* at 18 & n.94 (citation omitted). Commerce inferred “that all exporters from these countries may have benefitted from these subsidies.” *Id.* at 18

#### C. Parties' Contentions

Plaintiffs contend that substantial evidence does not support Commerce's determination that India, Indonesia, and South Korea maintain broadly available, non-industry specific export subsidy programs. Pls.' Mem. at 42. Plaintiffs also contend that “*CS Wind* . . . only stands for the proposition that Commerce can presume (rebuttably) benefits received under subsidies if the existence of these subsidies has otherwise been established by substantial evidence.” *Id.* at 45. To that end, Plaintiffs contend, evidence does not support “Commerce's finding that export subsidies were generally available in the countries at issue during AR2.” *Id.*

The Government contends that “Commerce adhered to its long-standing practice of disregarding import prices” if the agency has reason to believe they are subsidized. Gov’t’s Resp. at 30. The Government contends that “Plaintiffs misunderstand the statute,” which permits “Commerce [to] disregard price or cost values *without further investigation* if the [agency] has determined that broadly available export subsidies existed.” *Id.* Thus, according to the Government, the agency was not required to provide additional evidence of export subsidies. *Id.*

**D. Substantial Evidence Supports Commerce’s  
Exclusion of Certain Import Values in  
Determining Junhong’s Surrogate Values**

Here, Commerce cited four prior administrative determinations in which the agency found non-industry specific export subsidies to exist in the three countries at issue. *See* Prelim. Decision Mem. at 20 n.71. While Plaintiffs correctly note that the determinations in question occurred several years ago, Pls.’ Mem. at 43, they have not presented any evidence indicating that the non-industry specific subsidies are no longer available or have been discontinued. Section 1677b(c)(5) expressly provides that, “without further investigation,” Commerce may disregard such import prices if it “has determined that broadly available export subsidies existed.” Plaintiffs’ mere speculation regarding the passage of time does not obligate Commerce to further investigate the export subsidies in question absent any evidence of change during that period. Accordingly, Commerce reasonably determined to disregard the import prices from India, Indonesia, and South Korea “without further investigation.” 19 U.S.C. § 1677b(c)(5).

**CONCLUSION**

In accordance with the foregoing, Commerce’s *Final Results* will be sustained. Judgment will enter accordingly.

Dated: December 22, 2020  
New York, New York

/s/ Mark A. Barnett  
MARK A. BARNETT, JUDGE



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