

# U.S. Customs and Border Protection



## DECLARATION OF FREE ENTRY FOR RETURNED AMERICAN PRODUCTS (CBP FORM 3311)

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

**ACTION:** 30-Day notice and request for comments; extension of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted no later than November 26, 2021 to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email [CBP\\_PRA@cbp.dhs.gov](mailto:CBP_PRA@cbp.dhs.gov). Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (86 FR 41985) on August 4, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### **Overview of This Information Collection**

**Title:** Declaration of Free Entry for Returned American Products (CBP Form 3311).

**OMB Number:** 1651-0011.

**Form Number:** CBP Form 3311.

**Current Actions:** Extension without change.

**Type of Review:** Extension (without change).

**Affected Public:** Businesses.

**Abstract:** CBP Form 3311, *Declaration for Free Entry of Returned American Products*, which is authorized by, among others, 19 CFR 10.1, 10.66, 10.67, 12.41, 123.4, and 143.23, is used to collect information from the importer or authorized agent in order to claim duty-free treatment for articles entered under certain provisions of Subchapter I of Chapter 98 of the Harmonized Tariff Schedule of the United States (HTSUS, <https://hts.usitc.gov/current>). The form serves as a declaration that the articles are: (1) The growth, production, and manufacture of the United States; (2) are returned to the United States without having been advanced in value or improved in condition while abroad; (3) the goods were not previously entered under a temporary importation under bond provision; and (4) drawback was never claimed and/or paid.

This collection of information applies to members of the importing public and trade community who seek to claim duty-free treatment based on compliance with the aforementioned requirements. These members of the public and trade community are familiar with import procedures and with CBP regulations. Obligation to respond to this information collection is required to obtain benefits.

**Type of Information Collection:** CBP Form 3311, Declaration for Free Entry of Returned American Products.

**Estimated Number of Respondents:** 12,000.

**Estimated Number of Annual Responses per Respondent:** 35.

**Estimated Number of Total Annual Responses:** 420,000.

**Estimated Time per Response:** 0.10 hours.

**Estimated Total Annual Burden Hours:** 42,000.

Dated: October 12, 2021.

SETH D. RENKEMA,  
*Branch Chief,*  
*Economic Impact Analysis Branch,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, October 27, 2021 (85 FR 59407)]

## GUARANTEE OF PAYMENT

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

**ACTION:** 30-Day notice and request for comments; extension of an existing collection of information.

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**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email [CBP\\_PRA@cbp.dhs.gov](mailto:CBP_PRA@cbp.dhs.gov). Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (86 FR 35817) on July 7, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of

information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### **Overview of This Information Collection**

**Title:** Guarantee of Payment.

**OMB Number:** 1651-0127.

**Form Number:** CBP Form I-510.

**Current Actions:** Extension without change.

**Type of Review:** Extension (without change).

**Affected Public:** Businesses.

**Abstract:** Section 253 of the Immigration and Nationality Act (INA), 8 U.S.C. 1283, requires that a nonimmigrant crewman found to be or suspected of having any of the diseases named in section 255 of the INA must be hospitalized or otherwise treated, with the associated expenses paid by the carrier. The owner, agent, consignee, commanding officer, or master of the vessel or aircraft must complete CBP Form I-510, *Guarantee of Payment*, that certifies the guarantee of payment for medical and other related expenses required by section 253 of the INA. No vessel or aircraft can be granted clearance until such expenses are paid or the payment is appropriately guaranteed.

CBP Form I-510 collects information such as the name of the owner, agent, commander officer or master of the vessel or aircraft; the name of the crewmember; the port of arrival; and signature of the guarantor. This form is provided for by 8 CFR 253.1(a) and is accessible at: <https://www.cbp.gov/newsroom/publications/forms?title=I-510>.

**Type of Information Collection:** CBP Form I-510.

**Estimated Number of Respondents:** 100.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 100.

**Estimated Time per Response:** 0.083 hours.

**Estimated Total Annual Burden Hours:** 8.

Dated: October 22, 2021.

SETH D. RENKEMA,  
*Branch Chief,*  
*Economic Impact Analysis Branch,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, October 27, 2021 (85 FR 59406)]

# U.S. Court of International Trade

Slip Op. 21–148

MARMEN INC., MARMEN ÉNERGIE INC., AND MARMEN ENERGY CO.,  
Plaintiffs, and WIND TOWER TRADE COALITION, Consolidated  
Plaintiff, v. UNITED STATES, Defendant, and WIND TOWER TRADE  
COALITION, MARMEN INC., MARMEN ÉNERGIE INC., AND MARMEN ENERGY  
Co., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge  
Consol. Court No. 20–00169

[Sustaining in part and remanding in part the U.S. Department of Commerce’s final affirmative determination in the 2018–2019 antidumping duty investigation on utility scale wind towers from Canada.]

Dated: October 22, 2021

*Jay C. Campbell, Allison J.G. Kepkay, Ron Kendler, and Ting-Ting Kao*, White & Case, LLP, of Washington, D.C., for Plaintiffs and Defendant-Intervenors Marmen Inc., Marmen Energy Co., and Marmen Energie Inc.

*Alan H. Price, Daniel B. Pickard, Robert E. DeFrancesco, III, Maureen E. Thorson, and Laura El-Sabaawi*, Wiley Rein, LLP, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor Wind Tower Trade Coalition.

*Joshua E. Kurland*, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief were *Kirrin A. Hough*, Attorney, and *Natalie M. Zink*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

## OPINION AND ORDER

### Choe-Groves, Judge:

Plaintiffs Marmen Inc., Marmen Energy Co., and Marmen Energie Inc. (collectively, “Marmen”) and Consolidated Plaintiff Wind Tower Trade Coalition (“WTTTC”) filed this consolidated action challenging the final determination published by the U.S. Department of Commerce (“Commerce”) in the antidumping duty investigation on utility scale wind towers from Canada. *See Utility Scale Wind Towers from Canada (“Final Determination”),* 85 Fed. Reg. 40,239 (Dep’t of Commerce July 6, 2020) (final determination of sales at less than fair value and final negative determination of critical circumstances; 2018–2019); *see also* Issues and Decision Mem. for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Canada (June 29, 2020) (“Final IDM”), ECF No. 18–5. Before the Court are the Rule 56.2 Motion for Judg-

ment on the Agency Record on Behalf of Plaintiffs Marmen Inc., Marmen Energie Inc., and Marmen Energy Co., ECF Nos. 23, 24, and Wind Tower Trade Coalition’s Rule 56.2 Motion for Judgment on the Agency Record, ECF Nos. 25, 26. *See also* Mem. P. & A. Supp. Pls.’ Rule 56.2 Mot. J. Agency R. (“Marmen’s Br.”), ECF Nos. 23–2, 24–2; Wind Tower Trade Coalition’s Mem. Supp. Rule 56.2 Mot. J. Agency R. (“WTTC’s Br.”), ECF Nos. 25–1, 26–1. For the following reasons, the Court sustains in part and remands in part the *Final Determination*.

### ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce’s determination to weight-average product-specific plate costs is supported by substantial evidence;
2. Whether Commerce’s determination to reject Marmen’s additional cost reconciliation information was an abuse of discretion;
3. Whether Commerce’s determination to apply an average-totransaction comparison method is supported by substantial evidence;
4. Whether Commerce’s determination regarding the home market and the U.S. date of sale is supported by substantial evidence;
5. Whether Commerce’s determination to treat Marmen’s home market sales as being sales of tower sections rather than complete towers is supported by substantial evidence; and
6. Whether Commerce’s determination not to apply facts otherwise available with an adverse inference is supported by substantial evidence.

### BACKGROUND

In August 2019, Commerce initiated an antidumping duty investigation into wind towers from Canada for the period covering July 1, 2018 through June 30, 2019. *Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam*, 84 Fed. Reg. 37,992, 37,992–93 (Dep’t of Commerce Aug. 5, 2019) (initiation of less-than-fair-value investigations). Commerce selected Marmen Inc. and Marmen Energie Inc. as mandatory respondents. *See* Decision Mem. for the Prelim. Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Canada (Feb. 4, 2020) (“Prelim. DM”) at 1–2, PR 146.<sup>1</sup>

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

In the *Final Determination*, Commerce assigned weighted-average dumping margins of 4.94% to Marmen Inc. and Marmen Energie Inc.<sup>2</sup> *Final Determination*, 85 Fed. Reg. at 40,239. Commerce determined the all-others weighted average dumping margin of 4.94% based on Marmen's dumping margin. *Id.*

Commerce determined that Marmen's steel plate costs did not reasonably reflect the costs associated with the production and sale of the products and weight-averaged Marmen's reported steel plate costs. Final IDM at 4–6. Commerce rejected a portion of the supplemental cost reconciliation information submitted by Marmen as untimely, unsolicited new information. *Id.* at 7–9. Commerce applied a differential pricing analysis, using the Cohen's *d* test, and determined that there was a pattern of export prices that differed significantly. *Id.* at 10–11. As a result, Commerce calculated Marmen's weighted-average dumping margin by using the alternative average-to-transaction method. *Id.* Commerce determined that Marmen complied with its instructions by reporting invoice dates as the home market and U.S. dates of sale and by reporting home market sales as sales of wind tower sections. *Id.* at 13–18. Further, Commerce determined that the record contained the necessary information to calculate Marmen's dumping margin and relied on the data provided by Marmen, declining to apply facts otherwise available or an adverse inference. *Id.* at 18–20.

## 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), which grant the Court authority to review actions contesting the final determination in an antidumping duty investigation. The Court shall 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 Determination to Weight-Average Marmen's Steel Plate Costs

In order to determine whether certain products are being sold at less than fair value in the United States, Commerce compares the export price, or constructed export price, with normal value. 19

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<sup>2</sup> The Court notes that, although Marmen Energy Co. was not included as a mandatory respondent alongside Marmen Inc. and Marmen Energie Inc., comments and questionnaire responses were submitted collectively by the three Plaintiffs during Commerce's investigation. The Court herein refers to their assigned weighted-average dumping margins collectively as "Marmen's dumping margin."

U.S.C. § 1677b(a)(1)(A). Export price or constructed export price is the price at which the subject merchandise is being sold in the U.S. market, while normal value is the price at which a “foreign like product” is sold in the producer’s home market or in a comparable third-country market. *Id.* § 1677a(a)–(b). Before calculating a dumping margin, Commerce must identify a suitable “foreign like product” with which to compare the exported subject merchandise. A “foreign like product,” in order of preference, is:

- (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
- (B) Merchandise —
  - (i) produced in the same country and by the same person as the subject merchandise,
  - (ii) like that merchandise in component material or materials and in the purposes for which used, and
  - (iii) approximately equal in commercial value to the subject merchandise.
- (C) Merchandise —
  - (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
  - (ii) like that merchandise in the purposes for which used, and
  - (iii) which the administering authority determines may reasonably be compared with that merchandise.

*Id.* § 1677(16); see *NSK Ltd. v. United States*, 26 CIT 650, 656, 217 F. Supp. 2d 1291, 1299–1300 (2002). To identify such merchandise, Commerce employs a “model match” methodology consisting of a hierarchy of certain characteristics used to sort merchandise into groups. See *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378–80 (Fed. Cir. 2008). Each group is assigned a control number (“CON-NUM”), used to match home market sales with U.S. sales. See *Thuan An Prod. Trading & Serv. Co. v. United States*, 42 CIT \_\_, \_\_, 348 F. Supp. 3d 1340, 1344 n.7 (2018).

When determining costs of production, the statute states that:

[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such record are kept in accordance with the generally accepted accounting principles [“GAAP”] of the exporting country (or the producing country,

where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

19 U.S.C. § 1677b(f)(1)(A). The statute requires that “reported costs must normally be used only if (1) they are based on the records . . . kept in accordance with the GAAP *and* (2) reasonably reflect the costs of producing and selling the merchandise.” See *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1321 (Fed. Cir. 2020) (emphasis in original) (internal quotation marks and citations omitted). Commerce is not required to accept the exporter’s records. *Thai Plastic Bags Indus. Co. v. United States*, 746 F.3d 1358, 1365 (Fed. Cir. 2014) (citing 19 U.S.C. § 1677b(f)(1)(A)). Commerce may reject a company’s records if it determines that accepting them would distort the company’s true costs. See *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1377 (Fed. Cir. 2001). Commerce is directed to consider all available evidence on the proper allocation of costs. 19 U.S.C. § 1677b(f)(1)(A). Physical characteristics are a prime consideration when Commerce conducts its analysis. *Thai Plastic Bags*, 746 F.3d at 1368. If factors beyond the physical characteristics influence the costs, however, Commerce will normally adjust the reported costs in order to reflect the costs that are based only on the physical characteristics. See *id.*

To determine whether the subject merchandise wind towers from Canada were sold in the United States at less than fair value under section 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673, Commerce first considered all products produced and sold by Marmen in Canada during the period of investigation for the purpose of determining the appropriate product comparisons to U.S. sales. Prelim. DM at 13; see also Final IDM at 2–3, 5–6. Commerce determined that there were no sales of identical merchandise in the ordinary course of trade in Canada that could be compared to U.S. sales. Prelim. DM at 13; see also Final IDM at 5–6. Instead, Commerce applied a hierarchy of characteristics, matching foreign like products based on physical characteristics reported by Marmen in the following order of importance: type (tower or section), weight of tower/section, height of tower/section, total sections, type of paint or coating, metalizing, electrical conduit – bus bars, electrical conduit – power cable, elevators, number of platforms, and other internal components. Prelim. DM at 13 (citing Product Characteristics for the Antidumping Duty Investigation of Utility Scale Wind Towers from Canada (Sept. 17, 2019) (“Model Matching Questionnaire”), PR 77); see also Final IDM at 5–6.

Commerce did not dispute whether Marmen’s records were kept properly, noting that “the record is clear that the reported costs are

derived from the Marmen Group's normal books and records and that those books are in accordance with Canadian GAAP." Final IDM at 5; *see also* Utility Scale Wind Towers from Canada: Resp. to Question 14.g of Suppl. Section Questionnaire (Dec. 13, 2019) ("Marmen SDQR") at 2–4, PR 123–25. Commerce focused on the second prong of 19 U.S.C. § 1677b(f)(1)(A), calling into question whether Marmen reasonably reflected the costs of producing and selling the merchandise. Commerce reviewed evidence submitted by Marmen, concluding that the evidence demonstrated steel plate cost differences between CONNUMs unrelated to the products' physical characteristics, and Commerce weight-averaged the reported steel plate costs for all reported CONNUMs, except the CONNUM for the thickest plate. *See* Final IDM at 5.

Marmen argues that differences in its reported costs were related to differences in physical characteristics and that Commerce's determination that Marmen's records did not reflect the costs associated with the production and sale of products is not supported by substantial evidence. Marmen's Br. at 15–16. Marmen asserts that Commerce incorrectly determined that Marmen's costs did not reasonably reflect the costs associated with the production and sale of products. *See id.* Marmen argues that Commerce should have used Marmen's reported costs and should not have weight-averaged the reported costs. *Id.*

Commerce determined that the most significant physical characteristics in differentiating costs of steel plate were type, thickness, weight, width, and height. *See* Final IDM at 5. Commerce reviewed Marmen's questionnaire response and determined that Marmen's suppliers did not charge different prices for plates of different grade, thickness, width, or length. *Id.* (citing Utility Scale Wind Towers from Canada: Resubmission of Second Suppl. Section D Resp. (Feb. 28, 2020) ("Marmen RSSDQR") at 2, Ex. D-2, PR 162–65). Commerce excluded the CONNUM for the thickest plates because the record indicated that there was a surcharge applied to high thickness plates that was not applied to lower thickness plates. *Id.* at 5–6; *see* Cost of Production and Constructed Value Calculation Adjustments for the Final Determination—Marmen Inc. and Marmen Energie Inc. (June 29, 2020) ("Marmen Final Cost Calculation Mem.") at 2, PR 194. Commerce explained that there should be little difference in plate costs for different dimensions and grade based on record evidence on a per-unit weight basis, and that reported differences in plate costs are based on factors other than physical differences, such as timing of production. *See id.* (citing Marmen RSSDQR Ex. D-2). Commerce determined that most of the higher-priced CONNUMs were sold earlier in the period of review, citing information in Marmen's Final

Cost Calculation Memorandum. *Id.* at 6 (citing Marmen Final Cost Calculation Mem. at 1). In the Marmen Final Cost Calculation Memorandum, Commerce relied on record evidence showing that Marmen's steel suppliers did not charge different prices for plates of different grade, thickness width, or length. Marmen Final Cost Calculation Mem. at 2 (citing Marmen RSSDQR at 2, Ex. D-2). Commerce determined, therefore, that differences in plate prices were related to timing of production and factors other than differences in physical characteristics. Final IDM at 6.

Based on its determination that differences in plate costs were related to factors other than differences in the physical characteristics of the plates, Commerce determined that Marmen's records did not reflect the costs associated with the production and sale of products. *Id.* As a result, Commerce determined costs of production using the weight-average of the reported steel plate costs. *Id.*; see Marmen Final Cost Calculation Mem. at 1–3.

Commerce's stated practice is to adjust costs to address distortions when cost differences are attributable to factors beyond differences in the physical characteristics of such products, as required by statute. See Final IDM at 6; *Welded Carbon Steel Standard Pipe and Tube Products from Turkey*, 82 Fed. Reg. 49,179 (Dep't of Commerce Oct. 24, 2017) (final results of antidumping duty admin. review and final determination of no shipments; 2015–2016). The Court notes that the relevant statute and Commerce's stated practice focus on whether reported costs reasonably reflect the costs of producing and selling the merchandise—without requiring examined CONNUMs to be nearly identical. See *id.*; 19 U.S.C. § 1677b(f)(1)(A). The Court concludes, therefore, that Commerce's weight-averaging of Marmen's steel plate costs is consistent with the relevant statute and Commerce's stated practice.

The Court observes that Marmen's questionnaire response and record documents cited by Commerce, including one of Marmen's supplier agreements, indicate that plate costs did not vary for plates of different thickness, length, width, and weight. See Marmen RSSDQR Exs. D-1, D-2. Record documents reviewed by Commerce support the determination that Marmen's suppliers did not charge different prices for plates of varying physical characteristics, except to apply an upcharge for plates over a certain thickness. See *id.* Ex. D-2. The Court notes that record documents cited by Commerce support Commerce's determination that a majority of the higher-priced CONNUMs were sold earlier in the period of investigation. See Marmen Final Cost Calculation Mem. Attachs. 1, 2. Because record evidence cited by Commerce indicates that Marmen's plate costs did

not differ between plates of varying physical characteristics and that higher priced CONNUMs were sold earlier in the period of investigation, the Court concludes that Commerce's determination that differences in plate prices were related to timing of production and factors other than differences in physical characteristics is supported by substantial evidence.

The Court concludes that Commerce followed statutory requirements and Commerce's stated practices, and supported with substantial evidence its determination that Marmen's records did not reasonably reflect the costs associated with the production and sale of Marmen's merchandise. The Court sustains Commerce's determination to weight-average Marmen's steel plate costs.

## **II. Commerce's Rejection of Marmen's Additional Cost Reconciliation Information**

Commerce determined that a portion of Marmen's cost reconciliation information in Marmen's February 7, 2020 response constituted untimely and unsolicited new information and rejected Marmen's submission. *See* Final IDM at 8–9. Marmen argues that the information was corrective, and not new, and that Commerce abused its discretion by rejecting the correction. Marmen's Br. at 26–27.

A party may submit factual information to rebut, clarify, or correct questionnaire responses. 19 C.F.R. § 351.301(c). The regulations state that

[i]f the factual information is being submitted to rebut, clarify, or correct factual information on the record, the submitter must provide a written explanation identifying the information which is already on the record that the factual information seeks to rebut, clarify, or correct, including the name of the interested party that submitted the information and the date on which the information was submitted.

19 C.F.R. § 351.301(b)(2). The regulations outline time limits for submissions of information to Commerce. *See id.* § 351.301(c). Section 351.301(c)(1)(v) discusses time limits for factual information submitted to correct or clarify questionnaire responses by “an interested party other than the original submitter.” *Id.* § 351.301(c)(1)(v). Section 351.301(c)(5) requires that miscellaneous new factual information must be submitted either 30 days before the scheduled date of the preliminary determination in an investigation, or 14 days before verification, whichever is earlier. *Id.* § 351.301(c)(5). Commerce has the right to reject information that is untimely or unsolicited. *See* 19 C.F.R. § 351.302(d).

Nevertheless, Commerce has a duty “to determine dumping margins as accurately as possible.” See *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (internal quotation marks and citation omitted). “[A]ntidumping laws are remedial not punitive.” *Id.* (citation omitted). The U.S. Court of Appeals for the Federal Circuit has stated that “Commerce is obliged to correct any errors in its calculations during the preliminary results stage to avoid an imposition of unjustified duties.” *Fischer S.A. Comercio, Industria & Agricultura v. United States*, 471 F. App’x 892, 895 (Fed. Cir. 2012) (citation omitted). Further, “Commerce is free to correct any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final determination and adequately proves the need for the requested corrections.” *Timken United States Corp. v. United States* (“*Timken*”), 434 F.3d 1345, 1353 (Fed. Cir. 2006). The Court reviews whether Commerce abused its discretion when rejecting submitted information. See *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1384 (Fed. Cir. 2016) (“Commerce abused its discretion in refusing to accept updated data when there was plenty of time for Commerce to verify or consider it.”) (citations omitted). When reviewing Commerce’s determination to reject corrective information, this Court may consider factors such as Commerce’s interest in ensuring finality, the burden of incorporating the information, and whether the information will increase the accuracy of the calculated dumping margins. *Bosun Tools Co. v. United States*, 43 CIT \_\_, \_\_, 405 F. Supp. 3d 1359, 1365 (2019) (citations omitted).

Marmen argues that the information submitted was a minor correction and not new information. See Marmen’s Br. at 26–27. Marmen contends that Commerce abused its discretion by rejecting the information. See *id.* Commerce determined that the information was not responsive to its questionnaire and was new factual information that had not been requested. See Final IDM at 8 (citing Utility Scale Wind Towers from Canada: Second Suppl. Section D Resp. (Feb. 7, 2020) (“Marmen SSDQR”) Ex. D-9, PR 151–54).

The Court notes that the cost reconciliation information submitted by Marmen in its February 7, 2020 response corresponded directly to prior cost reconciliation information submitted in Marmen’s October 11, 2019 response. See Marmen SSDQR Ex. D-9; Utility Scale Wind Towers from Canada: Sections B, C, and D Resp. (Oct. 11, 2019) (“Marmen SBCDR”) Ex. D-14, PR 89–97. The Court observes that Marmen’s submission stated that the information updated purchase information that had not been properly converted to Canadian dol-

lars. *See* Marmen SSDQR Ex. D-9. Commerce itself called Marmen’s submission a “correction.” *See* Final IDM at 8–9. Because of Commerce’s own characterization of the submission, and because the information directly corresponds to a prior submission, the Court concludes that Commerce’s determination that the additional cost reconciliation information submitted by Marmen was new factual information is not supported by substantial evidence. The Court concludes that Marmen’s submission is a correction and reviews whether Commerce abused its discretion when rejecting Marmen’s submission.

When rejecting Marmen’s corrective submission, Commerce stated that because it was submitted after the preliminary determination, the information was submitted too late for Commerce to use. *Id.* at 9. This Court and the U.S. Court of Appeals for the Federal Circuit have repeatedly held that Commerce must accept corrections when there is sufficient time for Commerce to consider the submission prior to the final determination. *See, e.g., Timken*, 434 F.3d at 1353–54 (holding that the court did not err by remanding a case to Commerce for analysis of corrective evidence that was submitted after the preliminary results but before the final results); *Pro-Team Coil Nail Enter. v. United States*, 43 CIT \_\_, \_\_, 419 F. Supp. 3d 1319, 1332 (2019) (finding that finality concerns were not implicated when the information was submitted eight months prior to publication of the final results).

The information was submitted on February 7, 2020, approximately five months before publication of the *Final Determination*. *See* Marmen SSDQR at 1. The Court notes that Commerce cites no other reason for there being insufficient time to consider Marmen’s submission other than the fact that the submission was made after the preliminary determination. *See* Final IDM at 8–9. Because the information was submitted to Commerce five months prior to the *Final Determination*, the Court concludes that finality concerns are not implicated in this case and rejects Commerce’s determination that the information was filed too late to be considered.

The Court notes that Commerce stated summarily that Marmen’s submission was “not supported by factual information on the record,” but did not point to record evidence that contradicts the supplemental information submitted. *See* Final IDM at 9. Absent record evidence indicating a reason to question the veracity of Marmen’s cost reconciliation information, concerns over the accuracy of the calculated dumping margin favor accepting Marmen’s submitted cost reconciliation information. *See Pro-Team Coil Nail*, 43 CIT at \_\_, 419 F. Supp. 3d at 1332. Record documents cited by Commerce indicate that Mar-

men's cost reconciliation worksheet stated prices in Canadian dollars. *See* Marmen SSDQR Ex. D-9. The Court observes that record documents also indicate that, prior to Marmen's supplemental submission, Marmen had not converted one line of the cost reconciliation sheet from U.S. dollars to Canadian dollars. *See id.* The Court notes that Marmen explained that its submission corrected one line of the cost reconciliation worksheet to properly list prices in Canadian dollars. *See id.* In light of record evidence that supports Marmen's corrective submission and its explanation, and absent evidence questioning the veracity of the submission, the Court concludes that Commerce has not supported with substantial evidence its determination that Marmen's supplemental cost reconciliation information is inaccurate and, therefore, that Commerce abused its discretion by failing to consider Marmen's corrective submission.

The Court holds that Commerce's determination to reject Marmen's supplemental cost reconciliation information was an abuse of discretion. The Court remands Commerce's determination for further explanation or consideration in accordance with this opinion.

### **III. Commerce's Use of an Average-to-Transaction Methodology**

Commerce determined that its differential pricing analysis showed a pattern of prices that differed significantly for Marmen's U.S. sales of five CONNUMs that justified the use of an alternative average-to-transaction ("A-to-T") methodology to calculate Marmen's dumping margin. *See* Final IDM at 11. Marmen argues that Commerce's application of its differential pricing analysis methodology is unreasonable because there is not a significant difference in Marmen's U.S. prices and that, therefore, Commerce's determination to use an A-to-T method to calculate Marmen's dumping margin is unreasonable and not supported by substantial evidence. *See* Marmen's Br. at 32–34.

Commerce ordinarily uses an average-to-average ("A-to-A") comparison of "the weighted average of the normal values [of subject merchandise] to the weighted average of export prices (and constructed export prices) for comparable merchandise" when calculating a dumping margin. *See* 19 U.S.C. § 1677f1(d)(1)(A)(i); 19 C.F.R. § 351.414(c)(1). The statute allows Commerce to depart from using the A-to-A methodology and instead use an A-to-T comparison of the weighted average of normal values to the export prices and constructed export prices of individual transactions for comparable merchandise when: (1) Commerce observes "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time;" and (2)

“[Commerce] explains why such differences cannot be taken into account using [the A-to-A methodology].” 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). In contrast to the A-to-A method, which may mask dumped sales at low prices by averaging them with sales at higher prices, the A-to-T method allows Commerce “to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it.” *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1337, 1341 (Fed. Cir. 2017) (citation and internal quotation marks omitted).

The statute does not set forth the analysis for how Commerce is to identify a pattern of price differences. See 19 U.S.C. §§ 1677, 1677f-1; see also *Apex Frozen Foods*, 862 F.3d at 1346; *Dillinger France S.A.*, 981 F.3d at 1325. The Court affords Commerce deference in determinations “involv[ing] complex economic and accounting decisions of a technical nature.” See *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (citation omitted). However, Commerce still “must [] explain [cogently] why it has exercised its discretion in a given manner.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (citation omitted).

Commerce uses a differential pricing analysis to determine if a pattern of significant price differences exist and whether the difference can be taken into account using the A-to-A method. See Final IDM at 11. The standard of review for considering Commerce’s differential pricing analysis is reasonableness. *Stupp Corp. v. United States*, 5 F.4th 1341, 1353 (Fed. Cir. 2021). The U.S. Court of Appeals for the Federal Circuit and this Court have held the steps underlying the differential pricing analysis as applied by Commerce to be reasonable. See e.g., *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 670–74 (Fed. Cir. 2019) (discussing zeroing and the 0.8 threshold for the Cohen’s *d* test); *Apex Frozen Foods Priv. Ltd. v. United States*, 40 CIT \_\_, \_\_, 144 F. Supp. 3d 1308, 1314–35 (2016) (discussing application of the A-to-T method, the Cohen’s *d* test, the meaningful difference analysis, zeroing, and the “mixed comparison methodology” of applying the A-to-A method and the A-to-T method when 33–66% of a respondent’s sales pass the Cohen’s *d* test), *aff’d*, 862 F.3d 1337; *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1322 (Fed. Cir. 2017) (affirming zeroing and the 0.5% *de minimis* threshold in the meaningful difference test). However, the U.S. Court of Appeals for the Federal Circuit has stated that “there are significant concerns relating to Commerce’s application of the Cohen’s *d* test . . . in adjudications in which the data groups being compared are small, are not normally distributed, and have disparate variances.” *Stupp*, 5 F.4th at 1357.

The Cohen's  $d$  test is "a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group." *Apex Frozen Foods*, 862 F.3d at 1342 n.2. The Cohen's  $d$  test relies on assumptions that the data groups being compared are normal, have equal variability, and are equally numerous. *See Stupp*, 5 F.4th at 1357. Applying the Cohen's  $d$  test to data that do not meet these assumptions can result in "serious flaws in interpreting the resulting parameter." *See id.* at 1358.

In *Stupp Corp. v. United States*, 5 F.4th 1341 (Fed. Cir. 2021), the U.S. Court of Appeals for the Federal Circuit remanded Commerce's use of the Cohen's  $d$  test for further explanation because the data Commerce used may have violated the assumptions of normality, sufficient observation size, and roughly equal variances. *Id.* at 1357–60. The Court addressed Commerce's argument that it does not need to worry about normality because it is using a population instead of a sample, stating that Commerce's argument "does not address the fact that Professor Cohen derived his interpretive cutoffs under the assumption of normality." *Id.*

Marmen contends that the price differences of its U.S. sales of five of the seven CONNUMs used in the differential pricing analysis were less than one percent and were not significant. *See Marmen's Br.* at 32. Marmen argues that Commerce's application of its differential pricing analysis in this case was unreasonable. *Id.*

Commerce applied its two-step differential pricing methodology to determine if a pattern of significant price differences existed and whether the difference could be taken into account using the A-to-A method. *See Final IDM* at 11. Commerce chose the Cohen's  $d$  test "to evaluate the extent to which the prices to a particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise." *Prelim. DM* at 10. Commerce applied the Cohen's  $d$  test and determined that 68.29% of Marmen's U.S. sales passed. *Final IDM* at 11; *Analysis for the Final Determination of Utility Scale Wind Towers: Final Margin for Calculation for the Marmen Group* (June 29, 2020) ("Marmen Final Margin Calculations Mem.") at 3, PR 195. Based on the results of its Cohen's  $d$  test and its meaningful difference test, Commerce determined that a pattern of prices that differed significantly among purchasers, regions, or time periods existed, that the A-to-A method could not account for the pattern of price differences, and that the A-to-T method was appropriate to calculate Marmen's dumping margin. *Final IDM* at 11; *Marmen Final Margin Calculations Mem.* at 3.

Commerce determined that Marmen's U.S. prices differed significantly and decided to use the A-to-T method based on its differential

pricing analysis, which utilized the Cohen's *d* test. *See* Marmen Final Margin Calculations Mem. at 3–4. Commerce applied the Cohen's *d* test to data that showed differences that were not large in absolute terms, because the overall differences for five of the CONNUMs were less than one percent. *See id.* Attach. 2. The Court notes that Commerce did not explain whether the data applied to the Cohen's *d* test were normally distributed or contained roughly equal variances. *See* Final IDM at 10–11. Because the record appears to indicate that the price differences were not large in absolute terms, the evidence before the Court calls into question whether the data Commerce used in its differential pricing analysis violated the assumptions of normality and roughly equal variances associated with the Cohen's *d* test.

The Court remands the issue of Commerce's use of the Cohen's *d* test for Commerce to explain further whether the limits on the use of the Cohen's *d* test were satisfied in this case in the context of the *Stupp* case. The Court remands Commerce's use of the A-to-T method for further explanation of Commerce's differential pricing analysis in accordance with this opinion.

#### **IV. Commerce's Determination to Use Marmen's Invoice Dates as the Date of Sale for Marmen's Home Market and U.S. Sales**

Commerce determined the date of sale for Marmen's home market and U.S. sales based on reported invoice dates. Final IDM at 15–16. WTTC argues that Commerce should use a date other than the invoice date when determining Marmen's home market and U.S. dates of sale. *See* WTTC's Br. at 18–19.

Commerce must conduct a "fair comparison" of normal value and export price in determining whether merchandise is being, or is likely to be, sold at less than fair value. *See* 19 U.S.C. § 1677b(a); *see also* *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983). In doing so, normal value must be from "a time reasonably corresponding to the time of sale used to determine the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(A). Commerce has promulgated the following regulation regarding the date that should be used as the date of sale for purposes of comparing normal value and export price:

In identifying the date of sale of the subject merchandise or foreign like product, [Commerce] normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, [Commerce] may use a date other than the date of invoice if [Commerce] is satisfied

that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

19 C.F.R. § 351.401(i). This Court has previously held that the material terms of a sale generally include the price, quantity, payment, and delivery terms. *See, e.g., ArcelorMittal USA LLC v. United States*, 42 CIT \_\_, \_\_, 302 F. Supp. 3d 1366, 1378 (2018); *Nakornthai Strip Mill Pub. Co. v. United States*, 33 CIT 326, 337, 614 F. Supp. 2d 1323, 1333 (2009); *USEC Inc. v. United States*, 31 CIT 1049, 1055, 498 F. Supp. 2d 1337, 1343 (2007); *see also Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1377 n.1 (Fed. Cir. 2003). The important factor to determine is when the parties have reached a “meeting of the minds.” *Nucor Corp. v. United States*, 33 CIT 207, 249, 612 F. Supp. 2d 1264, 1300 (2009).

In promulgating the implementing regulation, Commerce explained that it will normally rely on the date provided on the invoice “as recorded in a firm’s records kept in the ordinary course of business.” *See Antidumping Duties; Countervailing Duties (“Preamble”)*, 62 Fed. Reg. 27,296, 27,348 (Dep’t of Commerce May 19, 1997). Commerce prefers to use a single and uniform source for the date of sale for each respondent, rather than determining the date of sale for each sale individually. *Id.* Commerce stated that “as a matter of commercial reality, the date on which the terms of a sale are first agreed is not necessarily the date on which those terms are finally established” because “price and quantity are often subject to continued negotiation between the buyer and the seller until a sale is invoiced.” *Id.* Commerce explained that:

absent satisfactory evidence that the terms of sale were finally established on a different date, [Commerce] will presume that the date of sale is the date of invoice . . . . If [Commerce] is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, [Commerce] will use that alternative date as the date of sale.

*Id.* at 27,349. The party seeking a date other than the invoice date bears the burden of presenting Commerce with sufficient evidence demonstrating that “another date . . . ‘better reflects the date on which the exporter or producer establishes the material terms of sale.’” *Viraj Grp., Ltd.*, 343 F.3d at 1377 n.1 (quoting 19 C.F.R. § 351.401(i)).

WTTC argues that Commerce has stated that “in situations involving large custom-made merchandise in which the parties engage in

formal negotiation and contracting procedures, [Commerce] usually will use a date other than the date of invoice.” WTTC’s Br. at 19 (citing *Preamble*, 62 Fed. Reg. at 27,349). However, the Court notes that “[Commerce] emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed.” *Preamble*, 62 Fed. Reg. at 27,349. The regulatory presumption exists that Commerce will use the date of invoice, and WTTC had the burden of proving to Commerce that another date better reflects the date on which the material terms of sale were established. *See* 19 C.F.R. § 351.401(i).

WTTC argues that Commerce should have used a date other than the invoice date as Marmen’s date of sale for home market and U.S. sales. *See* WTTC’s Br. at 18–19. WTTC asserts that the material terms of sale for Marmen’s sales did not change between when purchase orders were issued and when invoices were issued. *See id.* at 21. Commerce determined that Marmen had reported the invoice dates as the date of sale for home market and U.S. sales, as instructed, and that Marmen had responded to Commerce’s request for examples in which the terms of sale changed between the purchase order date and the invoice date. Final IDM at 15–16. Commerce reviewed Marmen’s questionnaire responses and determined that the record supported that “changes to the material terms of sale occurred between the purchase order and the invoice date in both the home and U.S. markets.” *Id.* (citing *Utility Scale Wind Towers from Canada: Section A Resp.* (Sept. 13, 2019) (“Marmen AQR”), PR 76; *Utility Scale Wind Towers from Canada: Sections B, C, and D Resp.* (Oct. 11, 2019) (“Marmen BCDQR”), PR 89–97; *Utility Scale Wind Towers from Canada: Suppl. Sections A, B, and C Resp.* (Feb. 6, 2020) (“Marmen First SABCQR”), PR 120–21; *Utility Scale Wind Towers from Canada: Second Suppl. Sections A, B, and C Resp.* (Feb. 6, 2020) (“Marmen Second SABCQR”), PR 181–83; *Marmen SDQR*). In support of using the invoice date as the date of sale for both home market and U.S. sales, Commerce cited the examples that Marmen provided of a change to the delivery terms in a home market sale and changes to the price, quantity, and payment terms in a U.S. sale. *Id.* at 16 (citing *Marmen First SABCQR Exs. FSQ-6, FSQ-7, FSQ-12, FSQ-14*).

The Court notes that Commerce’s questionnaires requested that Marmen state the “date of sale (*e.g.*, invoice date, etc.)” and provide an example of a change in the terms of sale between the purchase order and invoice date for both home market and U.S. sales. *See* *Antidumping Duty Investigation Req. for Information for Marmen Inc., Utility Scale Wind Towers from Canada* (Aug. 19, 2019) (“Initial Questionnaire”) at A-8, PR 54; *Antidumping Duty Investigation on Utility*

Scale Wind Towers from Canada: Suppl. Questionnaire for Marmen (“Nov. 20, 2019”) (“Supplemental Questionnaire”) at 5, PR 103. The Court observes that Marmen’s responses complied with Commerce’s requests, because Marmen reported the invoice date as the date of sale for its home market and U.S. sales, in line with Commerce’s questionnaire. *See* Initial Questionnaire at A-8; Marmen AQR at A-20. The Court notes that Marmen also provided examples of changes to the material terms of sale between the purchase order and invoice date, consistent with Commerce’s request. *See* Supplemental Questionnaire at 5; Marmen First SABCQR at 12–14.

The record evidence cited by Commerce supports a determination that the material terms of sale were not established prior to the invoice date, because the evidence shows changes to the terms between the purchase order and invoice date. The Court observes that record documents cited by Commerce show an example of a change in the delivery terms for one of Marmen’s home market sales between the purchase order and invoice. *See* Marmen First SABCQR at 12 (stating that the change in delivery terms resulted in additional costs for the delivery of the sale)). Record documents cited by Commerce also show a change in the terms of one of Marmen’s U.S. sales, showing that price, quantity, and payment terms changed between the letter of intent and the invoice date. *See id.* at 13–14, Ex. FSQ-7. Because record evidence cited by Commerce show changes to delivery terms, price, quantity, and payment terms, and these terms are considered material, the Court concludes that Commerce’s determination that there were changes to the material terms between the purchase order and invoice date is supported by substantial evidence.

Commerce has supported its determination that there were changes to the material terms of sale between the purchase order and invoice date, and the Court concludes that Commerce has supported with substantial evidence its determination that the invoice date best reflects when the material terms of sale were established. Therefore, the Court concludes that Commerce correctly applied the regulatory presumption to use the invoice date as the date of sale and that Commerce’s determination to use Marmen’s reported invoice dates as the date of sale for home market and U.S. sales is supported by substantial evidence.

## **V. Commerce’s Use of Marmen’s Reporting of Home Market Sales of Tower Sections**

Commerce determined that Marmen correctly reported its home market sales as sales of wind tower sections and relied on Marmen’s reported information. Final IDM at 17–18. WTTC argues that Marmen incorrectly reported its home market sales as sales of sections

and that Commerce should not use Marmen's reported home market sales information. WTTC's Br. at 34–37.

Commerce cited Marmen's questionnaire responses, which showed that Marmen issued invoices for each section of its home market sales. *See* Final IDM at 17–18 (citing Marmen AQR; Marmen BCDQR; Marmen First SABCQR Exs. FSQ-11, FSQ-12). Despite Marmen issuing purchase orders for whole towers, Commerce noted that Marmen issued invoices by section. *See id.*; *see also* Marmen First SABCQR Exs. FSQ-11, FSQ-12. Commerce determined, therefore, that Marmen's reporting was consistent with Commerce's instructions and with the manner in which Marmen actually invoiced its customer. *See* Final IDM at 17–18.

The Court notes that Commerce's questionnaires requested that Marmen report its sales by wind tower section as invoiced. *See* Initial Questionnaire at B-2; Model Matching Questionnaire Attach. 1. The Court observes that record documents cited by Commerce show that Marmen invoiced customers by section. *See* Marmen First SABCQR Exs. FSQ-11, FSQ-12. Because Marmen invoiced customers by wind tower section and Commerce instructed Marmen to report its sales as they were invoiced, the Court agrees with Commerce's determination that Marmen accurately reported its sales as sales of wind tower sections, consistent with Commerce's requests.

The Court concludes that Commerce's reliance on Marmen's reported information as accurate and treatment of Marmen's home market sales as sales of tower sections is reasonable and supported by substantial evidence on the record.

## **VI. Commerce's Determination Not to Apply Facts Otherwise Available or an Adverse Inference to Marmen**

Commerce determined that the record provided sufficient information to calculate Marmen's dumping margin and declined to apply adverse facts available to Marmen. *See* Final IDM at 19–20. WTTC contends that Marmen was not responsive to Commerce's questionnaires and that Marmen reported inaccurate and incomplete data. *See* WTTC's Br. at 37–44. WTTC argues that Commerce should have applied facts otherwise available or an adverse inference. *Id.* at 38.

Section 776 of the Tariff Act of 1930, as amended, provides that if “necessary information is not available on the record” or if a respondent “fails to provide such information by the deadlines for submission of the information or in the form and manner requested,” then the agency shall “use the facts otherwise available in reaching” its determination. 19 U.S.C. § 1677e(a)(1), (a)(2)(B). If Commerce finds further that “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information” from

the agency, then Commerce “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” *Id.* § 1677e(b)(1)(A). When Commerce can fill in gaps in the record independently, an adverse inference is not appropriate. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011).

WTTC asserts that Marmen’s reporting was incomplete and that the record lacked necessary information. WTTC’s Br. at 39–41. WTTC argues that Commerce should have applied facts otherwise available to calculate Marmen’s dumping margin. *See id.* at 41. WTTC asserts that Marmen mischaracterized its home market date of sale and misreported its sales as sales of wind tower sections. *See id.* at 38–41. As a result, WTTC argues that Marmen’s reporting did not comply with Commerce’s requests and Commerce should have applied an adverse inference. *See id.* at 40–44. Commerce cited Marmen’s questionnaire responses and determined that Marmen was “responsive to the information requested,” that its responses were submitted in a timely manner, and that there was “no missing information from the record that is a condition necessary for applying facts available.” Final IDM at 19–20. Commerce also determined that Marmen’s reporting of its home market date of sale based on invoice date and its sales of wind tower sections was consistent with Commerce’s requests and Marmen’s invoicing practices. *Id.* at 20. Because Marmen complied with Commerce’s requests and the record contained sufficient information for Commerce’s determination, Commerce declined to apply facts otherwise available or an adverse inference. *Id.* at 20.

The Court observes that Marmen’s questionnaire responses, cited by Commerce, were consistent with Commerce’s instructions. *See* Marmen AQR; Marmen BCDQR; Marmen First SABCQR. As discussed above, the Court concludes that Commerce’s determinations that Marmen reported invoice dates as the date of sale for home market and U.S. sales and reported home market sales as sales of wind tower sections, in accordance with Commerce’s questionnaire instructions, are supported by substantial evidence. *See supra* Parts IV & V. The Court concludes that Commerce’s determination that Marmen’s reporting was responsive to Commerce’s requests and no information was missing from the record is supported by substantial evidence. The Court holds that Commerce’s determination not to apply facts otherwise available or an adverse inference to Marmen is supported by substantial evidence.

### CONCLUSION

For the foregoing reasons, the Court sustains Commerce’s determination to weight-average Marmen’s plate costs; Commerce’s use of invoice dates as the date of sale; Commerce’s use of Marmen’s reported sales of tower sections; and Commerce’s decision not to apply facts otherwise available or an adverse inference. The Court remands Commerce’s determination rejecting Marmen’s additional cost reconciliation information and Commerce’s use of the A-to-T methodology to calculate Marmen’s dumping margin for further consideration in accordance with this opinion.

Accordingly it is hereby

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

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

1. Commerce shall file the remand determination on or before December 17, 2021;
2. Commerce shall file the remand administrative record on or before January 14, 2022;
3. Comments in opposition to the remand determination shall be filed on or before February 11, 2022;
4. Comments in support of the remand determination shall be filed on or before March 4, 2022; and
5. The joint appendix shall be filed on or before March 25, 2022.

Dated: October 22, 2021

New York, New York

*/s/ Jennifer Choe-Groves*

JENNIFER CHOE-GROVES, JUDGE

## Slip Op. 21–149

CARBON ACTIVATED TIANJIN CO., LTD., CARBON ACTIVATED CORPORATION, AND DATONG JUQIANG ACTIVATED CARBON CO., LTD., Plaintiffs, and BEIJING PACIFIC ACTIVATED CARBON PRODUCTS CO., LTD., NINGXIA GUANGHUA CHERISHMET ACTIVATED CARBON CO., LTD., NINGXIA MINERAL & CHEMICAL LIMITED, AND SHANXI SINCERE INDUSTRIAL CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CALGON CARBON CORPORATION AND CABOT NORIT AMERICAS, INC., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge  
Court No. 20–00007

[Sustaining the U.S. Department of Commerce’s remand results in the eleventh administrative review of the antidumping duty order on certain activated carbon from the People’s Republic of China.]

Dated: October 22, 2021

*Francis J. Sailer, Dharmendra N. Choudhary and Jordan C. Kahn*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., for Plaintiffs and Plaintiff-Intervenors.

*Mollie L. Finnan*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Ashlande Gelin*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

*John M. Herrmann, R. Alan Luberda, and Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, D.C., for Defendant-Intervenors.

**OPINION****Barnett, Chief Judge:**

This matter is before the court following the U.S. Department of Commerce’s (“Commerce” or “the agency”) redetermination upon remand in this case. *See* Final Results of Redetermination Pursuant to Court Remand (“Remand Results”), ECF No. 68–1.<sup>1</sup>

Plaintiffs and Plaintiff-Intervenors (collectively, “Plaintiffs”)<sup>2</sup> commenced this case challenging several aspects of Commerce’s final

<sup>1</sup> The administrative record associated with the Remand Results is divided into a Public Remand Record (“PRR”), ECF No. 69–3 and a Confidential Remand Record (“CRR”), ECF No. 69–2. The administrative record associated with the *Final Results* is divided into a Public Record (“PR”), ECF No. 39–5, and a Confidential Record (“CR”), ECF No. 39–4. Parties filed joint appendices containing record documents cited in their briefs. *See* Public Remand J.A., ECF No. 75; Confidential Remand J.A. (“CRJA”), ECF No. 74. Citations are to the CRJA unless stated otherwise.

<sup>2</sup> Plaintiffs consist of Carbon Activated Tianjin Co., Ltd. (“Carbon Activated”), Carbon Activated Corporation, Datong Juqiang Activated Carbon Co., Ltd. (“DJAC”), Beijing Pacific Activated Carbon Products Co., Ltd., Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Ningxia Mineral & Chemical Limited, and Shanxi Sincere Industrial Co., Ltd.

results in the eleventh administrative review (“AR11”) of the anti-dumping duty order on certain activated carbon from the People’s Republic of China (“China”) for the period of review (“POR”) April 1, 2017, through March 31, 2018. *See Certain Activated Carbon From the People’s Republic of China*, 84 Fed. Reg. 68,881 (Dep’t Commerce Dec. 17, 2019) (final results of antidumping duty admin. review; 2017–2018) (“*Final Results*”), ECF No. 39–2, and accompanying Issues and Decision Mem., A-570–904 (Dec. 11, 2019) (“I&D Mem.”), ECF No. 39–3. Plaintiffs challenged Commerce’s (1) selection of Malaysia instead of Romania as the primary surrogate country; (2) selection of surrogate values for Carbon Activated and DJAC’s inputs of bituminous coal and coal tar pitch; and (3) calculation of surrogate financial ratios. *See, e.g.*, [Corrected] Confidential Mem. of Law in Supp. of Pls.’ and Pl.-Ints.’ Mot. For J. on the Agency R. Pursuant to USCIT Rule 56.3, ECF No. 59.

On April 2, 2021, the court remanded Commerce’s selection of Malaysia as the primary surrogate country and Commerce’s selection of surrogate data to value bituminous coal, sustained Commerce’s selection of surrogate data to value coal tar pitch, and directed Commerce to reconsider the adjustments to the surrogate financial statements on remand. *See Carbon Activated Tianjin Co. v. United States (“Carbon Activated I”)*, 45 CIT \_\_, \_\_, 503 F. Supp. 3d 1278 (2021).<sup>3</sup>

On June 30, 2021, Commerce filed its Remand Results. Therein, Commerce retained Malaysia as the primary surrogate country, reconsidered its valuation of bituminous coal, and further explained its adjustments to the financial ratios. *See Remand Results* at 2–19, 21–42.

Plaintiffs filed comments opposing the Remand Results. *See Confidential Pls.’ Comments in Opp’n to Remand Redetermination (“Pls. Opp’n Cmts.”)*, ECF No. 70. Defendant United States (“the Government”) filed comments in support of the Remand Results. *See Def.’s Resp. to Pls.’ Comments on Commerce’s Remand Redetermination*, ECF No. 73 (“Def.’s Reply Cmts.”). Defendant-Intervenors Calgon Carbon Corporation and Cabot Norit Americas, Inc. filed a letter expressing support for the Remand Results without further comment. Letter from John M. Hermann to the Court (Aug. 30, 2021), ECF No. 72.

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<sup>3</sup> The court’s opinion in *Carbon Activated I* presents background information on this case, familiarity with which is presumed.

## 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).<sup>4</sup> 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).

## DISCUSSION

### I. Legal Framework for Surrogate Country and Surrogate Value Selection

An antidumping duty is “the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.” 19 U.S.C. § 1673. When an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production<sup>5</sup> in a surrogate country, *see id.* §1677b(c)(1), and those values are referred to as “surrogate values.” In selecting surrogate values, Commerce must, “to the extent possible,” use “the best available information” from a market economy country or countries that are economically comparable to the nonmarket economy country and are “significant producers of comparable merchandise.” *Id.* § 1677b(c)(1), (4).

In selecting a primary surrogate country, Commerce has adopted a four-step approach:

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

*Jianxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1293 (Fed. Cir. 2016); *see also* Import Admin., U.S. Dep’t of Commerce, Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (2004), <https://enforcement.trade.gov/policy/bull04-1.html> (last visited Oct. 22, 2021).

<sup>4</sup> Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition unless otherwise specified.

<sup>5</sup> The factors of production include but are not limited to: “(A) hours of labor require, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation.” 19 U.S.C. § 1677b(c)(3).

Commerce generally values all factors of production in a single surrogate country, referred to as the “primary surrogate country.” See 19 C.F.R. § 351.408(c)(2) (excepting labor). *But see Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,093–94 (Dep’t Commerce June 21, 2011) (expressing a preference to value labor based on industry-specific labor rates from the primary surrogate country). Commerce prefers surrogate values that are “input-specific, representative of a broad-market average, publicly available, contemporaneous with the POR, and tax- and duty-exclusive.” Remand Results at 25 & n.105 (citation omitted); *see also* 19 C.F.R. § 351.408(c)(1), (4) (directing Commerce to select “publicly available”/“non-proprietary information” to value factors of production and “manufacturing overhead, general expenses, and profit”). Commerce has broad discretion to determine what constitutes “the best available information” for the selection of surrogate values. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011).

## II. Bituminous Coal Surrogate Value Selection

For the *Final Results*, Commerce valued all bituminous coal using Romanian import data under the Harmonized System (“HS”) heading 2701.12 (Bituminous Coal, Not Agglomerated) after finding that the average unit value of Malaysian imports under HS 2701.12 was unreliable. I&D Mem. at 13–16. The court remanded the issue to Commerce for further explanation as to the applicability of Chapter 27, Subheading Note 2 (“Note 2”)<sup>6</sup> to Commerce’s selection of a surrogate value. *Carbon Activated I*, 503 F. Supp. 3d at 1290–91. On remand, Commerce determined that Note 2 applied to Malaysian HS data and chose different data sets to value bituminous coal depending on whether the calorific value of the bituminous coal was known to be below 5,833 kcal/kg. *See* Remand Results at 3–7.<sup>7</sup> Commerce continued to rely on Romanian import data under HS 2701.12 to value bituminous coal that was not documented as having a calorific value below 5,833 kcal/kg but determined to use Malaysian import data under HS 2701.19 (Other Coal) to value bituminous coal with a

<sup>6</sup> Note 2 limits HS 2701.12, *inter alia*, to bituminous coal with “a calorific value limit . . . equal to or greater than 5,833 [kilocalories per kilogram (“kcal/kg”).]” I&D Mem. at 14. For the *Final Results*, Commerce declined to apply Note 2 based on the agency’s view that Note 2 pertained solely to Thai HS data, not Malaysian HS data. I&D Mem. at 14.

<sup>7</sup> Commerce changed its position regarding the applicability of Note 2 in order to be consistent with “prior determinations in which Commerce . . . concluded that “[t]he International Convention on the Harmonized Commodity and Coding System applies the same [HS] six-digit prefix to products subject to international trade.” Remand Results at 6–7 & n.26 (citations omitted) (alternations in original).

known calorific value below 5,833 kcal/kg in light of its determination that Note 2 applied to the Malaysian import data. *Id.* at 7–8

### **A. Bituminous Coal Having Unknown Calorific Value**

In its Draft Remand Results, Commerce determined that bituminous coal used by two of Carbon Activated’s suppliers—Supplier C and an uncooperative supplier<sup>8</sup>—should be valued using Romanian import data reported under HS 2701.12 because Commerce lacked record evidence demonstrating that such bituminous coal had a calorific value of less than 5,833 kcal/kg as required for valuation under HS 2701.19. Draft Results of Redetermination Pursuant to Court Remand (“Draft Remand Results”) at 7, PRR 1, CRJA Tab 11.

For the Remand Results, Commerce further explained that “the plain language description of . . . HS 2701.12 . . . matche[d] the mandatory respondents’ description of their input (i.e., bituminous coal).” Remand Results at 28. Furthermore, without record evidence demonstrating that the coal input the mandatory respondents identified as “bituminous coal” was actually the “kind and grade more appropriately classified under HS 2701.19” (i.e., coal with a calorific value limit of less than 5,833 kcal/kg), Commerce stated that it could not consider that coal to fall under HS 2701.19. *Id.*

In their comments on the Draft Remand Results, Plaintiffs argued that Commerce never asked Supplier C to provide test reports documenting the calorific value of its inputs. *See id.* at 22, 26. Commerce explained that although it did not specifically ask “Supplier C to provide test results for its bituminous coal input, [it] asked Supplier C to ‘provide a detailed description of “smoke coal” and explain the difference between smoke coal and bituminous coal.’” *Id.* at 26 & n.113 (citing Carbon Activated Resp. to Sec. D Suppl. Questionnaire (Part I) (Feb. 21, 2019) (“Carbon Activated’s SDQR”) at 19, Ex. SD-27, PR 162–65, CR 254–88, CRJA Tab 5). Supplier C responded that “[b]oth bituminous coal and smoke coal belong to the same technical grade of bituminous coal.” *Id.* at 26 & n.114 (citing same). However, Supplier C provided only “a test report for its smoke coal input,” and not for its bituminous coal, leading Commerce to find that Supplier C failed to substantiate that the two were equivalent. *Id.* at 26–27. Without these test results, Commerce continued to use import data reported under Romanian HS subheading 2701.12 to value bituminous coal used by Supplier C and the uncooperative supplier. *Id.* at 30.

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<sup>8</sup> The names of Supplier C and the uncooperative supplier are proprietary and not relevant to the court’s disposition of this case.

## 1. Parties' Contentions

Plaintiffs contend that Commerce should have valued all bituminous coal with an unknown calorific value using the average of Romanian HS 2701.12 and HS 2701.19 data. Pls. Opp'n Cmts. at 2. Plaintiffs argue that because the record establishes that "the heat value of the bituminous coal input used by [DJAC], [DJAC's] supplier, and one of Carbon Activated's suppliers [was] below 5,833 kcal/kg," and thus was covered by HS 2701.19, *id.* at 3 (quoting Remand Results at 7), Commerce "impermissibly speculate[d] that the bituminous coal having unknown calorific value should be classified under [HS] 2701.12," *id.* Plaintiffs further argue that "Commerce never asked Carbon Activated's Supplier C . . . to provide calorific value information for its bituminous coal input" and is thus "precluded from . . . 'impos[ing] a de facto adverse facts available rate.'" *Id.* at 3–4 (quoting *Calgon Carbon Corp. v. United States*, 35 CIT 234, 244 (2011)) (emphasis omitted).

The Government contends that, with respect to bituminous coal having unknown calorific value, Commerce reasonably relied on Romanian HS 2701.12. Def.'s Reply Cmts. at 5–6. The Government argues that (i) there is "no record evidence" to support valuing these suppliers' "bituminous coal under HS 2701.19," (ii) "[t]he plain language description of HS 2701.12 . . . matches [Plaintiffs'] own description of their own input," (iii) Commerce's "decision to use different datasets for different respondents 'is consistent with Commerce's practice,'" and (iv) "Commerce's path to reliance on Romanian HS 2701.12 . . . is reasonably discernable." *Id.* at 6–7.

## 2. Commerce's Selection of Romanian HS 2701.12 Data to Value Bituminous Coal of Unknown Calorific Value is Supported by Substantial Evidence

There is no dispute that the record lacks evidence regarding the heat value of the input for Carbon Activated's Supplier C and Carbon Activated's uncooperative supplier. While Plaintiffs argue that Commerce impermissibly speculated that bituminous coal should be classified as "bituminous coal" under HS 2701.12, *see* Pls.' Opp'n Cmts. at 3–5, any basis for Commerce to apply HS 2701.19 was equally speculative. The court declines to reweigh the record evidence and finds that substantial evidence supports Commerce's decision to value bituminous coal of unknown calorific value under HS 2701.12.

Neither Supplier C nor Carbon Activated's uncooperative supplier documented the heat value of the bituminous coal they used. *See* Remand Results at 28. While Commerce specifically asked Carbon

Activated “to provide a detailed description of ‘smoke coal’ and explain the difference between smoke coal and bituminous coal,” Carbon Activated’s SDQR at 19 (emphasis added), Carbon Activated only documented the calorific value of Supplier C’s smoke coal, *see id.*, Ex. SD-27. Because Carbon Activated failed to document the calorific value of Supplier C’s bituminous coal and acknowledged that “the two types of coal differ in terms of key parameters such as volatile matter content, moisture and heat value,” Carbon Activated’s SDQR at 19, Commerce declined to value such coal as “Other Coal” under HS 2701.19, Remand Results at 30. Carbon Activated provided no information regarding the calorific value of the bituminous coal used by its uncooperative supplier. *Id.* at 7.

Plaintiffs’ reliance on *Calgon Carbon* to argue that Commerce was required to provide Supplier C with a “similar opportunity” to submit evidence of the calorific value of its bituminous coal is inapposite. *See* Pls.’ Opp’n Cmts. at 4 (citing *Calgon Carbon*, 35 CIT at 244). *Calgon Carbon* involved a respondent that voluntarily provided supplemental information at verification concerning the purity of hydrochloric acid. 35 CIT at 244. Commerce accepted this supplemental information and, based on that information, selected a different surrogate value for that respondent than it did for another respondent. *Id.* The court held that although Commerce had no obligation to accept the supplemental information, once it did, the agency had an obligation to give the other respondent an opportunity to provide comparable information, and failure to do so “led to arbitrary and unfair treatment.” *Id.* Unlike the respondent in *Calgon Carbon*, Carbon Activated had an opportunity to substantiate its claim that smoke coal and bituminous coal had similar calorific values, but failed to do so.

Without evidence of the calorific value of the bituminous coal reported by Carbon Activated’s suppliers, Commerce turned to other methods to value bituminous coal used by these suppliers. Specifically, Commerce reasoned that the “plain language description” of HS 2701.12—“Bituminous Coal, Not Agglomerated”—most accurately described the bituminous coal in question. Remand Results at 28. The court has found that Commerce may rely on the plain meaning of HS descriptions to determine the best available information to value a specific input. *See Mid Continent Steel & Wire, Inc. v. United States*, 42 CIT \_\_, \_\_, 321 F. Supp. 3d 1313, 1325 (2018) (sustaining use of a surrogate value based on the HS description that best matched the description provided by the respondent). Having reviewed the record and Commerce’s explanation for its valuation of bituminous coal

without a reported calorific value, the court finds that Commerce has provided a reasoned explanation based on substantial evidence to value bituminous coal.

## **B. Bituminous Coal Having Known Calorific Value**

As discussed above, having found that Note 2 applied to Malaysian HS subheading 2701.19, and having found no indication that the average unit value for Malaysian imports under HS 2701.19 was unreliable or aberrantly high, in the Draft Remand Results Commerce valued bituminous coal inputs with documented heat value below 5,833 kcal/kg using Malaysian HS 2701.19. Draft Remand Results at 7. Plaintiffs argued that because Commerce found Malaysian data reported under HS 2701.12 to be aberrant and unreliable, the agency should also disregard Malaysian data reported under HS 2701.19. Second Redacted and Resubmitted Comments on Draft Remand (June 23, 2021) (“Second Comments on Draft Remand”) at 10–11, PRR 19, CRR 13, CRJA Tab 19. Commerce responded that it continued to find the Malaysian HS 2701.19 subheading preferable to Romania’s because there was no evidence on the record showing that the Malaysian data was distorted, aberrational, or otherwise unreliable. Remand Results at 26. Commerce further noted that it had a preference for selecting surrogate values from the primary surrogate country which, in this case, was Malaysia. Remand Results at 25–26.

### **1. Parties’ Contentions**

Plaintiffs contend that Commerce should have valued all bituminous coal having known calorific value below 5,833 kcal/kg using Romanian HS 2701.19. Pls. Opp’n Cmts. at 2. Plaintiffs argue that because Commerce found Malaysian HS 2701.12 data to be “aberrant and unreliable, . . . Commerce should be skeptical of Malaysian [HS] 2701.19” data. *Id.* at 6. Further, they argue that because Commerce has “acknowledge[d] that Romanian data is necessary to value bituminous coal” of unknown calorific value, Commerce should use Romanian data to value all bituminous coal “in accordance with [Commerce’s] policy underlying surrogate valuation to minimize distortion that occurs when using data from multiple countries.” *Id.*

The Government contends that Commerce’s selection of Malaysian import data under HS 2701.19 should be sustained because Commerce provided a reasoned explanation for its selection of such data and Plaintiffs’ assertions of unreliability are unsupported. Def.’s Reply Cmts. at 4–5.

## 2. Commerce’s Selection of Malaysian HS 2701.19 Data to Value Certain Bituminous Coal is Sustained

Pursuant to 19 C.F.R. § 351.408(c)(2), Commerce “normally will value all [factors of production] in a single surrogate country.” The court has acknowledged Commerce’s regulatory preference “to use surrogate value data from the primary surrogate country to minimize distortion.” *Tri Union Frozen Prods., Inc. v. United States*, 41 CIT \_\_, \_\_, 227 F. Supp. 3d 1387, 1400 (2017). Furthermore, the court has upheld Commerce’s practice of requiring a party to provide support for any argument that data are aberrational or unreliable. *See, e.g., Jinan Farmlady Trading Co. v. United States*, 41 CIT \_\_, \_\_, 228 F. Supp. 3d 1351, 1356–57 (2017) (finding Commerce’s determination that data was not aberrational reasonable when respondent had not provided demonstrative evidence).

Here, Plaintiffs have not provided any evidence that the Malaysian HS 2701.19 data are aberrant or unreliable. *See* Pls.’ Opp’n Cmts. at 6–7. Plaintiffs have also failed to justify their position that Commerce should have found Malaysian HS 2701.19 data to be distorted simply because the agency separately found Malaysian HS 2701.12 data to be distorted. *See id.* Accordingly, Plaintiffs’ argument that Romanian HS 2701.19 data “is preferable to Malaysia because . . . Romanian [HS] 2701.12 data is undistorted,” Pls.’ Opp’n Cmts. at 6, is without support. Commerce has provided a reasoned explanation for not rejecting the Malaysian HS 2701.19 data—such import data is presumed to be reliable and the record is devoid of evidence to the contrary. The parties to the proceeding bear the burden of establishing an adequate record, *QVD Food Co.*, 658 F. 3d at 1324, and Plaintiffs have not met that burden with respect to this issue.

Commerce explained that it selected Malaysian HS 2701.19 data pursuant to its preference to value all factors of production in a single surrogate country, which, in this case, was Malaysia. *See* Remand Results at 25–26 & n.111 (citation omitted); *see also* 19 C.F.R. § 351.408(c)(2). Plaintiffs have not shown that Commerce was unreasonable in its selection of Malaysian HS 2701.19 data to value bituminous coal when the record demonstrated that the coal had a caloric value of less than 5,833 kcal/kg and Commerce’s decision was otherwise supported by substantial evidence.

### III. Surrogate Country Selection

In *Carbon Activated I*, the court was “unable to discern Commerce’s reasons for rejecting Romania as a primary surrogate country” and “selecting Malaysia as the primary surrogate country” and accord-

ingly remanded the matter to Commerce for reconsideration and further explanation. 503 F. Supp. 3d at 1289. On remand, Commerce determined that both Malaysia and Romania qualified as potential surrogate countries, finding that both countries were economically comparable to China and significant producers of comparable merchandise. Remand Results at 11–14. However, Commerce again selected Malaysia as the primary surrogate country after finding that Malaysian surrogate value data was superior to Romanian data based on its relative specificity. *Id.* at 14–16; 34.

With respect to the valuation of charcoal, Commerce explained that the Malaysian data reflected “a tariff classification at the 10-digit level that is specific to coconut-shell charcoal (i.e., [HS] subheading 4402.90.1000), a direct material that is consumed in significant quantities in the production of the subject merchandise by the mandatory respondents;” however, the Romanian data reflected only “a six-digit basket category HS subheading, 4402.90, which covers wood-based charcoal [but] also includes nut-based charcoal, which is an input not used by the mandatory respondents.” *Id.* at 15.

Despite selecting Malaysia as the primary surrogate country, Commerce again chose the financial statement of Romcarbon, a Romanian producer of comparable merchandise, to determine financial ratios because that statement provided specific breakouts for raw material, labor, and energy that were not provided in the Malaysian financial statements. *Id.* at 15–16

### A. Parties’ Contentions

Plaintiffs contend that Commerce should have chosen Romania over Malaysia as the primary surrogate country because, in their view, “Romania provides superior data quality” to Malaysia. Pls.’ Opp’n Cmts. at 7 (emphasis and capitalization omitted). As evidence of this superiority, Plaintiffs point to the aberrant Malaysian HS 2701.12 data and Commerce’s concession that the Malaysian financial statements lacked usable financial data. *Id.* at 7–8. Plaintiffs argue that Commerce incorrectly claimed that Romanian import data placed on the record was not POR-specific, *id.* at 10, and that Commerce’s reliance on the more specific HS subheading for coconut-shell charcoal is unsupported because Carbon Activated’s suppliers do not use coconut shell charcoal as an input, *id.* at 11.

The Government contends that Commerce’s reliance on the specificity of the tariff classification for coconut shell charcoal, used by some respondents, provides support for Commerce’s selection of Malaysia as the primary surrogate country. Def.’s Reply Cmts. at 12. The Government asserts that Commerce has the discretion to “value coal-

based carbonized material with either coconut shell or wood charcoal” and the record indicated that “[DJAC] used coconut shell charcoal in the production of the subject merchandise.” *Id.* The Government also rejects Plaintiffs’ contention that the aberrancy of Malaysian HS 2701.12 precluded Commerce from selecting Malaysia as the primary surrogate country. *Id.* at 11. According to the Government, “Commerce still had usable Malaysian data ‘covering nearly all of the bituminous coal input used by the mandatory respondents,’” *id.* at 11–12 (quoting Remand Results at 36), and Plaintiffs “provided no evidence to support discarding Malaysian data beyond the data under Malaysian HS 2701.12,” *id.* at 12.

### **B. Commerce’s Selection of Malaysia as the Primary Surrogate Country is Sustained**

In its Remand Results, Commerce determined that both Malaysia and Romania were significant producers of comparable merchandise; thus, Commerce selected the primary surrogate country based on data considerations. Remand Results at 11–16. While Plaintiffs invite the court to second guess the agency’s determination, it is the court’s task to determine whether Commerce has supported its determination with substantial evidence. *Huaiyin Foreign Trade Corp.* (30), 322 F.3d 1369, 1374 (Fed. Cir 2003). Upon consideration of the Remand Results, the court finds that Commerce’s selection of Malaysia as the primary surrogate country is supported by substantial evidence.

First, Commerce has provided a reasoned explanation as to why it selected Malaysia as the primary surrogate country: the specificity of the HS number for a known input (coconut shell charcoal) and data that was more contemporaneous with the POR. *See* Remand Results at 15, 34–39. While Carbon Activated’s suppliers do not use coconut shell charcoal, Carbon Activated Resp. to Sec. D Questionnaire (Sept. 28, 2018), Att. B/Ex.D-5, Att. C/Ex. D-5, Att. D/Ex. D-5, PR 90, CR 50–74, CRJA Tab 2, Plaintiffs ignore Commerce’s rationale for relying on the specificity provided by the Malaysian HS data. *See* Pls.’ Opp’n Cmts. at 11 (focusing solely on Carbon Activated’s suppliers to the exclusion of DJAC). Specifically, another mandatory respondent, DJAC, used coconut shell charcoal in the production of the subject merchandise. *See* Remand Results at 38 & n.159 (citations omitted). Because Commerce needed to value coconut shell charcoal for at least one of the respondents, and because Malaysia—and not Romania—was able to provide data at that level of specificity, Commerce’s discussion of coconut shell charcoal supports its selection of Malaysia as the primary surrogate country. Furthermore, Plaintiffs fail to identify any record evidence suggesting that the Malaysian HS

4402.90.100 data is aberrational or unreliable—they simply disagree with Commerce’s use of such data.

Plaintiffs also object to Commerce’s consideration of the Malaysian surrogate value information as more contemporaneous with the period of review than the Romanian data. *See* Pls.’ Opp’n Cmts. at 10–11. While Plaintiffs aver that the Romanian data they submitted were contemporaneous with the POR, *id.* at 10, those data were presented to Commerce as covering the period “2016–2018.” *See* Final Surrogate Value Comments by DJAC and [Carbon Activated] (May 13, 2019) (“Final SV Comments”) at Ex. 2A, PR 207–16, CRJA Tab 7. Now, before the court, Plaintiffs seek to clarify that, “the auto-generated heading was titled ‘2016–2018’ because the data source is programmed to automatically download three years of data,” but before the data was submitted to Commerce, “a ‘macro’ [was] used to filter POR-specific data.” Pls.’ Opp’n Cmts. at 10. This additional information is not part of the administrative record, which otherwise supports Commerce’s finding that the Malaysian surrogate value data is more contemporaneous with the POR than the Romanian data.

The court also rejects Plaintiffs’ argument that Commerce was required to give the respondent an opportunity to address any deficiency in the data. Potential surrogate value data is submitted to Commerce on a party’s own initiative, not in response to a request by Commerce. *See, e.g., Shenzhen Xinboda Indus. Co. v. United States*, 42 CIT \_\_, \_\_, 357 F. Supp. 3d 1295, 1305 & n.25 (2018). Thus, 19 U.S.C. § 1677m(d) is inapplicable here. *See id.* In short, there was no apparent deficiency in the Romanian data; Commerce accepted the data as presented; and Commerce evaluated the quality of that data in comparison to the quality of the Malaysian data. Commerce’s finding that the Malaysian data was more contemporaneous with the POR is supported by substantial evidence.

Likewise, Plaintiffs’ argument that the primary surrogate country should be weighted toward the country from which the financial ratios are drawn is unconvincing. Not only do Plaintiffs fail to cite to any provision of law or regulation requiring Commerce to weight its analysis in such a way, but they rely on instances in which a production input’s outsized impact on normal value led Commerce to prioritize that input in selecting a surrogate country, not the financial ratios’ impact on the normal value; thus, such reliance is inapposite. Pls.’ Opp’n Cmts. at 8–9 (relying on Issues and Decision Mem. for the Final Results of the Third Antidumping Duty Admin. Review at

13–14, available at <https://enforcement.trade.gov/frn/summary/prc/2013-06173-1.pdf> (last visited Oct. 22, 2021) (outsized impact of steel wire rod led to selection of Thailand as the primary surrogate country); *Jiaxing Brother Fastener Co. v. United States*, 11 F. Supp. 3d 1326, 1333 (2014), *aff'd* 822 F.3d 1289 (Fed. Cir. 2016) (sustaining Commerce’s choice of primary surrogate country based on superior data quality despite the relative weakness in financial statements from that country and the more limited impact of the financial ratios on normal value)).

Furthermore, Plaintiffs’ focus on Commerce’s previous reliance on the source of financial ratios to select a primary surrogate country is misplaced. See Pls.’ Opp’n Cmts. at 8–9. At most, these examples show that Commerce *may* consider the source of financial ratios to determine the primary surrogate country, not that Commerce *must*. See *Tianjin Wanhua Co. v. United States*, 41 CIT \_\_, \_\_, 253 F. Supp. 3d 1318, 1327–29 (2017) (affirming Commerce’s selection of Indonesia as the primary surrogate country based on the relative superiority of the Indonesian financial statements); *Ancientree Cabinet Co. v. United States*, 45 CIT \_\_, \_\_, Slip Op. 21–87, 2021 WL 2931313, at \*8–9, \*11 (CIT July 12, 2021) (concluding that Commerce acted within its discretion when selecting Romania as the primary surrogate country based on superior financial data); *Certain Cased Pencils from the People’s Republic of China*, 78 Fed. Reg. 42,932 (Dep’t Commerce July 18, 2013) (final results of antidumping duty administrative review and determination to revoke order in party; 2010–2011), and accompanying Issues and Decision Mem., A-570–827, (July 10, 2013), <https://enforcement.trade.gov/frn/summary/prc/2013-17160-1.pdf> (last visited Oct. 22, 2021) (selecting the Philippines as primary surrogate country because of the superiority of Philippine financial data for deriving surrogate financial ratios). Indeed, Carbon Activated has not cited, and this court cannot find, any authority indicating that Commerce must base the selection of a primary surrogate country on the quality of financial data. Accordingly, the court sustains Commerce’s selection of Malaysia as the primary surrogate country as based on substantial evidence.

#### IV. Financial Ratios

In *Carbon Activated I*, the court remanded the *Final Results* to Commerce to reconsider certain adjustments to the financial ratios, including: (i) offsetting pre-tax profits by the amount listed under “Gain/(Loss)” for adjustment and disposal of investment property; (ii) offsetting sales, general and administrative expenses (“SG&A”) by the amount listed under “Other Gains”; and (iii) allocating the

amount listed under “Social Contributions” and “Meal Tickets” to labor costs instead of SG&A. 503 F. Supp. 3d at 1294–95. The remand provided Commerce with the opportunity to address its treatment of these issues in AR11 in light of its treatment of similar adjustments to the financial ratios in the tenth administrative review (“AR10”) of this antidumping duty order. *See id.* On remand, Commerce offset pre-tax profits by the amount listed under “Gain/(Loss)” for adjustment and disposal of investment property and offset SG&A by the amount listed under “Other Gains.” Remand Results at 17–19. With respect to “Social Contributions” and “Meal Tickets,” however, Commerce continued to allocate these line items to SG&A. *Id.* at 19.

### **A. Parties’ Contentions**

Plaintiffs contend that Commerce “erroneously allocated [ ] ‘Social Contributions’ and ‘Meal Tickets’ under SG&A” instead of labor costs. Pls.’ Opp’n Cmts. at 17. Plaintiffs argue that, “[a]bsent evidence that Malaysian labor data excluded these costs,” such “costs are presumed to be embedded within the reported labor cost.” *Id.*

The Government contends that Commerce’s retention of “Social Contributions” and “Meal Tickets” under SG&A is supported by substantial evidence and lawful. Def.’s Reply Cmts. at 17.

### **B. Commerce’s Allocation of “Social Contributions” and “Meal Tickets” to SG&A is Sustained**

In *Carbon Activated I*, the court instructed Commerce to reconsider or further explain why “Social Contributions” and “Meal Tickets” should be allocated to SG&A instead of labor expenses as was the case in AR10. 503 F. Supp. 3d at 1295. In the Remand Results, Commerce explained that it will “avoid double-counting costs [when] the requisite data are available to do so.” Remand Results at 40 & n.169 (citation omitted). Thus, “when labor items . . . are clearly included in the [surrogate value] for labor, [Commerce] will include such items in the labor category of the surrogate financial ratios calculations to avoid double-counting such expenses.” Issues and Decision Mem. for the Final Results of the First Antidumping Duty Admin. Review, A-570–985 (February 13, 2017) at 73, <https://enforcement.trade.gov/frn/summary/prc/2017-03505-1.pdf> (last visited Oct. 22, 2021); *see also Hangzhou Yingqing Material Co. v. United States*, 40 CIT \_\_, \_\_, 195 F. Supp. 3d 1299, 1310–1311 (2016) (citing agency decisions in which Commerce adjusted surrogate financial ratios to avoid double counting labor costs). Commerce’s practice of adjusting financial ratios to avoid such double counting has been accepted by the court. *See Elkay Mfg. Co. v. United States*, 40 CIT \_\_, \_\_, 180 F. Supp. 3d 1245,

1256–1258 (2016) (sustaining a determination Commerce made in order to avoid the possibility of double-counting).

In the Remand Results, Commerce explained that the source of the Malaysian surrogate value for labor did not indicate whether “Social Contributions” or “Meal Tickets” were included in that surrogate value and there was no record evidence indicating “that the labor [surrogate value] used was overstated.” Remand Results at 41. Plaintiffs do not, and during the remand proceeding did not, point to any evidence that these items are included in the surrogate value for labor. *See* Pls.’ Opp’n Resp at 17; Second Comments on Draft Remand at 23–24. Instead, Plaintiffs simply assert, without citation to any prior Commerce determinations, court precedent, or Commerce guidelines, that absent evidence that the Malaysian surrogate labor data excluded “Social Contributions” and “Meal Tickets,” such costs “are presumed to be embedded within the reported labor cost.” Pls.’ Opp’n Cmts. at 17. Commerce rejected this unsupported assertion and noted the absence of record evidence demonstrating that the labor surrogate value included these costs. *See* Remand Results at 41. Accordingly, this court finds that Commerce has adequately explained the basis for its allocation of “Social contributions” and “Meal tickets” to SG&A and sustains Commerce’s adjustments to the financial ratios as supported by substantial evidence.

### CONCLUSION

For the forgoing reasons, the court will sustain Commerce’s Remand Results. Judgment will enter accordingly.

Dated: October 22, 2021

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, CHIEF JUDGE

## Slip Op. 21–150

THE DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff, v. UNITED STATES, Defendant, and BOSUN TOOLS Co., LTD., Defendant-Intervenor.

Before: Claire R. Kelly, Judge  
Court No. 17–00167

[Sustaining the U.S. Department of Commerce's second Final Remand Redetermination in its sixth annual review of the antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China.]

Dated: October 27, 2021

*Daniel B. Pickard, Maureen E. Thorson, and Stephanie M. Bell*, Wiley Rein LLP, of Washington, DC, argued for plaintiff Diamond Sawblades Manufacturers' Coalition.

*John J. Todor*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, argued for defendant United States. Of counsel was *Paul K. Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

*Gregory S. Menegaz, J. Kevin Horgan, and Alexandra H. Salzman*, deKieffer & Horgan, PLLC of Washington, DC argued for defendant-intervenor Bosun Tools Co., Ltd.

### OPINION

#### Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") remand redetermination filed pursuant to the court's order for further proceedings in accordance with *Diamond Sawblades Mfrs.' Coal. v. United States*, 986 F.3d 1351 (Fed. Cir. 2021); Final Remand Redetermination, *Diamond Sawblades Mfrs.' Coal. v. United States*, Ct. No. 17–00167, Appeal No. 20–1478, July 13, 2021, ECF No. 74–1 ("*Second Final Remand Redetermination*"); see Order, Mar. 25, 2021, ECF No. 71; see also *Diamond Sawblades*, 986 F.3d 1351. In its opinion, the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") instructed Commerce to reconsider its application of facts otherwise available with an adverse inference ("AFA")<sup>1</sup> to sales of which the country-of-origin information was determined using the product code or unit price. *Diamond Sawblades*, 986 F.3d at 1367. Defendant-intervenor Bosun Tools Co., Ltd. ("Bosun") challenges

<sup>1</sup> Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." See Tariff Act of 1930, as amended, § 776, 19 U.S.C. § 1677e(a)–(b) (2018).

Commerce’s remand redetermination as not supported by substantial evidence and contrary to law and requests that the court remand the case. *See* Def.-Intervenor [Bosun]’s Comments on Second Remand Redetermination, Aug. 12, 2021, ECF No. 78 (“Bosun’s Second Remand Comments”). Defendant United States and Plaintiff Diamond Sawblades Manufacturers’ Coalition (“DSMC”) request that the court uphold the Second Final Remand Redetermination in its entirety. Pl. [DSMC]’s Revised Resp. to [Bosun’s Second Remand Comments] (Confidential Version), Sept. 13, 2021, ECF No. 81 (“DSMC Resp.”); Def.’s Resp. to Comments on Remand Results, Sept. 13, 2021, ECF No. 79 (“Def.’s Resp.”). For the following reasons, the court sustains Commerce’s Second Final Remand Redetermination.

### BACKGROUND

In 2006 Commerce issued an antidumping duty order covering “diamond sawblades and parts thereof” (“sawblades”) imported from the People’s Republic of China (“China”). *Diamond Sawblades and Parts Thereof from [China]*, 71 Fed. Reg. 29,303 (Dep’t Com. May 22, 2006) (final deter. of sales at less than fair value and final partial affirmative deter. of critical circumstances). On April 27, 2016, Commerce selected Bosun, a Chinese exporter and producer of sawblades, for individual investigation during the sixth annual administrative review. Selection of an Additional Respondent for Individual Examination in the 2014–2015 Antidumping Duty Admin. Rev. at 1–2, PD 166, CD 117, Doc. No. 3463908–01 (Apr. 27, 2016). Sawblades produced by Bosun are sent to Bosun Tools, Inc., one of two of its U.S. importer-affiliates. Letter from deKieffer & Horgan, PLLC to Sec’y Com., re: Diamond Sawblades from [China] – Sections C & D Questionnaire Resp. at C-1, P.R. 207–210, C.R. 132–143, Doc. No. 3483626–01 (July 1, 2016) (“2016 Questionnaire Resp.”); *Second Final Remand Redetermination* at 2. Bosun’s second importer affiliate, Pioneer Tools Inc. imports sawblades from Thailand not covered by the antidumping order. 2016 Questionnaire Resp. at C-1–2; *Second Final Remand Redetermination* at 2. Bosun’s importer-affiliates sold sawblades to one another. 2016 Questionnaire Resp. at C-1–2.

To calculate Bosun’s antidumping margin, Commerce needed to identify the origin of the sawblades sold by the importer-affiliates, information that neither Bosun nor its importer-affiliates recorded. *Second Final Remand Redetermination* at 2; *see* 2016 Questionnaire Resp. at C-1–3. Bosun attempted to collect country-of-origin information using three methods: (1) identifying the product code, which in some cases was specific to the country of origin; (2) identifying the

unit price; and (3) making an inference that importer-affiliates generally sold product using a first-in, first-out (“FIFO”) method. 2016 Questionnaire Resp. at C-2–3; *Second Final Remand Redetermination* at 2. Commerce determined that the information provided by Bosun was reliable despite a discrepancy<sup>2</sup> uncovered during the verification of the FIFO methodology and assigned Bosun a weighted average dumping margin of 6.19 percent. Verification of the U.S. Sales Resp. of [Bosun] at 10–11, PD 383, CD 365, Doc. No. 3573591–01 (May 17, 2017) (“Verification Report”); *Diamond Sawblades and Parts Thereof from [China]*, 82 Fed. Reg. 26,912, 26,912 (Dep’t Com. June 6, 2017) (final results of antidumping duty admin. rev.; 2014–2015) (“Final Results”) and accompanying Issues and Decision Memo. at 25–27, Doc. No. 3578943–01 (June 6, 2017) (“Final Decision Memo.”); see *Second Final Remand Redetermination* at 2.

The domestic-industry DSMC challenged inter alia, Commerce’s decision not to use AFA before this court.<sup>3</sup> [DSMC’s] Memo. in Supp. of Rule 56.2 Mot. for J. on Agency R., Dec. 5, 2017, ECF No. 28; see *Diamond Sawblades Mfrs.’ Coal. v. United States*, 42 CIT \_\_, Slip op. 18–146 (Oct. 23, 2018) (“*Slip Op. 18–146*”). This court concluded Commerce’s determination was at odds with the Court of Appeals’ precedent regarding the “best of its ability” standard and remanded for clarification or reconsideration. *Slip Op. 18–146* at 7–14. Commerce issued the Final Remand Redetermination on April 17, 2019, using AFA for all of Bosun’s sales of sawblades during the review period due to the unreliability of the FIFO methodology. Final Remand Redetermination [*Slip Op. 18–146*], Apr. 17, 2019, ECF No. 43–1 (“*First Remand Redetermination*”). Bosun challenged the redetermination before this court, which affirmed Commerce’s determination. *Diamond Sawblades Mfrs.’ Coal. v. United States*, 43 CIT \_\_, \_\_, 415 F. Supp.3d 1365 (2019). Bosun appealed to the Court of Appeals. *Diamond Sawblades*, 986 F.3d at 1351.

On appeal, Bosun challenged Commerce’s decision to disregard all the origin data Bosun provided and the application of facts otherwise available, as unsupported by substantial evidence.<sup>4</sup> *Id.* at 1362. The

<sup>2</sup> Bosun’s FIFO methodology reported smaller quantities of subject merchandise than the original quantities invoiced for two of the on-site selected sales traces. Verification Report at 10.

<sup>3</sup> This court remanded the case for clarification or reconsideration of Commerce’s decision not to use AFA, *Slip Op. 18–146* at 18, the use of the Thai surrogate data, *id.* at 24–25, and its determination of the dumping margin for the separate rate. *Id.* at 26.

<sup>4</sup> Bosun also challenged this court’s initial decision to remand to Commerce for abuse of discretion. *Diamond Sawblades*, 986 F.3d at 1361. The Court of Appeals reviewed this court’s initial remand decision and found no abuse of discretion or material legal error. *Id.*

Court of Appeals determined that it was unclear whether country-of-origin information obtained for sales using the product code or unit price was unreliable, and therefore, the decision to disregard all of the country-of-origin information was unsupported by substantial evidence. *Id.* at 1366. The Court of Appeals remanded to determine whether substantial evidence existed to support a finding that the country-of-origin information determined using the product code or unit price was unreliable. *Id.* at 1367. If Commerce determined that there was no basis for the application of facts otherwise available to sales other than the sales where the country of origin was determined using the FIFO methodology (“FIFO Sales”), the Court of Appeals instructed Commerce to redetermine how adverse inferences applied to the matter. *Id.* On March 25, 2021, this court remanded the case to Commerce for proceedings consistent with the Court of Appeals’ opinion in *Diamond Sawblades*. Order, Mar. 25, 2021, ECF No.71.

On July 13, 2021, Commerce filed its Second Final Remand Redetermination. *Second Final Remand Redetermination*. On August 12, 2021, Bosun filed its comments on the Second Final Remand Redetermination. Bosun’s Second Remand Comments. DSMC filed its comments on September 14, 2021. DSMC Resp.

### **JURISDICTION AND STANDARD OF REVIEW**

This 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)<sup>5</sup> and 28 U.S.C. § 1581(c) (2018), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” *Xinjiaimei Furniture (Zhangzhou) Co. v. United States*, 38 CIT \_\_, \_\_, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274 (2008)).

### **DISCUSSION**

Commerce reviewed its application of AFA to the country-of-origin information supplied by Bosun. *Second Final Remand Redetermination* at 4–5. Commerce determined that there were no reliability issues with the country-of-origin information derived from methods using the product code or unit price and did not select from the facts

<sup>5</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

otherwise available for sales using those methodologies. *Id.* at 4. Commerce continued to find the FIFO methodology unreliable and determined that resorting to AFA remained warranted for the FIFO Sales. *Id.* at 4–5. Bosun challenges the application of adverse inferences to the FIFO Sales arguing that Commerce should apply neutral facts instead. Bosun’s Second Remand Comments at 8–12. In the alternative, Bosun argues that if AFA is applied, the scope of its application should be limited to the missing country-of-origin information for the FIFO Sales. *Id.* at 12–15. Bosun also challenges the inclusion of intracompany sales in Commerce’s calculations. *Id.* at 5–8. Finally, the court reviews Commerce’s decision to use the Thai surrogate value for valuing copper powder and copper iron clab for compliance with this court’s previous remand order. *Second Final Remand Redetermination* at 7–11; *Slip Op. 18–146* at 24–26.

## **I. The Application of Facts Available with Adverse Inferences**

Commerce continued to apply AFA to the FIFO sales in the Second Final Remand Redetermination. *Second Final Remand Redetermination* at 17–18. Bosun challenges Commerce’s continued use of adverse inferences to the FIFO Sales, the application of adverse inferences to the sale prices of the FIFO Sales, and the inclusion of what it claims are intracompany sales in the FIFO Sales to which the adverse inferences apply. Bosun’s Second Remand Comments at 5–15. For the following reasons, the court sustains Commerce’s use of adverse inferences and the inclusion of the alleged intracompany sales.

### **A. Adverse Inferences**

Bosun argues that Commerce should apply neutral facts available to the FIFO Sales because Bosun cooperated to the best of its ability. Bosun’s Second Remand Comments at 8–12. Defendant and DSMC respond that Commerce correctly concluded that Bosun failed to cooperate to the best of its ability by failing to maintain full and complete country-of-origin records. Def.’s Resp. at 15; DSMC Resp. at 9–12.

If necessary information is not available on the record, Commerce shall use facts otherwise available and may use an adverse inference if it determines that the respondent failed to cooperate to the best of its ability.<sup>6</sup> 19 U.S.C. § 1677e. If an interested party submits information that does not fully comply with all requirements, Commerce must consider whether the interested party cooperated to the best of

<sup>6</sup> Adverse inferences may be “derived from the petition, a final determination in the investigation, . . . any previous review . . . or determination, . . . or any other information placed in the record.” 19 U.S.C. § 1677e(b)(2).

its ability. *See id.* § 1677m(e)(4). An interested party cooperates to the best of its ability when it does “the maximum it is able to do.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Decisions by Commerce must be supported by substantial evidence. 19 U.S.C.S. § 1516a(b)(1)(B)(i). “Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Upon review, Commerce determined that it would no longer use facts otherwise available for country-of-origin information obtained using the product code or unit price methodologies. *Second Final Remand Redetermination* at 4. However, Commerce affirmed the use of facts otherwise available regarding the FIFO Sales because it found that Bosun “failed to maintain full and complete records regarding country of origin, despite its apparent ability to do so . . . and awareness of the need for distinguishing the country of origin of its merchandise for export.” *Id.* at 5. Commerce maintained that the country-of-origin information gathered using the FIFO methodology was unreliable and that Bosun failed to cooperate to the best of its ability. *Id.* at 4–6; *see also First Remand Redetermination* at 10; *Diamond Sawblades*, 986 F.3d at 1360. Thus, Commerce applied an adverse inference in connection with the FIFO Sales. *Second Final Remand Redetermination* at 5–6.

Commerce’s determination is supported by substantial evidence. The Court of Appeals left undisturbed this court’s decision sustaining Commerce’s prior determination regarding Bosun’s FIFO Sales. *See Diamond Sawblades*, 986 F.3d at 1364, 1367. In that decision, and as Commerce continues to find here, although the best of its ability standard does not require perfection, the standard compels respondents to take reasonable steps to keep and maintain complete records that they would reasonably be required to produce in an antidumping investigation. *Id.* at 1366–1367; *Second Final Remand Redetermination* at 5, 17–18; *see Nippon Steel Corp.*, 337 F.3d at 1382–1384. It is reasonable for Commerce to expect that an exporter would maintain country of origin records. *Slip Op. 18–146* at 11; *see Second Final Remand Redetermination* at 18. Since Bosun failed to maintain such records, the maximum it could do, Bosun attempted to fill the informational gap, using inter alia, the FIFO methodology. *Second Final Remand Redetermination* at 2. However, during verification of the FIFO Sales Commerce identified issues related to the reliability of the information reported. Verification Report at 10–11. As a result, Commerce could not verify that the country-of-origin information was

correct for the FIFO Sales and the informational gap persisted. *See Second Final Remand Redetermination* at 5. Seeking to fill that gap, Commerce reasonably used AFA because the gap is a direct result of Bosun's failure to maintain adequate records and no other information existed on the record to fill the gap.<sup>7</sup>

It is reasonably discernable that Commerce found Bosun's arguments that Commerce overlooked that Bosun relocated its main manufacturing operations for exports to Thailand, was no longer a top tier Chinese exporter of subject goods, and did not have reason to contemplate sales from multiple origins during prior reviews unpersuasive. *See Second Final Remand Redetermination* at 17–18; *see also* Bosun's Second Remand Comments at 10. Commerce continued to find that Bosun should have been familiar with Commerce's review proceedings and aware that it would need to distinguish country-of-origin information because Bosun was a mandatory respondent in the original investigation and two reviews.<sup>8</sup> *Second Final Remand Redetermination* at 5; *see also First Remand Redetermination* at 4, 21–22; *Slip Op. 18–146* at 9. Commerce's determination is reasonable.

## B. The Scope of the Adverse Inferences

In addition to the application of the AFA rate to the FIFO Sales listed in the U.S. sales database, Commerce also applied a per unit AFA rate to all of the FIFO Sales not listed in the U.S. sales database.<sup>9</sup> *Second Final Remand Redetermination* at 6. Bosun argues that Commerce unlawfully applied an adverse inference when it disregarded the prices of the FIFO Sales reported in the U.S. sales database and applied an AFA rate of 82.05 percent to all the FIFO

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<sup>7</sup> Bosun argues that it did not maintain country of origin records for the sawblades because its unaffiliated U.S. customers do not care about the origin of the sawblades. Bosun's Second Remand Comments at 9–10. It is reasonably discernable that Commerce determined Bosun's unaffiliated U.S. customers lack of concern regarding origin is irrelevant. Commerce explained that the Court of Appeals upheld its use of AFA for the FIFO Sales. *Second Final Remand Redetermination* at 5–6. Commerce continued by relying on precedent from the Court of Appeals explaining that exporters are required to take reasonable steps to maintain information that is likely to be asked for if reviewed. *Id.* at 18. An exporter has not complied with the best of its ability standard if the information missing is due to inadequate record keeping. *Id.* On remand, Commerce continued to find that Bosun failed to cooperate to the best of its ability because it failed to maintain country of origin records. *Id.* at 5, 17–18.

<sup>8</sup> Bosun was not initially called as a mandatory respondent, instead it requested review. *See* Letter from deKieffer & Horgan to Sec'y Com., re: Diamond Sawblades from [China] – Request for Admin. Rev., 2014 2015 Doc. No. 3420991–01 (Nov. 30, 2015).

<sup>9</sup> Bosun's FIFO methodology divided sawblades into Chinese or Thai sawblades. *See Second Final Remand Redetermination* at 2. Sawblades that were labeled Thai were excluded from the U.S. sales database. *See id.* at 6. Given the reliability issues with the FIFO method, Commerce reasonably considered all the FIFO Sales Chinese and therefore subject merchandise. *Id.* at 6–7.

Sales of Chinese origin.<sup>10</sup> Bosun’s Second Remand Comments at 12–15. Defendant and DSMC argue that Commerce correctly applied the AFA rate to all the FIFO Sales because the lack of reliable country-of-origin information obscures both the country of origin and the price of the sales. Def.’s Resp. at 20–22; DSMC Resp. at 12–15. For the reasons that follow, Commerce’s decision to apply the AFA rate to all the FIFO Sales is reasonable.

On remand, Commerce issued a supplemental questionnaire requesting that Bosun identify which of the sales within the U.S. sales database were determined to be of Chinese origin using the FIFO method and Bosun responded. *Second Final Remand Redetermination* at 6; Diamond Sawblades from [China] Supplemental Questionnaire for Remand, Doc. No. 4110206–01 (Apr. 12, 2021); Letter from deKieffer & Horgan, PLLC to Sec’y Com., re: Diamond Sawblades from [China] – Remand Supplemental Questionnaire, CD 2<sup>nd</sup> REM 2, PD 2<sup>nd</sup> REM 2–4, (Apr. 19, 2021) (“Second Supplemental Questionnaire Resp.”). Using the information in the supplemental questionnaire response and the sequence numbers in the U.S. sales database, Commerce identified all the FIFO Sales of Chinese origin in the U.S. sales database and applied an AFA rate of 82.05 percent. *Second Final Remand Redetermination* at 6; Letter from Thomas Schauer, Senior Int’l Trade Compliance Analyst, AD/CVD Operations, Office I, re: Diamond Sawblades and Parts Thereof from [China]: Final Remand Results Calculation Memo. for [Bosun] at 3, Doc. No. 4143355 (July 13, 2021). Commerce also calculated a per-unit amount AFA rate and applied it to all FIFO Sales not listed in the U.S. sales database. *Second Final Remand Redetermination* at 6.

Bosun argues Commerce should apply an adverse inference that all FIFO Sales are of Chinese origin, but that it should not disregard the U.S. sales price data previously submitted in connection with sales identified as Chinese sales. Bosun’s Second Remand Comments at

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<sup>10</sup> A dumping margin calculation compares the price at which the subject merchandise is sold in the United States with the subject merchandise’s normal value. See 19 U.S.C. § 1675 (a)(2). For a nonmarket economy (“NME”), like China, Commerce begins its review with the rebuttable presumption that all companies within that country are subject to government control and should be assessed a single antidumping duty rate. See *Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997) (approving Commerce’s application of a presumption of government control). However, if a company can establish de jure and de facto independence from the government, Commerce assigns it a separate rate. *Sparklers from [China]*, 56 Fed. Reg. 20,588, 20,589, (Dep’t Com. 1991) (final deter.); see *Sigma Corp.*, 117 F.3d at 1405–1407. Here, Commerce has determined that the China-wide rate is 82.05 percent, which it applied in place of the FIFO Sales data provided by Bosun. *Second Final Remand Redetermination* at 22; see *Diamond Sawblades and Parts Thereof from [China]: Notice of Court Decision Not in Harmony With the Final Results of Rev. and Amended Final Results of the Antidumping Duty Admin. Rev.*, 81 Fed. Reg. 36,261, 36,262 (Dep’t Com. June 6, 2016) (establishing that that the China-wide rate is 82.05 percent).

12–13. Relying on this court’s decision in *Dillinger France S.A. v. United States*, 350 F. Supp.3d 1348 (Ct. Int’l Trade 2018), Bosun argues that “Commerce cannot use adverse inferences to substitute information that is on the record.” *Id.* at 14.

Bosun’s argument assumes that all the FIFO Sales that it claimed were Chinese and placed in the U.S. sales database are Chinese sales. However, Commerce determined that the FIFO methodology did not yield reliable country-of-origin information. *Second Final Remand Redetermination* at 5. In light of the identified reliability issues, Commerce reasonably concluded it could not be certain that the FIFO Sales included in the U.S. sales database were Chinese, nor could it be certain that all of the FIFO Sales excluded from the U.S. sales database were Thai. *See id.* at 21. In response to Bosun’s argument that Commerce should determine that all FIFO Sales were Chinese, *see* Bosun’s Second Remand Comments at 13, Commerce explained that Bosun’s proposed application of adverse inferences would not lead to an accurate margin calculation because there was a possibility that the margin calculation could involve sales of Thai sawblades. *Second Final Remand Redetermination* at 21–22. Commerce explains that although Bosun correctly states that the information missing from the record is the country-of-origin for the FIFO Sales, that information is critical to the determination of whether a sale is properly included or excluded in the U.S. sales database. *Second Final Remand Redetermination* at 21. Thus, Commerce reasonably concludes that the inability to reliably identify the country of origin for the FIFO Sales means that the corresponding price data in the U.S. sales database is also unreliable because Commerce cannot accurately pair price data with the correct country of origin. *Second Final Remand Redetermination* at 21–22. Consequently, the U.S. sales database information is missing. *Id.* Since the information is missing from the record, Commerce filled the gap with facts otherwise available. *Id.* at 17–18. Because Commerce determined that Bosun failed to cooperate to the best of its ability, Commerce reasonably used adverse inferences when filling the gap. *Id.*

### C. Intracompany Sales

In the Second Final Remand Redetermination Commerce calculated an AFA per unit rate and applied it to all the FIFO Sales, some of which Bosun claims are intracompany sales. *Second Final Remand Redetermination* at 13–15. Bosun argues that Commerce’s decision not to remove intracompany sales data from the FIFO Sales renders its determination contrary to law and unsupported by substantial

evidence. *See* Bosun’s Second Remand Comments at 5–8. As a threshold matter, the Court of Appeals did not instruct Commerce to revisit its FIFO analysis. *See Diamond Sawblades*, 986 F.3d at 1367. Although Bosun argues that Commerce has acted contrary to law by ignoring evidence of intracompany sales, it is reasonably discernable that Commerce did not ignore the evidence, but rather found that it was not within the scope of the Court of Appeals’ instructions<sup>11</sup> and further would not be relevant as it was unverifiable. *Second Final Remand Redetermination* at 13–15. Consequently, Bosun’s substantial evidence argument also fails because Commerce has addressed that which detracts from its determination.<sup>12</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”).

## II. Surrogate Country Selection

Finally, the court reviews Commerce’s decision to use Thai average unit value (“AUV”) in the Second Final Remand Redetermination for compliance with the court’s remand order. *Second Final Remand Redetermination* at 8–11; *Slip Op. 18–146* at 24–25. In the Final Remand Results, Commerce used Thai average unit value data to value copper powder and copper iron clab.<sup>13</sup> Final Decision Memo. at 3. Finding Commerce failed to directly address DSMC’s argument that the Thai AUV data was an outlier and relied solely on a regulatory preference of valuing all inputs from the same country, this court remanded for further explanation regarding Commerce’s decision to use the Thai AUV data. *Slip Op. 18–146* at 24–25; *Second Final Remand Redetermination* at 9–11. Commerce’s decision to use AFA for all Bosun’s sales mooted the surrogate country selection issue.

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<sup>11</sup> Commerce explains that the Court of Appeals upheld its decision to use AFA for the FIFO Sales and instructed Commerce to reconsider its application of AFA to the sales where country-of-origin information was determined using product code or unit price. *Second Final Remand Redetermination* at 13–14.

<sup>12</sup> Bosun responded to Commerce’s second supplemental questionnaire stating it could not identify all the sequence numbers requested because a portion of those sales were sales between importer-affiliates. Second Supplemental Questionnaire Resp. at 1–2. Bosun argues that Commerce should issue an additional supplemental questionnaire requesting that Bosun identify the number of pieces in the intracompany sales transactions so they can be removed from Commerce’s margin calculations. Comments on Draft Results of Second Redetermination Pursuant to Court Remand at 9, Doc. No. 4126821 (June 1, 2021). Bosun’s argument that Commerce could or should issue a supplemental questionnaire does nothing to undermine the reasonableness of Commerce’s determination based on the record evidence and in light of the Court of Appeals’ decision.

<sup>13</sup> Copper powder and copper iron clab are factors of production for sawblades. *See Diamond Sawblades and Parts Thereof from [China]: Decision Memo. for Prelim. Results of Anti-dumping Duty Admin. Rev.; 2014–2015* at 2, Doc. No. 3527262–01 (Dec. 5, 2016).

*First Remand Redetermination* at 13; see also *Second Final Remand Redetermination* at 9–10. In the Second Final Remand Redetermination Commerce determined that it would no longer apply adverse inferences to all Bosun’s sales; therefore, in the Second Final Remand Redetermination, Commerce needed to address DSMC’s aberrancy argument<sup>14</sup> to comply with the court’s remand order. *Slip Op. 18–146* at 24–25.

Commerce explained that DSMC made mathematical errors when calculating the Thai AUV data. *Second Final Remand Redetermination* at 10–11; see Pre-Prelim. Letter at 3. Commerce noted that when correctly calculated, the Thai AUV data was not aberrational. *Second Final Remand Redetermination* at 10–11. Given Commerce’s preference to value all surrogate values in a single country and evidence that the Thai AUV data is not aberrational, Commerce’s decision to use the Thai AUV for copper powder and copper iron clab is reasonable. *Id.* at 11. No party challenges the use of Thai AUV data before the court. Commerce complied with the court’s order to address DSMC’s aberrancy argument of the Thai AUV and its determination is supported by substantial evidence on the record.

### CONCLUSION

For the reasons stated, Commerce’s Final Remand Redetermination is sustained. Judgment shall enter accordingly.

Dated: October 27, 2021

New York, New York

*/s/ Claire R. Kelly*

CLAIRE R. KELLY, JUDGE

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<sup>14</sup> In both its pre-preliminary determination comments and its case brief, DSMC argued that Commerce should use South African, not Thai, import data to value copper powder and copper iron clab because the Thai data was aberrational. Letter from Wiley Rein LLP to Sec’y Com., re: Diamond Sawblades and parts thereof from [China]: DSMC’s Pre-Prelim. Deter. Comments Regarding Surrogate Values at 2–4, Doc. No. 3522843 (Nov. 15, 2016) (“Pre-Prelim. Letter”); Case Br. *Diamond Sawblades from [China]* at 13–16, PD 373, CD 344 (Jan. 17, 2017). In its comments to the draft remand results DSMC reiterated that the Thai AUV data was an outlier and the South African AUV data should be used in its place. See Letter from Wiley Rein, re: Diamond Sawblades and Parts Thereof from [China]: Comments on Draft Results of Redetermination at 6–10, Doc. No. 4126645–01 (June 1, 2021) (“DSMC’s Draft Comments”).

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