

# U.S. Customs and Border Protection



## **QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES**

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

**ACTION:** General notice.

**SUMMARY:** This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will remain the same from the previous quarter. For the calendar quarter beginning October 1, 2021, the interest rates for overpayments will be 2 percent for corporations and 3 percent for non-corporations, and the interest rate for underpayments will be 3 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

**DATES:** The rates announced in this notice are applicable as of October 1, 2021.

**FOR FURTHER INFORMATION CONTACT:** Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298-1107.

### **SUPPLEMENTARY INFORMATION:**

#### **Background**

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85-93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: One for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the

Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2021–17, the IRS determined the rates of interest for the calendar quarter beginning October 1, 2021, and ending on December 31, 2021. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (0%) plus three percentage points (3%) for a total of three percent (3%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (0%) plus two percentage points (2%) for a total of two percent (2%). For overpayments made by non-corporations, the rate is the Federal short-term rate (0%) plus three percentage points (3%) for a total of three percent (3%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties remain the same from the previous quarter. These interest rates are subject to change for the calendar quarter beginning January 1, 2022, and ending on March 31, 2022.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Underpayments (percent)	Overpayments (percent)	Corporate overpayments (Eff. 1-1-99) (percent)
070174 .....	063075.....	6	6	.....
070175 .....	013176.....	9	9	.....
020176 .....	013178.....	7	7	.....
020178 .....	013180.....	6	6	.....
020180 .....	013182.....	12	12	.....
020182 .....	123182.....	20	20	.....
010183 .....	063083.....	16	16	.....
070183 .....	123184.....	11	11	.....
010185 .....	063085.....	13	13	.....
070185 .....	123185.....	11	11	.....
010186 .....	063086.....	10	10	.....
070186 .....	123186.....	9	9	.....
010187 .....	093087.....	9	8	.....
100187 .....	123187.....	10	9	.....
010188 .....	033188.....	11	10	.....

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (Eff. 1-1-99) (percent)
040188 .....	093088.....	10	9	.....
100188 .....	033189.....	11	10	.....
040189 .....	093089.....	12	11	.....
100189 .....	033191.....	11	10	.....
040191 .....	123191.....	10	9	.....
010192 .....	033192.....	9	8	.....
040192 .....	093092.....	8	7	.....
100192 .....	063094.....	7	6	.....
070194 .....	093094.....	8	7	.....
100194 .....	033195.....	9	8	.....
040195 .....	063095.....	10	9	.....
070195 .....	033196.....	9	8	.....
040196 .....	063096.....	8	7	.....
070196 .....	033198.....	9	8	.....
040198 .....	123198.....	8	7	.....
010199 .....	033199.....	7	7	6
040199 .....	033100.....	8	8	7
040100 .....	033101.....	9	9	8
040101 .....	063001.....	8	8	7
070101 .....	123101.....	7	7	6
010102 .....	123102.....	6	6	5
010103 .....	093003.....	5	5	4
100103 .....	033104.....	4	4	3
040104 .....	063004.....	5	5	4
070104 .....	093004.....	4	4	3
100104 .....	033105.....	5	5	4
040105 .....	093005.....	6	6	5
100105 .....	063006.....	7	7	6
070106 .....	123107.....	8	8	7
010108 .....	033108.....	7	7	6
040108 .....	063008.....	6	6	5
070108 .....	093008.....	5	5	4
100108 .....	123108.....	6	6	5
010109 .....	033109.....	5	5	4
040109 .....	123110.....	4	4	3
010111 .....	033111.....	3	3	2
040111 .....	093011.....	4	4	3
100111 .....	033116.....	3	3	2
040116 .....	033118.....	4	4	3

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (Eff. 1-1-99) (percent)
040118 .....	123118 .....	5	5	4
010119 .....	063019 .....	6	6	5
070119 .....	063020 .....	5	5	4
070120 .....	123121 .....	3	3	2

Dated: September 22, 2021.

JEFFREY CAINE,  
*Chief Financial Officer,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, September 27, 2021 (85 FR 53335)]

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**COLLECTION OF ADVANCE INFORMATION FROM  
CERTAIN UNDOCUMENTED INDIVIDUALS ON THE  
LAND BORDER**

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

**ACTION:** 60-Day notice and request for comments; revision 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 29, 2021) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0140 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP\_PRA@cbp.dhs.gov*.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

**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*. 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 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:** Collection of Advance Information from Certain Undocumented Individuals on the Land Border.

**OMB Number:** 1651–0140.

**Form Number:** N/A.

**Current Actions:** Revision.

**Type of Review:** Revision.

**Affected Public:** Individuals.

**Abstract:** The Department of Homeland Security (DHS), in consultation with U.S. Customs and Border Protection (CBP), has established a process to streamline the processing of undocumented noncitizens under Title 8 of the United States Code at certain ports of entry (POEs), as these individuals

require secondary processing upon their arrival, which takes longer than when individuals arrive with sufficient travel documentation.

CBP is proposing extending and amending this data collection, which was established on an emergency basis on May 3, 2021. This data collection expands on the previous collection process for persons who may warrant an exception to the CDC's Order *Suspending the Right To Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists* ("CDC Order") (85 FR 65806), to include undocumented noncitizens who will be processed under Title 8 at the time they arrive at the POE after the CDC Order is rescinded, in whole or in part. The purpose is to continue to achieve efficiencies to process undocumented noncitizens under Title 8 upon their arrival at the POE, consistent with public health protocols, space limitations, and other restrictions.

CBP collects certain biographic and biometric information from undocumented noncitizens prior to their arrival at a POE, to streamline their processing at the POE. The requested information is that which CBP would otherwise collect from these individuals during primary and/or secondary processing. This information is voluntarily provided by undocumented noncitizens, directly or through non-governmental organizations (NGOs) and international organizations (IOs). Providing this information is not a prerequisite for processing under Title 8, but reduces the amount of data entered by CBP Officers (CBPOs) and the length of time an undocumented noncitizen remains in CBP custody.

The biographic and biometric information being collected in advance, that would otherwise be collected during primary and/or secondary processing at the POEs includes, but is not limited to, descriptive information such as: Name, Date of birth, Country of Birth, City of Birth, Country of Residence, Contact Information, Addresses, Nationality, Employment history (optional), Travel history, Emergency Contact (optional), U.S. and foreign addresses, Familial Information (optional), Marital Status (optional), Identity Document (not a WHTI compliant document) (optional), Gender, Preferred Language, Height, Weight, Eye color and Photograph.

This information is submitted to CBP by undocumented noncitizens on a voluntary basis, for the purpose of facilitating and implementing CBP's mission. This collection is consistent with DHS' and CBP's authorities, including under 6 U.S.C. 202 and 211(c). Pursuant to these sections, DHS and CBP are generally charged with "[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States," and "implement[ing] screening and targeting capabilities, including the

screening, reviewing, identifying, and prioritizing of passengers and cargo across all international modes of transportation, both inbound and outbound.”

**Proposed Changes:** This information collection is being changed to require the submission of the photograph—previously optional—for all who choose to provide advance information. The submission of a photograph in advance will provide CBPOs with a mechanism to match a noncitizen who arrives at the POE with the photograph submitted in advance, therefore identifying those individuals, and verifying their identity. The photograph is particularly important for identity verification once NGOs/IOs are no longer facilitating the presentation of all individuals for CBP processing (NGOs/IOs will be able to continue assisting for some individuals but others will be able to participate on their own).

CBP will also allow individuals to request to present themselves for processing at a specific POE on a specific day and time, although such a request does not guarantee that an individual will be processed at a given time. Individuals will have the opportunity to modify their requests within the CBP One™ application to an alternate day or time. In all cases, CBP will inspect, and process individuals based on available capacity at the POE. This new functionality does not require the collection of new Personal Identifiable Information (PII) data elements.

*Type of Information Collection:* Advance Information on Undocumented Travelers.

**Estimated Number of Respondents:** 91,250.

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

**Estimated Number of Total Annual Responses:** 91,250.

**Estimated Time per Response:** 16 minutes.

**Estimated Total Annual Burden Hours:** 24,333.

Dated: September 23, 2021.

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

[Published in the Federal Register, September 28, 2021 (85 FR 53667)]

**REVOCATION OF TRUST CONTROL INTERNATIONAL  
(HOUSTON, TX), AS AN APPROVED COMMERCIAL  
GAUGER**

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

**ACTION:** General notice of revocation of Trust Control International as a customs-approved gauger.

**SUMMARY:** Notice is hereby given, pursuant to the U.S. Customs and Border Protection (CBP) regulations, that CBP's approval for Trust Control International's Houston, Texas, facility has been revoked from gauging petroleum and petroleum products for customs purposes.

**DATES:** The date of revocation is September 29, 2021.

**FOR FURTHER INFORMATION CONTACT:** Dr. Eugene Bondoc, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Suite 1500N, Washington, DC 20229, tel. 202-344-1060.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, regarding Trust Control International (Trust Control), 2800 Post Oak Blvd., Suite 4100, Williams Tower, Houston, TX 77056, Trust Control's approval has been indefinitely revoked from gauging petroleum and petroleum products for customs purposes in accordance with section 151.13 of the U.S. Customs and Border Protection (CBP) regulations in title 19 of the Code of Federal Regulations (CFR), (19 CFR 151.13). The basis for this revocation is pursuant to 19 CFR 151.13(d)(1)(vii), for the failure to meet the obligation as a CBP-approved commercial gauger to maintain a customs bond in accordance with part 113 of the CBP regulations (19 CFR part 113).

Inquiries regarding the entity's status as an approved gauger may be directed to CBP by calling (202) 344-1060 or by sending an email to [CBPGaugersLabs@cbp.dhs.gov](mailto:CBPGaugersLabs@cbp.dhs.gov). Please reference the website listed below for a complete listing of CBP-approved commercial gaugers and accredited laboratories. <http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories>

Dated: September 23, 2021.

LARRY D. FLUTY,  
*Executive Director,*  
*Laboratories and Scientific Services.*

**MEXICO TEXTILE AND APPAREL IMPORTS APPROVED  
FOR THE ELECTRONIC CERTIFICATION  
SYSTEM (eCERT)**

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

**ACTION:** General notice.

**SUMMARY:** This document announces that the certification requirement for certain imports of textile and apparel goods from the United Mexican States (Mexico) that are eligible for preferential tariff treatment under a tariff preference level (TPL) will be accomplished through the Electronic Certification System (eCERT). Specified quantities of certain textile and apparel imports from Mexico that are eligible for preferential tariff treatment under a TPL must have a valid certificate of eligibility with a corresponding eCERT transmission in order for an importer to claim the preferential duty rate. As the Agreement Between the United States of America, the United Mexican States and Canada (USMCA) requires the use of an electronic system for the transmission of a certificate of eligibility and other documentation related to TPLs for goods imported into the United States, Mexico has coordinated with the United States Government (USG) to implement the eCERT process. Mexico is now ready to participate in this process and transition from the way the USG currently receives certificates of eligibility from Mexico to eCERT. This transition will not change the TPL filing process or requirements applicable to importers of record, who will continue to provide the certificate numbers from Mexico in the same manner as when currently filing entry summaries with U.S. Customs and Border Protection. The format of the certificate of eligibility numbers will remain the same for the corresponding eCERT transmissions.

**DATES:** The use of the eCERT process for certain Mexican textile and apparel importations eligible for preferential tariff treatment under a TPL will be effective for certain textile and apparel goods entered, or withdrawn from a warehouse, for consumption on or after October 5, 2021.

**FOR FURTHER INFORMATION CONTACT:** For quota-related questions, contact Julia Peterson, Chief, Quota and Agriculture Branch, Trade Policy and Programs, Office of Trade, (202) 384-8905, or [HQQUOTA@cbp.dhs.gov](mailto:HQQUOTA@cbp.dhs.gov). For questions related to the TPL provisions, contact Anita Harris, Chief, Textile Policy Branch, Trade Policy and Programs, Office of Trade, (202) 604-2151, or [OTTEXTILE\\_POLICY\\_ENF@cbp.dhs.gov](mailto:OTTEXTILE_POLICY_ENF@cbp.dhs.gov).

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Pursuant to the Agreement Between the United States of America, the United Mexican States and Canada (USMCA), Section C (Preferential Tariff Treatment for Non-Originating Goods of another Party) of Annex 6–A of Chapter 6 (Textile and Apparel Goods) allows for preferential tariff treatment under a tariff-preference level (TPL) of specified annual quantities of certain textile and apparel goods from the United Mexican States (Mexico) for import into the United States. The TPLs for textile and apparel goods from Mexico set forth in U.S. Note 11 of subchapter XXIII of Chapter 98 of the Harmonized Tariff Schedule of the United States (HTSUS) are derived from Annex 6–A of Chapter 6 of the USMCA. Pursuant to Section C of Annex 6–A of the USMCA, the USMCA country where the good is being imported may require a document issued by the competent authority of a USMCA country, such as a certificate of eligibility, to provide information demonstrating that the good qualifies for duty-free treatment under a TPL, to track allocation and use of a TPL, or as a condition to grant duty-free treatment to the good under a TPL. Each USMCA country must notify the other USMCA countries if it requires a certificate of eligibility or other documentation. CBP has determined that TPLs under the USMCA will be administered using a certificate of eligibility. A TPL is a quantitative limit for certain non-originating textile or apparel goods that may be entitled to preferential tariff treatment based on the goods meeting certain requirements, as specified by the USMCA and CBP. A USMCA country will manage each TPL on a first-come, first-served basis, and will calculate the quantity of goods that enter under a TPL on the basis of its imports.

The Electronic Certification System (eCERT) is a system developed by CBP that uses electronic data transmissions of information normally associated with a required export document, such as a license or certificate, to facilitate the administration of TPLs and ensure that the proper restraint levels are charged without being exceeded. Mexico currently submits certificates of eligibility to CBP via email, and in the administration of the TPL, CBP validates these certificates with the certificate numbers provided by importers of record (importers) on their entry summaries. Paragraph 14 of Section C of Annex 6–A of the USMCA requires that the parties to the agreement establish a secure system for electronic transmission of certificates of eligibility or other documentation related to TPL utilization, as well as for sharing information in real time related to allocation and utilization of TPLs. CBP has coordinated with Mexico to implement

the eCERT process, and now Mexico is ready to participate in this process by transmitting its certificates of eligibility to CBP via eCERT.

Foreign countries participating in eCERT transmit information via a global network service provider, which allows connectivity to CBP's automated electronic system for commercial trade processing, the Automated Commercial Environment (ACE). Specific data elements are transmitted to CBP by the importer (or an authorized customs broker) when filing an entry summary with CBP, and those data elements must match eCERT data from the foreign country before an importer may claim the preferential duty rate under a TPL. An importer may claim a preferential duty rate when merchandise is entered, or withdrawn from warehouse, for consumption, only if the information transmitted by the importer matches the information transmitted by the foreign government. If there is no transmission by the foreign government upon entry summary, an importer must claim the most-favored nation (MFN) rate of duty.<sup>1</sup> An importer may subsequently claim the preferential duty rate under certain limited conditions.<sup>2</sup>

This document announces that Mexico will be implementing the eCERT process for transmitting certificates of eligibility for certain textile and apparel entries that are eligible for preferential tariff treatment under a TPL. Imported merchandise that is entered, or withdrawn from warehouse, for consumption on or after October 5, 2021, must match the eCERT transmission of a certificate of eligibility from Mexico in order for an importer to claim the preferential duty rate. The transition to eCERT will not change the TPL filing process or requirements. Under this process, importers will continue to provide the certificate of eligibility numbers from Mexico in the same manner as when currently filing entry summaries with CBP. The format of the numbers of certificates of eligibility will not change as a result of the transition to eCERT. CBP will reject entry summaries that claim a preferential duty rate under a TPL when filed without a valid certificate of eligibility in eCERT.

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<sup>1</sup> If there is no associated foreign government eCERT transmission available upon the filing of the entry summary, an importer may enter the merchandise for consumption subject to the MFN rate of duty or opt not to enter the merchandise for consumption at that time (*e.g.*, transfer the merchandise to a customs bonded warehouse or foreign trade zone or export or destroy the merchandise).

<sup>2</sup> An importer has the opportunity to make a post-importation claim for a TPL by requesting a refund of any excess customs duties at any time within one year after the date of importation of the goods. However, the preferential duty rate is allowable only if there are still amounts available within the original TPL period.

Dated: September 24, 2021.

ANNMARIE R. HIGHSMITH,  
*Executive Assistant Commissioner,  
Office of Trade.*

[Published in the Federal Register, September 30, 2021 (85 FR 54225)]

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**PROPOSED MODIFICATION OF TWO RULING LETTERS  
AND PROPOSED REVOCATION OF TREATMENT  
RELATING TO COUNTRY OF ORIGIN MARKING  
OF CERTAIN MIC PERCUTANEOUS PLACEMENT  
AND MEDICAL KITS**

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

**ACTION:** Notice of proposed modification of two ruling letters, and proposed revocation of treatment relating to the country of origin marking of certain MIC Percutaneous Placement and Medical Kits.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify two ruling letters concerning the country of origin marking of certain MIC Percutaneous Placement and Medical Kits. Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

**DATE:** Comments must be received on or before November 12, 2021.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number, and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

**FOR FURTHER INFORMATION CONTACT:** Tatiana Salnik Matherne, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify two ruling letters pertaining to the country of origin marking of certain MIC Percutaneous Placement and Medical Kits. Although in this notice, CBP is specifically referring to Headquarters Ruling Letter ("HQ") H016800, dated December 10, 2007 (Attachment A), and HQ H190655, dated July 14, 2014 (Attachment B), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the two identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In HQ H016800 and HQ H190655, CBP determined that the sealed outer containers of the MIC Percutaneous Placement and Medical

Kits must be marked with a list of countries of origin of all components contained within those containers, without reference to the country of origin of each individual component. CBP has reviewed HQ H016800 and HQ H190655 and has determined the ruling letters to be in error. It is now CBP's position that the MIC Percutaneous Placement and Medical Kits must be marked to specify the country of origin of each component.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify HQ H016800 and HQ H190655, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H265715, set forth as Attachment C to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

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

Attachments

HQ H016800

December 10, 2007

CLA-2 OT:RR:CTF:TCM H016800 KSH

CATEGORY: Marking

TARIFF NO.: 9018.90

DONALD S. STEIN, ESQ.  
GREENBERG TRAURIG, LLP  
800 CONNECTICUT AVENUE N.W.  
SUITE 500  
WASHINGTON, DC 20006

RE: NAFTA country of origin and marking of a MIC Percutaneous Placement Kit

DEAR MR. STEIN:

This letter is in response to your request of August 2, 2007, on behalf of your client, Avent Inc., in which you requested a binding ruling pertaining to the country of origin and marking of a MIC Percutaneous Placement Kit (PPK).<sup>1</sup> Your request has been forwarded by the National Commodity Specialist Division in New York to this office for a response.

**FACTS:**

The merchandise at issue is identified as the “MIC Percutaneous Placement Kit.” The PPK is a medical device to initially place balloon-retained enteral feeding catheters for gastrostomy feeding. The PPK will be marketed to and used in hospitals and clinics by healthcare professionals. The PPK consists of a stoma measuring device, two syringes, 24fr dilator, a gastroplexy assembly (package containing four devices), scalpel, introducer needle, hemostat, guidewire and catheter. The stoma measuring device, 24fr dilator and catheter are from Mexico. The guidewire is from Ireland. The hemostat is from Pakistan. The syringes, gastroplexy assembly, scalpel and introducer needle are from the United States. The PPK is assembled in Mexico. The individual components of the PPK are not marked. The kit will be placed in a sealed package and sterilized. The sealed kit is then placed in individual shipping boxes.

**ISSUE:**

Whether the PPK must be marked upon importation into the United States.

**LAW AND ANALYSIS:**

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. 1304 was that the ultimate purchaser should be able to

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<sup>1</sup> The tariff classification of the PPK was determined in New York Ruling Letter (NY) N012151, dated June 27, 2007, to be subheading 9018.90.8000, Harmonized Tariff Schedule of the United States (HTSUS).

know by an inspection of the markings on the imported goods the country of which the good is the product. “The evident purpose is to mark the goods so at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.” *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297 at 302 (1940).

Part 134, CBP Regulations (19 C.F.R. 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.1(b), CBP Regulations (19 C.F.R. 134.1(b)), defines “country of origin” as the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the “country of origin” within the meaning of this part; however, for a good of a NAFTA country, the NAFTA Marking Rules determine the country of origin.

Section 134.1(j), CBP Regulations (19 C.F.R. 134.1(j)), provides that the “NAFTA Marking Rules” are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g), CBP Regulations (19 C.F.R. 134.1(g)), defines a “good of a NAFTA country” as an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules, set forth at 19 C.F.R. Part 102.

Section 102.11(a), CBP Regulations (19 C.F.R. 102.11(a)), sets forth the required hierarchy under the NAFTA Marking Rules for determining country of origin for marking purposes. This section states that the country of origin of a good is the country in which:

- (1) The good is wholly obtained or produced;
- (2) The good is produced exclusively from domestic materials; or
- (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in [section] 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

Section 102.1(g), CBP Regulations (19 C.F.R. 102.1(g)), defines a good wholly obtained or produced as including “A good produced in that country exclusively from goods referred to in paragraphs (g)(1) through (g)(10) of this section or from their derivatives, at any stage of production.” Because the components of the PPK are manufactured in the United States, Pakistan, Ireland and Mexico, the PPK would not qualify as “a good wholly obtained or produced” in a country. Therefore, the country of origin of the oral care kits may not be determined under section 102.11(a)(1).

The next step under the hierarchy is to consider whether the country of origin may be determined according to section 102.11(a)(2). Under this section, the origin of the good may be based on the origin of the materials used to produce the good, provided the good is produced exclusively from domestic materials. Section 102.1(d), CBP Regulations (19 C.F.R. 102.1(d)), defines domestic material as “a material whose country of origin as determined under these rules is the same country as the country in which the good is produced.”

Because the PPK is not produced exclusively from domestic materials (i.e., Mexican), the country of origin cannot be determined under section 102.11(a)(2). Analysis must continue to 19 C.F.R. 102.11(a)(3) to determine the country of origin of the PPK under the NAFTA Marking Rules.

The catheter, introducer needle and guidewire are classified in subheading 9018.39, HTSUS, which provides for “Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Syringes, needles, catheters, cannulae and the like; parts and accessories thereof: Other.” The stoma measuring device, 24fr dilator, gastroplexy devices, scalpel and hemostat are classified in subheading 9018.90, HTSUS, which provides for “... Other instruments and appliances and parts and accessories thereof.” The syringes are classified in subheading 9018.31, HTSUS, which provides for “... Syringes, needles, catheters, cannulae and the like; parts and accessories thereof: Syringes, with or without needles; parts and accessories thereof.”

Pursuant to 19 C.F.R. 102.11(a)(3), the country of origin of a good is the country in which “each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in §102.20 and satisfies any other applicable requirements of that section.” Section 102.1(e), CBP Regulations (19 C.F.R. 102.1(e)) defines “Foreign material” as “a material whose country of origin as determined under these rules is not the same country as the country in which the good is produced.” At the time the PPK is exported from Mexico, it is classified in 9018.90.8000. See NY N012151. The applicable rule under 19 C.F.R. 102.20(q), CBP Regulations (19 C.F.R. 102.20(q)), states, in relevant part:

9018.90 A change to subheading 9018.90 from any other subheading, except from subheading 9001.90 or synthetic rubber classified in heading 4002 when resulting from a simple assembly; ....

19 C.F.R. 102.20 further states in relevant part, “Where a rule under this section permits a change to a subheading from another subheading of the same heading, the rule shall be satisfied only if the change is from a subheading of the same level specified in the rule. The introducer needle and guidewire are classified in subheading 9018.39, HTSUS. The hemostat, scalpel and gastroplexy assembly are classified in subheading 9018.90, HTSUS. The syringes are classified in heading 9018.31, HTSUS. Thus, in the case before us, only the guidewire, syringes and introducer needle will undergo the required tariff shift. Thus, as each foreign component does not undergo an applicable change in tariff classification within the requirements of section 102.20, the country of origin of the good may not be determined in accordance with this provision. Moreover, 19 C.F.R. 102.17 provides in relevant part:

A foreign material shall not be considered to have undergone an applicable change in tariff classification specified in [section] 102.20 or [section] 102.21 or to have met any other applicable requirements of those sections merely by reason of one or more of the following:

\* \* \*

(c) Simple packing, repacking or retail packaging without more than minor processing;

\* \* \*

Because the country of origin cannot be determined under 19 C.F.R. 102.11(a) (incorporating section 102.20), the next step is section 102.11(b), CBP Regulations (19 C.F.R. 102.11(b)), which states, in part:

- (b) Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a), of this section:
  - (1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character to the good[.]”

As the various items contained in the PPK are classified in different subheadings of 9018, HTSUS, NY N012151 classified the PPK as a set under GRI 3. Therefore, as the PPK was classified as a set pursuant to GRI 3, section 102.11(b) does not apply.

Under 19 C.F.R. 102.11(c), the country of origin is the country or countries of origin of all materials that merit equal consideration for determining the essential character of the good. All of the materials of the set, foreign and domestic, which merit equal consideration, must be considered.

De minimis goods are discussed in 19 C.F.R. 102.13(a) which states:

- (a) Except as otherwise provided in paragraphs (b) and (c) of this section, foreign materials that do not undergo the applicable change in tariff classification set out in [section] 102.20 or satisfy the other applicable requirements of that section when incorporated into a good shall be disregarded in determining the country of origin of the good if the value of those materials is no more than 7 percent of the value of the good or 10 percent of the value of a good of Chapter 22, Harmonized System.

Pursuant to 19 C.F.R. 102.13(a), the syringes, scalpel, introducer needle and hemostat may not be considered for the purposes of section 102.20 as each is valued at 7% or less of the value of the good. For the purposes of section 102.11(c), they remain de minimis in relation to the other components in terms of value. The remaining components which merit equal consideration are the stoma measuring device, 24fr dilator, gastroplexy assembly, guidewire and catheter. As such, the countries of origin for marking purposes are the United States, Ireland and Mexico.

You request confirmation that it would be appropriate for the port director to exempt the PPK from being marked with the country of origin. You suggest that the PPK need not be marked with its country of origin as the ultimate purchaser of the kit will receive the kit in its shipping case.

There exist certain exceptions to the marking requirements in the marking statute. One of those exceptions can be found in section 1304(a)(3)(D). Under section 1304(a)(3)(D) to the marking statute, an imported article is not required to be marked with its country of origin if:

The marking of a container of such article will reasonably indicate the origin of such article.

19 U.S.C. § 1304(a)(3)(D).

Subpart D to part 134 implements the exceptions in the marking statute. Section 134.32(d) to subpart D lists the following exception:

Articles for which the marking of the containers will reasonably indicate the origin of the articles.

19 C.F.R. § 134.32(d).

CBP has ruled in the past that products that are imported for sale to or for use by medical facilities need not be individually marked as to their country of origin but rather could be marked on the packages or on the outside of the containers in which the products were packed provided the medical facility receives the products in such properly marked packages or containers. See generally, HQ 560266 (dated January 17, 1997). In the instant case, if the PPK is sold to or provided for use by medical facilities in properly marked packages, they may be excepted from the country of origin marking requirements under section 304 of the Tariff Act of 1930 (19 U.S.C. § 1304 (a)(3)(D) and 19 C.F.R. § 134.32(d)).

You need not list all components and their country of origin. Rather, you may mark the PPK package "Product of USA, Ireland and Mexico," "Components (or parts) produced in U.S., Ireland and Mexico" or other words of similar meaning as you have requested. We note, however, that inasmuch as the marking requirements of 19 U.S.C. 1304 are applicable only to articles of "foreign origin," the PPK is not required to be marked with a reference to the United States origin upon importation into the United States. Claims of domestic origin is a matter under the jurisdiction of the Federal Trade Commission (FTC). Therefore, should you wish to identify any of the articles as "Made in the USA", we recommend that you contact that agency at the following address: Federal Trade Commission Division of Enforcement, 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580.

Further, we note the special marking requirements of 19 C.F.R. 134.46. Section 134.46, CBP Regulations (19 C.F.R. 134.46), as revised by T.D. 97-72, dated August 20, 1997, provides:

In any case in which the words "United States," or "American," the letters "U.S.A.," any variation of such words or letters, or the name of any city or location in the United States, or the name of any foreign country or locality other than the country or locality in which the article was manufactured or produced appear on an imported article or its container, and those words, letters or names may mislead or deceive the ultimate purchaser as to the actual country of origin of the article, there shall appear legibly and permanently in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning.

Section 134.46 provides that its special marking requirements are triggered when CBP determines that the non-origin marking may mislead or deceive the ultimate purchaser as to the actual country of origin of the article. CBP has ruled that in order to satisfy the "close proximity" requirement, the country of origin marking must appear on the same sides(s) or surface(s) in which the name of the locality other than the country of origin appears. See HQ 708994, dated April 24, 1978. Therefore, if the PPK or the packaging in which the medical facility receives it contains a reference to a location, such as of a distributor, other than the countries of origin, then the requirements of section 134.46 are applicable.

**HOLDING:**

Pursuant to section 102.11(c) of the CBP Regulations, the countries of origin of the PPK are the United States, Ireland and Mexico for country of origin marking purposes. The components and package may be excepted from the country of origin marking requirements under section 304 of the Tariff Act of 1930 (19 U.S.C. § 1304(a)(3)(D) and 19 C.F.R. § 134.32(d)) provided the PPK reaches the hospitals and clinics in properly marked individual shipping boxes. The PPK shipping box must be individually marked. Marking of the shipping container cases is insufficient.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the CBP officer handling the transaction.

*Sincerely,*

GAIL A. HAMILL,

*Chief*

*Tariff Classification and Marking Branch*

HQ H190655

July 14, 2014

OT:RR:CTF:TCM H190655 CKG

CATEGORY: Country of Origin

TARIFF NO.: 9018.90.80

PORT DIRECTOR  
U.S. CUSTOMS AND BORDER PROTECTION  
*PORT OF LAREDO*  
*P.O. BOX 3130*  
*LAREDO, TX 78044-3130*

Attn: Ray Peña  
Supervisory Import Specialist

RE: Request for Internal Advice No. 11/043 on the Country of Origin  
Marking of Medical Kits

DEAR PORT DIRECTOR,

This letter is in response to your request for Internal Advice 11/043, of October 18, 2011, on the country of origin marking of medical kits imported by Medline Industries, Inc. In reaching our decision, we have taken into account additional information provided by Medline during a conference call on December 19, 2011 and in additional submissions dated October 4, November 2 and December 30, 2011.

**FACTS:**

The instant merchandise consists of various medical kits, imported into the U.S. from Mexico. The kits contain numerous components, which are organized and packaged into sub-kits. The components include items such as needles, scissors, towels, catheters, sponges, scalpels, plastic bowls, forceps, gauzes, etc. The sub-kits group various components together into a single container—for example, a box with scissors of different sizes or a sealed bag with a catheter, needles, and blades. The components are sourced from various countries, including the U.S., Canada, Mexico, China, the Dominican Republic, South Korea, Thailand and Vietnam, are assembled into sub-kits by outside suppliers, and are packaged into a single container—the final medical kit—in Mexico. The components in the sub-kits may have different countries of origin. Upon importation into the U.S., some kits are sold directly to hospitals and some are repacked, with additional components inserted into the finished kit.

The imported kits are marked on the outside container with the names of countries from which the subject merchandise may originate, for example “Products of the U.S., Mexico, China, Taiwan”. The individual components are not marked. Medline notes that the value of the components of U.S. or Mexican origin in the subject kits comprise the majority of the value of the finished kit, such that it considers the components from other countries to be *de minimis*. Medline thus suggests that “products of the U.S. and Mexico” is an appropriate marking for those kits whose non-NAFTA components constitute less than 7% of the value of the total kit. An approximate cost breakdown of the Medline Open-Heart CDS-4 surgical procedure pack was provided to CBP.

Based on telephone conversations between Medline and CBP, as well as additional submissions from counsel to CBP dated October 4, November 2

and December 30, 2011, Medline in fact does not know the countries of origin of many of the individual components of some or most of the imported medical kits because an outside supplier has declined, for unspecified business reasons, to identify where these components are sourced. Thus, the country of origin of the articles is not readily ascertainable, and Medline claims that they can only be ascertained, if at all, only with the expenditure of considerable time and expense. Finally, during the teleconference held with CBP officials on December 19, 2011, Medline stated that even if their supplier did identify the countries of origin of the kit components, there would be no way to verify the truth or accuracy of those statements.

For this reason, Medline proposes to identify the origin of non-U.S. components by marking the outside container of the medical kits with a list of the source countries in which the components may have originated, such as: “Products of USA, Canada, China, Dominican Republic, Mexico, Thailand, Vietnam.”

#### **ISSUE:**

1. What is the country of origin of the medical kits?
2. Can the medical kits be marked with the names of the source countries in which the components may have originated, even if the origin of the components is not known?
3. Is it sufficient to mark the outer container only, or must the individual components or sub-kits also be marked with the country of origin?

#### **LAW AND ANALYSIS:**

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit in such manner as to indicate to the ultimate purchaser the English name of the country of origin of the article. The regulations implementing the requirements and exceptions to 19 U.S.C. 1304 are set forth in Part 134, CBP Regulations (19 C.F.R. 134). Section 134.1(b), CBP Regulations (19 C.F.R. 134.1(b)), defines “country of origin” as:

[T]he country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the “country of origin” within the meaning of [the marking requirements] ...

1. What is the country of origin of the medical kits?

Section 134.1(j), CBP Regulations (19 C.F.R. 134.1(j)), provides that the “NAFTA Marking Rules” are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g), CBP Regulations (19 C.F.R. 134.1(g)), defines a “good of a NAFTA country” as an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules, set forth at 19 C.F.R. Part 102.

Section 102.11(a), CBP Regulations (19 C.F.R. 102.11(a)), sets forth the required hierarchy under the NAFTA Marking Rules for determining country of origin for marking purposes. This section states that the country of origin of a good is the country in which:

- (1) The good is wholly obtained or produced;
- (2) The good is produced exclusively from domestic materials; or
- (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in [section] 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

As the instant kits are neither wholly obtained or produced in a NAFTA territory nor produced exclusively from domestic materials, the country of origin cannot be determined under section 102.11(a)(1) or 102.11(a)(2). Analysis must continue to 19 C.F.R. 102.11(a)(3) to determine the country of origin of the Medline kits under the NAFTA Marking Rules.

Pursuant to 19 C.F.R. 102.11(a)(3), the country of origin of a good is the country in which “each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in §102.20 and satisfies any other applicable requirements of that section.” Section 102.1(e), CBP Regulations (19 C.F.R. 102.1(e)) defines “Foreign material” as “a material whose country of origin as determined under these rules is not the same country as the country in which the good is produced.”

19 C.F.R. 102.17 provides, in relevant part:

A foreign material shall not be considered to have undergone an applicable change in tariff classification specified in [section] 102.20 or [section] 102.21 or to have met any other applicable requirements of those sections merely by reason of one or more of the following:

- (c) Simple packing, repacking or retail packaging without more than minor processing;

The foreign components of the instant kits are packaged in Mexico, . . . . Even if the goods were to undergo the applicable change in tariff classification in 19 CFR 102.20, as the goods are subject to simple packing or repacking it would not be a qualifying operation in Mexico under 19 CFR 102.17. Hence, the Medline kits cannot be considered to be products of Mexico pursuant to 19 C.F.R. 102.11(a)(3)

As the various items contained in the Medline kits are classified in different headings, put up together to meet a particular need or carry out a specific activity (e.g., vaginal delivery, open heart surgery), the Medline kits would be considered sets pursuant to GRI 3. Therefore, since section 102.11(b) contains an exception for goods classified as sets, it does not apply.

Under 19 C.F.R. 102.11(c), the country of origin of a GRI 3 set or composite good is the country or countries of origin of all materials that merit equal consideration for determining the essential character of the set. All of the materials of the set, foreign and domestic, which merit equal consideration, must be considered.

Components which are considered *de minimis* do not merit equal consideration for determining the essential character of the set. *De minimis* goods are discussed in 19 CFR 102.13, which states:

- (a) Except as otherwise provided in paragraphs (b) and (c) of this section, foreign materials that do not undergo the applicable change in tariff classification set out in § 102.20 or satisfy the other applicable requirements of that section when incorporated into a good shall be disregarded in determining the country of origin of the good if the value of those materials is no more than 7 percent of the value of the good or 10 percent of the value of a good of Chapter 22, Harmonized System.

Medline states that although the foreign articles of the Medline kits constitute a majority of the components in some kits, the foreign components each constitute less than 7% of the total value of the finished kit, and are thus *de minimis*. However, the *de minimis* rules of 19 CFR 102.13 clarify that it is the cumulative value of all foreign materials which must be seven percent or less of the total value of the good, not the value of each individual foreign component of a set. According to the cost breakdown provided for the Open Heart CDS-4 kit, this standard is met—the cumulative cost of the foreign materials is roughly 2%, well below the *de minimis* threshold. However, Medline notes that the cost breakdown is only an estimate, and that they do not possess the country of origin information of many of their components sourced from outside suppliers. Without this information, we cannot accurately and reliably assess the relative cost of the foreign and domestic articles of the Open Heart CDS-4 or other Medline kits. Without the *de minimis* information, the set would have to be marked with the country of origin of all of the items meriting equal consideration. See, for example HQ 560372, dated May 8, 1997.

Because we cannot definitively determine whether the foreign materials in the Open Heart CDS-4 or other Medline kits may be disregarded, we do not find the suggested marking “Product of the U.S. and Mexico” to be correct at this time.

2. Can the medical kits be marked with the names of the source countries in which the components may have originated, even if the origin of the components is not known?

Medline argues that it should be permitted to mark the subject medical kits with the names of the countries in which the non-originating articles may have originated, because it cannot determine the exact country of origin of these articles (except at an economically prohibitive expense), because the supplier of these articles refuses to disclose this information for confidentiality reasons. However, in the instant case, it is unclear that Medline can even verify that the merchandise was sourced from any of the countries listed as the possible countries of origin. Given the facts presented to us, the proposed marking “Products of Canada, China, Dominican Republic, Mexico, Thailand, Vietnam” represents an arbitrary list of countries which may or may not be the country or countries of origin of the subject merchandise. This is not an acceptable marking under 19 U.S.C. 1304.

The reluctance of a supplier to disclose the exact country of origin is not sufficient to warrant an exception to the marking requirements of 19 USC 1304. Nor is the potential expense of applying the correct country of origin marking, which Medline claims would be economically prohibitive. The marking exceptions of Section 134.32, Customs Regulations (19 CFR 134.32), specifically 134.32 (c) and (o) (which exempt articles that cannot be marked either prior to or after importation because the expense would be economi-

cally prohibitive), allow only individual articles to be exempted from marking. Even if these exceptions applied, the containers of the imported products must still be marked with an accurate list of the countries of origin of all the components, regardless of expense. *See* 19 CFR 134.22(a), *contents excepted from marking* (“When an article is excepted from the marking requirements by subpart D of this part, the outermost container or holder in which the article ordinarily reaches the ultimate purchaser shall be marked to indicate the country of origin of the article whether or not the article is marked to indicate its country of origin.”)

We further note that whether an article may be marked with the phrase “Made in the USA” or similar words denoting U.S. origin is an issue under the authority of the Federal Trade Commission (FTC). Thus, the propriety of any proposed markings indicating that an article is made in the U.S. is to be determined by the FTC Division of Enforcement, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

3. Must the individual components or sub-kits be marked with the country of origin?

With respect to the marking of the individual components, it is stated that the Medline medical kits will be sold exclusively to hospitals for use during surgical procedures. 19 CFR 134.1(d) defines an ultimate purchaser as “generally the last person in the U.S. who will receive the article in the form in which it was imported.” Accordingly, we find that the hospitals will be the ultimate purchasers of the Medline kits. *See e.g.*, HQ 560266, dated January 17, 1997, and HQ H016800, dated December 10, 2007. Under section 1304(a)(3)(D) (19 C.F.R. 134.32(d)) to the marking statute, an imported article is not required to be marked with its country of origin if the marking of a container of such article will reasonably indicate the origin of such article to the ultimate purchaser.

CBP has ruled in the past that products that are imported for sale to or for use by medical facilities need not be individually marked as to their country of origin but rather could be marked on the packages or on the outside of the containers in which the products were packed provided the medical facility receives the products in such properly marked packages or containers. *See e.g.*, HQ 560266 and HQ H016800 *supra*. If the containers of the Medline kits are properly marked, with the origin of the contents, it is sufficient that the ultimate purchasers—the hospitals—will receive the kits in their condition as imported, with only the outer container marked.

**HOLDING:**

The medical kits cannot be marked “Made in Mexico”

Medline must mark the outer containers of the imported kits with an accurate list of the countries of origin of all the articles. The individual articles may be excepted from individual country of origin marking pursuant to 19 CFR 134.32.

A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the CBP officer handling the transaction.

*Sincerely,*  
MYLES B. HARMON,  
*Director*  
*Commercial and Trade Facilitation Division*

HQ H265715  
OT:RR:CTF:FTM H265715 TSM  
CATEGORY: Marking

DONALD S. STEIN, ESQ.  
GREENBERG TRAUERIG, LLP  
800 CONNECTICUT AVENUE N.W.  
SUITE 500  
WASHINGTON, DC 20006

RE: Modification of HQ H016800 and HQ H190655; Country of origin marking of a certain MIC Percutaneous Placement Kit and Medical Kits.

DEAR MR. STEIN:

This is in reference to Headquarters Ruling Letter (“HQ”) H016800, issued to your client, Avent Inc., on December 10, 2007, concerning the country of origin marking of a certain MIC Percutaneous Placement Kit (“PKK”). In that ruling, U.S. Customs and Border Protection (“CBP”) determined that all components of the PKK kit and their country of origin need not be listed on the PKK kit packaging. Rather, the PKK kit sealed packaging may be marked “Product of USA, Ireland and Mexico” or other words of similar meaning.<sup>1</sup> This is also in reference to HQ H190655, dated July 14, 2014, concerning the country of origin marking of certain medical kits. In that ruling, CBP determined that the containers of the imported medical kits must be marked with an accurate list of countries of origin of all the articles.<sup>2</sup> Upon additional review, we have found these determinations to be incorrect. For the reasons set forth below we hereby modify HQ H016800 and HQ H190655.

**FACTS:**

HQ H016800, describes the subject merchandise as follows:

The merchandise at issue is identified as the “MIC Percutaneous Placement Kit.” The PPK is a medical device to initially place balloon-retained enteral feeding catheters for gastrostomy feeding. The PPK will be marketed to and used in hospitals and clinics by healthcare professionals. The PPK consists of a stoma measuring device, two syringes, 24fr dilator, a gastroplexy assembly (package containing four devices), scalpel, introducer needle, hemostat, guidewire and catheter. The stoma measuring device, 24fr dilator and catheter are from Mexico. The guidewire is from Ireland. The hemostat is from Pakistan. The syringes, gastroplexy assembly, scalpel and introducer needle are from the United States. The PPK is assembled in Mexico. The individual components of the PPK are not marked. The kit will be placed in a sealed package and sterilized. The sealed kit is then placed in individual shipping boxes.

In HQ H016800, CBP found that all components of the PPK and their country of origin need not be listed on the packaging. Rather, the packaging

<sup>1</sup> HQ H016800 also determined the country of origin of the MIC Percutaneous Placement Kit, which is not at issue here.

<sup>2</sup> HQ H190655 also determined the country of origin of the medical kit and the sufficiency of marking of the outer container in lieu of marking the individual articles contained within the container. Those issues are not addressed here.

may be marked “Product of USA, Ireland and Mexico,” “Components (or parts) produced in U.S., Ireland and Mexico” or other words of similar meaning.

HQ H190655, describes the subject merchandise as follows:

The instant merchandise consists of various medical kits, imported into the U.S. from Mexico. The kits contain numerous components, which are organized and packaged into sub-kits. The components include items such as needles, scissors, towels, catheters, sponges, scalpels, plastic bowls, forceps, gauzes, etc. The sub-kits group various components together into a single container—for example, a box with scissors of different sizes or a sealed bag with a catheter, needles, and blades. The components are sourced from various countries, including the U.S., Canada, Mexico, China, the Dominican Republic, South Korea, Thailand and Vietnam, are assembled into sub-kits by outside suppliers, and are packaged into a single container - the final medical kit - in Mexico. The components in the sub-kits may have different countries of origin. Upon importation into the U.S., some kits are sold directly to hospitals and some are repacked, with additional components inserted into the finished kit.

The imported kits are marked on the outside container with the names of countries from which the subject merchandise may originate, for example “Products of the U.S., Mexico, China, Taiwan.” The individual components are not marked.

In HQ H190655, CBP found that the outer containers of the imported medical kits must be marked with an accurate list of the countries of origin of all the articles.

#### **ISSUE:**

What is the country of origin marking of the PKK and medical kits?

#### **LAW AND ANALYSIS:**

The marking statute, section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304) provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was “that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.” *United States v. Friedlaender & Co. Inc.*, 27 C.C.P.A. 297, 302, C.A.D. 104 (1940).

The country of origin marking requirements and the exceptions of 19 U.S.C. § 1304 are set forth in Part 134, Customs Regulations (19 C.F.R. Part 134), which implements the country of origin marking requirements and exceptions of 19 U.S.C. § 1304. Section 134.41(b), Customs Regulations (19 C.F.R. § 134.41(b)), mandates that the ultimate purchaser in the United States must be able to find the marking easily and read it without strain. 19 C.F.R. § 134.1(d), defines the ultimate purchaser as generally the last person in the United States who will receive the article in the form in which it was

imported. 19 C.F.R. § 134.32(d) provides that articles for which the marking of the containers will reasonably indicate the origin of the articles are excepted from marking requirements.

The principles governing the country of origin marking of sets, mixtures, and composite goods, were addressed by CBP in Treasury Decision (“T.D.”) 91–7, 25 Cust. B. & Dec. 7 (January 8, 1991). In that decision, CBP determined in relevant part that for purposes of 19 U.S.C. § 1304, the relevant inquiry is whether the materials or components have been substantially transformed as a result of their inclusion in a set, mixture, or composite good. If the materials or components have not been substantially transformed, each component must be individually marked to indicate its own country of origin.

In HQ H016800, CBP determined that the components of the PKK kit, such as a stoma measuring device, two syringes, dilator, a gastroplexy assembly, scalpel, introducer needle, hemostat, guidewire, and catheter, retained their different countries of origin. CBP further determined that all components of the PPK and their countries of origin need not be listed on the sealed packaging. Rather, the packaging may be marked “Product of USA, Ireland and Mexico,” “Components (or parts) produced in U.S., Ireland and Mexico,” or other words of similar meaning.

In HQ H190655, CBP determined that the components of the medical kits, such as needles, scissors, towels, catheters, sponges, scalpels, plastic bowls, forceps, gauzes, etc., retained their different countries of origin. CBP further determined that the outer containers (sealed packages) of the imported medical kits must be marked with an accurate list of the countries of origin of all the articles, for example “Products of the U.S., Mexico, China, Taiwan.”

Upon review, we find that marking of the outer containers of PKK and medical kits with a list of countries of origin of all articles contained within those containers, without reference to the country of origin of each individual article, is not consistent with T.D. 91–7. As discussed above, T.D. 91–7 requires each item, if not substantially transformed as a result of its inclusion in a set, to be individually marked to indicate its own country of origin. In HQ H016800 and HQ H190655, CBP determined that the components of the PKK and medical kits retained their individual countries of origin. Accordingly, consistent with the requirements of T.D. 91–7, the outer containers of the PKK and medical kits must be marked to specify the country of origin of each component, for example “Catheters made in Mexico, Hemostats made in Pakistan, etc.” See HQ H009368, dated September 27, 2007, and HQ 954260, dated May 4, 1994 (finding that the Bondex Surface Preparation Kit and Child’s Fishing Kit must be marked with the countries of origin of the individual components).

#### **HOLDING:**

In accordance with T.D. 91–7, the outer containers (sealed packaging) of the PKK and medical kits at issue in HQ H016800 and HQ H190655, must be marked with the country of origin of each component contained within those kits, for example “Catheters made in Mexico, Hemostats made in Pakistan, etc.”

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

HQ H016800, dated December 10, 2007, is hereby MODIFIED with regard to the country of origin marking of the MIC Percutaneous Placement Kit.

HQ H190655, dated July 16, 2014, is hereby MODIFIED with regard to the country of origin marking of the medical kits.

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

*Sincerely,*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*



## 19 CFR PART 177

### REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A CAT COLLAR

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

**ACTION:** Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of a Cat Collar.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of a Cat Collar under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 26, on July 7, 2021. One comment was received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 12, 2021.

**FOR FURTHER INFORMATION CONTACT:** Michele A. Boyd, Chemicals, Petroleum, Metals and Miscellaneous Branch, Regulations and Rulings, Office of Trade, at (202) 325–0136.

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

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

Pursuant to 19 U.S.C. §1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 26, on July 7, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of a Cat Collar. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") 891581, dated November 1, 1993, CBP classified a Cat Collar in heading 4201, HTSUS, specifically in subheading 4201.00.3000, HTSUS, which provides for "saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddlebags, dog coats and the like), of any material: Dog leashes, collars, muzzles, harnesses and similar dog equipment." CBP has reviewed NY 891581 and has determined the ruling letter to be in error. It is now CBP's position that a Cat Collar is properly classified, in heading 4201, HTSUS, specifically in subheading 4201.00.6000, HTSUS, which provides for "saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddle bags, dog coats and the like), of any material: other."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY 891581 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter H310905, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: September 29, 2021

ALLYSON MATTANAH  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

*Attachment*

HQ H310905

September 29, 2021

OT:RR:CTF:CPMM:MAB

CATEGORY: Classification

TARIFF NO.: 4201.00.6000

Ms. PAULA DUNN  
NEXUS RUBICON  
57 MAXWILL AVE.  
TORONTO, ONTARIO  
CANADA M5P2B4

RE: Revocation of NY 891581; classification of a reflective cat collar

DEAR Ms. DUNN,

This is in reference to the New York Ruling Letters (NY) 891581 issued to you by U.S. Customs and Border Protection (CBP) on November 1, 1993, concerning the classification of a reflective cat collar under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed this ruling, and determined it is incorrect, with respect to the classification of the reflective cat collar under subheading 4201.00.3000, HTSUS, the provision for “saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddlebags, dog coats and the like), of any material: Dog leashes, collars, muzzles, harnesses and similar dog equipment.” For the reasons set forth below, we are revoking the ruling.

Pursuant to Section 6125(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by Section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CBP is revoking the above noted ruling concerning the classification of a cat collar under the HTSUS. Similarly, CBP is revoking any treatment previously accorded by it to substantially identical transactions. Notice of the proposed revocation was published on July 7, 2021, in Volume 55, Number 26, of the *Customs Bulletin*. One comment in agreement was received in response to the proposed notice.

**FACTS:**

The merchandise under consideration is identified as a cat collar. The “tenth life” collar is a reflective, adjustable, break away cat collar. The item consists of nylon webbing or elastic with a reflective film on top. It has a plastic buckle and glide and a steel rectangular D-ring. The collar is used for cat identification and as a safety device to increase a cat’s visibility at night to automobiles.

**ISSUE:**

Whether the subject merchandise consisting of a reflective cat collar should remain classified in subheading 4201.00.3000, HTSUS, as “saddlery and harness for any animal... Dog leashes, collars...” or subheading 4201.00.6000, HTSUS, as “other [harness for any animal].”

**LAW AND ANALYSIS:**

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

The HTSUS provisions at issue are as follows:

\* \* \* \* \*

4201.00 Saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddle bags, dog coats and the like), of any material:

4201.00.3000 Dog leashes, collars, muzzles, harnesses and similar dog equipment

4201.00.6000 Other

\* \* \* \* \*

As noted above, the merchandise was originally classified in subheading 4201.00.3000, HTSUS which comprises of dog leashes, collars and other similar dog equipment. The present merchandise, however, is a cat collar, and therefore is not provided for in subheading 4201.00.3000, HTSUS, as it is not dog equipment. Therefore, the correct classification for the merchandise described in NY 891581 is 4201.00.6000, HTSUS.

**HOLDING:**

The applicable subheading for the reflective cat collar, will be 4201.00.6000, HTSUS, which provides for “saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddle bags, dog coats and the like), of any material: other.”

The general, column 1 rate of duty for subheadings 4201.00.6000, HTSUS, is 2.8% *ad valorem*.

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

A copy of this ruling letter should be attached to the entry documents filed at the time the goods are to be entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the CBP officer handling the transaction.

**EFFECT ON OTHER RULINGS:**

New York Ruling letter N891581, dated November 1, 1993 is hereby REVOKED in accordance with the above analysis.

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

*Sincerely,*

ALLYSON MATTANAH

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

CC: NIS Vikki Lazaro



# U.S. Court of International Trade

Slip Op. 21–127

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

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

[Remanding the third remand determination of the U.S. Department of Commerce, following the final determination in the antidumping duty investigation of certain hardwood plywood products from the People’s Republic of China.]

Dated: September 24, 2021

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

*Jeffrey S. Neeley and Stephen W. Brophy*, Husch Blackwell LLP, of Washington, D.C., for Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co., Ltd., Highland Industries Inc., Jiashan Dalin Wood Industry Co., Ltd., Happy Wood Industrial Group Co., Ltd., Jiangsu High Hope Arser Co., Ltd., Suqian Yaorun Trade Co., Ltd., Yangzhou Hanov International Co., Ltd., G.D. Enterprise Limited, Deqing China-Africa Foreign Trade Port Co., Ltd., Pizhou Jin Sheng Yuan International Trade Co., Ltd., Xuzhou Shuiwangxing Trading Co., Ltd., Cosco Star International Co., Ltd., Linyi City Dongfang Jinxin Economic & Trade Co., Ltd., Linyi City Shenrui International Trade Co., Ltd., Jiangsu Qianjiuren International Trading Co., Ltd., and Qingdao Top P&Q International Corp.

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

*Sonia M. Orfield*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E.*

Davidson, Director, and Tara K. Hogan, Assistant Director. Of counsel was Savannah Rose Maxwell, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

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

## OPINION AND ORDER

### Choe-Groves, Judge:

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

Before the Court are the Final Results of Redetermination Pursuant to Court Remand, ECF Nos. 143–1, 144–1 ("*Third Remand Determination*"), which the Court ordered in *Linyi Chengen Import & Export Co. v. United States* ("*Linyi Chengen III*"), 44 CIT \_\_, 487 F. Supp. 3d 1349 (2020). Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co. ("*Dehua TB*"), Taraca Pacific, Inc. ("*Taraca*"), and Celtic Co. ("*Celtic*") each filed comments in opposition to the *Third Remand Determination*. Plaintiff Linyi Chengen Import & Export Co. ("*Linyi Chengen*"), a mandatory respondent, and Consolidated Plaintiff Shandong Dongfang Bayley Wood Co. ("*Bayley*"), a mandatory respondent, did not file comments in response to the *Third Remand Determination*.

Dehua TB filed comments collectively on behalf of itself and Highland Industries, Inc., Jiashan Dalin Wood Industry Co., Happy Wood Industrial Group Co., Jiangsu High Hope Arser Co., Suqian Yaorun Trade Co., Yangzhou Hanov International Co., G.D. Enterprise Ltd., Deqing China-Africa Foreign Trade Port Co., Pizhou Jin Sheng Yuan International Trade Co., Xuzhou Shuiwangxing Trading Co., Cosco Star International Co., Linyi City Dongfang Jinxin Economic & Trade Co., Linyi City Shenrui International Trade Co., Jiangsu Qianjiuren International Trading Co., and Qingdao Top P&Q International Corp.

Comments Opp'n Third Remand Redetermination Behalf Consol. Pls. [Dehua TB] et. al., ECF Nos. 162, 163 (“the Dehua TB Comments” or “Dehua TB Cmts.”).

Taraca filed comments collectively on behalf of itself and Canusa Wood Products, Ltd., Concannon Corp. d/b/a Concannon Lumber Co., Fabuwood Cabinetry Corp., Holland Southwest International, Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, and USPLY LLC. Consol. Pls. [Taraca], Canusa Wood Products Ltd., Concannon Corp. [d/b/a] Concannon Lumber Co., Fabuwood Cabinetry Corp., Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, & USPLY LLC Comments Opp'n Third Remand Redetermination, ECF Nos. 164, 165 (“the Taraca Comments” or “Taraca Cmts.”).

Celtic filed comments collectively on behalf of itself and Anhui Hoda Wood Co., Far East American, Inc., Jiaxing Gsun Import & Export Co., Jiaxing Hengtong Wood Co., Linyi Evergreen Wood Co., Linyi Glary Plywood Co., Linyi Jiahe Wood Industry Co., Linyi Linhai Wood Co., Linyi Hengsheng Wood Industry Co., Linyi Huasheng Yongbin Wood Co., Linyi Mingzhu Wood Co., Linyi Sanfortune Wood Co., Qingdao Good Faith Import & Export Co., Shanghai Futuwood Trading Co., Shandong Qishan International Trading Co., Suining Pengxiang Wood Co., Suqian Hopeway International Trade Co., Suzhou Oriental Dragon Import & Export Co., Xuzhou Andefu Wood Co., Xuzhou Jiangyang Wood Industries Co., Xuzhou Longyuan Wood Industry Co., Xuzhou Pinlin International Trade Co., Xuzhou Shengping Import & Export Co., and Xuzhou Timber International Trade Co. Consol. Separate Rate Pls.’ Comments Opp'n Third Remand Redetermination, ECF Nos. 166, 167 (“the Celtic Comments” or “Celtic Cmts.”).

The Court refers collectively to the non-examined parties that filed the Dehua TB Comments, the Taraca Comments, and the Celtic Comments as the “Separate Rate Plaintiffs.”

Defendant-Intervenor Coalition for Fair Trade of Hardwood Plywood (“Defendant-Intervenor”) filed comments in support of the *Third Remand Determination*. [Def.-Intervenor]’s Comments in Supp. of Commerce’s Remand Redetermination, ECF Nos. 195, 198 (“Def.-Interv.’s Cmts.”). Defendant United States (“Defendant”) responded to all filed comments. Def.’s Resp. Comments Remand Redetermination, ECF Nos. 196, 197 (“Def.’s Resp.”).

The Court reviews whether Commerce’s separate rate for the non-examined companies that were granted separate rate status, including Separate Rate Plaintiffs, (“all-others separate rate”) is supported

by substantial evidence. For the reasons discussed below, the Court holds that the all-others separate rate is not supported by substantial evidence and remands Commerce's *Third Remand Determination*.

## BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the Court's review of the *Third Remand Determination*. See *Linyi Chengen Imp. & Exp. Co. v. United States*, 43 CIT \_\_, \_\_, 391 F. Supp. 3d 1283, 1287–92 (2019); *Linyi Chengen Imp. & Exp. Co. v. United States*, 44 CIT \_\_, \_\_, 433 F. Supp. 3d 1278, 1280–84 (2020); *Linyi Chengen III*, 44 CIT at \_\_, 487 F. Supp. 3d at 1353–59.

Commerce initiated an antidumping investigation after reviewing an antidumping duty petition (“Petition”) submitted by Defendant-Intervenor. See *Certain Hardwood Plywood Products from the People's Republic of China*, 81 Fed. Reg. 91,125 (Dep't of Commerce Dec. 16, 2016) (initiation of less-than-fair-value investigation). The Petition contained price quotes, i.e., “two offers for sale for hardwood plywood produced in [China] from a Chinese exporter,” as the basis for its estimated dumping margins ranging from 104.06% to 114.72%. See *id.* at 91,128–29.

Commerce accepted applications from exporters and producers seeking to obtain separate rate status in the investigation (“separate rate applications”) to avoid the country-wide dumping margin because the investigation involved products from China, a non-market economy. See *id.* at 91,129. A company must provide the commercial invoice for the first sale to an unaffiliated party in the United States during the period of investigation with its separate rate application. *Third Remand Determination* at 21. Commerce assigned the all-others separate rate to the companies that were not individually examined but demonstrated their eligibility for separate rate status (“separate rate respondents”). *Final Determination*, 82 Fed. Reg. at 53,462. Commerce selected Bayley and Linyi Chengen as the only mandatory respondents in the investigation. See Decision Mem. Prelim. Determination Antidumping Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China (June 16, 2017) (“Prelim. DM”) at 4, PR 734.<sup>1</sup>

In *Linyi Chengen III*, the Court sustained Commerce's determination, under protest, that Linyi Chengen's dumping margin was 0%. See *Linyi Chengen III*, 44 CIT at \_\_, 487 F. Supp. 3d at 1356; Final Results of Redetermination Pursuant to Court Remand at 3, ECF

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

Nos. 113–1, 114–1. Commerce explained that assigning Linyi Chengen’s 0% rate as the all-others separate rate would not be reasonably reflective of the potential or actual dumping margins of the separate rate respondents—referring to the theoretical dumping margin of each of the separate rate respondents if they had been individually investigated. *See Linyi Chengen III*, 44 CIT at \_\_, 487 F. Supp. 3d at 1357. Commerce determined the all-others separate rate of 57.36% on second remand by applying a simple average of Bayley’s 114.72% Adverse Facts Available (“AFA”) China-wide entity rate and Linyi Chengen’s 0% rate. *Id.* at \_\_, 487 F. Supp. 3d at 1354, 1357. The Court concluded that Commerce did not support with substantial evidence its departure from the expected method and its determination of the all-others separate rate of 57.36%, and remanded for Commerce to reconsider or provide additional evidence. *Id.* at \_\_, 487 F. Supp. 3d at 1358–59.

In calculating the all-others separate rate on third remand, Commerce again departed from the expected method. *Third Remand Determination* at 24. Commerce applied “any reasonable method” and again calculated the all-others separate rate of 57.36% by using the simple average of Linyi Chengen’s 0% with Bayley’s AFA rate of 114.72%. *Id.* at 24–25.

## JURISDICTION AND STANDARD OF REVIEW

The U.S. Court of International Trade has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c). The Court shall hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court’s remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT \_\_, \_\_, 992 F. Supp. 2d 1285, 1290 (2014), *aff’d*, 802 F.3d 1339 (Fed. Cir. 2015).

## DISCUSSION

### I. Legal Framework

Commerce is authorized by statute to calculate and impose a dumping margin on imported subject merchandise after determining it is sold in the United States at less than fair value. 19 U.S.C. § 1673. The statute authorizes Commerce to determine an estimated weighted average dumping margin for each individually examined exporter and producer and one all-others rate for non-examined companies. *Id.* § 1673d(c)(1)(B). The U.S. Court of Appeals for the Federal Circuit has upheld Commerce’s reliance on the method for determining the

estimated all-others rate in § 1673d(c)(5) “in determining the separate rate for exporters and producers from nonmarket economies that demonstrate their independence from the government but that are not individually investigated.” *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1011 (Fed. Cir. 2017) (citation omitted).

The general rule under the statute for calculating the all-others rate is to weight-average the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely on the basis of facts available, including adverse facts available. 19 U.S.C. § 1673d(c)(5)(A). If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis, or are determined entirely under 19 U.S.C. § 1677e, Commerce may invoke an exception to the general rule. *Id.* § 1673d(c)(5)(B). The Statement of Administrative Action provides guidance that when the dumping margins for all individually examined respondents are determined entirely on the basis of the facts available or are zero or de minimis, the “expected method” of determining the all-others rate is to weight-average the zero and de minimis margins and margins determined pursuant to the facts available, provided that volume data is available. Uruguay Round Agreements Act, Statement of Administrative Action (“SAA”), H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201.

Commerce may depart from the “expected method” and use “any reasonable method” if Commerce reasonably concludes that the expected method is not feasible or results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers. *See* 19 U.S.C. § 1673d(c)(5)(B); *Navneet Publ’ns (India) Ltd. v. United States*, 38 CIT \_\_, \_\_, 999 F. Supp. 2d 1354, 1358 (2014) (“[T]he following hierarchy [is applied] when calculating all-others rates—(1) the ‘[g]eneral rule’ set forth in § 1673d(c)(5)(A), (2) the alternative ‘expected method’ under § 1673d(c)(5)(B), and (3) any other reasonable method when the ‘expected method’ is not feasible or does not reasonably reflect potential dumping margins.”); *see also* SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201; *Albemarle Corp.*, 821 F.3d at 1351–52 (quoting SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201). Commerce must determine that the expected method is not feasible or would not be reasonably reflective of the potential dumping margins for non-investigated exporters or producers based on substantial evidence. *Albemarle Corp.*, 821 F.3d at 1352–53; *see also* *Changzhou Hawd Flooring*, 848 F.3d at 1012.

## II. The All-Others Separate Rate is Unsupported by Substantial Evidence

### A. Commerce's Departure from the Expected Method

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

On third remand, Commerce determined that departure from the expected method of calculating the all-others separate rate was warranted because Linyi Chengen's 0% rate would not be reflective of the potential dumping margins of the Separate Rate Plaintiffs. *Third Remand Determination* at 13. First, Commerce compared the two price quotes from a Chinese exporter in the Petition to the commercial invoice in that same Chinese exporter's separate rate application ("Petition Separate Rate Application") and determined that the price on the commercial invoice was "almost identical" to one of the price quotes in the Petition. *Id.* at 18. Commerce inferred that the dumping margin range in the Petition was "supported by actual prices at which plywood was sold by a cooperating separate rate respondent in [the] investigation during the [period of investigation]" and was representative of the dumping selling behavior of the separate rate respondents during the period of review. *Id.* at 17–18. Commerce noted that Linyi Chengen sold the same product for almost 20% higher than the price quoted in the Petition. *Id.* at 18–19.

Commerce also explained that Linyi Chengen exported merchandise produced by its affiliated producer and none of the Separate Rate Plaintiffs shared Linyi Chengen's selling and cost structure. *Id.* at 19. Of the forty Separate Rate Plaintiffs, fifteen companies export merchandise that is self-produced and twenty-five companies resell merchandise that is purchased from unaffiliated producers. *Id.* at 19–20. Commerce explained that the twenty-five resellers had different cost structures and exporter-to-producer combinations than Linyi Chengen and there were "too many possible, unknown variables . . . to definitively state the extent of the operational differences" between those twenty-five companies and Linyi Chengen. *Id.*

In addition, Commerce analyzed commercial invoices from each of the separate rate applications submitted by the Separate Rate Plaintiffs. *Id.* at 21. Based on the data provided in the separate rate applications, Commerce noted that half of the Separate Rate Plain-

tiffs “sold plywood at prices lower than [Linyi] Chengen’s average price, [eighteen] of which also identified the [same] species of plywood as [Linyi Chengen].” *Id.* at 23–24. Commerce concluded that “these fact patterns indicate[d] that the likelihood of these sales being made at dumped prices is significantly greater than at the price at which [Linyi] Chengen sold its product . . . during the [period of investigation].” *Id.* at 24. Commerce determined that based on the record, “the selling activities, in both prices and products, of the Separate Rate Plaintiffs [were] dissimilar to [Linyi] Chengen’s” and indicated that Linyi Chengen’s 0% dumping margin was not “necessarily representative of the estimated weighted-average dumping margin that would apply to the Separate Rate Plaintiffs.” *Id.*

Commerce supported its determination that Linyi Chengen’s dumping margin would not be reasonably reflective of the Separate Rate Plaintiffs’ potential dumping margins by analyzing economic evidence on the record showing differences between Linyi Chengen’s and the Separate Rate Plaintiffs’ selling and cost structure and pricing during the period of investigation. While the Court notes that Commerce acknowledged the sparse record, the Court concludes that Commerce has reasonably supported its determination to depart from the expected method because the Separate Rate Plaintiffs’ potential dumping margins would not be represented by Linyi Chengen’s 0% dumping margin in light of evidence reviewed by Commerce, including the comparability of a Petition price quote to a price from the Petition Separate Rate Application, differences between Linyi Chengen’s and the Separate Rate Plaintiffs’ pricing and cost structures, and commercial invoices showing disparities between the Separate Rate Plaintiffs’ and Linyi Chengen’s selling activities. Thus, the Court sustains Commerce’s departure from the expected method.

### **B. Commerce’s Application of “Any Reasonable Method”**

After determining that departure from the expected method was appropriate, Commerce used “any reasonable method” under 19 U.S.C. § 1673d(c)(5)(B) to calculate the all-others separate rate of 57.36% by applying the simple average of Linyi Chengen’s 0% rate with Bayley’s 114.72% AFA rate. *Id.* at 25.

The Separate Rate Plaintiffs challenge Commerce’s determination on numerous grounds, including Commerce’s use of the estimated dumping margin from the Petition as highly speculative and not based on any company’s actual data. Dehua TB Cmts. at 4–5; Taraca Cmts. at 15–19 (incorporating by reference the Celtic Comments and the Dehua TB Comments); Celtic Cmts. at 3–4. The Separate Rate Plaintiffs assert that the price on a single commercial invoice in-

cluded in the Petition Separate Rate Application has “no rational bearing” on the representativeness of the Petition margin. Celtic Cmts. at 3–4; *see also* Dehua TB Cmts. at 4–5; Taraca Cmts. at 15–19. The Separate Rate Plaintiffs also dispute Commerce’s comparison of Linyi Chengen’s pricing data to the Petition Separate Rate Application’s single commercial invoice price and the other Separate Rate Plaintiffs’ single commercial invoice prices. Celtic Cmts. at 4; *see also* Dehua TB Cmts. at 4–6; Taraca Cmts. at 18–19. The Separate Rate Plaintiffs argue that the evidence of a single commercial invoice price does not support the application of a dumping margin of 57.36% to the Separate Rate Plaintiffs. Celtic Cmts. at 4; Dehua TB Cmts. at 4–6; Taraca Cmts. at 15. The Separate Rate Plaintiffs assert that the presence of a single sale with a lower price than Linyi Chengen’s lowest sales price does not indicate that the company would be dumping overall, much less at a rate of 57.36%. Celtic Cmts. at 5; Dehua TB Cmts. at 4–6; Taraca Cmts. at 18–19. Defendant-Intervenor avers that Commerce’s calculation was reasonable and supported by substantial evidence. *See* Def.-Interv.’s Cmts. at 8. Defendant defends Commerce’s determination as supported by substantial evidence and urges the Court to sustain Commerce’s “any reasonable method” used in the *Third Remand Determination*. *See* Def.’s Resp. at 9–23.

One substantiated and calculated basis, Linyi Chengen’s dumping margin, was available on the record for Commerce’s consideration for its all-others separate rate remand determination because Commerce selected only two mandatory respondents, which resulted in the 0% rate for Linyi Chengen and an AFA China-wide entity rate of 114.72%. *Third Remand Determination* at 13. As discussed above, Commerce explained and the Court sustains Commerce’s determination that Linyi Chengen’s 0% rate would not be representative of the separate rate respondents’ actual dumping margins.

Commerce noted the lack of information on the record from which to calculate the actual dumping margins for the Separate Rate Plaintiffs. *Id.* at 17. Commerce determined that the estimated dumping margins in the Petition were representative of the selling behavior of the separate rate respondents. *Id.* Commerce cited one commercial invoice from the Petition Separate Rate Application as record evidence showing a single sale of products similar to products sold by Linyi Chengen, noting that the price of the single sale was “almost identical” to one of the price quotes used to determine the estimated dumping margins in the Petition. *Id.* at 18. While recognizing the lack of “necessary information to determine the transaction-specific dumping margin of this particular sale,” Commerce found “it reasonable to infer . . . that this sale would have had a transaction-specific dumping

margin in the range of the Petition rates.” *Id.* at 17–18. Commerce explained that Linyi Chengen sold the same products at prices almost 20% higher than the price shown on the invoice from the Petition Separate Rate Application, and inferred that “the likelihood of the products sold by the Petition [Separate Rate Application] Exporter being made at dumped prices is significantly greater than at the price sold by [Linyi] Chengen during the [period of investigation].” *Id.* at 18–19. Commerce concluded, based on its review of the commercial invoice, that the approximately 20% difference between the prices of the Petition Separate Rate Application and Linyi Chengen supported Commerce’s application of a 57.36% rate to the Separate Rate Plaintiffs. *Id.* at 18–19, 25.

Commerce must support with substantial evidence its application of a 57.36% all-others separate rate. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). The Court notes Commerce’s acknowledgment that the record provides no opportunity for Commerce to know or to calculate the actual dumping margins of the Separate Rate Plaintiffs. *See Third Remand Determination* at 16. Nonetheless, Commerce is still required to assign dumping margins as accurately as possible. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Commerce created its own problems when it selected only two mandatory respondents, which resulted in sparse information on the record to support its assertions regarding the potential dumping margins of the separate rate respondents. *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1376–79 (Fed. Cir. 2013) (citing *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 35 CIT 948, 955 n.4 (2011) (“Commerce put itself in a precarious situation when it selected only two mandatory respondents.”)). Because Commerce cited as record evidence only one commercial invoice showing an approximately 20% price difference, the Court concludes that Commerce’s 57.36% separate rate assigned to the voluntary, cooperating Separate Rate Plaintiffs is not reasonable and is unsupported by substantial evidence.

## CONCLUSION

For the foregoing reasons, the Court remands Commerce’s *Third Remand Determination*.

Accordingly, it is hereby

**ORDERED** that the *Third Remand Determination* is remanded for Commerce to reconsider the all-others separate rate consistent with this opinion; and it is further

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

- (1) Commerce shall file the fourth remand determination on or before October 27, 2021;
- (2) Commerce shall file the administrative record on or before November 10, 2021;
- (3) Comments in opposition to the fourth remand determination shall be filed on or before December 15, 2021;
- (4) Comments in support of the fourth remand determination shall be filed on or before January 19, 2022; and
- (5) The joint appendix shall be filed on or before February 2, 2022.

Dated: September 24, 2021  
New York, New York

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

Slip Op. 21–128

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

Before: Jennifer Choe-Groves, Judge  
Consol. Court No. 18–00079

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

Dated: September 24, 2021

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

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

*Ashley Akers*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Ayat Mujais*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

## OPINION AND ORDER

### Choe-Groves, Judge:

This action arises from the administrative review by the U.S. Department of Commerce (“Commerce”) of certain passenger vehicle and light truck tires from the People’s Republic of China (“China”). *Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China (“Final Results”)*, 83 Fed. Reg. 11,690 (Dep’t of Commerce Mar. 16, 2018) (final results of antidumping duty admin. review and final determination of no shipments; 2015–2016); *see also* *Certain Passenger Vehicle and Light Truck Tires from People’s Republic of China: Issues and Decision Mem. Final Results 2015–2016 Antidumping Duty Admin. Review*, ECF No. 15–5 (“Final IDM”); *Decision Mem. Prelim. Results Antidumping Duty Admin. Review: Certain Passenger Vehicle and Light Truck Tires from People’s Republic of China* (Aug. 31, 2017), PR 420.<sup>1</sup>

Before the Court are the *Final Results of Redetermination Pursuant to Court Order*, ECF No. 21–1 (“*Second Remand Results*”), which the Court ordered in *Shandong Yongtai Group Co. v. United States (“Shandong Yongtai I”)*, 44 CIT \_\_, 487 F. Supp. 3d 1335 (2020). After the Court issued *Shandong Yongtai II*, the Court severed the lead case, *Shandong Yongtai Group Co. v. United States*, (formerly consolidated) Court No. 18–00077, from the consolidated action and reconsolidated the member cases with *Qingdao Sentury Co., Ltd. v. United States*, Consol. Court No. 18–00079, as the new lead case. *Shandong Yongtai Group Co. v. United States (“Shandong Severance”)*, 45 CIT \_\_, \_\_, 493 F. Supp. 3d 1342, 1345 (2021).

Plaintiffs Qingdao Sentury Tire Co., Sentury (Hong Kong) Trading Co., and Sentury Tire USA Inc. (collectively, “Sentury”) filed comments in support of the *Second Remand Results*. Sentury’s Comments Supp. Second Remand Results, ECF No. 24 (“Sentury’s Cmts.”). Consolidated Plaintiffs Pirelli Tyre Co., Pirelli Tire LLC, and Pirelli Tyre S.p.A. (collectively, “Pirelli”) filed comments on the *Second Remand Results*. Comments Consol. Pls. Pirelli Tyre Commerce’s Second Redetermination on Remand, ECF No. 23 (“Pirelli’s Cmts.”). Defendant United States (“Defendant”) filed a response to all comments on the *Second Remand Results*. Def.’s Resp. Comments Remand Redetermination, ECF No. 25 (“Def.’s Cmts.”).

For the following reasons, the Court remands in part and sustains in part the *Second Remand Results*.

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<sup>1</sup> Citations to the administrative record reflect the public record (“PR”) document numbers filed in the Joint Appendix (Public Version), ECF No. 48, in *Shandong Yongtai Group Co. v. United States*, (formerly consolidated) Court No. 18–00077.

## ISSUES PRESENTED

This case presents the following issues:

1. Whether Commerce's denial of Pirelli's separate rate status for the period of review from January 27, 2015 to October 19, 2015 is supported by substantial evidence; and
2. Whether Commerce's revised dumping margin assigned to Sentury is in accordance with the law.

## BACKGROUND

The Court assumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the Court's review of the *Second Remand Results*. See *Shandong Yongtai II*, 44 CIT at \_\_, 487 F. Supp. 3d at 1340–47; *Shandong Yongtai Grp. Co. v. United States*, (“*Shandong Yongtai I*”), 43 CIT \_\_, \_\_, 415 F. Supp. 3d 1303, 1306–07, 1312–18 (2019); see also *Shandong Severance*, 45 CIT at \_\_, 493 F. Supp. 3d at 1342.

Pirelli applied for separate rate status in this administrative review, but Commerce determined that Pirelli did not qualify for separate rate status because of de facto Chinese government control through Chem China's ownership of Pirelli. *Shandong Yongtai I*, 43 CIT at \_\_, 415 F. Supp. 3d at 1316; see also Final IDM at 28; [Pirelli's Separate Rate Application (Nov. 17, 2016) (“Pirelli's SRA”), PR 192–193. Commerce also denied Pirelli separate rate status for the segment of the period of review before Chem China's acquisition of Pirelli in October 2015 because Commerce asserted that Pirelli had not provided complete ownership information as to Pirelli's intermediate and ultimate owners from January through October 2015. *Shandong Yongtai I*, 43 CIT at \_\_, 415 F. Supp. 3d at 1317–18; see also Final IDM at 28. Commerce determined that Pirelli's separate rate status claim for the period of time before Chem China's acquisition was not supported by the record. *Shandong Yongtai I*, 43 CIT at \_\_, 415 F. Supp. 3d at 1318; see also Final IDM at 28. Thus, Commerce assigned Pirelli the China-wide entity rate for the entire period of review. *Shandong Yongtai I*, 43 CIT at \_\_, 415 F. Supp. 3d at 1318.

The Court remanded Commerce's denial of Pirelli's separate rate status for Commerce to reconsider the criteria for de jure and de facto governmental control. *Id.* at \_\_, 415 F. Supp. 3d at 1317. The Court did not reach the issue of Pirelli's request for separate rate status for the period before Chem China's acquisition. *Id.* at \_\_, 415 F. Supp. 3d at 1318.

In the *Final Results of Redetermination Pursuant to Remand, Shandong Yongtai Group Co. v. United States*, (formerly consolidated) Court No. 18–00077 (“Shandong Docket”), ECF Nos. 71, 72, Commerce maintained its determination of de facto Chinese government control and denied separate rate status to Pirelli. See *Shandong Yongtai II*, 44 CIT at \_\_, 487 F. Supp. 3d at 1344–45. Commerce examined the record and noted that Chinese government-owned entities had majority ownership of Pirelli. *Id.* at \_\_, 487 F. Supp. 3d at 1345. Commerce determined that Pirelli failed to satisfy the third criterion of the de facto test, whether the respondent has autonomy from the government in making decisions regarding the selection of management. *Id.* at \_\_, 487 F. Supp. 3d at 1345–46. The Court sustained Commerce’s determination denying separate rate status to Pirelli. *Id.* at \_\_, 487 F. Supp. 3d at 1346. On second remand, Commerce did not address Pirelli’s separate rate status before Chem China’s acquisition, nor did Pirelli comment on Commerce’s draft remand results. *Second Remand Results* at 2–3.

Commerce selected Sentury for individual examination as a mandatory respondent. See *Final IDM App. I* at 1. As to Sentury’s export price, Commerce reduced Sentury’s export price through a two-step methodology that first determined the irrecoverable value-added tax (“VAT”) on subject merchandise and then reduced the export price by the VAT determined. *Shandong Yongtai I*, 43 CIT at \_\_, 415 F. Supp. 3d at 1313. The Court remanded the *Final Results* for Commerce to explain how irrecoverable VAT was properly the subject of a downward adjustment to Sentury’s export price and for Commerce to explain the methodology for calculating irrecoverable VAT under 19 U.S.C. § 1677a(c)(2)(B). *Id.* at \_\_, 415 F. Supp. 3d at 1314.

Commerce used the same methodology on remand and explained that Sentury’s irrecoverable VAT was an “other charge imposed” by China pursuant to 19 U.S.C. § 1677a(c)(2)(B). *Shandong Yongtai II*, 44 CIT at \_\_, 487 F. Supp. 3d at 1340. The Court held that because the statutory language in 19 U.S.C. § 1677a(c)(2)(B) did not cover the type of internal domestic tax that Commerce alleged was irrecoverable VAT, Commerce’s downward adjustment to Sentury’s export price was not in accordance with the law and Commerce’s irrecoverable VAT calculation was not supported by substantial evidence. *Id.* at \_\_, 487 F. Supp. 3d at 1343–44. The Court remanded for Commerce to eliminate the adjustments made for Sentury’s irrecoverable VAT and to recalculate Sentury’s export price. *Id.* On second remand, Commerce recalculated Sentury’s export price and excluded any

downward adjustment for irrecoverable VAT. *Second Remand Results* at 4, 8. Commerce assigned a dumping margin of 1.27% for Sentury and the all-others separate rate of 1.45% for separate rate respondents. *Id.* at 8.

## JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). The Court 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). The Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT \_\_, \_\_, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

## DISCUSSION

### I. Commerce's Denial of Pirelli's Separate Rate Status for a Partial Period of Review

The period of review in this case is from January 27, 2015 to July 31, 2016. Final IDM at 1. Pirelli acknowledges that the Court previously sustained Commerce's determination to deny Pirelli separate rate status for the portion of the period of review following Chem China's acquisition of Pirelli on October 20, 2015, but requests that the Court rule on Pirelli's alternate claim of partial separate rate status for the first ten months of the period of review prior to Chem China's acquisition of Pirelli. Pirelli's Cmts. at 7–8. Defendant urges the Court to disregard Pirelli's argument as having “no bearing on the issues addressed on remand” and as “irrelevant at this juncture” because the Court has already sustained Commerce's determination to deny separate rate status to Pirelli. Def.'s Cmts. at 5.

Commerce denied Pirelli separate rate status and determined that it was a China-wide entity for the first ten months of the period of review because Pirelli purportedly did not provide complete ownership information for the period of review prior to October 20, 2015. Final IDM at 28. Commerce determined that Pirelli's claim that its ownership structure prior to October 2015 was the same as its ownership structure during the underlying investigation (when Commerce granted it separate rate status) was not supported by the instant record. *Id.* Commerce stated that the separate rate application instructs applicants to provide complete information on intermediate and ultimate ownership during the period of review, and that a “mere reference to the complete ownership information which served

as the basis for granting [Pirelli] a separate rate” prior to this proceeding was not a sufficient basis for Commerce to determine that Pirelli should receive a separate rate for this proceeding. *Id.* Pirelli argues, to the contrary, that it did provide documentation of corporate ownership prior to its acquisition by Chem China, including a Sales and Purchase and Co-investment Agreement showing that Pirelli was an Italian company prior to the Chem China acquisition in October 2015. [Pirelli] Mot. J. Agency R. at 50, Shandong Docket, ECF Nos. 23, 24 (“Pirelli’s 56.2 Mot.”); *see also* Pirelli’s SRA at 50–51, Attach. G(1).

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

This case presents an unusual situation—Pirelli argues that it submitted documentation to Commerce showing that during the first ten months of the period of review from January 2015 to October 19, 2015, Pirelli was an Italian company organized and existing in Italy, a market economy, with its registered offices in Milan and listing on the Italian stock exchange. Pirelli’s 56.2 Mot. at 32–33. Pirelli asserts that the record shows: (1) the Sales and Purchase and Co-investment Agreement reflects that Pirelli was an “Italian publicly listed company prior to Chem China’s acquisition;” (2) Chem China’s acquisition of Pirelli was finalized on October 20, 2015; and (3) Pirelli was “delisted from the Italian stock exchange as part of re-structuring following Chem China’s acquisition on November 6, 2015.” *Id.* at 50; *see also* Pirelli’s SRA Attachs. G(1)–(3). Pirelli argues that evidence from the record shows that Pirelli was not a China-wide entity under government control of an NME because it was a publicly listed Italian company with no Chinese ownership until Chem China’s acquisition on October 20, 2015. Pirelli’s 56.2 Mot. at 51.

In response, Defendant defended Commerce’s denial of separate rate status to Pirelli for the period of review from January 27, 2015 to October 19, 2015, averring that under the rebuttable presumption of governmental control, Pirelli had the burden of demonstrating that it

was de jure and de facto independent from the Chinese government during the period of review from January 27, 2015 to October 19, 2015. Def.'s Mem. Opp'n Pls.' Rule 56.2 Mots. J. Agency R. at 49–50, Shandong Docket, ECF Nos. 37, 38. The Court disagrees.

According to Commerce's stated practice, "if Commerce determines that a company is wholly foreign-owned or located in a market economy, then a separate rate analysis is not necessary to determine whether it is independent from government control." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT 1085, 1091 n.23, 925 F. Supp. 2d 1315, 1320 n.23 (2013) (brackets and internal quotation marks omitted) (quoting *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 76 Fed. Reg. 8338, 8340 (Dep't of Commerce Feb. 14, 2011) (prelim. results and prelim. partial rescission of fifth antidumping duty admin. review) (unchanged in the final results)), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015). In Commerce's practice, "a full separate-rate analysis is generally considered unnecessary for wholly foreign-owned companies." *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 38 CIT \_\_, \_\_, 28 F. Supp. 3d 1317, 1344 n.128 (2014) (citing *Petroleum Wax Candles from the People's Republic of China*, 72 Fed. Reg. 52,355, 52,356 & n.3 (Dep't of Commerce Sept. 13, 2007) (final results of antidumping duty admin. review)).

In this case, it appears that Commerce neglected to follow its own practice to first determine whether Pirelli was wholly foreign-owned or located in a market economy during the first ten months of the period of review. Commerce set forth its position with respect to Pirelli by stating, "[w]e continue to find that [Pirelli] does not qualify for a separate rate for these final results. In proceedings involving NME countries, Commerce maintains a rebuttable presumption that all companies within the country are subject to government control . . . ." Final IDM at 27. The Court finds that it was unreasonable for Commerce to not inquire first whether Pirelli was a wholly-owned Italian company located in a market economy (Italy) during the first ten months of the period of review. If Pirelli was a wholly-owned Italian company and located in Italy prior to Chem China's acquisition, according to Commerce's own practice, it would be unreasonable for Commerce to subject Pirelli to a full separate rate analysis to prove its independence from Chinese government control prior to Chem China's acquisition. The Court holds that it was unreasonable for Commerce: 1) to not follow its practice and determine first whether Pirelli was wholly foreign-owned or located in a market economy prior to the Chem China acquisition; and 2) to apply a presumption that Pirelli was a Chinese government-controlled company in an NME country for the period from January 2015 to October

2015 without considering first whether a separate rate analysis was necessary, especially in light of record evidence, including the Sales and Purchase and Co-investment Agreement, suggesting that Pirelli was a wholly owned Italian company located in Italy. The Court concludes that Commerce's denial of separate rate status to Pirelli during the period of review from January 2015 to October 2015 was unreasonable and not supported by substantial evidence.

Therefore, the Court remands for Commerce to determine whether Pirelli was wholly foreign-owned or located in a market economy prior to the Chem China acquisition; whether a separate rate analysis should be conducted for the period from January 2015 to October 2015; whether the presumption of Chinese governmental control applies to Pirelli prior to Chem China's acquisition; and if so, whether there was de jure or de facto Chinese governmental control over Pirelli before Chem China's acquisition. The Court reiterates that its prior holding still stands that Commerce's determination that Pirelli was a China-wide entity for the period from October 20, 2015 to July 31, 2016 is supported by substantial evidence and is sustained.

## **II. Commerce's Revised Dumping Margin Assigned to Sentury**

Commerce removed the downward adjustment to Sentury's export price and revised the dumping margin for Sentury and the all-others separate rate under respectful protest on second remand. *Second Remand Results* at 4. Sentury and Defendant ask the Court to sustain the *Second Remand Results*. Sentury's Cmts. at 1–2; Def.'s Cmts. at 4–5.

When calculating export price or constructed export price of the subject merchandise, Commerce is directed by statute to make certain additions to, and deductions from, the starting prices used for determining the export price or constructed export price of the subject merchandise. 19 U.S.C. § 1677a(c), (d). Downward tax-related adjustments to the export price are made to increase a dumping margin and to account for an export tax, duty, or other charge imposed on the exportation of the subject merchandise to the United States. *Id.* § 1677a(c)(2)(B).

Commerce previously applied a downward adjustment to Sentury's export price for "irrecoverable VAT," which the Court held was not in accordance with the law and remanded for Commerce to remove the adjustment and recalculate the dumping margin. *Shandong Yongtai II*, 44 CIT at \_\_, 487 F. Supp. 3d at 1344. Commerce's removal, under protest, of the downward adjustment for irrecoverable VAT on second remand is consistent with the Court's prior opinion and in accordance with the law. The Court notes that neither Sentury nor Defendant

oppose this determination or Commerce's recalculation of Sentury's dumping margin and the separate rate for separate rate respondents. The Court sustains Commerce's removal under protest of the downward adjustment to Sentury's export price, the revised dumping margin for Sentury, and the revised all-others separate rate.

### CONCLUSION

The Court remands the issue of Pirelli's separate rate status during the period of review from January 2015 to October 2015. The Court sustains Commerce's removal, under protest, of the downward adjustment to Sentury's export price, the revised dumping margin of 1.27% for Sentury, and the revised all-others separate rate of 1.45%.

Accordingly, it is hereby

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

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

- (1) Commerce shall file the third remand results on or before November 19, 2021;
- (2) Commerce shall file the administrative record on or before December 3, 2021;
- (3) Comments in opposition to the third remand results shall be filed on or before January 14, 2022;
- (4) Comments in support of the third remand results shall be filed on or before February 11, 2022; and
- (5) The joint appendix shall be filed on or before February 25, 2022.

Dated: September 24, 2021  
New York, New York

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

## Slip Op. 21–130

M S INTERNATIONAL, INC., Plaintiff, and FOSHAN YIXIN STONE COMPANY LIMITED, Consolidated Plaintiff, and ARIZONA TILE LLC, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and CAMBRIA COMPANY LLC, Defendant-Intervenor.

Before: Leo M. Gordon, Judge  
Consol. Court No. 19–00140

[Commerce’s *Final Determination* is sustained.]

Dated: September 24, 2021

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## OPINION

**Gordon, Judge:**

This action involves the U.S. Department of Commerce’s (“Commerce”) final determination in its antidumping (“AD”) investigation of certain quartz surface products (“QSPs”) from the People’s Republic of China. *See Quartz Surface Products from the People’s Republic of China*, 84 Fed. Reg. 23,767 (Dep’t of Commerce May 23, 2019) (“*Final Determination*”), and the accompanying Issues and Decision Memorandum, A-570–084 (Dep’t of Commerce May 14, 2019), ECF No. 37–4 (“*Decision Memorandum*”).

Before the court is the motion for judgment on the agency record under USCIT Rule 56.2 filed by Consolidated Plaintiff Foshan Yixin Stone Company, Ltd. (“Plaintiff” or “Yixin”). *See* Pl.’s Mem. in Supp. Mot. J. Agency R., ECF No. 49<sup>1</sup> (“Yixin Br.”); *see also* Def.’s Resp. to Pl.’s Rule 56.2 Mot. for J. Agency R., ECF No. 81 (“Def.’s Resp.”); Def.-Intervenor Cambria Co.’s Resp. to Pls.’ Rule 56.2 Mot. for J. Agency R., ECF No. 82 (“Def.-Intervenor’s Resp.”); Pl.’s Reply Br., ECF No. 84 (“Yixin Reply”). The court has jurisdiction pursuant to

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<sup>1</sup> All citations to parties’ briefs and the agency record are to their confidential versions unless otherwise noted.

Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2018),<sup>2</sup> and 28 U.S.C. § 1581(c) (2018).

To facilitate the efficient disposition of this action, this opinion focuses only on the respondent-specific challenges raised by Foshan Yixin. See Scheduling Order at 1, ECF No. 71 (directing separate briefing schedule for issues raised by Foshan Yixin); see also Order, ECF No. 72 (staying all briefing in action except for that relating to Foshan Yixin’s motion for judgment on agency record). For the reasons set forth below, the court sustains Commerce’s *Final Determination*.

### I. Standard of Review

The court sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966). Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2021). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the whole record.” 8A *West’s Fed. Forms*, National Courts § 3.6 (5th ed. 2021).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce’s interpretation of the anti-

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

dumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce’s “interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.”).

## II. Background

### A. Legal Framework

In an AD duty investigation, Commerce determines whether subject merchandise is being, or is likely to be, sold at less than fair value in the United States by comparing the export price and the normal value of the merchandise. *See* 19 U.S.C. §§ 1675(a)(2)(A), 1677b(a). In the non-market economy (“NME”) context, Commerce calculates normal value using data from surrogate market economy countries to value the factors of production (“FOPs”). *See* 19 U.S.C. § 1677b(c)(1)(B). Commerce must use the “best available information” in selecting surrogate data from “one or more” surrogate countries. *See* 19 U.S.C. § 1677b(c)(1)(B), (c)(4). Commerce has a stated regulatory preference to “normally ... value all factors in a single surrogate country.” *See* 19 C.F.R. § 351.408(c)(2).

The antidumping statute requires that surrogate data must “to the extent possible” be from a market economy country or countries that are (1) “at a level of economic development comparable to that of the [NME] country” and (2) “significant producers of comparable merchandise.” 19 U.S.C. § 1677b(c)(4). The statute does not define the phrase “level of economic development comparable to that of the [NME] country,” nor does it require Commerce to use any particular methodology in determining whether that criterion is satisfied. Commerce has developed a four-step method to select a surrogate country:

- (1) the Office of Policy (“OP”) assembles a list of potential surrogate countries that are at a comparable level of economic development to the NME 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.

*Vinh Hoan Corp. v. United States*, 39 CIT \_\_\_, \_\_\_, 49 F. Supp. 3d 1285, 1292 (2015) (quoting Import Admin., U.S. Dep’t of Commerce, Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 at 2 (2004), <http://enforcement.trade.gov/policy/bull04-1.html> (“Policy Bulletin 04.1”)).

## B. Procedural History & Determinations Specific to Yixin Stone

Consistent with 19 U.S.C. § 1677b(c)(4) and Policy Bulletin 04.1, Commerce compiled a list of market economy countries at a level of economic development comparable to China. *See Decision Memorandum* at 53 (noting countries on list were Brazil, Kazakhstan, Malaysia, Mexico, Romania, and Russian Federation). The parties submitted complete surrogate data for Mexico, limited surrogate data for Malaysia, and no data for the other countries. *See id.* at 54 (“[W]e found that parties placed complete data for Mexico, and limited data for Malaysia, on the record; and that no party provided complete surrogate value information for the other countries on the list (*i.e.*, for Brazil, Kazakhstan, Romania, or Russia), or argued in favor of using surrogate value information for any other the other countries.”).

In accordance with § 1677b(c)(1)(B), Commerce calculated the weighted-average dumping margin for Yixin by comparing Yixin’s own prices for the merchandise it sold to the United States with the normal value of the merchandise. *See id.* at 45. To calculate the normal value, Commerce used Yixin’s FOPs and the surrogate values (“SVs”) selected from a market economy country at a level of economic development comparable to China. *See id.*

Commerce’s calculation of Yixin’s dumping margin was thus based on three components: (1) Yixin’s U.S. prices; (2) Yixin’s FOPs; and (3) SVs used to value the FOPs. *Id.* at 45. To determine Yixin’s U.S. prices and FOPs, Commerce used Yixin’s own reported data with no adverse inferences. *Id.* To calculate the SVs, Commerce determined that, among the market economy countries at a level of economic development comparable to China, Mexico was a significant producer of identical merchandise, and that both Mexico and Malaysia were significant producers of comparable merchandise. *See id.* at 53. Commerce further determined that the Mexican data were the best available surrogate data for valuing Yixin’s FOPs because there were “complete, specific Mexican [Global Trade Atlas (“GTA”)] data for *each* input used by [Yixin], while [there were] limited Malaysian GTA data on the record ... and the Mexican surrogate financial statements on the record [were] for a company which produces ceramic wall and floor tiles (which are comparable to quartz surface products), while it [was] unclear whether the Malaysian surrogate financial statements [were] for manufacturers or merely finishers/fabricators of stone surface products.” *Id.* at 54. As a result, Commerce found that “Mexico [was] the best choice for surrogate country” because it was “1) at a similar level of economic development to China; 2) a significant producer of both comparable and identical merchandise; and 3) because

Mexico [had] the best data availability.” *Id.* at 55. Commerce emphasized that it has “a regulatory preference ‘to value all factors in a single surrogate country’” and “a practice ‘to only resort to a second surrogate country if data from the primary surrogate country are unavailable or unreliable.’” *Id.* at 66. Consequently, Commerce used Mexican data to value all FOPs and relied on the financial statements of a Mexican tile producer, Grupo Lamosa, to calculate surrogate financial ratios. *See id.* at 74, 85. This resulted in a weighted-average dumping margin for Yixin of 333.09 percent. *Final Determination*, 84 Fed. Reg. 23,769.

Plaintiff raises several challenges to Commerce’s *Final Determination*. Plaintiff argues that its assigned dumping margin is not grounded in commercial or economic reality and is therefore unlawful. *See Yixin Br.* at 3. Plaintiff also contends that Commerce unreasonably selected Mexico as the primary surrogate country, maintaining that Mexico is neither a producer of identical merchandise nor a producer of comparable merchandise, and that Commerce should have instead selected Malaysia as the primary surrogate country. *See id.* at 7. Plaintiff also argues that Commerce unreasonably selected Mexican data to value Plaintiff’s FOPs and Mexican financial statements to calculate surrogate financial ratios. Lastly, Plaintiff contends that—even if it was reasonable for Commerce to use financial statements from Mexico—Commerce should have averaged the financial statements of Grupo Lamosa with the financial statements of Unigel, another Mexican tile producer. *See id.* at 16, 19, 21, 23.

### III. Discussion

#### A. Dumping Margin & Commercial and Economic Reality

Yixin argues that its 333.09% margin is “an absurd, commercially and economically unrealistic figure,” and “the inevitable consequence of the Department’s use of aberrational Surrogate Values (“SVs”) to calculate Yixin’s Cost of Production (“COP”) under U.S. Non-Market Economy (“NME”) antidumping methodology.” *Yixin Br.* at 3–4. Yixin contends that in calculating the margin, Commerce “has not satisfied its legal requirements if it simply ‘conducted its surrogate value determinations in accordance with the relevant legal authorities and supported its determinations with substantial evidence’ because under the law, assigned surrogate values (“SVs”) must still be within ‘limits of permissible approximation.’” *Id.* at 4. Yixin requests that the court instruct Commerce “to reevaluate its selections in order to calculate a margin which is commercially and economically feasible.” *Id.*

Relying on *Baoding Mantong Fine Chemistry v. United States*, 39 CIT \_\_\_, \_\_\_, 113 F. Supp. 3d 1132, 1334 (2015) (“*Baoding I*”), Plaintiff argues that the margin determined by Commerce is unlawful, and thus must be recalculated, as it “[defies] commercial and economic reality.” See Yixin Br. at 3–4 (quoting *Baoding I*, 39 CIT at \_\_\_, 113 F. Supp. 3d at 1334); Yixin Reply at 2 (“*Baoding I* ... established a ‘commercially impossible standard’ for instances where the Department’s calculated antidumping margin is absurdly high ... that the antidumping margin must be understood as unsupported by substantial evidence, and otherwise contrary to law, as a result of the Department not considering adequate information on the record.”). Yixin contends that its margin is “commercially impossible” because it would have had to sell the merchandise at an export price that would have resulted in massive operating losses, and the financial statement Yixin submitted does not show any losses. Yixin Br. at 4–5. Additionally, Yixin points out that nothing in the record supported a finding of “domestic or export subsidies sufficient to offset such enormous losses.” *Id.* at 5. Yixin thus concludes that “[t]he apparent logic of producing an article at significant cost and practically giving it away, as represented by a 333.09 percent margin, defies commercial and economic reality in either a market economy or a non-market economy.” *Id.*

In *Baoding I*, the plaintiff there challenged Commerce’s calculations of SVs that were the basis for the large dumping margin (453.79%) and argued that “[e]ven where Commerce has acted in conformity with its statutory and regulatory obligations, the resulting dumping margin must be examined for its accuracy and fairness.” *Baoding I*, 39 CIT at \_\_\_, 113 F. Supp. 3d at 1336. The court stated that, under 19 U.S.C. § 1675(a)(2)(A), Commerce is required to “determine margins as accurately as possible,” and “to calculate antidumping duties in a way that is fair and equitable.” *Baoding I*, 39 CIT at \_\_\_, 113 F. Supp. 3d at 1334 (citing *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) and *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994)). The court elaborated that Commerce is “no less obligated to determine, fairly and equitably, margins that are remedial and not punitive” when “determining the normal value of subject merchandise according to specialized procedures applicable to goods produced in nonmarket economies.” *Baoding I*, 39 CIT at \_\_\_, 113 F. Supp. 3d at 1337. The court also noted that, “[a]lthough calculating normal value ‘for a producer in a nonmarket economy country is difficult and necessarily imprecise,’ the method used by Commerce still must fall within ‘the limits of permissible approximation.’” *Id.*, 39 CIT at \_\_\_,

113 F. Supp. 3d at 1337–38 (quoting *Sigma Corp. v. United States*, 117 F.3d 1401, 1408 (Fed. Cir. 1997)).

*Baoding I* held that Commerce failed to fulfill its obligation “to determine the most accurate margin possible” when it assigned the plaintiff there a weighted average dumping margin of 453.79% because this margin was “not realistic in any commercial or economic sense and punitive in its effect.” *Id.*, 39 CIT at \_\_\_, 113 F. Supp.3d at 1334. Critically, the court stated that “the record lack[ed] substantial evidence to support a finding that the 453.79% margin ha[d] any relationship to Baoding’s commercial reality, and the record evidence of Baoding’s profitability is contrary to any such finding.” *Id.*, 39 CIT at \_\_\_, 113 F. Supp. 3d at 1339.

In its *Final Determination* here, Commerce “disagree[d] with Yixin Stone that the margin [wa]s unreasonable or inaccurate or that it fail[ed] to reflect commercial reality,” and “disagree[d] that Commerce should recalculate Yixin Stone’s margin.” *Decision Memorandum* at 46–47. Commerce explained that, although Yixin submitted financial statements showing that Yixin made a profit during the period of investigation (“POI”), Commerce disagreed with Yixin’s contention that “its profitability proves that its margin is commercially impossible.” *See id.* at 46 (“We note that profit is a function of not only the revenue a company earns, but also the costs that it incurs. The presence of pervasive governmental controls in NME countries (*e.g.*, related to assets and investments, allocation of resources, etc.) renders the allocation of an NME company’s production costs invalid under Commerce’s normal dumping methodology. While we acknowledge that Yixin Stone’s financial statements do show a profit, we cannot be assured that Yixin Stone would have made a similar profit had it been located in a market economy country.”). In reaching its conclusion, Commerce rejected the applicability of *Baoding I*, relying instead on *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1334 (Fed. Cir. 2016). *See id.*

In the underlying administrative review there, Commerce drew adverse inferences to Nan Ya when selecting among the facts available to calculate Nan Ya’s dumping margin, and “relied upon the highest transaction-specific margin of 74.34% that it calculated for the other mandatory respondent in the review.” *Id.*, 810 F.3d at 1338. Nan Ya did not challenge Commerce’s decision to apply adverse facts; instead, Nan Ya argued that Commerce erred by failing to select an “accurate” adverse facts available rate that reflects “commercial reality.” *Id.*, 810 F.3d at 1341.

The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) rejected Nan Ya’s argument and sustained Commerce’s margin

calculation. *Id.* The court stated that “Congress has provided specific methods for Commerce to employ when it executes its duties, such as in calculating normal value or export price ... or when the agency assigns rates on the basis of adverse facts available,” and that, “[w]hen Congress directs the agency to ... execute its duties in a particular manner, Commerce need not examine the economic or commercial reality of the parties.” *Id.*, 810 F.3d at 1343–44. The court explained that a dumping margin determination “(1) is ‘accurate’ if it is correct as a mathematical and factual matter, thus supported by substantial evidence; and (2) reflects ‘commercial reality’ if it is consistent with the method provided in the statute, thus in accordance with law.” *Id.* at 1344.

Relying on the Federal Circuit’s guidance in *Nan Ya Plastics*, Commerce here concluded that its calculations were proper because they were “(1) in accordance with [its] normal NME practice; 2) factually and mathematically correct; and 3) supported by information on the record and in accordance with the law.” *Decision Memorandum* at 46. Plaintiff maintains that *Nan Ya Plastics* did not invalidate the “commercial impossibility” standard set forth in *Baoding I*. See Yixin Br. at 6 (citing *Baoding Mantong Fine Chemistry v. United States*, 41 CIT \_\_\_, \_\_\_, 222 F. Supp. 3d 1231, 1239 (2017) (“*Baoding II*”)); Yixin Reply at 2. Plaintiff emphasizes that, in *Baoding II*, the court “stated explicitly that the holding in *Nan Ya Plastics* did not ‘invalidate the basis of the court’s order in *Baoding I*.’” Yixin Br. at 6. Specifically, Plaintiff maintains that the Court of International Trade “has explicitly distinguished its ‘commercially impossible standard’ from [the] holding in *Nan Ya Plastics* ... because *Nan Ya Plastics* addresses instances where an antidumping duty margin may or may not be grounded in ‘accuracy or commercial reality,’ whereas *Baoding I* addresses instances where the calculated antidumping duty margins clearly ‘signif[ied] commercial impossibility.’” Yixin Reply at 3 (citing *Baoding II*, 41 CIT at \_\_\_, \_\_\_, 222 F. Supp. 3d at 1239).

The court in *Baoding II* noted that the factual circumstances in that matter significantly differed from those presented in *Nan Ya Plastics*. See *Baoding II*, 41 CIT at \_\_\_, 222 F. Supp. 3d at 1239 (“*Nan Ya Plastics Corp.* upheld an antidumping duty rate of 74.34% as facts otherwise available, and an adverse inference, ... for a respondent that refused to participate in an administrative review of an antidumping duty order. ... This case involves ... an administrative review of an antidumping duty order in which Commerce assigned an individual weighted average dumping margin of 453.79% to a cooperative respondent.”). The *Baoding II* court also concluded that the determination of a 453.79% margin for *Baoding* did not satisfy even the

standard set forth in *Nan Ya Plastics*. See *Baoding II*, 41 CIT at \_\_\_, 222 F. Supp. 3d at 1239 (“even if *Nan Ya Plastics Corp.* were considered to be a holding controlling the outcome of this case (which it is not), the guidance the Court of Appeals provided in its opinion would not support the notion that the court’s order remanding the Final Results is invalid”). The court further noted that “*Nan Ya Plastics Corp.* did not hold that Commerce is free to assign to a cooperative respondent a weighted-average dumping margin that is shown by record evidence—in particular, the evidence that the merchandise in question was not sold at a loss during the [period of review]—to be so enormously high as to be punitive.” *Baoding II*, 41 CIT at \_\_\_, 222 F. Supp. 3d at 1239.

In opposing Yixin’s argument regarding the applicability of the *Baoding* decisions, Defendant and Defendant-Intervenor rely on the recent decision in *TT Int’l Co. v. United States*, 44 CIT \_\_\_, \_\_\_, 439 F. Supp. 3d 1370 (2020) (“*TTI*”), in which the court rejected the idea that *Baoding I* established a separate “commercial impossibility” test. See Def.’s Resp. at 24–25; Def.-Intervenor’s Resp. at 2–4. In *TTI*, the plaintiff challenged the assignment of a 285.73% dumping margin because it “defie[d] commercial and economic reality.” *TTI*, 44 CIT at \_\_\_, 439 F. Supp. 3d at 1385. The court rejected this argument as based on the “mistaken premise that the value of the dumping margin, distinct from the components that constitute the margin, may be challenged.” *Id.* The court noted that “*Baoding I* did not establish a separate, ‘backstop’ test for high margins that could independently require a remand if found by the court to be ‘commercially impossible.’” *Id.* Instead, *TTI* emphasized that the remand in *Baoding I* was not based on the resulting margin alone, but also on the fact that Commerce had erred in its selection of SVs. See *id.* Accordingly, the court in *TTI* rejected a challenge to the allegedly “inaccurate and commercially unrealistic” dumping margin of 285.73%, concluding that plaintiff there had failed to demonstrate that the inputs into Commerce’s margin calculations were unsupported by the record. See *TTI*, 44 CIT at \_\_\_, 439 F. Supp. 3d at 1386.

Yixin’s argument here is analogous to arguments previously rejected by the court in *TTI*. Plaintiff attempts to challenge the result of a dumping margin calculation independently from the components that constitute the margin by framing its challenge as a legal argument based on the *Baoding* decisions. See Yixin Br. at 3–6. Specifically, Plaintiff here maintains that Commerce “has a statutory and legal mandate to ‘calculate margins as accurately as possible’ in a way that is ‘fair and equitable,’” and that Commerce “has not satisfied its

legal requirements” by conducting its determinations “in accordance with the relevant legal authorities” and by supporting them with substantial evidence. *See id.* at 4 (citing *Baoding II*, 41 CIT at \_\_\_, 222 F. Supp. 3d at 1239). Plaintiff further argues that Commerce “must adopt a different approach in calculating the margins ... to remain in accordance with law.” *Id.* at 6. Plaintiff does not cite, however, any statutory provision that Commerce may have violated. Plaintiff does not even cite to the foundational decision in *Chevron*, which provides the framework necessary for the court’s analysis of legal arguments. *See Yixin Br.* at 3–7; *see also Chevron*, 467 U.S. at 842–45.

Here, Plaintiff’s argument that the margin calculated by Commerce independently requires a remand as “an absurd, commercially and economically unrealistic figure” only challenges the *result* of Commerce’s calculations, rather than the reasonableness of the inputs selected by Commerce as a basis for its dumping margin calculations. *See Yixin Br.* at 3–7; *cf. TTI*, 44 CIT at \_\_\_, 439 F. Supp. 3d at 1385. Unfortunately for Plaintiff, “[a]dministrative decisions should be set aside ... only for ... procedural or substantive reasons as mandated by statute, ... not simply because the court is unhappy with the result reached.” *See Nan Ya Plastics*, 810 F.3d at 1334–35 (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council Inc.*, 435 U.S. 519, 588 (1978)). Furthermore, the term “commercial reality” does not appear in the statute, and “the statute, or Commerce’s permissible interpretation of it, provides the backdrop against which [a court] must review the agency’s determination.” *See id.*, 810 F.3d at 1334–35 (citing *Chevron*, 467 U.S. at 842–43); 19 U.S.C. § 1677b (“[T]he administering authority shall determine the normal value of subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise ... the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries ...”). Thus, to prevail on its challenge here, Plaintiff must show that Commerce’s *calculations* are not mathematically or factually correct, or inconsistent with the method provided in the statute. *See Nan Ya Plastics*, 810 F.3d at 1334. Consequently, merely arguing that a margin is “an absurd, commercially and economically unrealistic figure,” is not sufficient to show “that the margin is contrary to law or unsupported by substantial evidence.” *See TTI*, 44 CIT \_\_\_, \_\_\_, 439 F. Supp. 3d at 1385. The court therefore rejects Plaintiff’s legal arguments relying on the *Baoding* decisions.

Although Plaintiff styles its arguments as a legal challenge, the crux of Plaintiff’s challenge appears to be focused on Commerce’s

*application* of 19 U.S.C. § 1677b—the statutory provision governing the method that Commerce must follow in calculating a dumping margin in the NME context. Arguments challenging the agency’s application of statutory provisions require the court to consider factual information on the record and evaluate the agency’s decision against the substantial evidence standard (reasonableness review). See 19 U.S.C. § 1516a(b)(1)(B)(i); see also *TTI*, 44 CIT at \_\_\_, 439 F. Supp. 3d at 1374 n.1 (“Although *TTI* states that it challenges Commerce’s Final Results as contrary to law, the court understands *TTI* to make substantial evidence arguments. Therefore, the court will examine whether the Final Results are supported by substantial evidence and are in conformity with law.” (internal citations omitted)). The court thus turns to Plaintiff’s arguments challenging whether Commerce’s margin calculations were unsupported by substantial evidence, specifically the reasonableness of Commerce’s surrogate country and surrogate value selections.<sup>3</sup>

### B. Surrogate Country Selection

In determining the normal value of the subject merchandise under 19 U.S.C. § 1677b(c)(4), Commerce evaluates the respondent’s FOPs based on the values of those factors “in one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.” 19 U.S.C. § 1677b(c)(4). Here, Commerce found that, among the countries at a level of economic development comparable to China, “Mexico meets the criteria of [§ 1677b(c)(4)] as being 1) at a similar level of economic development to China; 2) a significant producer of both comparable and identical merchandise; and 3) because Mexico has the best data availability,” and thus found that “Mexico is the best choice for surrogate country.” *Decision Memorandum* at 55. Plaintiff does not challenge Commerce’s finding that Mexico is at a level of economic development comparable to China. See *Yixin Br.* at 7 n.1. Rather, Plaintiff questions the reasonableness of Commerce’s finding that Mexico is a significant producer of identical and comparable merchandise, as well as the finding that Mexico has the best available data. *Id.* at 7. Plaintiff argues that Commerce should have instead selected Malaysia as the primary surrogate country “because substantial evidence supports the conclusion that Malaysia, unlike Mexico, is a country with comparable

<sup>3</sup> Notably, in its reply brief, *Yixin* did not even continue to press its arguments that Commerce’s surrogate country and surrogate value selections were unsupported by substantial evidence. See generally *Yixin Reply*. Instead, *Yixin* chose to only reiterate its meritless arguments relating to “commercial impossibility” and the *Baoding* decisions. *Id.*

economic development to China, is a significant producer of identical and comparable merchandise, and the available data yields reliable, i.e., non/aberrational data to construct Yixin’s [costs of production] under the NME methodology.” *Id.*

### 1. Significant Production of Identical Merchandise

Neither the antidumping statute nor its implementing regulations define “significant producer of comparable merchandise,” but Commerce has promulgated Policy Bulletin 04.1, which sets forth how the agency evaluates and defines both the terms “comparable merchandise” and “significant producer.” See *Decision Memorandum* at 55 (citing Policy Bulletin 04.1). Policy Bulletin 04.1 states that “comparable merchandise” is “best determined on a case-by-case basis,” and Commerce further noted that “in all cases, if a country produces identical merchandise, it would also be a producer of comparable merchandise.” *Id.* at 55 n.269 (citing Policy Bulletin 04.1). The Policy Bulletin further provides that “the meaning of ‘significant producer’ can differ significantly from case to case, and that ‘fixed standards’ ... have not been adopted in Commerce’s surrogate country selection process.” *Id.* at 55 (citing Policy Bulletin 04.1). It also states that, in assessing whether a country is a significant producer of comparable merchandise, “Commerce considers whether all of the potential surrogate countries ... have significant exports of comparable merchandise ... and [does] not consider levels of significance in comparison with other countries.” *Id.* (citing Policy Bulletin 04.1).

Applying this policy, Commerce found that Mexico is a significant producer of merchandise identical to the QSPs produced by Yixin—and therefore of comparable merchandise—by relying on information submitted by the petitioner, Cambria Company LLC (“Cambria”), in its Rebuttal Surrogate Country Comments and the accompanying Exhibit 22. See *Decision Memorandum* at 53 (citing Petitioner’s Letter, “Re: Certain Quartz Surface Products from the People’s Republic of China: Comments on Surrogate Country Selection,” at 4–10 & Ex. 22, PR<sup>4</sup> 580–87 (Sept. 10, 2018) (“Petitioner Surrogate Country Comments”)).

Plaintiff challenges Commerce’s finding that Mexico is a significant producer of identical merchandise, contending that “at no point during this investigation” had Cambria ever claimed that Mexico is a significant producer of identical merchandise and that “the first and only statement made on this issue was by the Department in the QSP

<sup>4</sup> “PR \_\_\_” refers to a document contained in the public administrative record, which is found in ECF No. 21–5 unless otherwise noted.

*Final Determination IDM.*” Yixin Br. at 10 (citing *Decision Memorandum* at 53). Plaintiff’s argument is contradicted by the record. In its preliminary determination, Commerce found that “[i]nformation on the record indicates that Mexico is a significant exporter of merchandise covered by HTS categories identified in the scope of this investigation (*i.e.*, identical merchandise)” and that “Mexico’s position as a producer of *identical* merchandise, in conjunction with better data availability for Mexico ... make Mexico the preferred surrogate country.” See *Preliminary Decision Memorandum* at 10–11, PR 872 (emphasis added). Even though it did not explicitly state that Mexico is a significant producer of “identical” merchandise, Cambria, in Exhibit 22, did include data on Mexico’s production of QSP, demonstrating that Mexico produces merchandise identical to that produced by Yixin. See Petitioner Surrogate Country Comments at Ex. 22. Accordingly, the court concludes that there is no merit in Yixin’s challenge on this issue.

Plaintiff next argues that Commerce “did not include any discussion as to whether the production and export of the identical merchandise was sufficient to qualify Mexico as a *significant* producer of identical merchandise.” Yixin Br. at 10. Yixin maintains that Commerce “supported its determination with a general reference to the narrative of Petitioner’s rebuttal surrogate country selection comments ... and accompanying Exhibit 22, which shows negligible imports from Mexico to the United States” of the product in question. See *id.* (referencing Commerce’s *Decision Memorandum* at 53). Plaintiff emphasizes that Exhibit 22 only shows that Mexico exported to the United States around 5,142 square meters of QSP, whereas China exported around 5,615,462 square meters of the same merchandise to the United States. See *id.* (citing Petitioner Surrogate Country Comments at 4–10 and Ex. 22). According to Plaintiff, Commerce “has required in the past that a country produce a ‘commercially viable’ volume of exports to be considered a significant producer,” and argues that “there is no evidence” that the volume of Mexico’s exports is sufficient to reach that threshold. *Id.* at 10–11.

In response to Yixin’s comment that “Mexico is not a significant producer of identical merchandise ... due to its level of exports relative to China,” Commerce stressed that the antidumping statute grants Commerce discretion in identifying a “significant producer,” and that, in accordance with Policy Bulletin 04.1, “Commerce considers whether all of the potential surrogate countries ... have significant exports of comparable merchandise ... and [does] not consider levels of significance in comparison with other countries.” *Decision Memorandum* at 55 (citing Policy Bulletin 04.1). More specifically, Commerce

explained that “[s]o long as a country produces a commercially viable amount of exports, [Commerce] considers them a significant producer.” *Id.* at 56. Commerce concluded that, although “Mexico may not export the same amount of identical merchandise as China,” this alone is insufficient to compel Commerce to revisit its finding that Mexico is a significant producer of QSP. *Id.*

19 U.S.C. § 1677b(c)(1)(4) does not indicate the amount of production necessary to find that a production of identical merchandise is “significant.” Given that, a reasonable mind could find that Mexico’s QSP production of 5,142 square meters is “commercially viable,” considering that the QSP production values on the record range from 3 square meters (Bahamas) to 5,615,462 square meters (China). *See* Petitioner Surrogate Country Comments at Exhibit 22. While Plaintiff decries the relatively low level of QSP production in Mexico as compared to China, Plaintiff fails to explain what threshold amount of production is or should be required to be reasonably considered “significant.” *See* Yixin Br. at 10–11. Plaintiff’s arguments fail to engage with Commerce’s rationale for its surrogate country selection. *See Decision Memorandum* at 54–56 (noting that “[w]hile Mexico may not export the same amount of identical merchandise as China, as stated above, we do not look into levels of comparable significance. So long as a country produces a commercially viable amount of exports, we consider them a significant producer. ... Yixin Stone has not provided a sufficient basis to compel Commerce to revisit the preliminary finding with respect to Mexico’s production of subject merchandise, and we consider Mexico as a significant producer of quartz surface products and comparable products.”). Plaintiff acknowledges that Commerce “has required in the past that a country produce a ‘commercially viable’ volume of exports to be considered a significant producer.” Yixin Br. at 10. Nevertheless, Yixin argues that the record fails to demonstrate that the Mexican volume of QSP exports is commercially viable. *Id.* Yixin’s argument, however, ignores its duty to paper the record to obtain its desired outcome. In that respect, Yixin fails to provide any basis on which the court could conclude that Commerce unreasonably found that Mexican exports of QSPs were at a “commercially viable” threshold. The court therefore concludes that Commerce reasonably found Mexico to be a significant producer of identical merchandise. 2. Significant production of comparable

## **2. Significant production of comparable merchandise**

Commerce used a three-prong comparability test to assess whether ceramic tiles produced in Mexico were “comparable merchandise”

with respect to the subject QSPs. *Decision Memorandum* at 58 (“Although the statute does not define what constitutes ‘comparable merchandise,’ it is Commerce’s practice to, where appropriate, apply a three-prong test that considers the: 1) physical characteristics; 2) end uses; and 3) production processes.”). Commerce found that the physical characteristics, end uses, and production processes of QSP and ceramic tiles were comparable. *Id.* at 58–63. Plaintiff challenges each of these findings. *Yixin Br.* at 11–13.

As to the physical characteristics, Plaintiff maintains that “there are significant differences in thickness and layering” between QSPs and tiles, noting that while “QSP are manufactured as large, thick, monolithic singular slabs ... tiles are far smaller, thinner, and composed of discrete multiple elements that are pieced together.” *Id.* at 11–12. Plaintiff further states that the two products are “predominantly composed of non-comparable and distinct materials” because “QSP is stone-based ... whereas ceramic tiles are generally made from a slurry of clays and other inorganic materials.” *Id.* Plaintiff also notes that Chapter 68 of the Harmonized Tariff Schedule classifies QSP products as “articles of stone,” and Chapter 69 classifies ceramic tiles as “ceramic products.” *Id.* at 12. Commerce rejected Yixin’s proposed distinctions, finding that the physical characteristics of the two products merely need to be “comparable,” not “identical.” *Decision Memorandum* at 59. Commerce further noted that information provided by Cambria indicated that ceramic tiles can be “as large as a standard quartz slab,” and that “quartz is often used in the production of ceramic tile, and that the suppliers of quartz inputs to ceramic tile producers often supply quartz inputs to quartz surface product producers.” *Id.* (citing Petitioner Surrogate Country Comments at Exs. 2–6). Thus, Commerce found based on the record that the physical characteristics of ceramic tiles and QSP are comparable. *Id.*

As to the “end uses,” Plaintiff argues that while the “predominant use for QSP is for counter surfaces in kitchens and bathrooms,” the predominant use for ceramic tiles is “in floor and wall surfaces.” *Yixin Br.* at 12–13. Plaintiff further contends that QSPs are primarily chosen for structural and functional reasons, whereas ceramic tiles are primarily used for decorative purposes. *Id.* Yixin also emphasizes that “neither the Department nor Petitioner have ever claimed that ceramic tile has competitive equivalence to QSP producers or that it could operate as a substitute product.” *Id.* at 13.

Commerce rejected Yixin’s contentions as to the different “end uses” between QSPs and ceramic tile, finding that the uses of QSPs are not limited to the surfaces indicated by Yixin, and that QSPs can be also

used in “flooring, wall facing, shower surrounds, and as tiles.” *Decision Memorandum* at 60. Commerce also noted that “while [QSPs] might be, in some instances, chosen for structural and functional reasons, there is undoubtedly a level of decorative purpose inherent to them—as evidenced by the myriad patterns and designs used by the various manufacturers and the elaborate product brochures created to market the various designs.” *Id.* Thus, Commerce found that the record demonstrated that “ceramic tile has similar end uses to [QSPs].” *Id.*

Lastly, as to the “production process,” Plaintiff argues that “the Department and Petitioner point to only very general and superficial similarities in the production of both QSP and ceramic tile, as both processes involve mixing primary materials with a binder before being formed into shape, as evidence of alleged similarities in the manufacturing process.” Yixin Br. at 13. Yixin maintains that “the record demonstrates that the types of manufacturing equipment used in this process are, in fact, significantly different.” *Id.* Commerce, however, found little merit in Yixin’s proposed distinctions between the production processes for QSPs and ceramic tile. The agency reiterated that production processes merely need to be comparable, not identical, for purposes of Commerce’s comparability analysis. *Decision Memorandum* at 60. Commerce further noted that ceramic tiles share five of the seven production steps used for QSP and that the two production processes use similar machinery. *Id.* at 60–61 (noting that the stages involved in the production of QSP are: (1) mixing; (2) combining; (3) dispensing and molding; (4) pressing; (5) curing; (6) cooling, and (7) polishing, and that ceramic tiles’ production process involves mixing, molding, pressing, curing, and polishing). Thus, Commerce concluded that the record supported a finding that the production processes of ceramic tiles and QSPs are comparable. *Id.* at 61.

Plaintiff’s arguments before the court fail to demonstrate that Commerce’s application of its three-prong comparability analysis yielded unreasonable findings. *See* Yixin Br. at 11–13. While Yixin emphasizes other evidence on the record that may have allowed Commerce to reasonably conclude that QSPs and ceramic tile are not comparable, Yixin fails to demonstrate that its preferred outcome was the one and only reasonable conclusion on the record. *See Goodluck India Ltd. v. United States*, Appeal No. 20–2017, 2021 WL 3870722 at \*7 (Fed. Cir. Aug. 31, 2021) (“Even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce’s determination from being supported by substantial evidence.” (quoting *Am. Silicon Techs. v. United States*, 261

F.3d 1371, 1376 (Fed. Cir. 2001)); *Globe Metallurgical, Inc. v. United States*, 36 CIT \_\_\_, \_\_\_, 865 F. Supp. 2d 1269, 1276 (2012) (substantial evidence review “contemplates that more than one reasonable outcome is possible on a given administrative record”). Accordingly, the court sustains Commerce’s finding that Mexico was a significant producer of comparable merchandise.

### C. Yixin’s Proposed Alternative Surrogate Country

Commerce found that, among the countries at a level of economic development comparable to China, Malaysia, like Mexico, is a significant producer of comparable merchandise. *Decision Memorandum* at 53. However, Commerce found that Malaysia, unlike Mexico, is not a significant producer of identical merchandise because “evidence from the parties show[ed] that Malaysia ... does not actually produce quartz surface products,” and “no ... imports [of this merchandise] into the United States, during 2017, were recorded from Malaysia.” *Id.* (citing Petitioner Surrogate Country Comments at Ex. 22). Consequently, Commerce selected Mexico as the primary surrogate country because Mexico was a significant producer of both identical and comparable merchandise, in addition to having the best data availability. *Id.* at 63. Plaintiff disagrees, contending that Commerce should have selected Malaysia as the primary surrogate country. Yixin Br. at 13–23.

Plaintiff challenges Commerce’s reliance on data from petitioner indicating that there were no imports of QSP from Malaysia to the U.S., arguing that Commerce “cannot reject Plaintiff’s argument that Malaysia produces identical merchandise on the sole basis that there were no recorded imports into the United States.” *Id.* at 14. Yixin’s argument is conclusory and does not demonstrate that Commerce acted unreasonably in determining that the lack of imports of QSPs to the U.S. from Malaysia served as a reasonable basis for finding that Malaysia is not a significant producer of identical merchandise.

Plaintiff further argues that “the record clearly evidences that Malaysian companies in fact produce QSP and other reengineered stone products.” *Id.* Commerce, however, considered and rejected Yixin’s argument, concluding that “record evidence shows that, though these [Malaysian companies referenced by Yixin] may produce comparable merchandise, they do not produce identical merchandise.” *See Decision Memorandum* at 57. Commerce explained why the information on the record did not support a finding that the Malaysia companies proffered by Yixin produced identical merchandise to the subject QSPs. *Id.* Yixin wholly fails to engage with Commerce’s analysis and provides nothing more than conclusory assertions that the record

supports Yixin's position. Accordingly, the court rejects Yixin's challenge to Commerce's finding that Malaysia is not a significant producer of identical merchandise.

Plaintiff next argues that Malaysia should have been selected as a surrogate country because it "is a more significant producer of either identical or comparable merchandise than Mexico," and challenges Commerce's conclusion that "levels of significance [in the amount of exports to the United States] in comparison with other countries" are not relevant in selecting a surrogate country. Yixin Br. at 14 (citing *Decision Memorandum* at 55). Specifically, Plaintiff states that "import data for the six relevant HTS codes for the merchandise under consideration" demonstrate that "Malaysia exported the highest volume of merchandise among the countries determined to be at a level of economic development comparable to China." *Id.*

Commerce disagreed with Yixin, noting that the antidumping statute grants Commerce discretion in determining which country is a "significant producer," and that Commerce does not consider "levels of significance in comparison with other countries." *Decision Memorandum* at 55 (citing Policy Bulletin 04.1). Commerce observed that five of the six categories of merchandise corresponding to the HTS codes relied on by Yixin "have nothing to do with the subject merchandise." *Id.* at 56 ("For example, HS 2506.10 ... is the HS code Commerce used to value the respondents' raw material inputs of quartz. Another example, HS 6810.11 ('building blocks and bricks' made from cement, concrete, or artificial stone) is not similar to quartz surface products."). Commerce also noted that, while the analysis to determine "significant producers" by evaluating export data of potential surrogate countries uses HTSUS codes, which are at the ten-digit level, Yixin "attempts to compare these [data] to the Malaysian export data reported on the six-digit level, which are for a broader range of products." *Id.* Commerce highlighted that one of the HS codes mentioned by Yixin (HS 6810.99)—under which the HTSUS code corresponding to "agglomerated quartz slabs of the type used for countertops" (HTSUS 6810.99.0010) can be found—included products such as Buddha statues, which are not identical merchandise. *Id.*

Problematically for Plaintiff, the record reasonably supports Commerce's finding that Mexico is both a significant producer of identical merchandise and a significant producer of comparable merchandise. To prevail on its substantial evidence challenge here, Plaintiff needed to demonstrate that Malaysia, when compared with Mexico, was the one and only reasonable surrogate country selection on this administrative record, not simply that Malaysia may have constituted another possible reasonable choice. *See Goodluck India Ltd.*, 2021 WL

3870722 at \*7; *Globe Metallurgical*, 36 CIT at \_\_\_, 865 F. Supp. 2d at 1276 (substantial evidence review “contemplates that more than one reasonable outcome is possible on a given administrative record”). Plaintiff has failed to make this demonstration. The court therefore sustains Commerce’s selection of Mexico instead of Malaysia as the primary surrogate country.

#### **D. Surrogate Value Selection**

“If more than one potential surrogate country satisfies the statutory requirements for selection as a surrogate country, Commerce selects the primary surrogate country based on data availability and reliability.” See *Decision Memorandum* at 54. After finding that both Mexico and Malaysia are significant producers of comparable merchandise and that Mexico is a significant producer of identical merchandise, Commerce assessed the availability and reliability of the data from Mexico and Malaysia to select the primary surrogate country. See *id.* at 66–85. When selecting the “best available” data, “Commerce considers several factors, including whether the SVs are publicly available, contemporaneous with the [period of investigation], representative of a broad market average, tax and duty exclusive, and specific to the inputs being valued.” *Id.* at 54 (citing Policy Bulletin 04.1). Here, Commerce found that “Mexico provide[d] the best surrogate values in terms of specificity, contemporaneity, and quality of the data that is publicly available.” *Id.* at 63. Consequently, Commerce selected Mexico as the primary surrogate country and determined that it would rely on Mexican surrogate data to value quartz powder FOPs, transportation costs, and financial ratios. *Id.* at 54–55, 66–85. Yixin challenges Commerce’s use of these Mexican surrogate values as unreasonable. Yixin Br. at 15–26.

##### **1. Quartz Powder**

Commerce valued respondents’ QSP quartz powder input by using Mexican HS subheading 2506.10, covering “quartz in its crude state, including quartz that has been ground, powdered, sifted, screened, and separated.” See *Decision Memorandum* at 65–66. Plaintiff challenges as unreasonable Commerce’s refusal “to assess the reliability of Mexican quartz powder values by comparing benchmark prices from Malaysia and Thailand.” Yixin Br. at 16. Plaintiff contends that Commerce’s refusal was based on a “procedural technicality (i.e., that mid-way through the proceeding, Thailand was no longer considered to be a country at a comparable level of economic development to China by the Department.)” *Id.* at 17. Commerce disagreed that its finding that Thailand was not at a comparable level of economic development to China was a mere “procedural technicality.” Rather,

Commerce noted that it maintains a practice “to use data from economically comparable countries as benchmarks to determine whether surrogate values are aberrational.” See *Decision Memorandum* at 69. Commerce emphasized that the agency is “not required to evaluate data from non-economically comparable countries when making its surrogate value selections, unless the parties provide information showing that quality data is unavailable from all of the economically comparable countries.” *Id.* (citing *Clearon Corp. v. United States*, Slip Op. 15–91, 2015 WL 4978995 (CIT Aug. 20, 2015)).

Plaintiff challenges Commerce’s reliance on *Clearon*, arguing that this decision only noted that Commerce “is not required to evaluate data from non-economically comparable countries, not that it was precluded from considering this data.” Yixin Br. at 17. Plaintiff maintains that if the Mexican prices are compared to the prices in Thailand and Malaysia, “Mexican prices are plainly revealed to be unreliable (i.e., aberrational)” because “quartz powder imported into Malaysia, reported on a [cost, insurance, and freight (“CIF”)] basis ... was roughly valued at \$0.14/Kg ... [and] quartz imported into Thailand, reported on a CIF basis ... was roughly valued at \$0.15/Kg,” and that, in contrast, “[t]he reported Mexico [free on board (“FOB”)] import value of quartz powder is \$0.87 per kilo—[multiple] times higher the import values of quartz into Malaysia or Thailand.” *Id.* at 18–19. Plaintiff contends that the reason for “Mexico’s aberrational quartz prices” is likely that they reflect “higher value technical grade imports from the United States not used in QSP production,” noting that 84% of all quartz exports to Mexico come from the U.S. *Id.* Plaintiff further argues that Malaysian data are preferable because they are reported on a CIF basis (whereas Mexican data are reported on a FOB basis), and “Commerce recognizes that the availability of data reported on a CIF rather than FOB basis weighs as a factor against selecting an FOB-based country.” *Id.* at 15 n.2. Plaintiff contends that “the price for quartz powder in Malaysia and Thailand are roughly comparable,” and that Malaysian data “are therefore public, reliable, i.e., non/aberrational, reported on a CIF basis, and overall preferable to Mexican data.” *Id.* at 19.

Yixin’s arguments are unpersuasive. Yixin concedes that Commerce retains the discretion to determine whether the agency should consider data from non-economically comparable countries. Yixin has failed to demonstrate that, given the record, it was unreasonable for Commerce to refuse to compare the Mexican data against Thai data after finding that Thailand is not economically comparable to China. Commerce observed that, since no other countries on the list could serve as a source of data to provide a suitable benchmark, Commerce

was left with only two countries whose data could be compared—Mexico and Malaysia—and the mere fact that Mexico’s data were higher did not demonstrate that Mexico’s data were aberrational. *Decision Memorandum* at 69. Commerce also found that higher-grade quartz can be used in the production of QSP and thus disagreed with Yixin’s contention that this type of quartz was distorting the Mexican import values. *Id.* at 70. Commerce further explained that it adjusted the Mexican data (reported on a FOB basis) to value them on a CIF basis. *Id.* at 71 (“Consistent with our practice, because these data were stated on a FOB foreign port basis, we added an amount for international freight and marine insurance to derive a landed (or CIF) value, in Mexico.”).

Given Commerce’s explanation, the court cannot agree with Plaintiff that Commerce’s surrogate value selection for quartz powder was unreasonable. Yixin has failed to establish that Commerce’s finding that Thailand is not economically comparable to China was unreasonable. As Commerce explained, its practice is to disregard data from non-economically comparable countries where alternative data from economically comparable countries is available on the record. *See Decision Memorandum* at 68–69. Plaintiff’s additional arguments challenging the reasonableness of Commerce’s reliance on Mexican data fail for the reasons provided above. Ultimately, Plaintiff’s fundamental argument appears to be that Malaysian data are “preferable to Mexican data” simply because they show lower values. *See Yixin Br.* at 16–19. That is not enough for Plaintiff to prevail.

In summary, Plaintiff has failed to demonstrate that Malaysian data to value quartz powder may have constituted another possible reasonable choice on this administrative record, let alone that the Malaysia data constituted the *only* reasonable choice. *See Goodluck India Ltd.*, 2021 WL 3870722 at \*7; *Globe Metallurgical*, 36 CIT at \_\_\_, 865 F. Supp. 2d at 1276. Accordingly, the court sustains Commerce’s selection of Mexican surrogate value data for quartz powder.

## 2. Transportation Costs

Commerce valued Yixin’s brokerage and handling and truck freight expenses by using “a 20-foot container weight of 15 metric tons from *Doing Business in Mexico: 2018*.” *Decision Memorandum* at 74. Plaintiff maintains that Commerce unreasonably refused to “consider benchmark prices in Thailand and Malaysia for transportation costs to assess the reliability of Mexican transportation costs.” *Yixin Br.* at 19–21. Plaintiff argues that if the Mexican prices are compared to the prices in Thailand and Malaysia, Mexican prices are revealed to be “unreliable (i.e., aberrational)” because “brokerage and handling

costs in Malaysia and Thailand were valued at \$0.011383/Kg and \$0.011348/Kg respectively,” and that, in contrast, “brokerage and handling costs in Mexico equaled \$0.0322/Kg ... a figure which is nearly 300% higher than Malaysia and Thailand.” *Id.* at 20. Plaintiff further notes that Malaysia reports data on a CIF basis, whereas Mexican data are reported on an FOB basis. *Id.* Plaintiff contends that the “transportation cost in Malaysia and Thailand is roughly comparable,” and that Malaysian data “are therefore public, reliable, i.e., non-aberrational, reported on a CIF basis, and overall preferable to Mexican data.” *Id.* at 20–21.

Commerce rejected Yixin’s comparison between Mexican and Thai prices, finding that Thailand is not economically comparable to China and thus is not appropriate to use it as a surrogate country. *Decision Memorandum* at 76. Commerce emphasized that the Malaysian and Thai data preferred by Yixin were also from the 2018 *Doing Business* publications for those respective countries, and that those sources “use the same methodologies and assumptions (*i.e.*, 20-foot container weighing 15 metric tons) to calculate a brokerage and handling rate as *Doing Business in Mexico: 2018*.” *Id.* Commerce thus rejected Yixin’s contention, concluding that “Mexican transportation expenses and surrogate values are not distortive or aberrational merely by virtue of being larger.” *Id.* at 76–77.

Plaintiff’s preference for an alternative basis for valuing transportation expenses at a lower rate is insufficient to demonstrate that Commerce’s decision was unreasonable. Plaintiff points to nothing in the record to require a contrary outcome. Accordingly, the court sustains Commerce’s calculation of transportation costs.

### 3. Financial Statements

Commerce calculated surrogate financial ratios (manufacturing; overhead; selling, general & administrative (“SG&A”); and profit) by using the financial statements of Grupo Lamosa, a Mexican producer of ceramic tile. *See Decision Memorandum* at 80. Plaintiff argues that this was unreasonable, contending that Commerce should have instead used the financial statements from the Malaysian company, Marbon Industries SDN BHD (“Marbon”). Yixin Br. at 21. Specifically, Plaintiff argues that the Malaysian financial statements are superior because they are from companies manufacturing identical merchandise, and that Commerce erred in using financial statements from companies producing ceramic tiles because ceramic tiles are not comparable merchandise. *Id.* at 22. Plaintiff also challenges Commerce’s refusal “to assess the reliability of Mexican financial statements by comparing benchmark financial statements from Malaysia and Thai-

land.” *Id.* at 21. Plaintiff maintains that if the financial ratios calculated by using the Mexican financial statements are compared to those calculated by using data from Malaysia and Thailand, Mexican financial statements are revealed to be “unreliable (i.e., aberrational).” *Id.* at 22. Plaintiff contends that “Mexican financial statements yield surrogate financial ratios with roughly 700%-1,000% higher SG&A expenses, and roughly 300%-500% higher reported Profit, than Malaysian and Thai financial statements, and are clearly unreliable (i.e. aberrational).” *Id.* at 22–23.

“In selecting financial statements for purposes of calculating financial ratios, Commerce’s policy is to use data from ME surrogate companies based on the ‘specificity, contemporaneity, and quality of the data.’” *Decision Memorandum* at 80. “Additionally, Commerce has a regulatory preference to value all FOPs from a single surrogate country.” *Id.* at 81. Commerce disagreed with Yixin’s argument that the Malaysian financial statements were superior to those from Mexico, explaining that the agency has “determined that ceramic tiles are a comparable product to quartz surface products ... and, accordingly, a producer of ceramic tiles is representative of an NME producer of quartz surface products’ production experience.... Additionally, Grupo Lamosa’s financial statements are completely translated, publicly available, contemporaneous with the POI, show profit before taxes, do not contain countervailable subsidies, are sufficiently detailed to calculate financial ratios, and are from the primary surrogate country.” *Id.* at 81–82.

Commerce further determined that there were various problems with the proposed Malaysian financial statements that rendered them “inappropriate” for using to value the surrogate financial ratios. *Id.* at 83–84 (noting various flaws with Malaysian data including finding that Marbon had negative profit ratio, finding that another Malaysian company with data on record did not produce comparable merchandise, and fact that remaining Malaysian company’s data was not contemporaneous). Consequently, Commerce rejected Yixin’s proposed comparison of Mexican and Malaysian financial ratios to Thai financial ratios, reiterating that the agency has found that Thailand is not economically comparable to China and noting that “benchmarking of financial ratios is of limited use” because “financial statements are company-specific, related to an individual company’s production and sales experience.” *Id.* at 83. Commerce thus refused to use Malaysian financial statements, finding them “unusable or less preferable when compared to Grupo Lamosa’s statements.” *Id.*

Commerce explained why it disagreed with Yixin that Malaysian companies produce identical merchandise and that ceramic tiles are

not comparable to QSPs. *See Decision Memorandum* at 81. Commerce also explained why it rejected Yixin's proposal to consider Thai financial data as a benchmark. *Id.* at 83. Given this record, Plaintiff's only argument as to why Commerce's selection of Mexican data for calculating surrogate financial ratios was unreasonable is that this selection results in higher values than would result from selecting Malaysian financial statements. *See Yixin Br.* at 22–23. This argument is not persuasive. Plaintiff has failed to demonstrate that the Malaysian financial statements constituted the only reasonable choice for Commerce on this administrative record. *See Goodluck India Ltd.*, 2021 WL 3870722 at \*7; *Globe Metallurgical, Inc.*, 36 CIT at \_\_\_, 865 F. Supp. 2d at 1276. Accordingly, the court sustains Commerce's selection of Mexican financial statements for the calculation of surrogate financial values.

Alternatively, Plaintiff argues that even if only financial statements from Mexico are used for calculating surrogate financial ratios, then Commerce should be directed to average the financial statements of the two Mexican ceramic tile producers on the record (Grupo Lamosa and Unigel). *See Yixin Br.* at 23–26. Specifically, Plaintiff challenges Commerce's finding that Unigel's financial statements cannot be used because Unigel "operated at a loss before taxes for the three years covered by the financial statements," as Commerce's current practice is to reject financial statements showing zero profit. *Id.* Plaintiff maintains that Commerce's current practice "is grounded solely on preference" because there is "no statutory impediment preventing the use of financial statements submitted by unprofitable companies" and notes that Commerce has the task of "calculating dumping margins as accurately as possible using the 'best available information.'" *Id.* at 24. Plaintiff requests that the court direct Commerce "to return to its past practice of zeroing profit figures and averaging overhead and SG&A expenses," and abandon its current practice of "summarily rejecting otherwise credible financial statements showing negative profit, at least in instances where the record would otherwise only contain a single financial statement." *Id.* at 25. Finally, Plaintiff contends that its "suggestion is to look first to the profit figure established on the record, incorporate that percentage into the financial ratio of the company with negative profit, and allocate the remaining overhead, and SG&A costs on a proportional basis," and that, in case the court "disagrees with the practice of zeroing reported Profit," it should direct Commerce "to use a weighted-average of Overhead, SG&A and Profit." *Id.*

In rejecting the suggestion that Commerce use an average of Grupo Lamosa and Ungiel's financial statements, Commerce explained:

Unigel's financial statements are not usable because the company operated at a loss before taxes for the three years covered by its financial statements; Commerce's preference is to disregard financial statements showing a loss, if alternative statements are available. Moreover, Unigel is a Brazilian company, that makes solid surfaces in Mexico through a subsidiary. Thus, it is not clear what proportion of its operations involve comparable merchandise in the surrogate country or if Unigel's consolidated statements could be considered those of a Mexican company. Commerce prefers to value all FOPs in a single surrogate country.

*Decision Memorandum at 81–82.*

Contrary to Plaintiff's representations, Commerce's refusal to average Unigel's financial statements was not based "solely" in Commerce's practice of rejecting financial statements showing a loss. *See Decision Memorandum at 82; cf. Yixin Br. at 23.* Commerce emphasized its policy preference "to value all FOPs in a single surrogate country" and highlighted its concern with the fact that Unigel is a Brazilian company operating in Mexico through a subsidiary. *Decision Memorandum at 82* (noting that it is not clear "what proportion of [Unigel's] operations involve comparable merchandise in the surrogate country or if Unigel's consolidated financial statements could be considered those of a Mexican company"). Given this explanation, the court thus concludes that Commerce's selection of only Grupo Lamosa's financial statements to calculate the surrogate financial ratios was reasonable.

Additionally, Plaintiff's challenge to Commerce's practice of rejecting financial statements showing a loss as unreasonable is not persuasive. Plaintiff suggests that Commerce abandon its current practice of rejecting financial statements showing a loss and adopt a "more accurate methodology" that would allow Commerce to calculate dumping margins "as accurately as possible using the 'best available information.'" *Yixin Br. at 24.* While Plaintiff maintains that Commerce's practice to reject financial statements with zero or negative profit is "excessively wasteful," Plaintiff fails to demonstrate that including such data actually results in a "more accurate methodology." *Id. at 23–25.* Instead, Plaintiff merely provides a "suggestion" that Commerce adopt (at the court's direction) an alternative, more reasonable practice. *Id. at 25.* When challenging Commerce's selection of the "best available" data from surrogate countries under 19 U.S.C. § 1677b(c), Plaintiff must demonstrate that no reasonable mind could conclude that Commerce chose the best available infor-

mation. See *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (explaining that court’s “duty is ‘not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.’”). Yixin has failed to meet this burden. Accordingly, the court sustains Commerce’s calculation of surrogate financial ratios.

#### IV. Conclusion

For the foregoing reasons, the court denies Yixin’s motion for judgment on the agency record and sustains the *Final Determination* as to Commerce’s determinations on Yixin’s respondent-specific issues.

Dated: September 24, 2021  
New York, New York

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



Slip Op. 21–131

GODACO SEAFOOD JOINT STOCK COMPANY, Plaintiff, and CAN THO IMPORT-EXPORT JOINT STOCK COMPANY, GOLDEN QUALITY SEAFOOD CORPORATION, VINH QUANG FISHERIES CORPORATION, NTSF SEAFOODS JOINT STOCK COMPANY, GREEN FARMS SEAFOOD JOINT STOCK COMPANY, HUNG VUONG CORPORATION, and SOUTHERN FISHERY INDUSTRIES COMPANY, LTD., Consolidated Plaintiffs v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA, SIMMONS FARM RAISED CATFISH, INC., MAGNOLIA PROCESSING, INC., HEARTLAND CATFISH COMPANY, GUIDRY’S CATFISH, INC., DELTA PRIDE CATFISH, INC., CONSOLIDATED CATFISH COMPANIES LLC, AMERICA’S CATCH, ALABAMA CATFISH INC., Defendant-Intervenors.

Jennifer Choe-Groves, Judge  
Consol. Court No. 18–00063

[Sustaining the second remand results of the U.S. Department of Commerce following the thirteenth administrative review of the antidumping duty order on certain frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: September 27, 2021

*Andrew B. Schroth, Jordan C. Kahn, and Ned H. Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of Washington, D.C., for Plaintiff GODACO Seafood Joint Stock Company and Consolidated Plaintiff Golden Quality Seafood Corporation.

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*Kara M. Westercamp*, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Hendricks Valenzuela*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

*Jonathan M. Zielinski*, *James R. Cannon, Jr.*, and *Nicole Brunda*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenors Catfish Farmers of America, Simmons Farm Raised Catfish, Inc., Magnolia Processing, Inc. d/b/a Pride of the Pond, Heartland Catfish Company, Guidry's Catfish, Inc., Delta Pride Catfish, Inc., Consolidated Catfish Companies LLC d/b/a Country Select Catfish, America's Catch, and Alabama Catfish Inc. d/b/a Harvest Select Catfish, Inc.

## OPINION

### Choe-Groves, Judge:

This action concerns the import of frozen fish fillets, including regular, shank, and strip fillets and portions thereof, of the species *Pangasius Bocourti*, *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus* from the Socialist Republic of Vietnam ("Vietnam"), subject to the thirteenth administrative review by the U.S. Department of Commerce ("Commerce"). *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam* ("Final Results"), 83 Fed. Reg. 12,717 (Dep't of Commerce Mar. 23, 2018) (final results, final results of no shipments, and partial rescission of the antidumping duty admin. review; 2015–2016); *see also* *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Mem. for the Final Results of the Thirteenth Antidumping Duty Admin. Review: 2015–2016*, ECF No. 18–5 ("Final IDM"); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 82 Fed. Reg. 42,785 (Dep't of Commerce Sept. 12, 2017) (prelim. results, prelim. determination of no shipments, and partial rescission of the antidumping duty admin. review; 2015–2016). Before the Court are the Final Results of Redetermination Pursuant to Court Remand, ECF No. 95–1 ("*Second Remand Results*"), which the Court ordered in *GODACO Seafood Joint Stock Co. v. United States* ("*GODACO II*"), 45 CIT \_\_, 494 F. Supp. 3d 1294 (2021).

Defendant-Intervenors Catfish Farmers of America, Simmons Farm Raised Catfish, Inc., Magnolia Processing, Inc. d/b/a Pride of the Pond, Heartland Catfish Co., Guidry's Catfish, Inc., Delta Pride Catfish, Inc., Consolidated Catfish Cos. LLC d/b/a Country Select Catfish, America's Catch, and Alabama Catfish, Inc. d/b/a Harvest Select Catfish, Inc. (collectively, "Defendant-Intervenors") filed comments in opposition to the *Second Remand Results*. Def.-Intervs.' Comments Opp'n Second Remand Results, ECF Nos. 99, 100 ("Defendant-Intervenors' Comments" or "Def.-Intervs.' Cmts."). Consolidated Plaintiffs NTSF Seafoods Joint Stock Company, Vinh

Quang Fisheries Corporation, Green Farms Seafood Joint Stock Company, Hung Vuong Corporation, and Can Tho Import-Export Joint Stock Company (collectively, “Separate Rate Plaintiffs”) and Defendant United States (“Defendant”) responded to Defendant-Intervenors’ Comments. Consol. Pls.’ Resp. Comments [Def.-Interv.] Second Remand Results, ECF Nos. 101, 103 (“Separate Rate Pls.’ Cmts.”); Def.’s Resp. Support Second Remand Results, ECF No. 102 (“Def.’s Resp.”).

The Court reviews whether Commerce’s separate rate for the non-examined companies that were granted separate rate status, including Separate Rate Plaintiffs, (“all-others separate rate”) is supported by substantial evidence. For the reasons discussed below, the Court holds that the all-others separate rate is supported by substantial evidence and sustains Commerce’s *Second Remand Results*.

### BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the Court’s review of the *Second Remand Results*. See *GODACO II*, 45 CIT at \_\_\_, 494 F. Supp. 3d at 1303–07; *GODACO Seafood Joint Stock Co. v. United States*, 44 CIT \_\_\_, \_\_\_, 435 F. Supp. 3d 1342, 1347–50, 1360 (2020).

In *GODACO II*, the Court sustained in part and remanded in part Commerce’s Final Results of Redetermination Pursuant to Court Remand, ECF No. 77–1 (“*Remand Results*”). *GODACO II*, 45 CIT at \_\_\_, 494 F. Supp. 3d at 1306. Commerce assigned Plaintiff GODACO Seafood Joint Stock Company (“GODACO”) an adverse facts available (“AFA”) rate of \$3.87/kg, which the Court sustained. *Id.* at \_\_\_, 494 F. Supp. 3d at 1303. Commerce then applied GODACO’s AFA rate to the cooperating Separate Rate Plaintiffs as the purported “expected method” under 19 U.S.C. § 1673d(c)(5)(B). *Id.* at \_\_\_, 494 F. Supp. 3d at 1304. The Court concluded that Commerce’s application of a total AFA rate to the cooperating Separate Rate Plaintiffs was unreasonable and not supported by substantial evidence, and the Court remanded for Commerce to reevaluate the rate assigned to the Separate Rate Plaintiffs. *Id.* at \_\_\_, 494 F. Supp. 3d at 1306.

Under protest, Commerce revised the all-others separate rate by applying a simple average of the separate rates assigned in the four prior administrative reviews of the antidumping duty order and assigned that average rate to the Separate Rate Plaintiffs. *Second Remand Results* at 9–11. Commerce revised the all-others separate rate from \$3.87/kg to \$0.89/kg. *Id.* at 11.

## JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c). The Court 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). The Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT \_\_, \_\_, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

## DISCUSSION

### I. Legal Framework

Commerce is authorized by statute to calculate and impose a dumping margin on imported subject merchandise after determining it is sold in the United States at less than fair value. 19 U.S.C. § 1673. The statute authorizes Commerce to determine an estimated weighted average dumping margin for each individually examined exporter and producer and one all-others rate to assign to non-examined companies. *Id.* § 1673d(c)(1)(B). The U.S. Court of Appeals for the Federal Circuit has upheld Commerce's reliance on 19 U.S.C. § 1673d(c)(5) for determining the estimated all-others rate "for exporters and producers from nonmarket economies that demonstrate their independence from the government but that are not individually investigated." *Changzhou Haud Flooring Co. v. United States*, 848 F.3d 1006, 1011 (Fed. Cir. 2017) (citation omitted).

The general rule under the statute for calculating the all-others rate is to weight-average the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely on the basis of facts available, including adverse facts available. 19 U.S.C. § 1673d(c)(5)(A). If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis, or are determined entirely under 19 U.S.C. § 1677e, Commerce may invoke an exception to the general rule. *Id.* § 1673d(c)(5)(B). The Statement of Administrative Action provides guidance that when the dumping margins for all individually examined respondents are determined entirely on the basis of the facts available or are zero or de minimis, the "expected method" of determining the all-others rate is to weight-average the zero and de minimis margins and margins determined pursuant to the facts available, provided that volume data is available. Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"),

H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201.

Commerce may depart from the “expected method” and use “any reasonable method” if Commerce reasonably concludes that the expected method is not feasible or results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers. *See* 19 U.S.C. § 1673d(c)(5)(B); *Navneet Publ’ns (India) Ltd. v. United States*, 38 CIT \_\_, \_\_, 999 F. Supp. 2d 1354, 1358 (2014) (“[T]he following hierarchy [is applied] when calculating all-others rates—(1) the ‘[g]eneral rule’ set forth in § 1673d(c)(5)(A), (2) the alternative ‘expected method’ under § 1673d(c)(5)(B), and (3) any other reasonable method when the ‘expected method’ is not feasible or does not reasonably reflect potential dumping margins.”); *see also* SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201.

## II. Commerce’s All-Others Separate Rate

### A. Commerce’s Departure from the Expected Method

On second remand, Commerce explained that it departed from the expected method under protest due to the Court’s prior holding in *GODACO II* that Commerce’s application of the AFA rate of \$3.87/kg to the fully cooperating Separate Rate Plaintiffs was unreasonable. *Second Remand Results* at 9–11, 14–15; *see also GODACO II*, 45 CIT at \_\_, 494 F. Supp. 3d at 1306. Commerce clarified that its previous methodology in the *Remand Results* applied the expected method, and that in the *Second Remand Results*, Commerce departed from the expected method under protest and applied “any reasonable method” due to the Court’s holding in *GODACO II*. *Second Remand Results* at 9–11, 14–15. Commerce reevaluated the all-others separate rate assigned to the Separate Rate Plaintiffs and assigned a revised dumping margin based on an average of the separate rates assigned in the four prior administrative reviews of the antidumping duty order. *Id.* at 9.

Defendant-Intervenors argue that Commerce deviated unlawfully from the expected method because the previous rate was both feasible for Commerce to calculate and there was no evidence that the rate would not be reasonably reflective of potential dumping margins. Def.-Intervs.’ Cmts. at 2–4. Separate Rate Plaintiffs and Defendant ask the Court to sustain the *Second Remand Results*. Separate Rate Pls.’ Cmts. at 7; Def.’s Resp. at 9.

Because the Court already held that Commerce’s application of the expected method was unreasonable when Commerce assigned an AFA rate to the cooperating Separate Rate Plaintiffs, the Court sus-

tains Commerce's departure from the expected method in the *Second Remand Results*.

### **B. Commerce's Application of "Any Reasonable Method"**

After determining that departure from the expected method was appropriate, Commerce used "any reasonable method" under 19 U.S.C. § 1673d(c)(5)(B) to calculate a revised all-others separate rate by applying a simple average of the separate rates assigned in the four prior administrative reviews of the antidumping duty order, resulting in a reduction of the all-others separate rate from \$3.87/kg to \$0.89/kg. *Second Remand Results* at 9–11. Defendant-Intervenors oppose this revised all-others separate rate as unreasonable and not supported by substantial evidence. Def.-Intervs.' Cmts. at 8–9. Separate Rate Plaintiffs and Defendant ask the Court to sustain the *Second Remand Results*. See Separate Rate Pls.' Cmts. at 11–15; Def.'s Resp. at 9–10.

After departing from the "expected method," the statute allows Commerce to use "any reasonable method" to determine the all-others separate rate, subject to the Court's finding that the determination is reasonable and supported by substantial evidence on the record. See 19 U.S.C. §§ 1673d(c)(5)(B); 1617a(b)(1)(B)(i). Commerce explained that the selected separate rates from the previous four administrative reviews were more contemporaneous than the AFA rate previously assigned to the Separate Rate Plaintiffs in the *Remand Results*. *Second Remand Results* at 9–11. Commerce noted that the margins assigned to the mandatory respondents from the previous four administrative reviews accounted for the largest volume of entries to the United States and that the separate rates ranged from \$0.69/kg to \$1.20/kg. *Id.* Commerce stated that the simple average of the prior four separate rates accounted for any variations between the periods of review. *Id.* at 10–11.

The Court holds that Commerce supported its determination with substantial evidence and it is reasonable for Commerce to assign an all-others separate rate of \$0.89/kg because the revised rate is based on four separate rates from previous administrative reviews, which are no longer subject to judicial review, and averaging the separate rates from four prior reviews accounts for any variations.

### **CONCLUSION**

For the reasons set forth above, the Court sustains Commerce's *Second Remand Results*.

Judgment will be issued accordingly.

Dated: September 27, 2021  
New York, New York

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

Slip Op. 21–132

NEXTEEL Co., LTD, Plaintiff, HYUNDAI STEEL COMPANY and SeAH STEEL CORPORATION, Consolidated Plaintiffs, and HYUNDAI STEEL COMPANY, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY and NUCOR TUBULAR PRODUCTS INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge  
Consol. Court No. 20–03868

[Remanding the final results by the U.S. Department of Commerce following the 2017–2018 administrative review of the antidumping duty order on circular welded non-alloy steel pipe from the Republic of Korea.]

Dated: September 27, 2021

*J. David Park, Henry D. Almond, Daniel R. Wilson, Leslie C. Bailey, and Kang Woo Lee, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for Plaintiff NEXTEEL Co., Ltd.*

*Jarrod M. Goldfeder and Robert G. Gosselink, Trade Pacific PLLC, of Washington, D.C., for Consolidated Plaintiff and Plaintiff-Intervenor Hyundai Steel Company.*

*Jeffrey M. Winton, Michael J. Chapman, Amrietha Nellan, and Vi N. Mai, Winton & Chapman PLLC, of Washington, D.C., for Consolidated Plaintiff SeAH Steel Corporation.*

*Robert R. Kiepora, Trial Attorney, Commercial Litigation Branch, Civil Division, 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, Jeanne E. Davidson, Director, and Franklin E. White, Jr., Assistant Director. Of counsel on the brief was Jonzachary Forbes, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.*

*Roger B. Schagrin and Elizabeth J. Drake, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Wheatland Tube Company.*

*Alan H. Price, Robert E. DeFrancesco, III, and Cynthia C. Galvez, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor Nucor Tubular Products Inc.*

**OPINION AND ORDER**

**Choe-Groves, Judge:**

Plaintiff NEXTEEL Co., Ltd. (“NEXTEEL”), Plaintiff-Intervenor and Consolidated Plaintiff Hyundai Steel Company (“Hyundai Steel”), and Consolidated Plaintiff SeAH Steel Corporation (“SeAH”), (collectively, “Plaintiffs”), challenge the final results in the 2017–2018 administrative review of the antidumping duty order covering circular welded non-alloy steel pipe (“CWP”) from the Republic of Korea (“Korea”). *Circular Welded Non-Alloy Steel Pipe from the Republic of*

*Korea* (“*Final Results*”), 85 Fed. Reg. 71,055 (Dep’t of Commerce Nov. 6, 2020) (final results of antidumping duty admin. review; 2017–2018), and accompanying Issues & Decisions Mem. for the Final Results of the 2017–2018 Admin. Review of the Antidumping Duty Order on Circular Non-Alloy Steel Pipe from the Republic of Korea, ECF No. 25–5 (“Final IDM”). Before the Court are Plaintiffs’ motions for judgment on the agency record. Mot. Pl. [SeAH] J. Agency R., ECF No. 36; Br. [SeAH] Supp. Rule 56.2 Mot. J. Agency R., ECF No. 36–1 (“SeAH’s Br.”); Rule 56.2 Mot. J. Agency R. [NEXTEEL], ECF Nos. 37, 38; Mem. Supp. Pl. [NEXTEEL] Rule 56.2 Mot. J. Upon Agency R., ECF Nos. 37–1, 38–1 (“NEXTEEL’s Br.”); [Hyundai Steel] Rule 56.2 Mot. J. Agency R., ECF No. 39; Mem. Supp. Mot. [Hyundai Steel] J. Agency R., ECF No. 39–1 (“Hyundai Steel’s Br.”).

Defendant United States (“Defendant”) responded. Def.’s Resp. Pls.’ Mots. J. on the Agency R., ECF No. 40 (“Defendant’s Response” or “Def.’s Resp.”). Defendant-Intervenors Wheatland Tube Company (“Wheatland”) and Nucor Tubular Products Inc. (collectively, “Defendant-Intervenors”) responded jointly. Resp. Br. [Def.-Intervs.], ECF No. 41 (“Defendant-Intervenors’ Response” or “Def.-Intervs.’ Resp.”).

NEXTEEL and Hyundai Steel replied to Defendant’s Response and Defendant-Intervenors’ Response. Reply Br. Supp. Pl. [NEXTEEL] Rule 56.2 Mot. for J. upon the Agency R., ECF No. 43; Reply Br. of Consol. Pl. & Pl.-Interv., [Hyundai Steel], ECF No. 44. For the following reasons, the Court remands the *Final Results*.

### ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce’s particular market situation adjustment to the cost of production when conducting a sales-below-cost test is in accordance with the law; and
2. Whether Commerce’s particular market situation determination is in accordance with the law.

### BACKGROUND

Commerce initiated this administrative review and selected NEXTEEL and Husteel Co., Ltd. (“Husteel”) as mandatory respondents. Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: 2017–2018 (Jan. 9, 2020) (“Prelim. DM”) at 1, PR 203.<sup>1</sup> Wheatland submitted a particular market situation allegation

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

(“Petition”). *Id.* at 9. Commerce calculated preliminary dumping margins of 31.64% for NEXTEEL, 5.11% for Husteel, and an all-others rate of 23.74%, which applied to Hyundai Steel and SeAH. *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea (“Preliminary Results”)*, 85 Fed. Reg. 2719 (Dep’t of Commerce Jan. 16, 2020) (prelim. results of antidumping duty admin. review; 2017–2018).

Commerce determined that a particular market situation existed in Korea that distorted the cost of production of CWP, and applied an upward adjustment to the cost of production based on a regression analysis submitted by Wheatland in the Petition (“regression analysis”). Prelim. DM at 12–13. The regression analysis was submitted with the Petition and “quantifie[d] the impact of global steel excess capacity on the price of [hot-rolled steel coil] in Korea, and derive[d] a corresponding percentage adjustment factor that . . . account[ed] for the distortions inherent to an overcapacity-driven [particular market situation].” *Id.* at 10. Commerce conducted a sales-below-cost test and disregarded certain sales made at prices below the cost of production. *Id.* at 17–18. Commerce calculated normal value from the remaining above-cost home market sales for mandatory respondents NEXTEEL and Husteel. *Id.* at 18.

In the *Final Results*, Commerce used the methodology applied in the *Preliminary Results* but corrected the amount of the particular market situation adjustment to the cost of production for costs related only to hot-rolled steel coil instead of “all direct material costs.” Final IDM at 3. Commerce assigned weighted-average dumping margins of 27.28% for NEXTEEL, 4.92% for Husteel, and an all-others rate of 21.01%, which applied to Hyundai Steel and SeAH. *Final Results*, 85 Fed. Reg. at 71,056.

## **JURISDICTION AND STANDARD OF REVIEW**

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an anti-dumping duty order. The Court shall hold unlawful any determination found to be unsupported by substantial record evidence or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

## **DISCUSSION**

### **I. Particular Market Situation**

#### **A. Governing Law**

Commerce determines antidumping duties by calculating the amount by which the normal value of subject merchandise exceeds

the export price or the constructed export price for the merchandise. 19 U.S.C. § 1673. When reviewing antidumping duties in an administrative review, Commerce must determine: (1) the normal value and export price or constructed export price of each entry of the subject merchandise, and (2) the dumping margin for each such entry. *Id.* § 1675(a)(1)(B), (a)(2)(A). The statute dictates the steps by which Commerce may calculate normal value “to achieve a fair comparison” with export price or constructed export price. *Id.* § 1677b(a).

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

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

Third, when using home market sales for normal value, if Commerce cannot determine the normal value of the subject merchandise based on home market sales, then Commerce may use qualifying third-country sales or a constructed value as a basis for normal value.

*Id.* § 1677b(a)(4), (a)(1)(B)(ii), (b)(1). Constructed value represents: (1) the cost of materials and fabrication or other processing of any kind used in producing the merchandise; (2) the actual amounts incurred and realized for selling, general, and administrative expenses, and for profits, in connection with the production and sales of a foreign like product, in the ordinary course of trade, for consumption in the foreign country; and (3) the cost of packing the subject merchandise. *Id.* § 1677b(e). When calculating constructed value, if Commerce determines that a particular market situation exists “such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, [then] [Commerce] may use . . . any other calculation methodology.” *Id.*

### **B. Unauthorized Adjustment to the Cost of Production for the Sales-Below-Cost Test**

For purposes of determining whether sales were made at less than cost, Commerce adjusted the reported costs of production of hot-rolled steel coil, a primary CWP input, based on its determination that a particular market situation in Korea distorted the cost of hot-rolled steel coil. *See* Final IDM at 3, 7; Prelim. DM at 12–13. Defendant argues that the plain language of Section 504 of the Trade Preferences Extension Act of 2015 (“TPEA”), Pub. L. No. 114–27, § 504, 129 Stat. 385, and its legislative history “demonstrate that Commerce possesses the discretion to adjust NEXTEEL’s [hot-rolled steel coil] input purchase prices for calculating cost of production as part of Commerce’s sales-below costs test . . . and establish that Commerce has discretion when [] selecting a calculation methodology to address distortions in a particular market.” Def.’s Resp. at 26. Plaintiffs counter that the statute permits a particular market situation adjustment only in the course of determining constructed value, not when determining whether home market sales were made at less than the cost of production. NEXTEEL’s Br. at 10–23; SeAH’s Br. at 2 (incorporating NEXTEEL’s arguments); Hyundai Steel’s Br. at 7 (incorporating NEXTEEL’s arguments). Defendant-Intervenors contend that Commerce is authorized by Section 1677b(e)(1) to use “any other calculation methodology,” and “[t]he fact that the authorization is contained in a section of the statute concerning constructed value does not in itself limit the scope of the explicit authority to use other calculation methodologies.” Def.-Intervs.’ Resp. at 7.

As the U.S. Court of International Trade has held repeatedly, the statute does not authorize a particular market situation adjustment to the cost of production when Commerce applies the sales-below-cost test to determine which home market sales to exclude from the

calculation of normal value. See *Saha Thai Steel Pipe Pub. Co. v. United States*, 43 CIT \_\_, \_\_, 422 F. Supp. 3d 1363, 1368–70 (2019); *Husteel Co. v. United States*, 44 CIT \_\_, \_\_, 426 F. Supp. 3d 1376, 1383–89 (2019); *Borusan Mannesmann Boru Sanayi Ve Ticaret A.Ş. v. United States*, 44 CIT \_\_, \_\_, 426 F. Supp. 3d 1395, 1411–12 (2020); *Dong-A Steel Co. v. United States*, 44 CIT \_\_, \_\_, 475 F. Supp. 3d 1317, 1337–41 (2020); *Husteel Co. v. United States*, 44 CIT \_\_, \_\_, 476 F. Supp. 3d 1363, 1370–73 (2020); *Saha Thai Steel Pipe Pub. Co. v. United States*, 44 CIT \_\_, \_\_, 476 F. Supp. 3d 1378, 1382–86 (2020); *Hyundai Steel Co. v. United States*, 45 CIT \_\_, \_\_, Slip Op. 21–88 at 10–17 (July 19, 2021).

Commerce applied an adjustment to the cost of production calculation set forth in Section 1677b(b)(3) for purposes of the sales-below-cost test pursuant to Section 1677b(b)(1). See Final IDM at 3, 7; Prelim. DM at 12–13. Commerce relied erroneously on Section 504 of the TPEA for the authority to adjust the cost of production for the sales-below-cost test. Commerce explained that:

[W]here a [particular market situation] affects the [cost of production] of the foreign like product because it distorts the cost of inputs, it is reasonable to conclude that such a situation may prevent a proper comparison of the [export price] with normal value based on home market prices just as it would when normal value is based on [constructed value]. . . . [Section 1677b(e)] specifically includes the term “ordinary course of trade.” Thus, the definition of that term, again, found in [Section 1677(15)], is integral to that [particular market situation] provision. Accordingly, [Commerce] disagree[s] with the argument that Commerce cannot analyze a [particular market situation] claim in determining whether a company’s comparison-market sale prices were below cost, and therefore, are outside the “ordinary course of trade.”

Final IDM at 8–9. In Commerce’s view, the amendments provide Commerce “discretion to use ‘any other calculation methodology’ if costs are distorted by a [particular market situation], including for the purposes of [cost of production] under [19 U.S.C. § 1677b(b)(3)].” *Id.* at 10. In other words, Commerce made a particular market situation adjustment to costs based on Section 1677b(e). Commerce asserted that the cost-based particular market situation analysis and alternative calculation methodology set forth in Section 1677b(e) are available whether Commerce bases normal value on home market sales or constructed value. Commerce also asserted that the sales-below-cost test set forth in Section 1677b(b)(1), by relying on the phrase “ordinary course of trade” defined in Section 1677(15)(C) as

excluding sales made in a particular market situation, authorizes Commerce to conduct the particular market situation analysis and adjust costs based on Sections 1677b(b)(1) and 1677(15)(C). *Id.* at 8–10.

Section 504 of the TPEA amended the statutory provisions governing constructed value. The amendment authorizes Commerce to use alternative cost methodologies when computing constructed value after making a particular market situation determination. The amended language provides:

For purposes of paragraph (1) [in reference to calculating constructed value], if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority [Commerce] may use another calculation methodology under this part or any other calculation methodology.

19 U.S.C. § 1677b(e). The amended statute gives Commerce discretion to adjust the cost of production calculation methodology when determining constructed value if Commerce determines that a particular market situation exists. *See id.* Commerce cannot rely on Section 1677b(e) when Commerce bases normal value on home market sales. No part of the statute allows Commerce to use any other methodology when market sales are used for normal value. *See Saha Thai Steel Pipe Pub. Co.*, 43 CIT at \_\_, 422 F. Supp. 3d at 1368–70; *Husteel Co.*, 44 CIT at \_\_, 426 F. Supp. 3d at 1383–89; *Borusan*, 44 CIT at \_\_, 426 F. Supp. 3d at 1411–12; *Dong-A Steel Co.*, 44 CIT at \_\_, 475 F. Supp. 3d at 1340–41; *Husteel*, 44 CIT at \_\_, 476 F. Supp. 3d at 1371; *Saha Thai Steel Pipe Pub. Co.*, 44 CIT at \_\_, 476 F. Supp. 3d at 1384; *Hyundai Steel*, 45 CIT at \_\_, Slip Op. at 13. The “any other methodology” language is reserved solely for when normal value is determined by constructed value. *Husteel Co.*, 44 CIT at \_\_, 426 F. Supp. 3d at 1388.

With respect to Sections 1677b(b)(1) and 1677(15)(C), Defendant argues that Section 1677b(b)(1)’s reference to the phrase “ordinary course of trade” authorizes Commerce to conduct a cost-based particular market situation analysis and make an adjustment in the course of the sales-below-cost test. Def.’s Resp. at 27.

Section 1677b(b)(1) provides:

(b) Sales at less than cost of production

(1) Determination; sales disregarded

Whenever the administering authority has reasonable grounds to believe or suspect that sales of the foreign like

product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production. If the administering authority determines that sales made at less than the cost of production—

- (A) have been made within an extended period of time in substantial quantities, and
- (B) were not at prices which permit recovery of all costs within a reasonable period of time,

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

19 U.S.C. § 1677b(b)(1). Section 1677b(b)(1) sets forth the sales-below-cost test based on the calculation specified in Section 1677b(b)(3) to confirm that sales were made at less than the cost of production. Within Section 1677b(b) for “Sales at less than cost of production,” the subsection 1677b(b)(1) for “Determination; sales disregarded” authorizes Commerce to disregard those below-cost sales as outside the ordinary course of trade. *Id.*

The plain language of the reference to “ordinary course of trade” provides that sales on which normal value are based must be in the ordinary course of trade. *Id.* § 1677b(b)(1), (a)(1)(B)(i). Sales made at less than cost, between affiliates, and in a particular market situation are excluded from the definition of “ordinary course of trade” in Section 1677(15). Thus, sales in those three categories are disregarded for purposes of calculating normal value based on market sales. Nothing in the statute grants Commerce the authority to modify the sales-below-cost test to permit a particular market situation analysis or adjustment, and the specificity of the sales-below-cost test leaves no ambiguity. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

In sum, although Section 504 of the TPEA amended Section 1677b(e) for “Constructed value” to grant Commerce the discretion to use an alternative calculation methodology, and Section 1677(15) for “Ordinary course of trade” to grant Commerce an additional ground on which it may disregard sales from the normal value calculation

when using home market sales, the Section 504 amendment did not amend Section 1677b(b), which sets out the calculation of the cost of production for the sales-below-cost test to determine whether and which sales should be disregarded as outside the ordinary course of trade when normal value is based on home market sales. “[W]here ‘Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’” *Thomas v. Nicholson*, 423 F.3d 1279, 1284 (Fed. Cir. 2005) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Thus, the statute authorizes Commerce to disregard certain sales when basing normal value on home market sales, or to use an alternative calculation methodology upon a cost-based particular market situation determination when basing normal value on constructed value.

Commerce applied a cost-based particular market situation adjustment for purposes of the sales-below-cost test of Section 1677b(b)(1), while basing normal value on home market sales. The statute does not authorize Commerce to adjust the cost of production as an alternative calculation methodology when using normal value based on home market sales under Section 1677b(e) as claimed by Commerce. The statute also does not authorize Commerce to adjust the cost of production for purposes of the sales-below-cost test under Sections 1677b(b)(1) and 1677(15)(C) as claimed by Commerce. Section 1677b(e) applies only when Commerce bases normal value on constructed value. Because Commerce based normal value on home market sales, not constructed value, Section 1677b(e) is inapplicable. Nothing in Sections 1677b(b)(1) and 1677(15)(C) authorizes Commerce to adjust the cost of production for the sales-below-cost test. The Court concludes, therefore, that Commerce’s particular market situation adjustment to the cost of production is not in accordance with the law. Because Commerce may not adjust the cost of production when using normal value based on home market sales, the Court does not consider the lawfulness or reasonableness of Commerce’s adjustment calculation, particularly its reliance on Wheatland’s submitted regression analysis.

### **C. Unauthorized Particular Market Situation Determination**

Commerce determined that a particular market situation distorted costs based on the totality of four factors, namely: (1) Korean subsidies of hot-rolled steel coil; (2) Korean imports of hot-rolled steel coil from the People’s Republic of China; (3) strategic alliances between Korean hot-rolled steel coil producers and CWP producers; and (4)

distortions in the Korean electricity market. Final IDM at 8; *see also* Prelim. DM at 12. Plaintiffs argue that Commerce’s particular market situation determination is not in accordance with the law and that the record does not support the existence of the four factors that are the basis of Commerce’s determination. NEXTEEL’s Br. at 23–46; SeAH’s Br. at 2 (incorporating NEXTEEL’s arguments); Hyundai Steel’s Br. at 7 (incorporating NEXTEEL’s arguments).

Commerce based its particular market situation determination on distortions in the cost of hot-rolled steel coil, a primary CWP input. Final IDM at 8, 14. Commerce explained:

Section 504 of the TPEA added the concept of [particular market situation] in the definition of the term “ordinary course of trade,” for purposes of [constructed value] under section [1677b(e)], and through these provisions for purposes of the [cost of production] under section [1677b(b)(3)]. [Section 504] of the TPEA states that “if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under the subtitle or any other calculation methodology.” Thus, under section 504 of the TPEA, Congress has given Commerce the authority to determine whether a [particular market situation] exists within the foreign market from which the subject merchandise is sourced and to determine whether the cost of materials, fabrication, or processing of such merchandise fail to accurately reflect the [cost of production] in the ordinary course of trade.

Final IDM at 7–8. Commerce made the particular market situation determination under Section 1677b(e) based on the assertion that Section 1677b(e)’s reference to “ordinary course of trade” incorporates Section 1677b(e) into the cost of production calculation in Section 1677b(b)(3). *Id.* at 7.

As discussed in the previous section, Section 1677b(e) applies expressly when Commerce bases normal value on constructed value. 19 U.S.C. § 1677b(e). Nothing in the statute can be read to authorize a cost-based particular market situation determination when Commerce bases normal value on home market sales. The statute does not provide for a cost-based particular market situation analysis when using home market sales to calculate normal value. Commerce made an unlawful particular market situation cost-based determination in this case, while basing normal value on home market sales. The Court concludes that Commerce’s cost-based particular market situation determination is not in accordance with the law, and the Court

thus does not consider whether Commerce's particular market situation determination is supported by substantial evidence on the record.

### CONCLUSION

The Court concludes that Commerce's cost-based particular market situation determination and subsequent adjustment are not in accordance with the law.

Accordingly, it is hereby

**ORDERED** that the *Final Results* are remanded for Commerce to reconsider its particular market situation determination and adjustment in light of this opinion; and it is further

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

- (1) Commerce shall file remand results on or before October 29, 2021;
- (2) Commerce shall file the administrative record on or before November 12, 2021;
- (3) Comments in opposition to the remand results shall be filed on or before December 3, 2021;
- (4) Comments in support of the remand results shall be filed on or before December 17, 2021; and
- (5) The joint appendix shall be filed on or before December 30, 2021.

Dated: September 27, 2021  
New York, New York

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



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