

# U.S. Customs and Border Protection



## ENHANCED TRANSPARENCY AND ACCESS TO INFORMATION FOR REFUND REQUESTERS IN THE AUTOMATED COMMERCIAL ENVIRONMENT

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

**ACTION:** General notice.

**SUMMARY:** This document announces that U.S. Customs and Border Protection (CBP) is making available a new report in the Automated Commercial Environment (ACE). ACE account users will have the option to electronically view and track their outstanding refund status and history for all refunds processed after the deployment date.

**DATES:** CBP will deploy the new Refunds ACE Report on August 29, 2022.

**ADDRESSES:** Comments concerning this notice may be submitted at any time via email to the ACE Collections Team, Investment Analysis Office, Office of Finance, U.S. Customs and Border Protection, at [ACECollections@cbp.dhs.gov](mailto:ACECollections@cbp.dhs.gov), with a subject line identifier reading “ACE Collections Refund Release.”

**FOR FURTHER INFORMATION CONTACT:** Steven J. Grayson, Program Manager, Investment Analysis Office, Office of Finance, U.S. Customs and Border Protection, at (202) 579-4400, or [steven.j.grayson@cbp.dhs.gov](mailto:steven.j.grayson@cbp.dhs.gov).

### SUPPLEMENTARY INFORMATION:

#### I. Background

##### *A. Ongoing Modernization of the Collections System at U.S. Customs and Border Protection*

U.S. Customs and Border Protection (CBP) is modernizing its collections system, allowing CBP to eventually retire the Automated Commercial System (ACS) and transfer all collections processes into the Automated Commercial Environment (ACE). This modernization effort, known as ACE Collections, includes the consolidation of the

entire collections system into the ACE framework, which will enable CBP to utilize trade data from ACE modules, benefitting both the trade community and CBP with more streamlined and better automated payment processes. The new collections system in ACE will reduce costs for CBP, create a common framework that aligns with other initiatives to reduce manual collection processes, and provide additional flexibility to allow for future technological enhancements. ACE Collections will also provide the public with more streamlined and better automated payment processes with CBP, including better visibility into data regarding specific transactions.

ACE Collections supports the goals of the Customs Modernization Act (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act), of modernizing the business processes that are essential to securing U.S. borders, speeding up the flow of legitimate shipments, and targeting illicit goods that require scrutiny. ACE Collections also fulfills the objectives of Executive Order 13659 (79 FR 10655, February 25, 2014), to provide the trade community with an integrated CBP trade system that facilitates trade, from entry of goods to receipt of duties, taxes, and fees.

CBP is implementing ACE Collections through phased releases in ACE. Release 1 was deployed on September 7, 2019, and dealt with statements integration, the collections information repository (CIR) framework, and automated clearinghouse (ACH) processing. *See* 84 FR 46749 and 84 FR 46678 (September 5, 2019). On September 23, 2019, a minor correction was made to the Release 1 notice. *See* 84 FR 49650 (September 23, 2019).

Release 2 was deployed on February 5, 2021, and focused on non-ACH electronic receivables and collections, for Fedwire and *Pay.gov*, that included user fees, Harbor Maintenance Fee (HMF), and Seized Assets and Case Tracking System (SEACATS) payments. All of the changes in Release 2 were internal to CBP and did not affect the trade community; as such, no notice was published.

Release 3 was deployed on May 1, 2021, and primarily implemented technical changes to the liquidation process, and deferred tax bills, which were internal to CBP. *See* 86 FR 22696 (April 29, 2021). Release 3 also harmonized the determination of the due date for deferred tax payments with the entry summary date, streamlined the collections system, and provided importers of record with more flexibility and access to data when making deferred payments of internal revenue taxes owed on distilled spirits, wines, and beer imported into the United States.

Release 4 was deployed on October 18, 2021, and primarily implemented technical changes to the production and management of the internal CBP processes for supplemental bills, certain reimbursable bills, and non-reimbursable/miscellaneous bills issued by CBP to the public. *See* 86 FR 56968 (October 13, 2021). Release 4 also made available to importers of record, licensed customs brokers, and other ACE account users, an option to electronically view certain, unpaid, open bill details as reports in ACE Reports and adopted a new, enhanced format for the CBP Bill Form.

Most recently, Release 5 was deployed on March 21, 2022, and implemented internal technical changes to the production, tracking, and management of overdue bills and delinquent accounts and the bonds associated with them, including enhancements to the unpaid, open bill details reports in ACE Reports. *See* 87 FR 14899 (March 16, 2022). Release 5 also included a May 1, 2022, delayed deployment of minor modifications to the mailed Formal Demand on Surety for Payment of Delinquent Amounts Due (also informally referred to as the 612 Report) and the ability to electronically view 612 Reports in ACE Reports.

As explained more fully below, Release 6 will be deployed on August 29, 2022. Release 6 focuses on the management of refunds, and it includes mainly internal, technical changes to the ability to search, create, and review/certify those refunds. Release 6 also includes enhancements that improve transparency and access to information through ACE for ACE account users who have sought refunds from CBP to view certain information regarding the ACE account user's own refunds. Additional releases for ACE Collections will follow, and any further changes affecting the public will be announced by notice in the **Federal Register**, as needed.

### *B. Overview of CBP's Refund Process*

CBP is authorized to collect duties, taxes, and fees from customs activities. *See generally* 19 U.S.C. 58a, 58b, 58b–1, 58c, 1505; 26 U.S.C. 4461. Pursuant to 19 U.S.C. 1505(a), importers of record are required to deposit with CBP the amount of duties and fees estimated to be payable for imports. CBP is also required to collect any increase or refund any excess deposits of duties and fees, with interest, as determined at the time of liquidation or reliquidation. *See* 19 U.S.C. 1505(b)–(c). CBP has additional and more specific authority to refund duties or other receipts for excess deposits; fees, charges, and exactions; fines, penalties, forfeitures; and deposits made prior to liquidation. *See* 19 U.S.C. 1520. Certain other statutes also provide CBP with additional, specific authority for refunds associated with necessary repairs (*see* 19 U.S.C. 1466); drawback (*see* 19 U.S.C. 1313); loss,

deterioration, or damage (*see* 19 U.S.C. 1563); countervailing duty investigations (*see* 19 U.S.C. 1671c–1671e, 1677g); and antidumping investigations (*see* 19 U.S.C. 1673c–1673e, 1677g). Finally, 19 U.S.C. 983 outlines the general procedures for returning property seized during civil forfeiture proceedings.

The regulations for processing refunds are contained in part 24 of title 19 of the Code of Federal Regulations (CFR). Specifically, refunds for the overpayment of quarterly payments to express consignment carrier and centralized hub facilities are addressed in 19 CFR 24.23. Refunds associated with harbor maintenance fees are addressed in 19 CFR 24.24. Refunds of excessive duties, taxes, or interest connected to an entry are addressed in 19 CFR 24.36.<sup>1</sup> Setting off legal claims and judgments against debts owed to the United States for customs-related activities is addressed in 19 CFR 24.72. Specific rules for drawback can be reviewed in 19 CFR part 190 and in 19 CFR part 191 (for certain claims made on or before February 23, 2019). Finally, seized assets, handled under the seized assets and case tracking system (SEACATS), are addressed under subpart H of 19 CFR part 162.<sup>2</sup>

Generally, CBP refunds the overpayment of customs duties, taxes, and fees automatically. However, members of the public can request specific refunds through written or electronic requests, depending upon the type of refund sought.<sup>3</sup> Regardless of how a refund is requested, the processing aspects of all refund requests are handled the same way. Refund requests are initially processed by CBP and then processed by the U.S. Department of the Treasury (Treasury) prior to disbursement, if the request is valid. Generally, refunds are dispersed as checks to the address designated on CBP Form 4811 (Special Address Notification) on file with CBP for the specific requester or request.<sup>4</sup> Members of the public who have signed up to use ACH Refund and do not submit a CBP Form 4811 with an entry, or a refund

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<sup>1</sup> Additional unique interactions between refunds of duties, taxes, fees, or interest and the calculation of the accrual of interest are addressed in 19 CFR 24.3a.

<sup>2</sup> For more information concerning SEACATS please visit <https://www.dhs.gov/publication/dhscbppia-040-seized-assets-and-case-tracking-system?msclkid=330e2440d06311ec895071ecc7b3bd6b>.

<sup>3</sup> For example, certain requests can be mailed to the Revenue Division/Attention: Reimbursables, 6650 Telecom Drive, Suite 100, Indianapolis, Indiana 46278. Electronic requests are made and processed through the specific CBP-authorized electronic data interchange system designated for the refund. For example, modernized drawback claims may be requested within ACE and seized assets are processed in SEACATS.

<sup>4</sup> CBP Form 4811 may be electronically accessed at <https://www.cbp.gov/document/forms/form-4811-special-address-notification>.

request, will receive electronic disbursements of valid refunds to the account and location designated in ACH Refund.<sup>5</sup>

## **II. Availability of an Option for Electronic Viewing of Refund Status and History in ACE**

Currently, members of the public are not informed of the status of their refunds while CBP and Treasury are processing the refund. CBP's deployment of Release 6 will enable ACE to pull, organize, and process data elements into a report that displays refund status and details, which an ACE account user may view in ACE Reports for certain information regarding its own refunds. After refunds are processed by CBP, the same refund data will appear in a consolidated format, the Refund ACE Report, alongside all other outstanding refunds attributed to the same refund identification number and payee identification number.<sup>6</sup>

Within a business day after initial processing of refund data by CBP, including review and certification by CBP and transfer to Treasury for processing, ACE will reproduce the refund data in the corresponding Refund ACE Report. For each ACE account user, the report will include a summary of the total number of outstanding refunds requested, the total dollar amount requested in all outstanding refunds, and a consolidated table of all outstanding refunds and relevant data for the ACE account user's own refunds. The data elements appearing in the consolidated table will include:

- the specific refund's identification number;
- the requester's refund identification number;
- the requester's name;
- whom the refund will be in the care of, if applicable;
- the address the refund will be sent to;
- the date the refund request was made;
- the status of the refund in processing;
- the type of refund requested;

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<sup>5</sup> For additional information about ACH Refund, including how to sign-up and when to expect electronic refund, see <https://www.cbp.gov/trade/automated/ach/refund>.

<sup>6</sup> The refund identification number is an ACE-specific number created for a refund requester the first time the requester requests a refund. CBP uses the refund identification number to track all refund requests made by the requester. The payee identification number is an importer's identification number, an employer's identification number, or an individual's social security number.

- the number of the document that produced the refund;<sup>7</sup>
- the total amount sought in the specific refund request;
- the check or ACH Trace number the refund will be disbursed through;
- whether the refund will be disbursed through ACH;
- the Center of Excellence and Expertise (Center) associated with the refund;
- the team associated with the refund; and
- the port code associated with the refund.

The report will only display outstanding and dispersed refund data, processed by ACE, after the deployment date. Refund data will not be removed from the report after the corresponding refund has been dispersed. As of now, refunds put into process before the deployment date of August 29, 2022, will not appear in the Refund ACE Report.

The outstanding refunds and historical details will be viewable only in ACE Reports. It is important to note that CBP will continue its current processes for communicating refund statuses and disbursements through physical mailings; however, members of the public that have signed up for ACH Refund will receive electronic communications. These physical mailings (for refunds via U.S. Treasury checks) and electronic communications (for ACH Refunds) will remain the primary source of legal notice. Information and data that appear in those communications will supersede the data elements that appear in ACE Reports and the public should continue to consult the physical mailings and electronic communications to ensure the proper processing of refunds. Furthermore, nothing in this document will change the specific timeframes within which the public is required to request refunds, such as the five-year period for drawback claims, nor does the document change the timeframes within which CBP is required to respond to refund requests.

Only members of the public who have an ACE Portal account can view their refunds report in ACE Reports. CBP encourages members of the public (including, but not limited to, importers of record and licensed customs brokers) who do not already have an ACE Portal account to apply for access to be able to view the new report.<sup>8</sup> CBP

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<sup>7</sup> This number can be associated with many CBP forms, such as CBP Form 7501, Entry Summary; CBP Form 368, CBP Collection Receipt Form; or the CBP Bill Form.

<sup>8</sup> The step-by-step instructions to apply for an ACE Portal account are available online at <https://www.cbp.gov/trade/automated/getting-started/portal-applying>.

will provide any needed support for setting up ACE Portal accounts. The public may access the ACE Reports application through the ACE Secure Data Portal at <https://ace.cbp.dhs.gov>.<sup>9</sup> Within ACE Reports, an ACE account user may access the Refund ACE Report for its own refunds in the Workspace Module.<sup>10</sup>

Dated: August 5, 2022.

CRINLEY S. HOOVER,  
*Acting Chief Financial Officer*  
*U.S. Customs and Border Protection.*

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<sup>9</sup> For more information about accessing, navigating, and personalizing ACE Reports, please review the ACE Reports Trainings online at <https://www.cbp.gov/trade/ace/training-and-reference-guides>.

<sup>10</sup> The Workspace Module is a window in ACE Reports that provides ACE account users access to their standard reports categorized by subject area (such as Cargo Release, Entry Summary, Manifest, etc.) and includes a navigation list (a folder structure of standard reports) and a viewer that displays the report selected. For additional information about the Workspace Module, please consult the specific ACE Report training at <https://www.cbp.gov/trade/ace/training-and-reference-guides> or the quick reference card at <https://www.cbp.gov/document/guidance/ace-reports-qrc-navigating-workspace-module>.

# U.S. Court of Appeals for the Federal Circuit

MEYER CORPORATION, U.S., Plaintiff-Appellant v. UNITED STATES,  
Defendant-Appellee

Appeal No. 2021–1932

Appeal from the United States Court of International Trade in Nos. 1:13-cv-00154-TJA, 1:13-cv-00181-TJA, 1:13cv-00182-TJA, 1:13-cv-00226-TJA, 1:13-cv-00227-TJA, 1:13-cv-00258-TJA, 1:13-cv-00259-TJA, 1:13-cv-00266TJA, 1:13-cv-00322-TJA, 1:13-cv-00323-TJA, 1:13-cv00405-TJA, 1:14-cv-00118-TJA, 1:14-cv-00277-TJA, 1:15cv-00018-TJA, 1:15-cv-00019-TJA, 1:15-cv-00091-TJA, 1:15-cv-00092-TJA, 1:15-cv-00191-TJA, 1:15-cv-00332TJA, 1:16-cv-00112-TJA, 1:16-cv-00271-TJA, 1:17-cv00186-TJA, Senior Judge Thomas J. Aquilino, Jr.

Decided: August 11, 2022

JOHN MICHAEL PETERSON, Neville Peterson LLP, New York, NY, argued for plaintiff-appellant. Also represented by PATRICK KLEIN; JOHN DONOHUE, Philadelphia, PA; RICHARD F. O'NEILL, Seattle, WA.

BEVERLY A. FARRELL, International Trade Field Office, United States Department of Justice, New York, NY, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, JUSTIN REINHART MILLER; PAULA S. SMITH, Office of the Assistant Chief Counsel, Bureau of Customs and Border Protection, United States Department of Homeland Security, New York, NY.

Before MOORE, *Chief Judge*, CLEVENGER and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

This appeal involves two issues related to duties assessed on cookware that Meyer Corporation, U.S. imported. First, Meyer sought duty-free treatment for cookware manufactured in Thailand. Thailand is a beneficiary developing country under the Generalized System of Preferences, so certain products manufactured there with 35% or more Thai inputs are eligible for duty-free treatment. Materials imported to Thailand from other countries must undergo a “double substantial transformation” in Thailand to count toward the 35%. The United States Court of International Trade ruled that Meyer’s pots and pans manufactured in Thailand are not eligible for duty-free treatment because they were made of steel discs from China that underwent only one substantial transformation. The Court of International Trade did not clearly err in finding only one substantial transformation, so we affirm.

Second, Meyer sought to establish the dutiable value of its cookware using the “first-sale” price from affiliated manufacturers to

affiliated distributors. Relying on language from our decision in *Nissho Iwai American Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992), the Court of International Trade required Meyer to prove that these first sales were not only at arm's length but were also unaffected by China's status as a nonmarket economy. Finding that Meyer did not prove the absence of "nonmarket influences" for its cookware imported from China or produced with Chinese inputs, the trial court did not allow Meyer to rely on its first-sale prices. The trial court misinterpreted *Nissho Iwai* to impose a requirement beyond what the statute and regulations demand, so we vacate and remand for the trial court to reconsider whether Meyer may rely on its first-sale prices.

## BACKGROUND

This appeal concerns duties that U.S. Customs and Border Protection assessed on cookware imported by Meyer Corporation, U.S. (Meyer). Some cookware was manufactured in Thailand, and some was manufactured in China.

Each piece of cookware manufactured in Thailand began as a steel disc imported from China. In Thailand, the manufacturer used a deep drawing process to produce "shells" having the rough shape and size of the finished cookware. Then, the manufacturer turned the shells into finished cookware in a series of steps including trimming the edges, removing grease, polishing, flattening the bottom, wrapping in plastic, marking with the product's specifications, punching holes for the handle, and attaching the handle.

The manufacturers in Thailand and China sold finished cookware to distributors in Macau and Hong Kong, respectively, and then to the U.S. importer, Meyer. The manufacturers, distributors, and importer are all related, with common parent/shareholder Meyer International Holdings, Ltd.

Meyer requested duty-free treatment for the cookware produced in Thailand, based on Thailand's status as a beneficiary developing country under the Generalized System of Preferences. *Meyer Corp., U.S. v. United States*, No. 13–00154, 2021 WL 777788, at \*3 (Ct. Int'l Trade Mar. 1, 2021) (*Decision*). Meyer also asked Customs to value its cookware based on the first-sale price that its affiliated distributors paid to the manufacturers. *Id.* Following an audit, Customs ultimately denied duty-free treatment. *Id.* at \*4; Summons at 2, *Meyer Corp., U.S. v. United States*, No. 13–00154 (Ct. Int'l Trade Apr. 16, 2013), ECF No. 1. Customs also assessed duties based on the second-sale price that Meyer paid to its distributors, rejecting Meyer's re-

quest to use the first-sale price. *Decision* at \*4; Summons at 2, *Meyer*, No. 13–00154.

Meyer protested Customs' decisions and then appealed to the Court of International Trade. *Decision* at \*4. Following a bench trial, the trial court ruled that Meyer failed to prove it was entitled to duty-free treatment for the cookware manufactured in Thailand. *Id.* at \*50. It explained that under *Torrington Co. v. United States*, 764 F.2d 1563, 1567 (Fed. Cir. 1985), raw materials from non-beneficiary developing countries must undergo a “double substantial transformation” in the beneficiary developing country to count toward duty-free treatment. *Decision* at \*3, \*36–37. It found that Meyer had shown that the manufacturer substantially transformed steel discs once, “when a flat blank [wa]s deep drawn into a shell that [wa]s an unfinished pot or pan.” *Id.* at \*37. But, in the trial court's view, the manufacturer did not substantially transform the input a second time by converting the shell into a finished pot or pan. *Id.* Further, the trial court found that Meyer failed to show that an unfinished shell is a “distinct article of commerce” that is “readily susceptible to trade,” as *Torrington* also requires. *Id.* at \*38 (citing *Torrington*, 764 F.2d at 1570). Having found that Meyer failed to satisfy the requirements of *Torrington*, the trial court concluded that the steel discs could not count toward the value added in Thailand, and thus Meyer failed to prove its cookware was eligible for duty-free treatment. *Id.*

The trial court also affirmed Customs' decision “to deny ‘first sale’ treatment.” Judgment, *Meyer Corp., U.S. v. United States*, No. 13–00154 (Ct. Int'l Trade Mar. 1, 2021), ECF No. 187. It held that, under our decision in *Nissho Iwai*, an importer wishing to rely on the first-sale price bears the burden to show that the first sales were “(1) bonafide sales that are (2) clearly destined for the United States (3) transacted at arm's length and (4) absent any distortive nonmarket influences.” *Decision* at \*1, \*5 (citing *Nissho Iwai Am. Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992)). The trial court suggested that Meyer could prove the absence of nonmarket influences with “the factors used by entities located [in China] to obtain a duty rate other than the country-wide rate” in antidumping proceedings. *Id.* at \*2. For both Meyer's Chinese-manufactured products and its Thai-manufactured products made in part from Chinese inputs, the trial court found that Meyer had not provided adequate information to prove that its first sales met the last requirement: that they were free of “market-distortive influence, either with respect to the plaintiff directly or the provision of inputs generally.” *Id.* at \*6, \*51. It thus concluded that Meyer could not rely on the first-sale prices. *Id.* at \*50–51.

Meyer appeals the trial court’s determinations that its products manufactured in Thailand were not eligible for duty-free treatment and that it could not rely on first-sale prices. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

## ANALYSIS

“We review the Court of International Trade’s conclusions of law *de novo*.” *Ford Motor Co. v. United States*, 286 F.3d 1335, 1340 (Fed. Cir. 2002). “Following a trial, we review the court’s findings of fact for clear error.” *Id.*

### I

The Generalized System of Preferences statute “represents the United States’ participation in a multinational effort to encourage industrialization in lesser developed countries through international trade.” *Torrington*, 764 F.2d at 1565. Under the Act, the President “prepare[s] a list of beneficiary developing countries” and designates eligible products from those countries. *Id.* (citing 19 U.S.C. § 2462). “A designated product imported from a listed country may enter the United States duty free.” *Id.* (citing 19 U.S.C. § 2461).

To be eligible, the sum of “the cost or value of the materials produced in the beneficiary developing country” and “the direct costs of processing operations performed in such beneficiary developing country” must be at least 35% of the appraised value of the article. 19 U.S.C. § 2463(a)(2)(A)(ii).

Regulations define materials “produced in the beneficiary developing country” to include materials imported from other countries but “[s]ubstantially transformed in the beneficiary developing country into a new and different article of commerce.” 19 C.F.R. § 10.177(a)(2).

In *Torrington*, we interpreted the statute and regulation to require a “dual transformation.” 764 F.2d at 1567–68. A raw material from another country must be substantially transformed once to become an intermediate article “produced in the beneficiary developing country” under 19 C.F.R. § 10.177(a), and then a second time to be considered an input into the final product—rather than the final product itself—under 19 U.S.C. § 2463(a)(2)(A)(ii)(I). *Torrington*, 764 F.2d at 1567–68.

The intermediate article cannot be the output of any arbitrary step in the manufacturing process. Instead, under 19 C.F.R. § 10.177(a), it must be an article “of commerce.” The “regulation imposes the requirement that the ‘new and different’ product be commercially recognizable as a different article, i.e., that the ‘new and different’ article be readily susceptible of trade, and be an item that persons might well wish to buy and acquire for their own purposes of consumption or

production.” *Torrington*, 764 F.2d at 1570.

To find a “substantial transformation,” we consider whether “an article emerges from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process.” *Id.* at 1568. “The name element . . . has received less weight and is considered ‘the weakest evidence of substantial transformation.’” *Koru N. Am. v. United States*, 12 C.I.T. 1120, 1126 (1988) (citation omitted).

The trial court found “no change in character” from a shell to a finished pot or pan. *Decision* at \*37. Analyzing the manufacturing steps after deep drawing, the trial court noted “that there [wa]s no annealing or galvanizing performed or any change in chemical composition or mechanical properties.” *Id.* (citing *Ferrostaal Metals v. United States*, 11 C.I.T. 470 (1987)). “Nor was there any significant change in shape or form” because “the drawing process g[ave] the article its final form, not the subsequent finishing operations.” *Id.* (citing *Nat’l Hand Tool Corp. v. United States*, 16 C.I.T. 308 (1992), *aff’d*, 989 F.2d 1201 (Fed. Cir. 1993) (per curiam)).

Meyer argues that those specific types of changes are not required; the change in character here is from “producers’ goods” to “consumers’ goods” as discussed in *Torrington*, 764 F.2d at 1571, and *Midwood Industries, Inc. v. United States*, 64 Cust. Ct. 499, 507 (1970). But Meyer takes references to producers’ and consumers’ goods out of context. In *Torrington* and *Midwood*, the articles changed from “producers’ goods” to “consumers’ good” because of substantial changes in shape, form, chemical properties, and mechanical properties. *Torrington*, 764 F.2d at 1571 (citing *Midwood*, 64 Cust. Ct. at 504–07). For example, in *Torrington*, creating the consumers’ needles from the producers’ swages required changing the shape and form by cutting the swage to the right length, adding a hole, and sharpening the tip. *Id.* at 1566, 1571. It also involved changing the chemical and mechanical properties by hardening, tempering, and plating the needle. *Id.* Because of these changes, the court considered swages to be producers’ goods distinct from finished needles.

Here, the trial court correctly focused its inquiry on manufacturing steps that changed the shape, form, chemical properties, and mechanical properties. It did not clearly err in finding no substantial change in character from the shells to the final product.

The trial court also found “no change in use” because “the use of the [shells] [wa]s predetermined; they w[ould] be finished and used as a specific pot or pan.” *Decision* at \*37 (citing *Nat’l Hand Tool*, 16 C.I.T. at 311–12). Meyer argues that the district court relied on the wrong test to identify a change in use—rather than consider whether each

shell's use is predetermined, the court should have considered whether a consumer can use a shell as a pot or pan. The shells have no handles, making them useless as pots and pans, so Meyer argues that adding a handle changes the use.

The trial court got the test right. In both *Torrington* and *National Hand Tool*, the court considered whether the intermediate article was useful only for producing a specific finished product, not whether it was usable as the finished product. Compare *Torrington*, 764 F.2d at 1566 (finding a change in use because although “the swage is useful solely in the production of sewing-machine needles with a predetermined blade diameter, . . . the resulting needle may vary in other respects (e.g., eye placement, eye size, and needle length)”), with *Nat'l Hand Tool*, 16 C.I.T. at 311 (finding no change in use because “[e]ach component was intended to be incorporated in a particular finished mechanics' hand tool”). Applying this test, the trial court found, and Meyer does not now contest, that each shell was meant to be finished into a specific model of pot or pan. *Decision* at \*37.

Although the record does suggest that the article underwent a change in name, that is not dispositive. Both parties called the intermediate article a “work in progress' shell[],” *id.* at \*42, \*30–31, or just a “shell,” *id.* at \*37. The finished product was a pot or pan. But it is unclear from the record whether “shell” is a convenient term adopted for this litigation or for Meyer's internal use, or if instead it is a common term across the industry. Even so, this difference in name, the least important factor, is not enough to show clear error in the district court's conclusion that there was no second substantial transformation. See *Koru*, 12 C.I.T. at 1126.

The trial court did not clearly err in finding only one substantial transformation. We thus affirm the trial court's denial of duty-free treatment for the cookware manufactured in Thailand. We need not reach Meyer's argument that it satisfied the separate requirement that the shells be an article of commerce susceptible to sale.

## II

Customs primarily uses the “transaction value” of imported merchandise as the dutiable value. 19 U.S.C. § 1401a(a)(1). The transaction value “is the price actually paid or payable for the merchandise when sold for exportation to the United States,” plus specified additions. 19 U.S.C. § 1401a(b)(1).

To be viable as a basis for valuation, a transaction must meet the requirements of 19 U.S.C. § 1401a(b)(2), including, for transactions “between a related buyer and seller,” that either “an examination of the circumstances of the sale of the imported merchandise indicates

that the relationship between such buyer and seller did not influence the price actually paid or payable” or “the transaction value. . . closely approximates” a test value. 19 U.S.C. § 1401a(b)(2)(B). The corresponding regulation, 19 C.F.R. § 152.103(l)(1), lists ways for Customs to find that the relationship between the buyer and seller did not influence the price, for example, by finding that “the price has been settled in a manner consistent with the normal pricing practices of the industry in question,” or that “the price is adequate to ensure recovery of all costs plus a profit which is equivalent to the firm’s overall profit.”

In *Nissho Iwai American Corp. v. United States*, we addressed which price Customs should use in a multi-tiered import scheme in which all the entities are related—the first-sale price the distributor paid to the manufacturer, or the second-sale price the importer paid to the distributor. 982 F.2d 505, 508–11 (Fed. Cir. 1992). “[O]nce it is determined that both the [first- and second-sale] price[s] are statutorily viable transaction values, the rule is straightforward: the manufacturer’s [first-sale] price, rather than the [distributor’s second-sale] price . . . , is used as the basis for determining transaction value.” *Id.* at 509. Our decision elaborated on the meaning of “statutorily viable”: “[t]he manufacturer’s price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and middleman deal with each other at arm’s length, in the absence of any non-market influences that affect the legitimacy of the sales price.” *Id.*

Here, the trial court articulated four requirements for a viable transaction under *Nissho Iwai*, including that the sale be “(3) transacted at arm’s length and (4) absent any distortive nonmarket influences.” *Decision* at \*1. The court noted that the fourth factor “has generally been neglected” but was relevant here because China “presumptively remains a non-market economy in this and other proceedings,” *id.* at \*1, \*6. The court placed the burden on Meyer to prove that the first sale met these requirements, including to prove “the absence of any market-distortive influences” arising in a nonmarket economy. *Id.* at \*2, \*5–6

The trial court misinterpreted our decision in *Nissho Iwai* to require any party to show the absence of all “distortive nonmarket influences.” There is no basis in the statute for Customs or the court to consider the effects of a non-market economy on the transaction value. The statute requires only that “the relationship between [the] buyer and seller did not influence the price actually paid or payable.” 19 U.S.C. § 1401a(b)(2)(B). This provision concerns effects of the

relationship between the buyer and seller, not effects of government intervention, and especially not with government intervention that affects the industry as a whole. Neither *Nissho Iwai* nor the government's briefing identifies other statutes or regulations that could require Customs or the Court of International Trade to consider whether the goods were sold in a nonmarket economy or were otherwise affected by a nonmarket economy.

When Congress wants to distinguish between market and nonmarket economies in the trade laws, it does so expressly. *E.g.*, 19 U.S.C. §§ 1677b(c), 1671(f)(2), 1677f-1(f)(1) (providing special rules for nonmarket economy countries in antidumping and countervailing duty investigations). Congress has not provided for differing treatment in 19 U.S.C. § 1401a. Further, the trade laws “must be interpreted to be consistent with [international] obligations, absent contrary indications in the statutory language or its legislative history.” *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004) (alteration in original) (citation omitted). The General Agreement on Tariffs and Trade (GATT) requires that all Member States be treated equally unless a specific provision authorizes differing treatment. GATT at Art. 1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. The GATT valuation agreement, on which § 1401a is based, does not distinguish between “market economy” and “nonmarket economy” countries and says that valuations should be made “without distinction between sources of supply.” Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), 1868 U.N.T.S. 279 (1994). The trial court's reading of *Nissho Iwai* creates a risk that Customs will value goods from different countries unequally, even though neither the valuation code nor another specific provision authorizes differing treatment.

With all this in mind, we read *Nissho Iwai* as merely restating the statutory requirements for a transaction value, rather than introducing a new requirement separate from the arm's-length requirement. The decision lays out two requirements, both enumerated in the statute, and then elaborates on the second:

The manufacturer's price constitutes a viable transaction value when [1] the goods are clearly destined for export to the United States [§ 1401a(b)(1)] and [2] when the manufacturer and the middleman deal with each other at arm's length [§ 1401a(b)(2)(B)], in the absence of any non-market influences that affect the legitimacy of the sales price.

982 F.2d at 509. In context, “nonmarket influences” just refers to influences growing out of the relationship of buyer and seller that distort the “price paid or payable,” which Customs must consider under 19 U.S.C. § 1401a(b)(2)(B).

Because the Court of International Trade relied on its misreading of *Nissho Iwai* to reject Meyer’s first-sale price, we vacate and remand for the court to reconsider whether Meyer may rely on the first-sale price. We need not reach Meyer’s alternative argument that the court should have subjected Meyer’s second-sale price to the same nonmarket-influences requirement it imposed on the first-sale price.

\* \* \*

For the reasons set forth above, the decision of the Court of International Trade is

**AFFIRMED-IN-PART, VACATED-IN-PART, AND  
REMANDED**

**COSTS**

No costs.

# U.S. Court of International Trade

Slip Op. 22–87

UNITED STATES, Plaintiff, v. GREENLIGHT ORGANIC, INC. AND PARAMBIR SINGH AULAKH, Defendants.

Before: Jennifer Choe-Groves, Judge  
Court No. 17–00031

[Denying Defendants’ motion for summary judgment.]

Dated: August 4, 2022

*William G. Kanellis* and *Ashley Akers*, Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff United States. With them on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. *Robert B. Silverman*, *Joseph M. Spraragen*, and *Robert F. Seely*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, N.Y., for Defendants Greenlight Organic, Inc. and Parambir Singh Aulakh.

## **OPINION AND ORDER**

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

Plaintiff United States (“Plaintiff”) brings this 19 U.S.C. § 1592 civil enforcement action seeking to recover unpaid duties and to affix penalties, alleging that Defendants Greenlight Organic, Inc. (“Greenlight”) and Parambir Singh Aulakh (“Aulakh”) (collectively, “Defendants”) imported wearing apparel into the United States fraudulently. Second Am. Compl. ¶ 1, ECF No. 124. The statute 19 U.S.C. § 1592 prohibits companies from making false statements or omitting material information in the course of importing merchandise into the United States through fraud, gross negligence, or negligence. *See* 19 U.S.C. § 1592(a)(1). Plaintiff alleges that Greenlight misclassified and undervalued its subject merchandise fraudulently in violation of the statute. Second Am. Compl. ¶¶ 21–22.

Before the Court is the Motion for Summary Judgment (“Defs.’ Mot.”), ECF No. 157, filed by Defendants. *See also* Mem. Law Supp. Defs.’ Mot. Summ. J. (“Defs.’ Mem.”), ECF No. 157–1. This is Defendants’ third dispositive motion challenging the statute of limitations, but unlike the previous two motions, this motion was filed after the Parties completed discovery. Defendants argue that Plaintiff’s fraud action is time-barred by the five-year statute of limitations set forth in 19 U.S.C. § 1621. *See* Defs.’ Mot. at 1; Defs.’ Mem. at 35–36; Defs.’ [Corrected] Reply Pl.’s Opp’n Defs.’ Mot. Summ. J. at 1, ECF No. 168.

Plaintiff contends that the action was initiated timely because the statute of limitations did not begin to run until February 2012 when the Government first obtained evidence of double invoicing from Greenlight. United States' Opp'n Defs.' Second Mot. Summ. J. ("Pl.'s Opp'n") at 2, ECF No. 162.<sup>1</sup> For the following reasons, the Court denies the Motion for Summary Judgment.

### JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1582. The Court will grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). To raise a genuine issue of material fact, a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing version of the truth at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastic Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006) (citation omitted).

### PROCEDURAL BACKGROUND

The Court presumes familiarity with the procedural history and recounts briefly the procedural history for context. *See United States v. Greenlight Organic, Inc. ("Greenlight I")*, 42 CIT \_\_, \_\_, 352 F. Supp. 3d 1312, 1313–14 (2018); *United States v. Greenlight Organic, Inc. ("Greenlight II")*, 43 CIT \_\_, \_\_, 419 F. Supp. 3d 1298, 1301–02 (2019); *United States v. Greenlight Organic, Inc. ("Greenlight III")*, 44 CIT \_\_, \_\_, 466 F. Supp. 3d 1260, 1262–63 (2020).

Plaintiff commenced this action against Greenlight on February 8, 2017. Summons, ECF No. 1; Compl., ECF No. 2. The Court denied

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<sup>1</sup> Plaintiff filed its untimely response to the Motion for Summary Judgment eighteen days late on September 7, 2021. Docket Entry, ECF No. 162. Plaintiff explains that it relied on the ECF email notification that reflected a due date for the response by September 7, 2021 because the thirty-five-day period was consistent with the time period for parties to respond to dispositive motions pursuant to USCIT Rule 7(d). United States' Resp. Court's Sept. 10, 2021 Order and Mot. File out of Time at 1, ECF No. 165. Plaintiff further explains that although the docket entry was subsequently amended to reflect the earlier due date, Plaintiff did not receive a notification of the change, was not aware of the change, and "believed the due date to be settled." *Id.* at 1–2.

USCIT Rule 7 provides a thirty-five-day period to respond to dispositive motions "[u]nless otherwise prescribed . . . by order of the court." USCIT R. 7(d). In an opinion issued on March 30, 2021, the Court ordered that responses to dispositive motions be filed on or before August 20, 2021. *United States v. Greenlight, Organic, Inc.*, 45 CIT \_\_, \_\_, 503 F. Supp. 3d 1269, 1277 (2021). ECF email notifications reflect automatically generated deadlines that are consistent with the Rules of the U.S. Court of International Trade. ECF email notifications do not have the effect, however, of amending or superseding court orders. In the interest of full consideration of the merits, the Court will accept Plaintiff's untimely response, but notes that court ordered dates supersede dates generated automatically by ECF.

Greenlight’s first motion for summary judgment, in which Greenlight argued that the action was time-barred by the five-year statute of limitations, because the record did not provide enough information to assess when Plaintiff first discovered Greenlight’s fraud—whether in 2011, as Greenlight asserted, or in February 2012, as Plaintiff asserted—from which time the five-year statute of limitations began to run. *See Greenlight I*, 42 CIT at \_\_, 352 F. Supp. 3d at 1313–14, 1315–16 (citing 19 U.S.C. § 1621). The Court explained:

The record on summary judgment does not provide the court with enough information to assess when the Government first had knowledge of Greenlight’s fraudulent activities. For example, the record does not demonstrate clearly whether the Government had knowledge of Greenlight’s intent to defraud the revenue or otherwise violate the laws of the United States when the Government discovered Greenlight’s misclassification of its entries in 2011. More facts are needed to ascertain when the Government first had knowledge of Greenlight’s fraudulent misclassification and undervaluation activities, including when the Government began to suspect a potential double[ ]invoicing scheme and when the Government had knowledge of an intent to defraud with respect to the misclassification of entries.

*Id.* at \_\_, 352 F. Supp. 3d at 1315–16.

Plaintiff filed the First Amended Complaint, adding Aulakh as a defendant and pleading additional facts, with leave of the Court on April 2, 2019. *See* First Am. Compl., ECF No. 111. The Court granted Aulakh’s motion to dismiss the First Amended Complaint for failure to state a claim upon which relief may be granted, with judgment to be entered after forty-five days if Plaintiff did not file a second amended complaint.<sup>2</sup> *Greenlight II*, 43 CIT at \_\_, 419 F. Supp. 3d at 1306.

Plaintiff filed the Second Amended Complaint on January 8, 2020. Second Am. Compl. The Court denied Aulakh’s motion to dismiss the Second Amended Complaint, in which Aulakh argued for dismissal on the theories that U.S. Customs and Border Protection (“Customs”) failed to exhaust administrative remedies, the five-year statute of limitations had expired, and Plaintiff failed to plead fraud with particularity based on additional facts pleaded in the Second Amended

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<sup>2</sup> The Court granted the motion of Greenlight’s counsel to withdraw their appearance in this matter. Order (Feb. 27, 2019), ECF No. 108. Greenlight had not retained counsel at the time of the Court’s decision on Aulakh’s motion to dismiss and did not join Aulakh’s motion to dismiss. *Greenlight II*, 43 CIT at \_\_, 419 F. Supp. 3d at 1301 n.1, 1306.

Complaint.<sup>3</sup> *Greenlight III*, 44 CIT at \_\_\_, 466 F. Supp. 3d at 1263–66. Aulakh argued that the five-year statute of limitations had run, and Plaintiff asserted again that the Government discovered Defendants’ fraudulent scheme in February 2012, when Aulakh first produced to Customs records from Greenlight showing evidence of a double invoicing scheme. *Id.* at \_\_\_, 466 F. Supp. 3d at 1264. The Court held that the Second Amended Complaint contained sufficient facts accepted as true to establish on its face that the Government discovered the fraudulent activity in February 2012 and the Complaint was filed within five years in February 2017. *Id.* at \_\_\_, 466 F. Supp. 3d at 1265.

### UNDISPUTED FACTS

The following facts are not in dispute.

Leslie Jordan is the principal of Leslie Jordan, Inc. (“LJI”), a business and manufacturer of apparel that was a competitor of Greenlight. The United States’ Rule 56.3 Statement of Issues of Material Fact (“Pl.’s SMF”) ¶ B.1, ECF No. 162–1; *see* Defs.’ USCIT R. 56.3 Statement of Material Facts Not in Issue (“Defs.’ SMF”) ¶ 1, ECF No. 157–1. By Letter of May 31, 2011, Ms. Jordan sent a “complaint” to U.S. Immigration and Customs Enforcement (“ICE”), Homeland Security Investigations (“HSI”), that described Greenlight’s alleged misconduct. Defs.’ SMF ¶ 2 (citing Ex. B); Pl.’s SMF ¶ B.1.

In September 2011, HSI Special Agent Sean Lafaurie sought assistance from Customs Regulatory Audit to evaluate the allegations of undervaluation and misclassification. Pl.’s SMF ¶ B.9 (citing Ex. 6); *see* Defs.’ SMF ¶ 5 (citing Ex. E).

Customs testing showed that sample merchandise was classified mistakenly as “woven” rather than “knit.” Pl.’s SMF ¶ B.13 (citing Soo Hoo Decl. ¶ 5); Defs.’ SMF ¶ 7.

By email of October 26, 2011, Customs provided a calculated loss of revenue. Defs.’ SMF ¶ 7 (citing Ex. G); Pl.’s SMF ¶¶ B.10, B.14.

On December 6, 2011, Customs Supervisory Import Specialist Tonda Fuller issued a Customs Form 28 “Request for Information” to Greenlight, seeking import data. Defs.’ SMF ¶ 15 (citing Ex. K); Pl.’s SMF ¶ B.16 (citing Ex. 9).

On December 19, 2011, Customs and HSI interviewed Greenlight officials Monika Gill and Aulakh at Greenlight’s office. Defs.’ SMF ¶ 17 (citing Exs. L, M); Pl.’s SMF ¶ B.17 (citing Ex. 11). Greenlight was served with a Department of Homeland Security Summons or subpoena, requesting documents including shipping documents, com-

<sup>3</sup> Greenlight was not represented by counsel. *Greenlight III*, 44 CIT at \_\_\_, 466 F. Supp. 3d at 1261 n.1.

mercial invoices, and receipts of payment related to the importation of goods into the United States. Defs.' SMF ¶ 17 (citing Exs. L, M); Pl.'s SMF ¶ B.17 (citing Ex. 12).

## DISCUSSION

Defendants argue that the date of discovery in this fraud investigation from which the five-year statute of limitations began to run was either: (1) May 31, 2011, when Leslie Jordan provided her complaint to ICE and ICE began to (informally) investigate Greenlight; (2) October 31, 2011, when ICE opened a formal investigation; or (3) December 19, 2011, when Customs opened a formal investigation. Defs.' Mem. at 21. Plaintiff contends that the Government discovered evidence of fraud no earlier than February 9, 2012, when Greenlight first produced some of its internal business records showing double invoicing. Pl.'s Opp'n at 5.

For fraudulent civil penalty enforcement actions brought under 19 U.S.C. § 1592, the statute sets forth a five-year statute of limitations for commencing a case:

[N]o suit or action (including a suit or action for restoration of lawful duties under subsection (d) of such sections) may be instituted unless commenced within 5 years after the date of the alleged violation or, *if such violation arises out of fraud, within 5 years after the date of discovery of fraud . . . .*

19 U.S.C. § 1621(1) (emphasis added). The language “within 5 years after the date of discovery of fraud” invokes the discovery rule, which tolls the statute of limitations period until the date of discovery of fraud. *See United States v. Spanish Foods, Inc.*, 24 CIT 1052, 1056, 118 F. Supp. 2d 1293, 1297 (2000) (quoting *United States v. Ziegler Bolt & Parts Co.*, 19 CIT 13, 17 (1995)). The statute, regulations, and opinions of the U.S. Court of Appeals for the Federal Circuit do not define discovery of fraud under 19 U.S.C. § 1621(1).

In *United States v. Spanish Foods, Inc.* (“*Spanish Foods I*”), 24 CIT 1052, 118 F. Supp. 2d 1293 (2000), the court defined the date of discovery of fraud as “the date when the plaintiff first learns of the fraud or is sufficiently on notice as to the possibility of fraud to discover its existence with the exercise of due diligence,” 24 CIT at 1056, 118 F. Supp. 2d at 1297 (quoting *United States v. Modes, Inc.*, 16 CIT 879, 887, 804 F. Supp. 360, 368 (1992)) (other citations omitted). In *United States v. Spanish Foods, Inc.* (“*Spanish Foods II*”), 25 CIT 108, 131 F. Supp. 2d 1374 (2001), the court explained, based on the caselaw of various jurisdictions, that “[t]he state of being sufficiently on notice for the purpose of the discovery of fraud has been defined by

case law to mean the state at which a party comes to obtain knowledge of the fraud or such information on the basis of which the fraud could be detected with reasonable diligence.” 25 CIT at 112–13, 131 F. Supp. 2d at 1378–79 (citing *Urland v. Merrell-Dow Pharms., Inc.*, 822 F.2d 1268 (3d Cir. 1987); *Rosner v. Codata Corp.*, 917 F. Supp. 1009 (S.D.N.Y. 1996); *Augusta Bank & Tr. v. Broomfield*, 231 Kan. 52, 643 P.2d 100 (Kan. 1982); *Salem Sand & Gravel Co. v. Salem*, 260 Or. 630, 492 P.2d 271 (Or. 1971)). “Reasonable diligence” does not imply the duty to investigate mere suspicions,” but instead provides an inquiry determining “when Customs came in possession of information or knowledge of facts that: (1) amounted to more than a mere suspicion; and (2) could have led a man of ordinary prudence to learn of the fraud or the possibility of fraud under the particular circumstances.” *Id.* at 113, 131 F. Supp. 2d at 1379.

Defendants assert that “the date of discovery in this fraud investigation” was May 31, 2011, when Leslie Jordan provided her complaint to ICE and ICE began to investigate Greenlight. Defs.’ Mem. at 21. Defendants argue that, as in *Spanish Foods II*, in which the court held that the date of discovery was the date of the meeting between the informer and Customs, the date of discovery in this case occurred when Ms. Jordan sent “written materials to ICE . . . that provided specific factual information”—“her name, the name of her company, the names of vendors who were undervaluing shipments to Greenlight, their method of undervaluation, and entry-specific details about those shipments which related to her claim of undervaluation and product misdescription[—which] ultimately resulted in the instant action.” *Id.* at 23–24.

Defendants’ reliance on *Spanish Foods II* in proposing May 31, 2011 as the date of discovery of fraud is misplaced. The *Spanish Foods II* court concluded that the date of the meeting between the informer and Customs was the date of discovery of fraud because “[the informer] provided [Customs] with the double invoicing documents” at that meeting. *See Spanish Foods II*, 25 CIT at 117, 131 F. Supp. 2d at 1383. As the U.S. Court of Appeals for the Federal Circuit has upheld, double invoicing is a basis for a finding of fraudulent intent. *United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1344 (Fed. Cir. 2009). The undisputed facts do not establish that Ms. Jordan’s complaint alleged fraudulent intent, and contrary disputed facts suggest that Customs received double invoicing documents in 2012. Viewed in the light most favorable to Plaintiff, the undisputed facts do not establish that discovery of fraud occurred on May 31, 2011, when Ms. Jordan first provided information about Greenlight to the Government.

Defendants argue next, applying the Government’s (unsuccessful)

position from *Spanish Foods II* that the date of discovery occurred when Customs opened a formal investigation of the importer, that “there is no escape from the conclusion that the date of discovery in this case is October 31, 2011, when ICE opened a formal criminal undervaluation and misdescription case against Greenlight.” Defs.’ Mem. at 25. Similarly, Defendants’ third proposed date of discovery of fraud is December 19, 2011, when Customs opened a formal investigation of Greenlight. *Id.* at 25, 35. Defendants assert that “several important Government publications clearly state that the date of discovery begins to run in a customs fraud case when a formal investigation is opened by ICE and/or [Customs].” *Id.* at 21, 32–34 (citing Exs. KK (DHS OI Commercial Trade Fraud Investigations Handbook (OI HB 07–03, Dec. 3, 2007)), LL (ICE Investigations: Mission Roles in Multi-Agency Areas of Responsibility (Aug. 2007)), MM (ICE OI Case Management Handbook (OI HB 08–02, Feb. 1, 2008)), NN (The ABC’s of Prior Disclosure, U.S. Customs Informed Compliance Publication (May 2001))). Plaintiff contends that the discovery of fraud occurred in February 2012 when the Government first obtained evidence of double invoicing from Greenlight. Pl.’s Opp’n at 2.

The Parties dispute the underlying facts of whether the Government opened a formal criminal case against Greenlight on October 31, 2011, or a formal investigation of Greenlight on December 19, 2011. The Parties also dispute what information the Government knew about Greenlight’s fraudulent intent on May 31, 2011, October 31, 2011, and December 19, 2011. The Parties agree upon very few facts and the Court can only consider undisputed facts, not disputed facts, for summary judgment. Determining when a statute of limitations begins to run is a fact-specific inquiry. *Greenlight I*, 43 CIT at \_\_\_, 352 F. Supp. 3d at 1315 (citing *Spanish Foods I*, 24 CIT at 1056, 118 F. Supp. 2d at 1297–98). The question of when a plaintiff discovered fraud is not one that often lends itself to resolution by way of summary judgment. The Court notes that there are more disputed material facts with respect to the statute of limitations than undisputed facts. The few undisputed facts agreed upon by the Parties do not establish that May 31, 2011, October 31, 2011, or December 19, 2011 was the date of discovery of fraud as alleged in Defendants’ Motion for Summary Judgment. The Court observes that contrary disputed evidence suggests that discovery of fraud may have occurred in February 2012 when the Government first obtained evidence of double invoicing by Greenlight.

### CONCLUSION

For the aforementioned reasons, the Court concludes that the undisputed facts viewed in the light most favorable to non-movant Plaintiff do not establish that the date of discovery of fraud occurred on May 31, 2011, October 31, 2011, or December 19, 2011, as asserted by Defendants. The Court denies Defendants' Motion for Summary Judgment.

Accordingly, it is hereby

**ORDERED** that The United States' Response to the Court's September 10, 2021 Order and Motion to File out of Time, ECF No. 165, is granted; and it is further

**ORDERED** that the Motion for Summary Judgment, ECF No. 157, is denied; and it is further

**ORDERED** that the Parties shall file a joint proposed pre-trial order with the Court on or before September 19, 2022. If the Parties are unable to agree on a joint proposed pre-trial order, the Parties shall file separate proposed orders with the Court on or before September 19, 2022.

Dated: August 4, 2022

New York, New York

*/s/ Jennifer Choe-Groves*

JENNIFER CHOE-GROVES, JUDGE

## Slip Op. 22–88

## MID CONTINENT STEEL &amp; WIRE, INC., Plaintiff/Consolidated Defendant-Intervenor, v. UNITED STATES, Defendant, and OMAN FASTENERS, LLC, Defendant-Intervenor/Consolidated Plaintiff.

Before: Mark A. Barnett, Chief Judge  
 Consol. Court No. 15–00214

[Sustaining Commerce’s surrogate company selection to calculate constructed value profit in this antidumping duty investigation of certain steel nails from the Sultanate of Oman]

Dated: August 8, 2022

*Adam H. Gordon, Jennifer M. Smith, and Lauren Fraid*, The Bristol Group PLLC, of Washington, DC, for Plaintiff/Consolidated Defendant-Intervenor Mid Continent Steel & Wire, Inc.

*Mikki Cottet*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Ian McInerney*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Michael P. House, Andrew Cardias, and Shuaiqi Yuan*, Perkins Coie LLP, of Washington, DC, for Defendant-Intervenor/Consolidated Plaintiff Oman Fasteners, LLC.

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

This matter arises out of a challenge to the U.S. Department of Commerce’s (“Commerce” or “the agency”) third remand results in its antidumping duty investigation of certain steel nails from the Sultanate of Oman. *See* Final Results of Redetermination Pursuant to [Third] Court Remand (“Third Remand Results”), ECF No. 150–1.<sup>1</sup> Commerce issued the Third Remand Results in response to an opinion by the U.S. Court of International Trade (“the court” or “CIT”) holding that Commerce had not adequately explained its reliance on a financial statement from Hitech Fastener Manufacturer (Thailand) Co., Ltd. (“Hitech”), a third-country company, to determine constructed-value profit because the agency had not sufficiently considered the existence or potential impact of subsidies on Hitech’s financial statements. *Mid Continent Steel & Wire, Inc. v. United States*, 45 CIT \_\_, 551 F. Supp. 3d 1360 (2021) (“*Mid Continent 2021*”).

In the Third Remand Results, Commerce chose to rely instead on the financial statements of Sundram Fasteners Limited (“Sundram”),

<sup>1</sup> The administrative record associated with the Third Remand Results is contained in a public administrative record (“PR”), ECF No. 152–2, and a confidential administrative record, ECF No. 152–3. Parties submitted a public Joint Appendix (“JA”), ECF No. 160, containing record documents cited in their comments on the Third Remand Results.

another third-country company, rather than those of Hitech, to determine constructed-value profit. Third Remand Results at 2. For the reasons discussed herein, the court will sustain Commerce’s determination.

## BACKGROUND

The instant matter originated when Plaintiff Mid Continent Steel & Wire, Inc. (“Mid Continent”) and Consolidated Plaintiff Oman Fasteners, LLC (“Oman Fasteners”) each challenged separate aspects of Commerce’s determination that Oman Fasteners was selling goods at less than fair value, or “dumping,” in the United States. *See Certain Steel Nails From the Sultanate of Oman*, 80 Fed. Reg. 28,972 (Dep’t Commerce May 20, 2015) (final determination of sales at less than fair value), ECF No. 16–1, and accompanying Issues and Decision Mem., A-523–808 (May 13, 2015) (“I&D Mem.”), ECF No. 16–2. Their respective cases were consolidated under this lead case. Consolidation and Scheduling Order at 2, ECF No. 18.

When determining whether a company is dumping, section 773(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(a) (2012),<sup>2</sup> directs Commerce to calculate the difference between the export price and the normal value, a value usually based on the price at which the merchandise is sold in the exporting country or in a third country other than the United States. *Id.* If, however, there are insufficient home-market and third-country sales, as was the case with Oman Fasteners, Commerce calculates the “constructed value” of the merchandise to use as the normal value. 19 U.S.C. § 1677b(a)(4). Constructed value consists of the sum of (1) the cost of producing the merchandise; (2) amounts for selling, general, and administrative expenses; and (3) an amount for profit. *See* 19 U.S.C. § 1677b(e). The method used for the constructed value profit calculation depends on what data is available: Commerce either uses the “preferred method,” which is based on actual profits and expenses, or, if no “actual data” are available, one of three alternative methods, among which there is no hierarchy or preference. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1374 (Fed. Cir. 2001).

In this case, because “actual data” were not available, Commerce chose the third of the alternative methods, which allows Commerce to utilize “any other reasonable method” to determine constructed value profit, subject to a profit cap provided in the statute. *See Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 535–36 (Fed.

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<sup>2</sup> Further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2012 edition, unless stated otherwise.

Cir. 2019) (“*Mid Continent CAFC*”) (citations omitted); 19 U.S.C. § 1677b(e)(2)(B)(iii). Other reasonable methods may include, as Commerce chose in this case, the use of financial statements from a third-country company. See *Mid Continent CAFC*, 941 F.3d at 542–545.

As proposed sources of constructed value profit, Oman Fasteners submitted financial data from several Omani companies along with partially translated financial statements from L.S. Industry Co., Ltd. (“LSI”), a Thai producer of steel nails. *Id.* at 535. *Mid Continent*, in turn, submitted financial statements from two Taiwanese producers of steel nails; those of Hitech, a Thai producer of steel screws; and those of Sundram, an Indian producer of auto parts and fasteners. *Id.* at 535–36; I&D Mem. at 14.

Commerce initially chose Hitech as the source of constructed value profit, declined to consider the partially translated LSI statements, and found no profit cap available to apply to the constructed value profit determination. *Mid Continent CAFC*, 941 F.3d at 536. In choosing Hitech’s financial statements, Commerce found that a note on Hitech’s financial statements stating that “The company has been support [*sic*] for production screws (SCREW) Category 4.7 Manufacture of wire products, metal wire, Promotional Number 1447/2538 on July 10, 1995,” did not establish that Hitech’s receipt of a countervailable subsidy, even though the program indicated by the above quotation had “previously [been] found to be countervailable.” See Final Results of Redetermination Pursuant to [Second] Court Order, ECF No. 135–1.

These findings were challenged, and subsequent litigation has led to three remands.<sup>3</sup> Familiarity with this procedural history is presumed.

Most recently, this court remanded the determination to Commerce to further explain or reconsider the choice of Hitech’s financial statements, consistent with this court’s opinion and that of the Federal Circuit in *Mid Continent CAFC*. *Mid Continent 2021*, 551 F. Supp. 3d at 1365. The court found that Commerce had failed to justify its reliance on Hitech’s financial statements because it “did not explain why this case is distinguishable from a case in which Hitech’s financial statements were disregarded due to evidence of a countervailable

<sup>3</sup> For the additional history in this case, see *Mid Continent Steel & Wire, Inc. v. United States* (“*Mid Continent I*”), 41 CIT \_\_, 203 F. Supp. 3d 1295 (2017), and *Mid Continent Steel & Wire, Inc. v. United States* (“*Mid Continent II*”), 41 CIT \_\_, 273 F. Supp. 3d 1348 (2017). *Mid Continent I* remanded the determination, and Commerce issued the first remand results. *Mid Continent II* affirmed the first remand results; that decision was appealed to the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”), which remanded the determination back to this court for further proceedings consistent with *Mid Continent CAFC*, 941 F.3d 530.

subsidy” or “why, given its finding that the potential subsidies could not be quantified, Hitech’s financial statements were a better choice than Sundram’s.” *Id.* at 1366. The court ordered Commerce to “seriously engage with the possible inclusion of subsidies” in Hitech’s statements, and to “address whether a comparative analysis inclusive of the other financial statements on the record is appropriate.” *Id.* at 1368. The court did not require Commerce to reopen the record, but instead left that decision to Commerce’s discretion. *Id.*

In response to *Mid Continent 2021*, Commerce issued the Third Remand Results in which the agency continued to use the alternative method for calculating constructed value pursuant to 19 U.S.C. § 1677b(e)(2)(B)(iii), that is, “any other reasonable method,” and relied on third-country sources as affirmed in *Mid Continent CAFC*. Third Remand Results at 4. In these Third Remand Results, Commerce selected Sundram, rather than Hitech, as the source of financial statements to calculate constructed value profit, resulting in a dumping margin of 4.22 percent. *Id.* at 2, 20.

Commerce addressed each of the eleven financial statements on the record in the Third Remand Results. Of the eleven statements, six were from Omani companies. *Id.* at 4. Commerce found that these companies did not “produce[] steel nails or any type of merchandise comparable enough to steel nails to satisfy the statutory preferences.” *Id.* at 4–5. Commerce also declined to use either of the two Taiwanese financial statements or LSI’s financial statements because they lacked complete English translations. *Id.* at 5. The agency noted that the Federal Circuit upheld its decision not to rely on LSI’s partially translated financial statements and to reject the late submission of full translations. *Id.* at 5 & n.23 (citing *Mid Continent CAFC*, 941 F.3d at 540–42). Commerce found that “the Taiwanese [financial statements] and LSI’s [financial statements] contain significant defects which prevent Commerce from effectively evaluating their appropriateness as sources of [constructed value] profit.” *Id.* at 15.

Between the two remaining financial statements on the record, Hitech’s and Sundram’s, Commerce chose to use Sundram’s. *See id.* at 5–10, 13–16. Commerce found that both companies received subsidies and that both companies produced comparable merchandise. *Id.* at 6, 16. While Commerce had previously found that Hitech’s financial statements did not contain evidence of a subsidy, this time the agency concluded that Hitech’s statements “contain evidence of subsidies.” *Id.* at 6 (analogizing to the facts examined in *Steel Wire Garment Hangers From the People’s Republic of China*, 79 Fed. Reg. 65,616 (Dep’t Commerce Nov. 5, 2014) (prelim. results of antidumping duty admin. review; 2012–2013)). Commerce also found that Sundram

received subsidies of “30 Lakhs during the 2013–14 period” from the “state government of Uttarakhand as special capital subsidy, for setting up an industrial undertaking in the state.” *Id.* at 6–7 & n.26 (citing Pet’r [Mid Continent’s] [Constructed Value] Submission (Oct. 31, 2014), Ex. 10A,<sup>4</sup> PR 104, JA Tab 4).

Acknowledging that “it is not [the agency’s] preference to use data which include subsidies, [Commerce] consider[ed] Hitech and Sundram equal in that they both indicate that they received some form of a subsidy.” *Id.* at 7. The agency went on to compare the two, finding that “[b]ecause the record shows that no other companies derived profit from the production and sale of comparable merchandise, we must rely on the [financial statements] of either Hitech or Sundram, even though both companies received some form of a subsidy.” *Id.* Commerce’s stated practice in such a circumstance involves considering:

- (1) the similarity between a potential surrogate’s business operations and products and those of the respondent;
- (2) the extent to which a potential surrogate has sales in the United States and the home market;
- (3) the contemporaneity of the surrogate data; and
- (4) the similarity of customer base between a potential surrogate and the respondent.

*Id.* at 7–8 (citations omitted). Commerce noted that it was unable to consider criterion (2) because “the record of this investigation does not sufficiently identify the geographical breakdown of sales for either Hitech or Sundram.” Third Remand Results at 8. Commerce also found that criterion (4) did not weigh in favor of either Hitech or Sundram, as both likely had “customer bases [that should] also closely match those of Oman Fasteners.” *Id.*

Commerce found that “[b]oth Hitech and Sundram produce comparable merchandise,” with Hitech producing “various screws and rivets (i.e., fasteners) and Sundram produc[ing] high tensile fasteners, all of which [Commerce considered] comparable to steel nails.” *Id.* at 8. Accordingly, Commerce found that “their respective production experiences, raw materials consumption, supply and demand conditions, and facilities should resemble those of Oman Fasteners,” and that “their respective profit experiences and customer bases should also closely match those of Oman Fasteners.” *Id.* Citing its preference to use contemporaneous data, Commerce noted that Sundram’s financial statements were contemporaneous with the period of investiga-

<sup>4</sup> Although Commerce cites to Exhibit 10A to support this assertion and the cover page to Tab 4 states 10A, the cover page to the exhibit is labeled 9A.

tion, while Hitech's were not. *Id.* at 9. Commerce considered this sufficient to tilt the scales in favor of using Sundram's financial statements despite "dissimilar" merchandise making up 64 percent of Sundram's production. *Id.* at 9–10.

Oman Fasteners opposes the Third Remand Results, arguing that Commerce did not sufficiently compare the financial statements on the record and that Sundram's financial statements were improperly selected. *See generally* Cmts. of [Oman Fasteners] in Opp'n to Commerce Dept.'s Remand Redetermination ("Opp'n Cmts.") at 2, 10–11, ECF No. 153. Defendant United States ("The Government") and Mid Continent support the Third Remand Results. *See generally* Def't.'s Resp. to Cmts. on Remand Redetermination ("Govt. Reply"), ECF No. 159; Cmts. of [Mid Continent] on Final Remand Redetermination ("Mid Continent Reply"), ECF No. 158.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law.

## DISCUSSION

### I. Parties' Contentions

Oman Fasteners contends that Commerce did not sufficiently explain its preference for Sundram's financial statements over LSI's or those of Al Jazeera (which is one of the six Omani companies that Commerce determined does not produce comparable merchandise). Opp'n Cmts. at 2, 10–11; *see also* Third Remand Results at 13. Oman Fasteners argues that because both Hitech's and Sundram's financial statements contained evidence of subsidies, Commerce should have rejected them in favor of another financial statement on the record. Opp'n Cmts. at 6–7. Oman Fasteners also asserts that Commerce ignored this court's remand instructions by not considering and comparing all financial statements on the record side-by-side—as opposed to rejecting all but two before commencing the comparison. *Id.* at 7–8 (citing *Mid Continent 2021*, 551 F. Supp. 3d at 1367; *CP Kelco US Inc. v. United States* ("CP Kelco I"), Slip Op. 15–27, 2015 WL 1544714 (CIT Mar. 31, 2015)). Oman Fasteners contends that had Commerce properly compared all of the financial statements on the record, rather than reducing the comparison to Sundram and Hitech, the agency would have found that LSI or, alternatively, Al Jazeera, was a better alternative. *Id.* at 10. Lastly, Oman Fasteners argues that Commerce should have reopened the record in order to allow

Oman Fasteners to submit full translations of LSI's financial statements, because, in its view, there was no other suitable financial statement on the record. *Id.* at 11–13.

The Government contends that “Commerce reasonably tied its determination to the governing statutory standard and to the record evidence by indicating what statutory interpretations the agency adopted and what facts the agency found.” Govt. Reply at 5–6 (citing *Mid Continent CAFC*, 941 F.3d at 537). The Government contends that Commerce was not required to compare the financial statements, *id.* at 12, and that Commerce “reasonably exercised its discretion” in compliance with the court’s remand order, *id.* at 10. Emphasizing that the Federal Circuit upheld Commerce’s refusal to use LSI’s incomplete financial statements or accept the late submission of the full version, the Government also contends that the missing information in LSI’s financial statements rendered that information unusable because Commerce could not evaluate its appropriateness or accuracy. *Id.* at 12. The Government also supports Commerce’s rejection of Al Jazeera’s financial statements because that company does not produce comparable merchandise. *Id.* at 13. Lastly, the Government contends that Commerce was not required to reopen the record because Commerce properly enforced its deadlines, there were other sources of constructed value profit on the record, and the Federal Circuit already affirmed this decision. *Id.* at 13–14.

Mid Continent contends that because Hitech’s financial statements were not contemporaneous with the period of investigation but Sundram’s were, Commerce’s selection of Sundram’s financial statements for constructed value profit calculations should be sustained. Mid Continent Reply at 2–3, 8. Mid Continent argues that Oman Fasteners’ citation to *CP Kelco* is inapposite. *Id.* at 3–4. Lastly, Mid Continent contends that the amount of Sundram’s subsidy was quantifiable and small, making the effect of the subsidy “negligible” in terms of Sundram’s financial experience for the relevant time period. *Id.* at 7–8.

## II. Analysis

As discussed in the “Background” section above, the court reviews the Third Remand Results against the backdrop of its prior opinions in this case and the opinion of the Federal Circuit. Therein, the Federal Circuit restated the standard against which the court reviews Commerce’s determinations, including that substantial evidence is “such relevant evidence as a reasonable mind might accept to support a conclusion” considering the record as a whole. *Mid Continent CAFC*, 941 F.3d at 537 (citing *Novartis AG v. Torrent Pharm.*

*Ltd.*, 853 F.3d 1316, 1324 (Fed. Cir. 2017); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88 (1951)). Additionally, “Commerce must provide an explanation that is adequate to enable the court to determine whether its choices are actually reasonable.” *Id.*; see also *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016) (finding that Commerce had “failed to meet its obligation to set forth a comprehensible and satisfactory justification for its approach as a reasonable implementation of statutory directives supported by substantial evidence”); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) (finding that Commerce must “examine the record and articulate a satisfactory reason for its action”). “[T]he required explanation must reasonably tie the determination under review to the governing statutory standard and to the record evidence by indicating what statutory interpretations the agency is adopting and what facts the agency is finding.” *Mid Continent CAFC*, 941 F.3d at 537.

The Federal Circuit has emphasized that comparing the options on the record and considering their “comparative deficiencies” is an important part of Commerce’s selection of financial statements for determining constructed value profit. *Id.* at 544 (“The size of any subsidies would obviously be relevant, as would the comparative deficiencies of the alternative sources.”). *Oman Fasteners* cites to *CP Kelco I* to argue that Commerce was required to compare, side-by-side, all eleven financial statements, and that this comparison would have led the agency to choose either LSI or Al Jazeera’s financial statements. *Opp’n Cmts.* at 7–8 (citation omitted). In *CP Kelco I*, the court remanded Commerce’s selection of the financial statements of a company that contained evidence of countervailable subsidies over financial statements that were not fully translated. *CP Kelco I*, 2015 WL 1544714, at \*7–8. The *CP Kelco I* court found that “Commerce must faithfully compare the strengths and weaknesses of each [potential surrogate-data source] before deciding which to use.” *Id.* at \*7.

While *CP Kelco I* required Commerce to fully compare the two financial statements at issue, a full review of the *CP Kelco* litigation shows that the case does not stand for the proposition that a side-by-side analysis of every financial statement on the record is always required. See *CP Kelco US Inc. v. United States* (“*CP Kelco VI*”), 949 F.3d 1348, 1359 (Fed. Cir. 2020); *CP Kelco US Inc. v. United States*, 41 CIT \_\_, \_\_, 211 F. Supp. 3d 1338, 1343 (2017). In *CP Kelco VI*, the Federal Circuit upheld Commerce’s determination to reject incomplete financial statements “after making a fact-sensitive finding that the [incomplete financial statements were] missing ‘vital’ information.” 949 F.3d at 1359. The appellate court upheld Commerce’s de-

cision not to compare directly each of the financial statements when Commerce had sufficiently explained that the missing paragraphs in the rejected financial statement were a “key component of a company’s financial statements” and “integral” to the necessary calculations—that is, of “critical importance.” *Id.*

Here, while Commerce did not directly compare each of the eleven financial statements on the record, Commerce explained its decision to reject the financial statements from the six Omani companies, the two Taiwanese companies, and LSI, such that it did not need to compare these statements to those of Hitech and Sundram. Regarding LSI’s financial statements and the Taiwanese financial statements, Commerce explained that there was “no way to ascertain whether the companies have properly captured their revenues and costs (and thereby their profits) in accordance with their respective [generally accepted accounting principles] or whether the [financial statements can serve as reliable sources for the profit ‘normally’ experienced by a producer of steel nails.” Third Remand Results at 14–15. The agency concluded that the partially translated financial statements “contain[ed] significant defects which prevent[ed] Commerce from effectively evaluating their appropriateness as sources for [constructed value] profit.” *Id.* at 15. In addition, Commerce highlighted that the Federal Circuit upheld Commerce’s decision not to use the LSI or Taiwanese statements because they were missing what Commerce called “vital” information. *Id.* at 5 & n.23 (citing *Mid Continent CAFC*, 941 F.3d. at 540–42). Consistent with the requirements outlined in *CP Kelco VI*, 949 F.3d at 1359, and *Mid Continent CAFC*, 941 F.3d at 540–42, Commerce found that these defects rendered the LSI and Taiwanese financial statements unusable. Accordingly, Commerce adequately explained its reasons for not relying on these financial statements to determine constructed value profit.

Regarding the rejection of the six Omani companies’ financial statements, Commerce found that “data reflecting the production and profit from sale of comparable merchandise are always preferable to a profit experience wholly dissimilar to the mandatory respondent,” indicating that because none of the six Omani companies produced comparable merchandise, they were not “suitable source[s]” of “[constructed value] profit information.” Third Remand Results at 15; see also *Mid Continent CAFC*, 941 F.3d at 542 (explaining that Commerce must reasonably choose, given the record, a surrogate company that accurately reflects the home market profit experience of the respondents in order to “build into a fair sales price for the particular merchandise”). Commerce also explained, elsewhere in the Third Remand Results, that “producers of comparable merchandise will

likely share a number of similarities in their respective production experiences and raw material consumptions, . . . [such that their experiences] should resemble those of Oman Fasteners.” Third Remand Results at 8. Indeed, having found that “data about sales in the ordinary course of trade”—a phrase that means “the conditions and practices which . . . have been normal in the trade under consideration with respect to merchandise of the same class or kind—is necessary for the preferred method to apply, the Federal Circuit upheld Commerce’s decision not to use home-market financial statements in part because no Omani company produced comparable merchandise. *Mid Continent CAFC*, 941 F.3d at 539 (quoting 19 U.S.C. § 1677b(e)(2)(A), and § 1677(15)).

Nevertheless, Commerce went on to explain further its rejection of the Omani companies’ data: Commerce found that their production of wholly non-comparable merchandise meant that “all six Omani [financial statements] likely do not share similarities to Oman Fasteners in their respective production experiences or raw material consumptions and are not subject to the same supply and demand conditions in the global marketplace as Oman Fasteners” and, thus, constitute “less ideal sources” of information. Third Remand Results at 13. Because it is within Commerce’s discretion to choose which criteria to prioritize in making these determinations, and Commerce explained how it reached its determination and why it considered comparability to be so important, the court finds that Commerce’s determination not to use the Omani companies’ financial statements was supported by substantial evidence.

Commerce’s explanation of its rejection of the LSI, Taiwanese companies’, and Omani companies’ financial statements was sufficient to justify its choice not to further compare these financial statements to other financial statements on the record but, instead, to use an iterative process to eliminate these statements from consideration. *See* Third Remand Results at 4–5. Because Hitech and Sundram were the only two companies with sufficient information on the record that would accurately reflect the experience of a nail producer, Commerce found, these were the only two for which a detailed comparison of their statements was warranted. *See id.* at 8. Oman Fastener’s remaining arguments in favor of the rejected financial statements are unpersuasive.

Commerce’s comparative analysis of the two financial statements satisfied the remand order in *Mid Continent 2021*. The court did not require Commerce to select Sundram’s financial statements; instead, it required Commerce to compare Hitech’s and Sundram’s financial

statements in a meaningful way, addressing any subsidies, the similarity of each company's production, and other considerations Commerce considered relevant. See *Mid Continent 2021*, 551 F. Supp. 3d at 1368. In the Third Remand Results, Commerce addressed the court's question of "why [certain] language [related to subsidies on Hitech's financial statements] is sufficient to be considered 'evidence of a subsidy' in *Steel Wire Garment Hangers From China* yet may be ignored in this case." *Id.* The agency examined the evidence and found that there was insufficient difference between Hitech's financial statements in this case and in *Steel Wire Garment Hangers From China* to justify a different finding. Third Remand Results at 6.

The agency noted that although it preferred not to use data which included subsidies, Hitech and Sundram were "equal" in that both received subsidies. *Id.* at 7. Therefore, Commerce turned to other considerations, explaining how the four criteria for selecting surrogate financial statements applied to its evaluation of Hitech and Sundram. *Id.* at 7–8.

With a focus on contemporaneity and comparability of merchandise, Commerce provided a well-reasoned explanation of its choice of Sundram over Hitech. The agency explained that producing comparable merchandise is an important consideration because it will likely lead to similarities in production experience and raw material consumption with similar supply and demand conditions affecting raw material inputs. *Id.* at 8. Thus, Commerce took into account Sundram's production of comparable merchandise when it weighed this criterion. See *id.* at 9.

Commerce also explained how contemporaneity played into its selection of Sundram, finding that while Hitech's financial statements cover a period ending four months before the period of investigation, Sundram's financial statements match the period of investigation. *Id.* Commerce explained that it prefers contemporaneous data because they "better reflect a mandatory respondent's cost and sales data, along with the same market conditions and operating environment of the respondent." *Id.* at 9–10.

Commerce concluded that "the record contains two companies with imperfect data which produce and sell comparable merchandise," and it found Sundram's data to be superior given the above criteria; therefore, Commerce selected Sundram's financial statements. *Id.* at 10. Commerce acknowledged that neither Hitech's nor Sundram's financial statements were perfect; however, Commerce explained why it chose Sundram's financial statements, presenting the evidence it relied upon and the criteria it prioritized. As such, Commerce's choice

of Sundram’s financial statements is supported by substantial evidence and in accordance with law.

Oman Fasteners asserts that Commerce should be required to re-open the record to allow Oman Fasteners to submit a full translation of LSI’s financial statements. Opp’n Cmts. at 11–13. The court will not require Commerce to reopen the record.

In *Mid Continent 2021*, the court stated that “the agency is not required to reopen the record,” but that “such a decision is within the agency’s discretion if it determines that reopening would provide the most reasonable path forward.” 551 F. Supp. 3d at 1368. Here, Commerce found that “the record contains sufficient [financial statements] in order to render an accurate determination” and, accordingly, it was unnecessary to reopen the record. Third Remand Results at 17. Reopening the record “is not something the court will require simply based on a plaintiff’s argument that better information is available.” *Pro-Team Coil Nail Enter., Inc. v. United States*, Slip Op. No. 22–84, 2022 WL 2783885, at \*8 (CIT Jul. 15, 2022). Instead, “Commerce retains significant discretion to determine whether to reopen the record on remand.” *Id.*

Interested parties bear the burden of developing the record, *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011), and the court will not “set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered,” *Mid Continent CAFC*, 941 F.3d at 541 (quoting *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761 (Fed. Cir. 2012)). The interests of finality also suggest that the court should limit interfering with the agency’s procedures and deadlines. *See, e.g., Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 554–55 (1978); *Pro-Team*, 2022 WL 2783885, at \*8.

Having found that substantial evidence supports Commerce’s choice of Sundram’s financial statements among the eleven financial statements on the record, the court finds no error in Commerce’s determination that “reopening the record was not necessary.” Third Remand Results at 17. Here, Commerce properly enforced its deadlines when it declined to allow Oman Fasteners to submit LSI’s complete translated financial statements after the deadline for such information and the court will not disturb that decision.

## CONCLUSION

Based on the foregoing, the court will sustain Commerce’s Third Remand Results. Judgment will enter accordingly.

Dated: August 8, 2022  
New York, New York

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

## Slip Op. 22–89

CARBON ACTIVATED TIANJIN CO., LTD., CARBON ACTIVATED CORPORATION, DATONG JUQIANG ACTIVATED CARBON CO., LTD., SHANXI INDUSTRY TECHNOLOGY TRADING CO., LTD., DATONG MUNICIPAL YUNGUANG ACTIVATED CARBON CO., LTD. AND BEIJING PACIFIC ACTIVATED CARBON PRODUCTS CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and CALGON CARBON CORPORATION AND CABOT NORIT AMERICAS, INC., Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge  
Court No. 21–00131

[Sustaining in part and remanding in part the final results of the twelfth administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China.]

Dated: August 8, 2022

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

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

*John M. Herrmann, R. Alan Luberda, and Melissa M. Brewer, Kelley Drye & Warren LLP, for Defendant-Intervenors Calgon Carbon Corporation and Cabot Norit Americas, Inc.*

**OPINION AND ORDER****Barnett, Chief Judge:**

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the twelfth administrative review ("AR12") of the antidumping duty ("ADD") order on certain activated carbon from the People's Republic of China ("China") for the period of review ("POR") April 1, 2018, through March 31, 2019. *See Certain Activated Carbon From the People's Republic of China*, 86 Fed. Reg. 10,539 (Dep't Commerce Feb. 22, 2021) (final results of antidumping admin. review, final determination of no shipments, and final rescission of admin. review, in part; 2018–2019) ("*Final Results*"), ECF No. 32–3, and accompanying

Issues and Decision Mem., A-570–904 (Feb. 12, 2021) (“I&D Mem.”), ECF No. 32–2.<sup>1</sup>

Plaintiffs Carbon Activated Tianjin Co., Ltd., Carbon Activated Corporation, Datong Juqiang Activated Carbon Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Datong Municipal Yunguang Activated Carbon Co., Ltd., and Beijing Pacific Activated Carbon Products Co., Ltd. (collectively, “Plaintiffs” or, in the administrative proceeding, “Respondents”), challenge Commerce’s selection of surrogate values for bituminous coal, anthracite coal, hydrochloric acid, carbonized materials, caustic soda, and steam, along with the selection of surrogate financial ratios. *See* Confidential Pls.’ Mot. for J. on the Agency R. Pursuant to Rule 56.2, and accompanying Mem. of Law in Supp. of Pls.’ Mot. for J. on the Agency R. Pursuant to USCIT Rule 56.2 (“MJAR”), ECF No. 36; Confidential Pls.’ Reply to Def. and Def.-Int.’s Resps. to Pls.’ Rule 56.2 Mot. for J. on the Agency R. (“Pls.’ Reply”), ECF No. 41.

Defendant United States (“the Government”) and Defendant-Intervenors Calgon Carbon Corporation and Cabot Norit Americas, Inc. (together, “Calgon” or, in the administrative proceeding, “Petitioners”) filed response briefs in support of Commerce’s determinations—with Calgon focused solely on the valuation of hydrochloric acid. *See* Def.’s Resp. to Pls.’ Mot. for J. on the Agency R. (“Def.’s Resp.”), ECF No. 38; Confidential Def.-Ints.’ Resp. in Opp’n to Pls.’ Mot. for J. on the Agency R. (“Def.-Ints.’ Resp.”), ECF No. 39.

For the reasons discussed herein, the court sustains in part and remands in part the *Final Results*.

## BACKGROUND

### I. Proceedings Before Commerce

In June 2019, Commerce initiated AR12 of the ADD order on activated carbon from China. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 27,587, 27,589–90 (Dep’t Commerce June 13, 2019), PR 151, CJA Tab 13. In July 2019, Commerce selected Carbon Activated Tianjin Co., Ltd. (“Carbon Activated”) and Datong Juqiang Activated Carbon Co., Ltd. (“DJAC”) as mandatory respondents. Selection of Respondents for Individual Re-

<sup>1</sup> The administrative record filed in connection with the *Final Results* is divided into a Public Administrative Record (“PR”), ECF No. 32–4, and a Confidential Administrative Record (“CR”), ECF No. 32–5. Parties filed joint appendices containing record documents cited in their briefs. *See* Public J.A., ECF Nos. 44 (Vol. I; Tabs 1–11), 44–1 (Vol. II; Tab 12), 44–2 (Vol. III; Tabs 13–18), 44–3 (Vol. IV; Tab 19), 44–4 (Vol. V; Tabs 20–37); Confidential J.A. (“CJA”), ECF Nos. 43 (Vol. I; Tabs 1–12), 43–1 (Vol. II; Tabs 13–18), 43–2 (Vol. III; Tab 19), 43–3 (Vol. IV; Tabs 20–37). Citations are to the confidential joint appendices unless stated otherwise.

view (July 1, 2019) at 1, PR 23, CJA Tab 1. Carbon Activated and DJAC responded to the Department's ADD questionnaires by reporting their factors of production<sup>2</sup> and provided surrogate value information as well as information rebutting the surrogate value information provided by Petitioners. See *Certain Activated Carbon From the People's Republic of China*, 85 Fed. Reg. 23,947 (Dep't Commerce Apr. 30, 2020) (prelim. results of antidumping duty admin. review, intent to rescind the review in part, and prelim. determination of no shipments; 2018–2019) (“*Preliminary Results*”), PR 271, CJA Tab 28, and accompanying Decision Mem. for the Prelim. Results at 2, A-570–904 (Apr. 24, 2020) (“Prelim. Mem.”), PR 259, CJA Tab 26 (describing questionnaire process).

Because Commerce considers China to be a nonmarket-economy country for the purposes of the unfair trade laws, the agency determines normal value by valuing the factors of production used in producing the subject merchandise, general expenses, profit, and “the cost of containers, coverings, and other expenses” in a surrogate market economy country. 19 U.S.C. § 1677b(c)(1) (2018).<sup>3</sup> In selecting these “surrogate values,” Commerce must, “to the extent possible,” use data from a market economy country that is at “a level of economic development comparable to that of the nonmarket economy country” and is a “significant producer[] of comparable merchandise.” *Id.* § 1677b(c)(4).

In the underlying proceeding, Commerce identified six potential surrogate countries: Brazil, Bulgaria, Malaysia, Mexico, Russia, and Turkey. Request for Cmts. Re: (1) Economic Development, (2) Surrogate Country and (3) Surrogate Value Information (Sept. 20, 2019), Attach. at 2, PR 104, CJA Tab 6. Respondents and Petitioners submitted comments regarding the surrogate country selection process; Petitioners supported the choice of Malaysia or Mexico as the primary surrogate country, while Respondents advocated for the use of Mexico, Russia, or Brazil. Pet'rs' Cmts. on Surrogate Country Selection at 6, PR 115, CJA Tab 8; Pet'rs' Submission of Surrogate Values at 2, PR 121–22, CJA Tab 10.

On April 30, 2020, Commerce published the preliminary results of AR12. *Preliminary Results*. Therein, Commerce selected Malaysia as the primary surrogate country. Prelim. Mem. at 17.

After addressing challenges to the preliminary calculations by Respondents and responses by Petitioners, Commerce finalized its ADD

<sup>2</sup> The factors of production “include, but are not limited to—(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation.” 19 U.S.C. § 1677b(c)(3).

<sup>3</sup> Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition unless otherwise specified.

rates at \$1.83/kilogram (“kg”) for Carbon Activated, \$0.38/kg for DJAC, and \$0.65/kg for the non-examined separate rate respondents. *Final Results*, 86 Fed. Reg. at 10,540. Commerce continued to rely on Malaysia as the primary surrogate country for the valuation of all material inputs. *See, e.g.*, I&D Mem. at 28 (identifying Malaysia as the primary surrogate country in the context of Commerce’s valuation of anthracite coal). The agency selected Malaysian company Bravo Green Sdn. Bhd.’s (“Bravo Green”) 2018 financial statements to use for calculating financial ratios. *Id.* at 34.

Plaintiffs subsequently challenged the *Final Results* before this court. *See* Compl., ECF No. 12. In particular, Plaintiffs challenge Commerce’s surrogate value selections for (1) bituminous coal; (2) anthracite coal; (3) hydrochloric acid; (4) caustic soda; (5) steam; (6) coal-based carbonized materials; and (7) financial ratios. *See* MJAR at 1–3.

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

Commerce generally values all factors of production in a single surrogate country, referred to as the “primary surrogate country.” *See* 19 C.F.R. § 351.408(c)(2) (excepting labor); *Jiaxing Brother Fastener Co. v. United States* (“*Jiaxing II*”), 822 F.3d 1289, 1294 & n.3 (Fed. Cir. 2016). *But see* *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,093–94 (Dep’t Commerce June 21, 2011) (expressing a preference to value labor based on industry-specific labor values from the primary surrogate country). The court has acknowledged this practice as a way “to minimize distortion.” *Tri Union Frozen Prods., Inc. v. United States*, 41 CIT \_\_, \_\_, 227 F. Supp. 3d 1387, 1400 (2017); *see also* *Carbon Activated Tianjin Co. v. United States*, 45 CIT \_\_, \_\_, 547 F. Supp. 3d 1310, 1318 (2021) (also discussing Commerce’s preference to value all factors of production in a single surrogate country).

To select a primary surrogate country, Commerce has adopted a four-step approach:

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

more than one country satisfies steps (1)-(3), Commerce will select the country with the best factors data.

*Jiaxing II*, 822 F.3d at 1293 (explaining that the primary surrogate country is selected based on “the reliability and completeness of the data in the similarly-situated surrogate countries and [Commerce] generally selects the one with the best data as the primary surrogate country”); *see also* Import Admin., U.S. Dep’t of Commerce, Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (2004), <https://enforcement.trade.gov/policy/bull04-1.html> (last visited August 8, 2022).

The agency will “only resort to a secondary surrogate country if data from the primary surrogate country are unavailable or unreliable.” *Jiaxing Brother Fastener Co. v. United States* (“*Jiaxing I*”), 38 CIT 1404, 1412, 11 F. Supp. 3d 1326, 1332–33 (2014) (citations omitted), *aff’d*, *Jiaxing II*, 822 F.3d 1289.

As previously noted, in selecting surrogate values for the factors of production, Commerce must, “to the extent possible,” use “the best available information” from a market economy country or countries that are economically comparable to the nonmarket economy country and are “significant producers of comparable merchandise.” 19 U.S.C. § 1677b(c)(4). Commerce, in selecting surrogate values, “generally selects, to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review.” *Jiaxing II*, 822 F.3d at 1293 (citing *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014)); 19 C.F.R. § 351.408(c)(1), (4) (directing Commerce to select “publicly available,” “non-proprietary information” to value factors of production and “[m]anufacturing overhead, general expenses, and profit”). Commerce also prefers surrogate values that are input-specific and tax- and duty-exclusive. *See* Policy Bulletin 04.1; *Jiaxing II*, 822 F.3d at 1293.

There is no hierarchy for applying the surrogate value selection criteria. *See, e.g., United Steel & Fasteners, Inc. v. United States*, 44 CIT \_\_, \_\_, 469 F. Supp. 3d 1390, 1398–99 (2020); *Hangzhou Spring Washer Co. v. United States*, 29 CIT 657, 672, 387 F. Supp. 2d 1236, 1250–51 (2005) (stating that the court “does not decide . . . whether contemporaneity should be valued over specificity”). Commerce therefore has discretion to choose which criteria to emphasize in selecting the “best available information” so long as it does so in conformity with the substantial evidence standard. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). Commerce must articulate a “rational and reasonable relationship” between the surrogate

value and the factor of production it represents. *Globe Metallurgical Inc. v. United States*, 28 CIT 1608, 1622, 350 F. Supp. 2d 1148, 1160 (2004) (citing *Olympia Indus., Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1001 (1998)). Due to the discretionary, fact-specific nature of Commerce’s determination, the court does not address “whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.” *Jiaxing II*, 822 F.3d at 1300–01.

“The burden of creating an adequate record lies with the interested parties, not with Commerce.” *Qingdao Sea-Line Trading Co.*, 766 F.3d at 1386. Furthermore, the court has upheld Commerce’s practice of requiring a party to establish on the record any claims for a particular surrogate value and establish on the record any argument that data are aberrational or unreliable. *See, e.g., Jinan Farmlady Trading Co. v. United States*, 41 CIT \_\_, \_\_, 228 F. Supp. 3d 1351, 1356–57 (2017).

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2018). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

For each factor of production, Commerce found that the data it selected was contemporaneous with the period of review, publicly available, product-specific, tax-exclusive, and representative of a broad market average. I&D Mem. at 17–18, 23–24, 27, 36, 40, 43, 44, 47. The agency also cited its “regulatory preference” to value all factors of production from a single surrogate country to support its choice of Malaysian data for each factor of production. *Id.* at 40, 47.

Plaintiffs challenge Commerce’s valuation of six factors of production and selection of the financial statements for the calculation of financial ratios as unsupported by substantial evidence and otherwise not in accordance with law. *See generally* MJAR. The Government contends that Commerce properly exercised its discretion by choosing Malaysian data for each of the seven factors. Def.’s Resp. at 13; *cf.* Def.-Ints.’ Resp. at 2–4 (discussing hydrochloric acid).

### I. Bituminous Coal

Commerce valued all bituminous coal using Malaysian import data under the Harmonized System (“HS”) heading 2701.12, which covers

“bituminous coal, not agglomerated,” and constitutes a so-called “basket category” including both coking and non-coking coal. I&D Mem. at 16.

Respondents contended that only non-coking coal was used, and that Commerce therefore should have selected two more-specific subheadings— 2701.12.9000, “bituminous coal: other than coking coal,” and 2701.19, “other coal,”— depending on the supplier or manufacturer. *See id.* at 13–15. Respondents argued that their records indicated use of “Bituminous coal, *not* metallurgical grade,” and that record evidence further indicated that metallurgical grade coal is coking coal. *Id.* at 13 (emphasis added). While Respondents conceded that Carbon Activated’s supplier listed one of its inputs as “coking bituminous coal,” they asserted that this was a mistake, as confirmed by a signed declaration to that effect. *Id.* at 13–14 & n.75 (citing Case Br. of [DJAC], [Carbon Activated] and Carbon Activated Corp. (July 20, 2020) at 8, PR 285, CJA Tab 29).

Respondents highlighted evidence describing the transactions, along with an “independent article” explaining that semi-soft coking coal is not metallurgical coal; “washed coal” is generally non-coking coal; and coking coal is not suitable for producing the subject merchandise. *Id.* at 14. Respondents additionally noted that the record showed that DJAC’s supplier used coal with the same moisture, ash, and volatility content as Carbon Activated’s supplier, which in their view indicated that coal from DJAC’s supplier was also non-coking coal. *Id.* at 14. They argued that Commerce should have valued Carbon Activated’s coal using HS 2701.12.9000 and DJAC’s bituminous coal, with its calorific value of less than 5,833 kilocalories (“kcal”)/kg, using HS 2701.19. *Id.* at 15.

Commerce found that “the information on the record [was] insufficient to support the mandatory respondents’ assertion that [the two more-specific subheadings were] more appropriate . . . to value their bituminous coal input.” *Id.* at 17. Commerce also found that the “English translations on the purchase invoices only indicated ‘non-coking bituminous coal 1,’ ‘non-coking bituminous coal 2,’ and ‘bituminous coal 3.’” *Id.* at 18. Underscoring the ambiguity in the record due to invoice discrepancies and translation issues, Commerce stated that “because the record lacks sufficient evidence to support the selection of a more specific HS category within HS 2701.12 to value the bituminous coal used by [Carbon Activated’s supplier] or [DJAC’s] supplier, or [to] depart from our preliminary selection of HS 2701.12 to value [DJAC’s] bituminous coal input, we continue to use HS 2701.12 to value the mandatory respondents’ bituminous coal input.”

*Id.* at 18. Regarding DJAC’s inputs, Commerce found the declaration from the general manager to be a “mere attestation” that “does not specify the calorific value of the bituminous coal used or any other specification of the coal used which provides distinguishing characteristics for [surrogate value] selection purposes.” *Id.* at 19.

### **a. Parties’ Contentions**

Plaintiffs contend that because they did not consume coking coal, HS 2701.12 should not have been used to value their bituminous coal because it “fails to provide a product specific and accurate [surrogate value] for the specific non-coking bituminous coal input.” MJAR at 11. Similarly, they assert that the values for HS 2701.12 are “distorted by coking coal,” making it insufficiently specific to value Plaintiffs’ inputs. *Id.* at 10–11; Pls. Reply at 3. Plaintiffs argue that the suppliers’ coal inputs were non-coking coal and above the threshold calorific value necessary for valuation under HS 2701.12.9000, and that DJAC’s additional coal input of less than the threshold calorific value was non-coking and should have been valued using HS 2701.19. MJAR at 11. Moreover, Plaintiffs contend that “[i]f Commerce required industry standards to value this [factor of production], it was required by statute to ‘inform’ Carbon Activated ‘of the nature of the deficiency’ and ‘provide . . . an opportunity to remedy or explain the deficiency.’” *Id.* at 12 (citing 19 U.S.C. § 1677m(d)); *see also* Pls.’ Reply at 3.

The Government contends that Commerce’s use of the basket category was within the agency’s discretion. Def.’s Resp. at 14. Specifically, the Government notes that the record evidence was insufficient to justify departing from the basket category due to translation issues, mis-labeling, lack of test results demonstrating the non-coking quality of the coal, and Respondents’ failure to cite to industry standards to demonstrate the category of coal being used. *Id.* at 14–16 (citing I&D Mem. at 17–19). In response to Plaintiff’s argument that Commerce was obligated to notify and provide an opportunity to remedy the deficiency in the record, the Government states that “section 1677m(d) does not apply to the submission of potential surrogate value information.” *Id.* at 16–17.

In response to the Government’s argument that Plaintiffs’ evidence was unclear and inconsistent, Plaintiffs contend that their input descriptions were “consistent (and not ‘conflicting’)” such that the Government’s concerns with that evidence are meritless. Pls.’ Reply at 3–5. Plaintiffs assert that the sworn declarations “establishe[d] a bright line distinction between coking and non-coking coal” such that

industry standards were unnecessary, but that if Commerce required additional documentation, it should have informed Plaintiffs of that requirement. *Id.* at 6. Lastly, Plaintiffs compare this review to previous and subsequent reviews to support their assertion that Commerce’s valuation of bituminous coal was erroneous. *Id.* at 8.

### **b. Commerce’s Decision To Use the Basket Category Is Supported by Substantial Evidence**

While Respondents characterized the record evidence as “imply[ing]” the use of “non-coking coal,” I&D Mem. at 17, and Plaintiffs here likewise contend that the record is clear in this regard, MJAR at 11; Pls.’ Reply at 6, Commerce examined the record evidence and found that it could not evaluate the appropriateness of a more-specific subheading, *see* I&D Mem. at 18. The discrepant translations of the purchase invoice descriptions led Commerce to conclude that the documents were unreliable. *Id.* (citations omitted). The court finds that Commerce sufficiently examined the invoice descriptions and translations and considered the reliability of their contents. The agency explained how it interpreted this information and provided reasoning for why the invoices and their translations did not support Respondents’ claims for a more-specific surrogate value.<sup>4</sup>

It is the respondents’ responsibility to build the record to support their desired outcome, and they have failed to do so here. *See QVD Food Co.*, 658 F.3d at 1324. While Respondents submitted sworn declarations attesting to the use of non-coking coal during production, Commerce found that these declarations “did not provide any specific standard which Commerce [could] use to determine the specificity of the HS subheading preferred by the mandatory respondents.” I&D Mem. at 18. Thus, Commerce concluded that Respondents did not “fulfil[] their obligation to meet [their] burden [of constructing the record] because they have not provided sufficiently detailed translations . . . [or] provided industry standards differentiating coking quality coal from non-coking quality coal, along with test reports, to substantiate their claim” that they used only non-coking coal. *Id.* As to DJAC’s inputs, Commerce found that the declarations submitted by DJAC’s supplier and DJAC’s general manager did not specify the calorific value of the bituminous coal or any other specification of the coal used which could have provided distinguishing characteristics for surrogate value selection purposes. *Id.*

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<sup>4</sup> Because the court finds that Commerce’s choice of the basket category over a more-specific subheading was supported by substantial evidence, it need not address Plaintiffs’ claims that the basket category was distorted by the inclusion of coking coal. *See* MJAR at 10–11, Pls.’ Reply at 1.

Plaintiffs' assertion that 19 U.S.C. § 1677m(d) required Commerce to request additional information is unavailing. "[W]hen a party claims that a particular surrogate is not appropriate to value the [factor of production] in question, [Commerce] has determined that the burden is on that party to prove the inadequacy of said [surrogate value] or, alternatively, to show that another value is preferable." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 40 CIT \_\_, \_\_, 145 F. Supp. 3d 1349, 1363 (2016). To the extent the record did not support Respondents' preferred surrogate value for the bituminous coal, the burden was on Respondents to provide such evidence. Section 1677m(d) is inapposite to such a situation and does not obligate Commerce to request additional information in support of Respondents' request.

Commerce's determination that the record did not support the selection of the more-specific subheadings, and its corresponding selection of the basket category, is supported by substantial evidence. Commerce weighed the evidence on the record and exercised its discretion in determining the best information available. *See* 19 U.S.C. § 1677b(c)(1), (4). While there was some evidence on the record related to the moisture, ash, and volatility contents of the coal, I&D Mem. at 17, Commerce also found that the record did not include industry standards or accurate translations of the invoices necessary to support the subheadings requested by Plaintiffs, *id.* at 18–19. Plaintiffs fail to identify any error in the agency's analysis. Instead, they largely reassert the arguments they made to the agency. However, the court does not reweigh evidence. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015) (citing *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)). Thus, the court will sustain Commerce's selection of Malaysian HS 2701.12 to value inputs of bituminous coal.

## II. Anthracite Coal

Commerce valued anthracite coal using Malaysian import data under HS 2701.11, the basket category covering "Anthracite Coal, whether or not pulverized, but not agglomerated." I&D Mem. at 27–29.

Respondents claimed that the anthracite coal used in the production of subject merchandise had a volatility content below ten percent. *Id.* at 26. Because the Russian tariff schedule includes a narrower category for anthracite coal characterized by "maximum yield of volatile substances of not more than ten percent mass fraction," Respondents requested that Commerce use Russian import data un-

der HS 2701.11.1000 rather than the Malaysian basket category. *Id.* Respondents asserted that this Russian category indicates that Commerce should view volatility content as “one of the most significant product characteristics” and choose surrogate data for anthracite coal based on its volatility content. *Id.* at 28.

Commerce found that Russia’s sub-categorization based on volatility content was insufficient to consider volatility content one of the most important characteristics and it noted that “the Malaysian HS does not provide a tariff subheading for HS 2701.11 based on volatility content.” *Id.* Commerce thus declined to “depart from [its] preliminary decision to rely on data from the primary surrogate country.” *Id.*

Commerce also found that the Malaysian data was reliable and available. *Id.* Commerce considered the representativeness of the Malaysian data by comparing the Malaysian values for HS 2701.11 to values for this subheading from Brazil, Bulgaria, Mexico, Russia, and Turkey. *Id.* at 29. Commerce found that the Malaysian data was not “aberrational in comparison to the [average unit values (“AUVs”)] from other countries on the OP List.” *Id.* at 29. Commerce also found that the Malaysian data were “sufficiently representative of a broad market average.” *Id.*

### **a. Parties’ Contentions**

Plaintiffs contend that Russian data for HS 2701.11.1000 provides the most specific data source “from an approved country” and “specific to the input in question” because Russia categorized anthracite coal based on volatility content. MJAR at 35. (citation and emphasis omitted); *see also* Pls.’ Reply at 19. Plaintiffs assert that volatility content was sufficiently important to justify departing from the primary surrogate country’s data even absent evidence of aberrancy or unreliability of the Malaysian data. *See id.* at 35–37.

The Government asserts that volatility content was neither the only criterion nor the most important one. Def.’s Resp. at 18 (citing I&D Mem. at 27). Considering Commerce’s balancing of the various product characteristics and its comparison of the potential datasets on the record, *see id.* at 19, the Government avers that Plaintiffs have “failed to establish that volatility content should be the driving factor” in the selection of the HS category, *id.* at 20. As such, the Government contends, the record did not support departure from the primary surrogate country in favor of Russian data. *Id.* at 20–21.

In their reply, Plaintiffs assert that the Russian data was superior to the Malaysian data both because it subdivides based on volatility content but also because the import quantity was far greater than the

Malaysian data. Pls.’ Reply at 19. Plaintiffs argue that Commerce failed to address the superiority of the Russian data for the sole reason that Malaysia was the primary surrogate country. *Id.*

**b. Commerce’s Decision To Use Malaysian HS 2701.11 Data Is Supported by Substantial Evidence**

Commerce substantiated its decision to use Malaysian data to value anthracite coal by comparing the Malaysian data with that of the alternative surrogate countries. *See* I&D Mem. at 29. Commerce found that the volume of the Malaysian imports (484,415,312 kg) compared to other countries’ import volumes was representative because it was within the range of volumes from the other surrogate country options: Brazil (1,681,143,359 kg); Bulgaria (350,489,586 kg); Mexico (46,535,076 kg); Russia (4,372,971,252 kg); and Turkey (940,396,419 kg). *Id.* Moreover, the Malaysian data, as noted by Commerce, falls within the range of AUVs for the six countries examined: the Malaysian AUV is \$199.6 (in U.S. dollars per metric ton), compared to values of \$119 (Brazil), \$163.8 (Bulgaria), \$250.3 (Mexico), \$37.3 (Russia), and \$130.3 (Turkey). *Id.* Plaintiffs’ attempt to establish the Russian data as superior is unconvincing when the record shows that the Russian AUV was an outlier as compared to the other AUVs, at roughly one-third of the next-lowest value, while the Malaysian data was “not aberrational” and was based on sufficient imports to be representative of a broad market average. *Id.* In sum, Commerce compared the Malaysian volume and value of imports to the other record data and substantiated its decision that the Malaysian data was sufficiently representative of a broad market average.

Commerce additionally considered Plaintiffs’ arguments related to volatility content and found that the mere fact that Russian data includes a volatility-based subclassification was not enough to establish that volatility is an important characteristic. *Id.* at 28. Commerce thus considered the merits of prioritizing volatility content but found that Russia’s use of this subclassification was an insufficient basis to diverge from the primary surrogate country, particularly when other countries, Malaysia included, do not disaggregate based on volatility. *See id.* Before this court, Plaintiffs identify no error by Commerce and simply seek to have the court reweigh evidence presented to Commerce. This the court will not do. *See Downhole Pipe*, 776 F.3d at 1376–77.

Based on the foregoing, the court finds that Commerce’s valuation of anthracite coal is supported by substantial evidence and reasoned explanation, and it will be sustained.

### III. Hydrochloric Acid

To value hydrochloric acid, Commerce selected Malaysian import data for HS 2806.10, which covers “hydrogen chloride (hydrochloric acid),” and which constitutes a basket category including both anhydrous hydrogen chloride and aqueous hydrochloric acid. I&D Mem. at 40. “HCl” is the chemical formula for hydrogen chloride; the parties have used this term interchangeably with hydrochloric acid and hydrogen chloride, despite the distinctions in their form.

Respondents argued that they utilized aqueous hydrochloric acid in the production of subject merchandise, whereas the basket category selected by Commerce, HS 2806.10, covers both aqueous and anhydrous hydrogen chloride and is not specific to their input. *Id.* at 37–38. Carbon Activated requested that Commerce instead value “HCl” using import data for aqueous HCl from Brazilian or Turkish HS classifications. *Id.* at 38. Respondents also contended that certain record documents describe hydrochloric acid and its composition and that these documents establish that they used aqueous HCl. *Id.*

Commerce found that “the evidence on the record only demonstrates the purity level for HCl that [Carbon Activated] used in October 2018.” *Id.* at 40. Commerce further found that the record did not contain specific information indicating whether the HCl that Respondents procured and consumed during the POR was aqueous or anhydrous. *Id.* at 40–41. Commerce considered the documents provided by Respondents and found that Respondents “failed to provide an explanation as to how these documents tie to the [surrogate value] and actual consumption of the HCl that they reported for the POR.” *Id.* at 41.

#### a. Parties’ Contentions

Plaintiffs contend that record evidence establishes that they used aqueous HCl to produce subject merchandise and, as such, Commerce should have used a subheading specific to aqueous HCl. MJAR at 29–30. They assert that the evidence on the record regarding purity content necessarily means that the HCl is aqueous. *Id.* at 29; *see also* Pls.’ Reply at 14–15. Plaintiffs assert that the Malaysian basket category does not provide adequate specificity, but that the Brazilian or Turkish data contain specific classifications for aqueous HCl and Commerce should have selected data from one of those countries instead. *Id.* at 30–31.

The Government contends that Plaintiffs failed to substantiate their claim that their inputs constituted aqueous HCl and that the Malaysian data was therefore appropriate. Def.’s Resp. at 21. The Government further contends that use of a purity level metric does

not, “standing alone,” indicate the state of the substance. *Id.* (citing I&D Mem. at 40–41). The Government argues that there is no “other reason to depart from what Commerce had determined to be available and reliable data from the primary surrogate country.” *Id.*

Calgon similarly contends that there was insufficient record evidence to conclude that Respondents purchased HCl in its aqueous form. Def.-Ints.’ Resp. at 2–4. They note that the purity level evidence on the record not only does not clarify the state of the HCl, but also does not specify the form of the HCl at the time it was acquired, providing evidence only about the HCl used in production<sup>5</sup>. *Id.* at 3. Calgon also points to additional evidence that water was consumed in addition to the HCl “in preparing the acid bath used to wash the subject merchandise,” suggesting to Calgon that the HCl was diluted after it was purchased. *Id.* at 4.

**b. Commerce’s Use of Malaysian Data under HS  
2806.10 to Value Hydrochloric Acid Is Supported by  
Substantial Evidence**

It is the respondents’ burden to build the record that supports their desired outcome. *QVD Food Co.*, 658 F.3d at 1324. Here, Commerce reasonably found that Respondents had “only demonstrate[d] the purity level for HCl that it used in October 2018. The record does not contain specific information indicating whether the HCl that the [ ] respondents procured and consumed during the [period of review] was in a water solution, a concentrated liquid form, or a different state.” I&D Mem. at 40–41.

In support of their assertion that they used aqueous HCl, Plaintiffs cite to a document that provided limited information, was not fully translated, and did not state that the HCl was dissolved in water. MJAR at 28 (citing Carbon Activated Sec. D Suppl. Questionnaire Resp. (Part I) (Mar. 18, 2020), Ex. SD-1 (“October 2018 Test Report”), CR 171–79, PR 184–90, CJA Tab 16). The document contains the description, “HCl Test Report for October 2018,” and includes the terms “date,” “purity,” and “inspector.” October 2018 Test Report. Plaintiffs assert that a “purity level [of] less than 100 [percent] means that the HCl is necessarily in an aqueous solution – as confirmed by record evidence and Commerce practice.” MJAR at 29. They further assert that “[t]he record confirms that HCl exists in two forms: ‘(1)

<sup>5</sup> Calgon also points to additional evidence that water was consumed in addition to the HCl “in preparing the acid bath used to wash the subject merchandise,” suggesting that the HCl was diluted after it was purchased. Def.-Ints.’ Resp. at 2–4. This argument is not addressed in the Issues & Decision Memorandum, and as such, it is not discussed further in the analysis.

anhydrous or liquid form (without added water); and (2) aqueous solution (with added water),” where “the latter form is expressed with purity levels.” *Id.* (citing Final Surrogate Value Cmts. by DJAC and [Carbon Activated] Tianjin (Mar. 30, 2020) (“Final SV Cmts.”), Ex. 6B, PR 179–231, CJA Tab 19). In fact, the record indicates that hydrochloric acid is “the aqueous (water-based) solution of hydrogen chloride gas,” “a colorless watery liquid . . . [consisting] of hydrogen chloride, a gas, dissolved in water”—but Plaintiffs fail to address how this distinction between hydrochloric acid and hydrogen chloride applies when the test report on the record only describes “HCl.” *See* Final Surrogate Value Cmts., Ex. 6B.

Commerce found that the referenced documents do not specifically describe the connection between the substance at issue in this case (HCl with a purity level less than 100 percent) and the substance those documents described (aqueous hydrochloric acid). I&D Mem. at 41. Indeed, the October 2018 Test Report on which Plaintiffs rely states only “HCl Test Report for October 2018” and the translation for the term “purity,” but it does not anywhere explain that the only contaminant was water such that its purity level of less than 100 percent pure means that it is aqueous hydrochloric acid. *See* October 2018 Test Report. Accordingly, Commerce reasonably assessed that the evidence was insufficient to clearly define the HCl on the record as aqueous hydrochloric acid or to depart from the Malaysian basket category in favor of the narrower Brazilian or Turkish aqueous HCl data. *See* I&D Mem. at 41.

Having reviewed the record evidence and Commerce’s explanation, the court finds that Commerce’s decision to rely on the Malaysian basket category is based on substantial evidence and in accordance with law; thus, it will be sustained.

#### **IV. Caustic Soda**

Commerce valued caustic soda using Malaysian import data under HS 2815.11, which covers “solid sodium hydroxide.” I&D Mem. at 44. Respondents requested that Commerce instead value caustic soda using the subheading 2815.12, which covers “liquid sodium hydroxide.” *Id.* Parties refer interchangeably to “sodium hydroxide” and “caustic soda.”

Commerce concluded that the record did not establish that Respondents purchased liquid caustic soda. *Id.* at 44–45. Commerce noted that the suppliers used “sodium hydroxide with purity in the range of 30.6 to 33.1 percent,” which Commerce saw as insufficient to establish that the caustic soda was in liquid form. *Id.* at 45. Commerce also noted that one of the respondents consumed more caustic soda than

it purchased. *Id.* Although the record was unclear, from this evidence Commerce inferred that “Carbon Activated’s suppliers [likely] purchased solid sodium hydroxide and created the liquid caustic solution themselves.” *Id.* Based on this analysis of the record evidence, Commerce continued to use HS 2815.11 to determine the surrogate value for caustic soda. *Id.*

### **a. Parties’ Contentions**

Plaintiffs contend that HS 2815.12 should be used to value caustic soda because it “was clearly reported as a liquid input with diluted purity.” MJAR at 26. Plaintiffs assert that Commerce “impermissibly speculated that ‘Carbon Activated’s suppliers actually purchased solid sodium hydroxide and created liquid caustic themselves’ as opposed to having purchased ‘liquid sodium hydroxide in its diluted form.’” *Id.* at 27 (quoting I&D Mem. at 45). Plaintiffs also assert that Commerce was required to inform Carbon Activated about the deficiency of the record in this regard and provide Carbon Activated with an opportunity to remedy or explain the deficiency. *Id.* at 28 (citing 19 U.S.C. § 1677m(d)); *see also* Pls.’ Reply at 13.

The Government contends that Commerce’s choice of the solid caustic soda subheading constituted an inference based on evidence, not mere speculation. *See* Def.’s Resp. at 28–29. The Government further contends that Commerce was not required to ask Respondents for clarification before drawing conclusions or inferences because 19 U.S.C. § 1677m(d) “does not apply to the submission of potential surrogate value information.” *Id.* at 29.

### **b. Commerce’s Use of Malaysian Data for Solid Sodium Hydroxide to Value Caustic Soda Is Supported by Substantial Evidence**

While Plaintiffs contend that Commerce’s caustic soda valuation was based on speculation and not substantial evidence, Commerce’s determination in fact constituted an evidence-based inference. Plaintiffs claim that they consumed liquid caustic soda in their production of subject merchandise; however, Commerce noted that “the evidence on the record only indicates that the suppliers used [caustic soda] with purity in the range of 30.6 to 33.1 percent, as demonstrated by the test reports provided for October 2018.” I&D Mem. at 45. Commerce also found that “something happen[ed] to the caustic soda input after its purchase because once the input is applied into the production process, the volume reported is larger than the volume

purchased.”<sup>6</sup> *Id.* This difference in volume, in Commerce’s view, justified an “infer[ence]” that the input was solid caustic soda, and that the suppliers created the liquid caustic soda from a purchased solid. *Id.* Commerce took the evidence it had on the record—a difference in volume purchased and volume consumed—and drew a conclusion based thereon.

While Plaintiffs maintain, and the court acknowledges, that there may be additional explanations for the purchase-to-consumption difference other than the inference drawn by Commerce—such as, Plaintiffs claim, purchases of caustic soda outside of the POR, MJAR at 27—substantial evidence review requires the court to determine whether Commerce’s conclusion was reasonable, not whether the conclusion was the only possible one, *see Jiaxing II*, 822 F.3d at 1301. Plaintiffs’ alternative explanation was not exhausted below nor do Plaintiffs point to record evidence ignored by Commerce when adopting its inference. Because Plaintiffs did not raise their alternative explanation for the volume discrepancy before Commerce, the agency drew its own conclusion. Direct evidence, or “evidentiary exactitude,” need not support Commerce’s determination; insofar as Commerce’s inference is logical under the circumstances, the court finds that it is supported by substantial evidence. *See, e.g., Fuwei Films (Shandong) Co. v. United States*, 36 CIT 764, 774–75, 837 F. Supp. 2d 1347, 1356 (2012) (finding that “the question [was] not whether Commerce engaged in ‘conjecture’ that fail[ed] to qualify as ‘substantial evidence, . . . but simply whether Commerce’s findings and conclusions supporting its ultimate determination. . . [were] reasonable given the circumstances presented by the record”).

Plaintiffs’ contention that Commerce was required, pursuant to 19 U.S.C. § 1677m(d), to request clarification about the nature of the input fails for the same reasons discussed above regarding bituminous coal, *supra* at 14–15. As described, Commerce found that it had enough information to find a surrogate value for caustic soda. *See* I&D Mem. at 45. Plaintiffs were under an obligation to populate the record to “prove the inadequacy of [Commerce’s chosen surrogate value] or, alternatively, to show that another value is preferable.” *Ad Hoc Shrimp*, 145 F. Supp. 3d at 1363. Plaintiffs did not meet that burden here, and the court will not shift that burden to the agency.

Thus, Commerce’s reliance on Malaysian import data under HS 2815.11 will be sustained.

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<sup>6</sup> The details of the volumes of caustic soda purchased and used are business proprietary. *See* Carbon Activated Resp. to Section D. of Questionnaire (Part I) (Sept. 19, 2019) at Ex. D-4, D-5, Attach. A, Ex. D-5, D-12.4, PR 102, CJA Tab 4.

## V. Steam

Commerce valued steam using Malaysian import data under HS 2711.11, which covers liquefied natural gas. I&D Mem. at 47–48. The agency “valued steam by benchmarking the cost of steam from the cost of natural gas required to generate steam” and then developed a “ratio to convert [the] cost of natural gas to the cost of steam.” Mem. Surrogate Values for the Prelim. Results (Apr. 24, 2020) (“Prelim. SV Mem.”) at 6, Attach. 2 to Mem. Re: Calculation of the Margin for Respondents Not Selected for Individ. Examination (Apr. 24, 2020), PR 265–68, CJA Tab 27.

Respondents challenged the liquefied natural gas price as unreliable and not product-specific; they requested that Commerce instead use HS 2711.21, covering “gaseous natural gas.” I&D Mem. at 45. They also argued that because Malaysia did not have any imports under HS 2711.21 during the POR, Commerce should have selected data from the secondary surrogate country with the largest import volume, Mexico, to value steam using HS 2711.21. *Id.* Respondents argued that Malaysian data for HS 2711.11 were unreliable because the domestic prices of natural gas during the POR were lower than the import prices of natural gas. *Id.* at 45–46.

Commerce determined that Malaysian data existed for both HS 2711.21 and HS 2711.11, and, in this case, the data for 2711.11 was preferable.<sup>7</sup> *Id.* at 48. Commerce acknowledged that, in other reviews, it calculated the surrogate value for steam using import data under both HS 2711.21 and HS 2711.11. *Id.* at 47–48 & nn.321–22 (citations omitted). Here, the agency found that the Malaysian data for HS 2711.11 represented “a significantly larger volume of imports (i.e., 1,329,366,876 kg) from multiple countries (i.e., Singapore, Brunei, and Australia), covering nearly the entirety of the POR,” as compared to the import data under HS 2711.21, which represented a “smaller volume of imports (i.e., 3,207,783 kg) from only one country (i.e., Brunei) covering only two months of the POR.” *Id.* at 48. Commerce addressed Respondents’ argument regarding domestic natural gas prices by explaining that the “domestic prices the . . . [R]espondents provide[d] were] not supported by the underlying methodology used to derive those prices.” *Id.* Consequently, Commerce found the Malaysian import data reliable and declined to “consider import data from a secondary surrogate country.” *Id.*

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<sup>7</sup> Contrary to Plaintiffs’ assertion, Commerce found that Malaysia imported 3,207,783 kg of natural gas under HS 2711.21 during the POR. I&D Mem. at 47.

### **a. Parties' Contentions**

Plaintiffs contend that Commerce should have used HS 2711.21 because Commerce typically selects the surrogate value for steam based “on whether the natural gas was purchased in gaseous or liquefied state,” and the steam used by Respondents was gaseous. MJAR at 31–32 (citation omitted) (asserting that because “Commerce never questioned the manner in which steam was reported,” i.e., gaseous, “it should have been valued as natural gas in the same physical form, i.e., gaseous”); *see also* Pls.’ Reply at 18. Plaintiffs also contend that Malaysian import data under HS 2711.11 was unreliable because products under this subheading were sold at higher prices than in the domestic market, making it unlikely that Malaysian producers would have purchased imported natural gas. MJAR at 33–34 (citing *Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 617 (2002)); *see also* Pls.’ Reply at 18. Lastly, Plaintiffs contend that “Commerce improperly compared import volumes reported under two different [HS] subheadings covering distinct products,” and that “Commerce failed to provide any precedent to support comparing the broad market average attributes of disparate [HS] subheadings.” *Id.* at 34.

The Government contends that if “there is nothing on the record regarding the specific composition [of an input]”—in this case, whether the natural gas used to create the steam was liquid or gaseous—then claims regarding the greater specificity of certain HS subheadings are unavailing. Def.’s Resp. at 31 (quoting *Fine Furniture (Shanghai) Ltd. v. United States*, 42 CIT \_\_, \_\_, 353 F. Supp. 3d 1323, 1348 (2018)) (alteration in original)). The Government further contends that Plaintiffs’ argument regarding unreliability lacks merit because Commerce could not determine how domestic prices were determined or evaluate the reliability of that data. *Id.* (citing I&D Mem. at 48). Thus, the Government contends, Commerce’s choice of Malaysian import data under HS 2711.11 constituted a reasonable exercise of the agency’s discretion to choose between imperfect data-sets. *Id.*

### **b. Commerce’s Valuation of Steam using Malaysian HS 2711.11 Data Is Supported by Substantial Evidence**

Plaintiffs’ first argument, that steam should be valued using the HS subheading for natural gas that is consistent with the phase of matter in which the steam is in, *see* MJAR at 31–32, is nonsensical and inapposite. While steam is certainly gaseous, it is created by using an energy source to heat water. To that end, the energy source input need not be in the same phase (solid, liquid, gaseous) as the steam the

energy creates. The only question is whether the conversion factor is correlated to the value of the particular energy source selected as the surrogate value. *See* Prelim. SV. Mem. at 6. Commerce was not required to select gaseous natural gas simply because the steam was gaseous. Indeed, Commerce declined to do so. *See* I&D Mem. at 47–48. Moreover, the court notes that Plaintiffs do not argue that the conversion factor Commerce used to convert the value of the liquified natural gas to a value for steam was inaccurate for that purpose.

Turning to Commerce’s choice of HS 2711.11, Commerce explained that the data under HS 2711.11 “represent a significantly larger volume of imports . . . from multiple countries . . . , covering nearly the entirety of the POR” as compared to “the import data under HS 2711.21,” which “represent a smaller volume of imports . . . from only one country . . . covering only two months of the POR.” I&D Mem. at 48.

The agency also noted that the domestic price data, which Respondents used to argue that the HS 2711.11 data were unreliable, were themselves of undetermined reliability because Respondents had not provided Commerce with the underlying methodology used to derive those prices. *Id.* Plaintiffs cite to *Yantai Oriental Juice Co.*, 26 CIT at 617, to support their argument that Commerce was required to select HS 2711.21 in part because the Malaysian imported natural gas prices under HS 2711.11 were significantly higher than the domestic prices of the same product. However, in that case, “Commerce nowhere explain[ed] how the use of seemingly more expensive imported coal data [was] the best available information,” *id.* at 617, whereas here, Commerce found that the domestic price data was unreliable *and* found that the HS 2711.11 data were better due to the volume and contemporaneity of the import data under that subheading, I&D Mem. at 48.

As noted above, Commerce has discretion to choose which criteria to prioritize, especially when there is “nothing on the record regarding the specific composition” of the plaintiff’s product such that “claims of greater specificity . . . are immaterial.” *Fine Furniture (Shanghai) Ltd. v. United States*, 353 F. Supp. 3d at 1348. Like in *Fine Furniture*, here, the agency found that there was no way to determine which surrogate value was most appropriate due to lack of evidence regarding the state of the natural gas used to generate the steam. I&D Mem. at 48. While Commerce did not use a basket category—in fact, no basket category has been proposed—Commerce selected what it deemed to be the best available information by examining differences between the two datasets and explaining why it preferred HS 2711.11 over HS 2711.21. *See id.*

The court declines to interfere with Commerce’s exercise of its discretion in selecting among potential surrogate values because the agency adequately explained its choice and supported its choice with substantial evidence. Thus, Commerce’s determination as to the valuation of steam will be sustained.

## VI. Carbonized Materials

Commerce valued coal-based carbonized material using Malaysian data for HS 4402.90.1000, which covers “coconut shell charcoal.” I&D Mem. at 43. Respondents requested that Commerce instead use HS 4402.90, which covers “wood charcoal (including shell or nut charcoal), excluding that of bamboo,” and which is the basket category inclusive of HS 4402.90.1000 and HS 4402.90.9000, covering “other wood charcoal.” *Id.* at 41, 43. According to Commerce, there was no record evidence “indicating that the mandatory respondents produced subject merchandise from wood, nuts, or any other non-coal charcoal.” *Id.* at 43. Commerce noted that, “when asked to specify the type of carbonized material used to produce subject merchandise, Carbon Activated reported that its suppliers purchased coal-based carbonized material.” *Id.* Commerce further stated that “[f]or both [DJAC’s] and Carbon Activated’s suppliers, the record only contains test reports demonstrating the moisture, ash, volatility content and particle size of the carbonized material purchased from its suppliers, but no evidence to support the mandatory respondents’ assertion that they used wood-based charcoal.” *Id.*

### a. Parties’ Contentions

Plaintiffs contend that Commerce unlawfully rejected HS 4402.90.9000 for the valuation of carbonized materials because “Commerce failed to demonstrate that coal-based carbonized material was identical to coconut shell charcoal.” MJAR at 17. Plaintiffs highlight evidence indicating that the wood-based charcoal in HS 4402.90.9000 “is comparable to coal-based carbonized materials in terms of key properties and cost,” and that “Commerce’s failure to address this critical point . . . invalidates” its choice of HS 4402.90.1000. *Id.* Plaintiffs also assert that Commerce’s citation to the fifth administrative review of the order on certain activated carbon from China (“AR5”), in which the agency found that wood and non-coconut-shell carbonized material would only be applicable if a respondent had sold subject merchandise produced from these types of charcoal, was inappropriate. *Id.* (citing *Certain Activated Carbon From the People’s Republic of China*, 78 Fed. Reg. 70,533, 70,533 (Dep’t Commerce Nov. 6, 2013) (“AR5 Final Results”), and accompanying Issues and Decision Mem., A-570–904 (Nov. 20, 2013) (“AR5 I&D Mem.”)). Plaintiffs

explain that there is no record evidence here establishing that the subject merchandise could not have been produced from wood charcoal, which distinguishes this review from AR5. *Id.* at 17–18 (citations omitted). Plaintiffs accordingly contend that Commerce should have selected the basket category HS 4402.90. *Id.* at 18–19.

The Government contends that there is “no reason to resort to the basket category” for carbonized material because the record does not demonstrate that Respondents “used any carbonized materials made from wood, nuts, or any other non-coal charcoal.” Def.’s Resp. at 23 (citing I&D Mem. at 43). Thus, the Government contends, consistent with AR5, Commerce could not select HS 4402.90.9000 because there was no evidence of the use of wood charcoal. *Id.* at 24–25. The Government asserts that Commerce was “well-within its discretion to choose among imperfect datasets” in selecting HS 4402.90.1000. *Id.* at 26.

Plaintiffs in their reply assert that record evidence establishes that “wood charcoal is an equally viable proxy to coal-based carbonized material” compared to coconut shell charcoal. Pls.’ Reply at 9. Plaintiffs also reiterate their argument that the AR5 findings were inapposite, and they reiterate that even if the choice between “imperfect alternatives” is discretionary, Commerce must still explain its decision with reference to substantial evidence on the record. *Id.* at 9–10.

### **b. Commerce’s Valuation of Carbonized Materials Is Unsupported by Substantial Evidence**

The court finds that Commerce’s selection of Malaysian data for HS 4402.90.1000 to value carbonized material is unsupported by substantial evidence and remands the selection to the agency for further explanation or reconsideration. In particular, the agency’s choice of a specific subcategory over a basket category in the valuation of carbonized material is not supported by Commerce’s explanation.

While Commerce found it “clear that Carbon Activated’s suppliers did not purchase carbonized material that was made from wood or nut charcoal so as to merit the inclusion of HS 4402.90.9000, ‘other wood charcoal,’ as part of the [surrogate value] valuation,” Commerce made no analogous finding as to whether Carbon Activated’s suppliers purchased carbonized material made from coconut shell charcoal. I&D Mem. at 43. Thus, the problem Commerce identified with respect to wood-based charcoal also appears to apply to coconut shell charcoal. Absent evidence that Respondents used coconut shell charcoal, Commerce’s selection of one subheading (coconut shell charcoal) over another (other wood charcoal) is unsupported by substantial evidence and reasoned explanation.

Commerce's reliance on its findings in AR5 is unavailing because Commerce did not explain the relevance of that finding to Commerce's determination in this review. *See id.* As noted in *Qingdao*, "[e]ach administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record." 766 F.3d at 1387; *see also Jiaxing II*, 822 F.3d at 1299 (quoting *Qingdao*, 766 F.3d at 1387). AR5 involved a specific type of activated carbon that could not have been produced using wood charcoal. *See* AR5 I&D Mem. at 36. Commerce has not established or indicated that such is the case in the present review.

Commerce is within its discretion to choose among imperfect datasets; however, Commerce's decision-making must take into account the facts on the record and reflect a well-reasoned application of its methodology to the situation.<sup>8</sup> *See Seah Steel Vina Corp. v. United States*, 41 CIT \_\_, \_\_, 269 F. Supp. 3d 1335, 1344 (2017); *Tr. Chem Co. v. United States*, 35 CIT 1012, 1017, 791 F. Supp. 2d 1257, 1263 (2011). Here, Commerce has failed to explain its choice between two imperfect datasets and the court remands that selection for further explanation or reconsideration.

## VII. Financial Ratios

Commerce selected the 2018 financial statements of "Bravo Green, a Malaysian producer of granulated carbon and steam activated carbon," to determine the surrogate financial ratios. I&D Mem. at 32–33. In addition to valuing the factors of production, Commerce is required to add an amount for other expenses, including profit, using surrogate financial ratios. *See* 19 C.F.R. § 351.408(c)(4); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010); *TT Int'l v. United States*, 44 CIT \_\_, \_\_, 439 F. Supp. 3d 1370, 1382 (2020).

Respondents advocated for the use of 2018 financial statements from either Joint Stock Company Sorbent ("JSC Sorbent"), a Russian producer of respiratory personal protective equipment, activated carbons, coagulants, and water treatment systems, or S.C. Romcarbon S.A. ("Romcarbon"), a Romanian producer of filters, polyethylene packaging, charcoal, and other chemical products. I&D Mem. at 30, 33. Respondents argued that JSC Sorbent's 2018 financial statements were from a significant producer of comparable merchandise, were contemporaneous with the period of review, and better disaggregated the company's costs. *Id.* at 30. Respondents also contended that Romcarbon's financial statements met all of the criteria for selection

<sup>8</sup> Plaintiffs contend that record evidence established the comparability of HS 4402.90.9000, "other wood charcoal," to coal-based carbonized materials, suggesting that HS 4402.90.9000 should have been used in lieu of HS 4402.90.1000. *See* MJAR at 18–19. On remand, Commerce should address the relevance of such evidence to its surrogate value selection.

of its financial ratios. *Id.*

Commerce selected Bravo Green's 2018 financial statements based on its preference for using a financial statement from the primary surrogate country unless such data is unavailable or unreliable. *Id.* at 31–32. Commerce emphasized its preference for using contemporaneous statements from profitable companies that are not distorted or otherwise unreliable, and that do not indicate that the company received subsidies. *Id.* at 32. These considerations led the agency to select Bravo Green's 2018 statements, rather than any of the three Malaysian financial statements from 2017 that had been used for the *Preliminary Results* or the Russian and Romanian alternatives argued for by Respondents. *Id.* at 33–34. Commerce acknowledged, however, that Bravo Green's financial statements were “not as detailed as Commerce prefers.” *Id.* at 33.

#### **a. Parties' Contentions**

Plaintiffs contend that Bravo Green's 2018 financial statements were insufficiently disaggregated to be used for calculating financial ratios. MJAR at 38–42. Plaintiffs indicate that these statements do not itemize raw materials, labor, or energy costs but instead “itemize a basket category” titled “Cost of sales,” which Plaintiffs assert could have included a portion of manufacturing overhead and therefore have distorted the profit ratios Commerce used. *Id.* at 38–39; Pls.' Reply at 21. Plaintiffs argue that JSC Sorbent's 2018 financial ratios should have been used because they separately itemized raw materials, labor, and energy. MJAR at 42. In the alternative, Plaintiffs argue that the financial statements of Romcarbon are preferable to Bravo Green's because they included breakouts for all cost elements, and Romania, while not on the OP list, was economically comparable to China. *Id.* at 44–46.

The Government contends that Bravo Green's 2018 financial statements met Commerce's selection criteria and were sufficient to calculate the financial ratios. Def.'s Resp. at 33–34. The Government argues that the burden is on Plaintiffs to demonstrate the unreliability or unavailability of financial statements from the primary surrogate country and Plaintiffs have not made that showing here. *Id.* at 34.

In response to the Government's argument that Commerce's broad discretion justifies the choice of Bravo Green over JSC Sorbent or Romcarbon, Plaintiffs note that this is an insufficient explanation when there are such “tell-tale data flaws resulting in distorted ratios” from Commerce's chosen financial statements. Pls.' Reply at 21. Plaintiffs also assert that “Commerce resorted to a disjunctive

analysis—selecting qualitatively inferior and distorted Bravo [Green] statements based simply on its single surrogate country preference, entirely bypassing the qualitatively superior alternatives from Russia and Romania.” *Id.* at 22 (citing *CP Kelco US, Inc. v. United States*, Slip Op. 16–36, 2016 WL 1403657, at \*2 (CIT Apr. 8, 2016)).

**b. Commerce’s Choice of Bravo Green’s 2018 Financial Statements is not Supported by Substantial Evidence**

Commerce explained that, of the Malaysian financial statements, four were “from producers of identical or comparable merchandise.” I&D Mem. at 33. Commerce then considered whether to use all four of them—three from 2017 and one from 2018—and determined to use only Bravo Green’s 2018 financial statements because this was the only option that was “contemporaneous with the POR and reflect[ed] the experience of a producer of merchandise identical to the subject merchandise.” *Id.* at 34. The agency acknowledged that it generally prefers to use multiple companies’ financial statements where practicable, but explained that in this case it prioritized contemporaneity and therefore narrowed its selection to the 2018 Bravo Green statements. *Id.*

Commerce’s choice of Bravo Green’s 2018 financial statements over the non-Malaysian alternatives was conclusory, however. Commerce itself acknowledged that Bravo Green’s 2018 statements were “not as detailed as Commerce prefers,” I&D Mem. at 33, but did not explain why the less-than-ideal Bravo Green statements were better than the alternatives proposed by Respondents. *See Mid Continent Steel & Wire, Inc. v. United States*, 45 CIT \_\_, 551 F. Supp. 3d 1360 (2021) (remanding for failure to fully compare two imperfect sets of financial statements for calculation of surrogate value profit); *CP Kelco US, Inc.*, 2016 WL 1403657, at \*2;<sup>9</sup> *Catfish Farmers of Am. v. United States*, 37 CIT 717, 742 (2013). Commerce rejected the non-Malaysian data without considering its potential merits, in favor of data from the primary surrogate country—even though the data from the primary surrogate country was less disaggregated and detailed than preferred. *See* I&D Mem. at 33. The agency’s entire answer to Respondents’ argument that JSC Sorbent or Romcarbon’s statements should be used was: “We disagree. The record contains five financial statements from the primary surrogate country, Malaysia. Of the five

<sup>9</sup> A subsequent appeal from this case held that if Commerce made a specific finding that certain financial statements were unusable, then the agency was not required to compare side-by-side the different options on the record. *CP Kelco US Inc. v. United States*, 949 F.3d 1348, 1359 (Fed. Cir. 2020). That is not the case here, where Commerce merely found that Bravo Green’s financial statements were preferable, not that the others were unusable.

financial statements, four are from producers of identical or comparable merchandise . . . .” It appears that Commerce did not consider JSC Sorbent or Romcarbon for the sole reason that they were not from Malaysia but did not explain why association with the primary surrogate country outweighed other considerations or criteria.

The court remands this issue to Commerce. In so doing, the court does not require Commerce to choose any particular financial statement or reject Bravo Green’s 2018 financial statements. Commerce must, however, fairly weigh the available options and explain its decision in light of its selection criteria, addressing any shortcomings.

### CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

**ORDERED** that Commerce’s *Final Results* are sustained with respect to the selection of surrogate values for bituminous coal, anthracite coal, hydrogen chloride, sodium hydroxide, and steam; it is further

**ORDERED** that Commerce’s *Final Results* are remanded for reconsideration or further explanation with respect to the selection of the surrogate value for carbonized materials and the financial statement selection for determining surrogate financial ratios; it is further

**ORDERED** that Commerce shall file its remand redetermination on or before November 7, 2022; it is further

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

**ORDERED** that any comments or responsive comments must not exceed 4000 words.

Dated: August 8, 2022

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, CHIEF JUDGE

## Slip Op. 22–90

GLOBAL ALUMINUM DISTRIBUTOR LLC, Plaintiff, and HIALEAH ALUMINUM SUPPLY, INC., Consolidated Plaintiff, and KINGTOM ALUMINIO S.R.L., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and TA CHEN INTERNATIONAL, INC., Defendant-Intervenor.

Before: Richard K. Eaton, Judge  
Consol. Court No. 21–00198

[Joint motion for entry of judgment is granted.]

Dated: August 8, 2022

*David J. Craven*, Craven Trade Law LLC, of Chicago, IL, for Plaintiff Global Aluminum Distributor LLC.

*Lizbeth R. Levinson*, Fox Rothschild LLP, of Washington, D.C., for Consolidated Plaintiff Hialeah Aluminum Supply, Inc. With her on the brief were *Ronald M. Wisla* and *Brittney R. Powell*.

*Brady W. Mills*, Morris Manning & Martin LLP, of Washington, D.C., for Plaintiff-Intervenor Kingtom Aluminio S.r.L. With him on the brief were *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas, III*, *Jordan L. Fleischer*, and *Nicholas C. Duffey*.

*Alexander Vanderweide*, Senior Trial Counsel, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant the United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-in-Charge, and *Aimee Lee*, Assistant Director. Of counsel on the brief were *Tamari J. Lagvilava* and *Chelsea Reyes*, Office of the Chief Counsel, U.S. Customs and Border Protection, of New York, N.Y.

*Jeremy W. Dutra*, Squire Patton Boggs (US) LLP, of Washington, D.C., for Defendant-Intervenor Ta Chen International, Inc.

### MEMORANDUM AND ORDER

#### Eaton, Judge:

This matter is before the court following remand to U.S. Customs and Border Protection (“Customs”) for reconsideration of its affirmative duty evasion determination, under the Enforce and Protect Act of 2015. *See* 19 U.S.C. § 1517 (2018); *see also* Remand Redetermination for Enforce and Protect Act Consolidated Case No. 7348 (June 13, 2022), ECF No. 93 (“Remand Redetermination”).

Plaintiff Global Aluminum Distributor LLC (“Global Aluminum”), Consolidated Plaintiff Hialeah Aluminum Supply, Inc. (“Hialeah”), Plaintiff-Intervenor Kingtom Aluminio S.r.L. (“Kingtom”), and Defendant the United States (“Defendant”) have filed a Joint Motion for Entry of Judgment, asking the court to sustain Customs’ uncontested Remand Redetermination. *See* Jt. Mot. Entry J., ECF No. 95. Defendant-Intervenor Ta Chen International, Inc. (“Ta Chen”) neither joins the motion, nor opposes it.

Jurisdiction lies under 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c) (2018). For the following reasons, the parties' joint motion is granted, and judgment will be entered in favor of Defendant.

Global Aluminum and Hialeah are U.S. importers of aluminum extrusions that are produced in the Dominican Republic by Kingtom. See Global Aluminum's Compl. ¶ 3, ECF No. 2; see also Hialeah's First Am. Compl. ¶ 4, ECF No. 17.

Ta Chen is a U.S. importer of aluminum extrusions from the People's Republic of China. Aluminum extrusions from the People's Republic of China have been subject to antidumping and countervailing duty orders since 2011. See *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011) (antidumping duty order); *Aluminum Extrusions From the People's Republic of China*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) (countervailing duty order).

In August 2019, Ta Chen filed a petition with Customs alleging that Global Aluminum and Hialeah, among others, were transshipping Chinese aluminum extrusions by commingling them with aluminum extrusions that were produced in the Dominican Republic and falsely reporting the Chinese products to Customs as Dominican products to avoid paying duties owed under the orders. See Ta Chen's Suppl. Allegation (Aug. 22, 2019), ECF No. 33-2, PR 1-3.

In October 2019, Customs commenced an investigation and issued requests for information from, *inter alia*, Global Aluminum, Hialeah, and Kingtom. See Notice of Determination as to Evasion (Nov. 2, 2020), ECF No. 33-6, PR 286 & ECF No. 40-25, CR 463 ("Evasion Notice").

Under the statute, "[Customs] shall make a determination, based on substantial evidence, with respect to whether . . . covered merchandise was entered into the customs territory of the United States through evasion." 19 U.S.C. § 1517(c)(1)(A). "Covered merchandise" is defined as "merchandise that is subject to . . . an antidumping duty order issued under [19 U.S.C. § 1673e] . . . or . . . a countervailing duty order issued under [19 U.S.C. § 1671e]." *Id.* § 1517(a)(3)(A)-(B). "Evasion" means

entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

*Id.* § 1517(a)(5)(A). When making its evasion determination, should Customs determine that the use of facts otherwise available is warranted, Customs may apply adverse inferences when selecting from among the facts available, “if a party or person described [in the statute] has failed to cooperate by not acting to the best of [its] ability to comply with a request for information.”<sup>1</sup> *Id.* § 1517(c)(3)(A); *see also id.* § 1517(c)(2)(A).

In November 2021, Customs made a final affirmative determination of evasion in Enforce and Protect Act Consolidated Case Number 7348. Specifically, Customs found, based on adverse facts available, that Chinese aluminum extrusions were being transshipped to the United States through the Dominican Republic to avoid the payment of owed duties under the orders. *See* Evasion Notice at 17–18 (finding that there were deficiencies in foreign producer Kingtom’s responses to Customs’ requests for information, and that Kingtom did not cooperate with Customs’ requests to the best of its ability).

As a result of the affirmative evasion determination, Global Aluminum’s and Hialeah’s imports became subject to antidumping and countervailing duties pursuant to the orders on Chinese aluminum extrusions. *See* Global Aluminum’s Compl. ¶ 4; Hialeah’s First Am. Compl. ¶ 5.

In April 2021, Global Aluminum and Hialeah each brought suit in this Court to challenge Customs’ affirmative evasion determination, and the cases were consolidated.<sup>2</sup> In October 2021, Kingtom intervened in the case on the side of plaintiffs. *See Global Aluminum Distributor LLC v. United States*, No. 21–00198, 2021 WL 4691611 (CIT Oct. 7, 2021) (publication pending in the Federal Supplement). In February 2022, Global Aluminum, Hialeah, and Kingtom filed the opening briefs in support of their respective motions for judgment on the agency record. *See* Pls.’ Mots. J. Agency R., ECF Nos. 80–85.

In April 2022, after considering the arguments in the opening briefs, Defendant filed a motion to suspend the briefing schedule and for voluntary remand so that Customs could reconsider its original

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<sup>1</sup> Under its regulations, Customs “will obtain information from its own files, from other agencies of the United States Government, through questionnaires and correspondence, and through field work by its officials.” 19 C.F.R. § 165.5(a) (2019). Customs’ regulations further provide that if the allegor, importer, or foreign producer or exporter of the covered merchandise “fails to cooperate and comply to the best of its ability with a request for information made by [Customs], [Customs] may apply an inference adverse to the interests of that party in selecting from among the facts otherwise available to make the determination as to evasion.” *Id.* § 165.6(a).

<sup>2</sup> On May 17, 2021, the court consolidated *Hialeah Aluminum Supply, Inc. v. United States*, Court No. 21–00207 under the lead case, *Global Aluminum Distributor LLC v. United States*, Court No. 21–00198. *See* Order (May 17, 2021), ECF No. 15. *Hialeah* and *Global Aluminum* involve challenges to the same administrative decision.

affirmative evasion determination. *See* Mot. Voluntary Remand, ECF No. 91 (stating that Global Aluminum, Hialeah, and Kingtom consented; Ta Chen took no position). The court granted the motion. *See* Order (Apr. 15, 2022), ECF No. 92.

On remand, Customs reviewed the administrative record of this case de novo and ultimately reversed its original affirmative finding of evasion: “Based upon the documentation and information provided in the administrative record, we find that there is not substantial evidence to support a finding of evasion.” *See* Remand Redetermination at 7. At the agency level, no party disputed Customs’ analysis on remand. *See* Remand Redetermination at 2.

In June 2022, shortly after the Remand Redetermination was published, Global Aluminum, Hialeah, Kingtom, and Customs filed this Joint Motion for Entry of Judgment. Ta Chen did not file a response to the motion. By their motion, Global Aluminum, Hialeah, Kingtom, and Customs ask the court to sustain the Remand Redetermination because there are no further issues in dispute: “As no party raised issues with the Draft Redetermination at the agency level and no party intends to oppose the [Remand] Redetermination, Judgment should be entered sustaining the [Remand] Redetermination in its entirety.” *See* Jt. Mot. Entry J. at 2.

Since no party opposes the motion for entry of judgment or the Remand Redetermination, and because there are no further issues for the court to decide in this case, it is hereby

**ORDERED** that the Joint Motion for Entry of Judgment is granted; it is further

**ORDERED** that the Remand Redetermination is sustained as uncontested; and it is further

**ORDERED** that judgment in favor of Defendant will be entered accordingly.

Dated: August 8, 2022

New York, New York

*/s/ Richard K. Eaton*

JUDGE

## Slip Op. 22–91

WORLDWIDE DOOR COMPONENTS, INC., Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE AND ENDURA PRODUCTS, INC., Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge  
Court No. 19–00012

[Ordering a remand to the issuing agency of a determination that is not in a form the court could sustain upon judicial review]

Dated: August 10, 2022

*John M. Foote*, Kelley Drye & Warren LLP, of Washington, DC, for plaintiff.

*Aimee Lee*, Assistant Director, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Nikki Kalbing*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

*Robert E. DeFrancesco, III*, Wiley Rein LLP, of Washington, DC, for defendant-intervenors. With him on the brief were *Alan H. Price* and *Elizabeth S. Lee*.

## OPINION AND ORDER

### Stanceu, Judge:

Plaintiff Worldwide Door Components, Inc. (“Worldwide”) brought this action to contest a decision (the “Scope Ruling”) by the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) on its imported “door thresholds,” each of which is an assembly containing an aluminum extrusion among various other components. In this litigation, Commerce previously took the position that an aluminum extrusion component within each door threshold is within the scope of antidumping and countervailing duty orders on aluminum extrusions from the People’s Republic of China (the “Orders”).

Before the court is the Department’s most recent decision (“Second Remand Redetermination”), which Commerce submitted in response to the court’s opinion and order in *Worldwide Door Components, Inc. v. United States*, 45 CIT \_\_, 537 F. Supp. 3d 1403 (2021) (“*Worldwide II*”). In an effort to respond to the court’s order while changing its position only under protest, Commerce stated in the Second Remand Redetermination that the aluminum extrusion components within the imported door thresholds are not subject to the Orders.

Plaintiff has commented in favor of the Second Remand Redetermination. Defendant-intervenors, the Aluminum Extrusions Fair Trade Committee and Endura Products, Inc., a U.S. producer of aluminum extrusions, have commented in opposition.

The court issues another remand order to Commerce. The Department's latest determination is not itself a new scope ruling in a form the court could sustain. Instead, Commerce informs the court that if the court were to sustain the Second Remand Redetermination, Commerce would issue a new scope ruling accordingly. Under this proposal, Commerce would issue its final ruling outside of the court's direct review. Also, the agency determination before the court misconstrues the court's opinion in *Worldwide II* in some respects. The court orders Commerce to submit for the court's consideration, on an expedited basis, a new determination that would go into effect if sustained upon judicial review.

### I. BACKGROUND

Background on this litigation is presented in the court's previous opinions and is summarized and supplemented herein. *Id.*, 45 CIT at \_\_\_, 537 F. Supp. 3d at 1405–06; *Worldwide Door Components, Inc. v. United States*, 44 CIT \_\_\_, \_\_\_, 466 F. Supp. 3d 1370, 1372–73 (2020) (“*Worldwide I*”).

The decision contested by plaintiff in this litigation is *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Rulings on Worldwide Door Components Inc., MJB Wood Group, Inc., and Columbia Aluminum Products Door Thresholds*, P.R. Doc. 39 (Int'l Trade Admin. Dec. 19, 2018) (“*Scope Ruling*”). The Scope Ruling construed the scope of *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) (“*AD Order*”), and *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) (“*CVD Order*”).

The court remanded the Scope Ruling to Commerce in *Worldwide I*, ruling that Commerce had misinterpreted the scope language of the Orders in two respects and, finding the Department's response to the court's opinion and order in *Worldwide I* (the “First Remand Redetermination”), *Final Results of Redetermination Pursuant to Court Remand* (Dec. 23, 2020), ECF No. 64–1 (“*First Remand Redetermination*”), flawed as well, issued a second remand order in *Worldwide II*.

In response to the court's order in *Worldwide II*, Commerce filed the Second Remand Redetermination with the court on December 13, 2021. *Final Results of Redetermination Pursuant to Ct. Remand*, ECF No. 85–1 (“*Second Remand Redetermination*”). Plaintiff submitted comments in support on January 12, 2022. Plaintiff's Comments in Supp. of Remand Redetermination, ECF No. 87. Defendant-

intervenor filed their comments in opposition on January 12, 2022. Def.-Intervenor's Comments on Final Results of Second Redetermination Pursuant to Ct. Remand, ECF Nos. 89 (conf.), 90 (public). Defendant replied to the comments on February 11, 2022. Def.'s Resp. to Comments on Second Remand Redetermination, ECF No. 95.

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a.<sup>1</sup> Among the decisions that may be contested according to section 516A is a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." *Id.* § 1516a(a)(2)(B)(vi). In reviewing the Scope Ruling, the court must set aside any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

### B. The Court's Decisions in *Worldwide I* and *Worldwide II*

The Orders apply generally to "aluminum extrusions," which are defined in the Orders as "shapes and forms, produced by an extrusion process." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. As the court's previous decisions have recognized, the door thresholds at issue in this litigation are not themselves aluminum extrusions. Nevertheless, the Orders contain a provision (the "subassemblies" provision) that enlarges the scope of the Orders to include aluminum extrusion components present in certain imported "partially assembled merchandise." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. Another provision in the scope language of the Orders, the "finished merchandise exclusion," excludes from the scope of the Orders certain assembled and completed merchandise containing aluminum extrusions as parts. *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

At issue in this litigation are eighteen models of imported door thresholds, each of which is not itself an aluminum extrusion but is instead an assembly of various components, including polyvinyl chloride, other plastics, wood, or steel. *Worldwide I*, 44 CIT at \_\_\_, 466 F. Supp. 3d at 1372–73. One of those components in each door threshold

<sup>1</sup> Citations to the United States Code and to the Code of Federal Regulations are to the 2018 editions.

is fabricated from a single piece of extruded aluminum and, were it imported separately, would be described by the scope language of the Orders.

In *Worldwide I*, the court held that the contested Scope Ruling misinterpreted the scope language of the Orders in three respects. The Scope Ruling relied on a sentence in the scope language, “[s]ubject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture.” *AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order* 76 Fed. Reg. at 30,654. From this sentence, the Scope Ruling concluded that “. . . the aluminum extruded components of . . . Worldwide’s . . . door thresholds may be described as parts for final finished products, *i.e.*, parts for doors, which are assembled after importation (with additional components) to create the final finished product, and otherwise meet the definition of in-scope merchandise.” *Scope Ruling* at 33. Rejecting this reasoning, *Worldwide I* stated that “[t]he Scope Ruling erred in relying on that sentence from the scope language, which is inapplicable to the issues presented by Worldwide’s imported products.” *Worldwide I*, 44 CIT at \_\_, 466 F. Supp. 3d. at 1374. The court noted that Commerce failed to recognize that the subject of the quoted sentence was “[s]ubject *aluminum extrusions*,” which Worldwide’s door thresholds, at the time of importation, were not. *Id.*, 44 CIT at \_\_, 466 F. Supp. 3d. at 1374–75 (quoting *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added)). “The sentence refers to the way that goods may be described ‘at the time of importation,’ but according to the uncontested facts, Worldwide’s door thresholds are not ‘aluminum extrusions’ at the time of importation; rather, they are door thresholds that contain an aluminum extrusion as a component in an assembly.” *Id.*, 44 CIT at \_\_, 466 F. Supp. 3d. at 1375. With respect to the scope language sentence at issue, which contains the words “may be described at the time of importation as parts for final finished products that are assembled after importation,” *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654, the court also reasoned that the aluminum extrusion component in each door threshold is not itself the imported article and that it had become part of the imported, assembled good prior to, not after, importation. *Worldwide I*, 44 CIT at \_\_, 466 F. Supp. 3d. at 1375.

*Worldwide I* ruled that Commerce also erred in misinterpreting the following sentence from the scope language in the Orders: “Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, *door thresholds* . . .” *Id.*, 44 CIT at \_\_,

466 F. Supp. 3d. at 1376 (quoting *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (emphases added)). Mentioning that “the plain language of the scope of the *Orders* specifies that ‘door thresholds’ are included within the scope ‘if they otherwise meet the scope definition . . .,’” the Scope Ruling erroneously concluded that “[i]n light of the above, we find that . . . Worldwide’s . . . door thresholds are within the scope of the *Orders*.” *Scope Ruling* at 34. As *Worldwide I* pointed out, Commerce overlooked that the subject of this sentence in the *Orders* also is “[s]ubject extrusions,” which Worldwide’s imported door thresholds are not. *Worldwide I*, 44 CIT at \_\_\_, 470 F. Supp. 3d. at 1376 (quoting *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added)). The court reasoned that these goods “are not, in the words of the scope language, ‘aluminum extrusions which are shapes and forms, produced by an extrusion process,’” and they do not, therefore, otherwise meet the scope definition for an aluminum extrusion. *Id.* (quoting *AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,653–54).

The court identified a third error in the interpretation Commerce applied to the scope language, which was to refuse to consider whether Worldwide’s door thresholds were excluded from the scope of the *Orders* under the “finished merchandise exclusion.” *Id.* This express exclusion from the scope applies to “finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.” *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

Commerce concluded in the Scope Ruling that “the express inclusion of ‘door thresholds’ within the scope of the *Orders* (regardless of whether the door thresholds are ready for use at the time of importation) renders the reliance of Worldwide . . . upon the finished merchandise exclusion inapposite.” *Scope Ruling* at 35–36. *Worldwide I* rejected the Department’s reasoning because it misinterpreted the scope language of the *Orders*. “The scope language does not expressly include all door thresholds in which there is an extruded aluminum component. Instead, as the court has discussed, the inclusion of ‘door thresholds’ in the scope language as an exemplar is confined to door thresholds that *are* aluminum extrusions.” *Worldwide I*, 44 CIT at \_\_\_, 470 F. Supp. 3d. at 1376 (citing *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654).

*Worldwide I* concluded, further, that Commerce “erred in reasoning that ‘finding door thresholds excluded under the finished merchandise exclusion would render the express inclusion of “door thresholds” meaningless.’” *Id.*, 44 CIT at \_\_, 470 F. Supp. 3d. at 1376 (quoting *Scope Ruling* at 36). As the court recognized, “[d]oor thresholds that are fabricated from aluminum extrusions are ‘extrusions’ for purposes of the scope language and are expressly included in the scope by operation of the reference to ‘door thresholds’; other door thresholds, which are not themselves ‘extrusions’ for purposes of the Orders, are not.” *Id.*, 44 CIT at \_\_, 466 F. Supp. 3d. at 1376–77. *Worldwide I* added that:

Rather than rendering the express inclusion of door thresholds meaningless, excluding the assembled goods at issue from the Orders according to the finished merchandise exclusion would have no effect at all on the express inclusion of door thresholds, for a straightforward reason: a door threshold that is fabricated from an aluminum extrusion could never qualify under the finished merchandise exclusion in the first place because the finished merchandise exclusion applies only to assembled goods.

*Id.*, 44 CIT at \_\_, 466 F. Supp. 3d. at 1377 (citing *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654).

*Worldwide I* also rejected the Department’s conclusion that the Scope Ruling was supported by sources described in its regulation, 19 C.F.R. § 351.225(k)(1) (providing that the Secretary of Commerce may take into account “[t]he descriptions of the merchandise contained in the petition . . . ; . . . the initial investigation . . . ; . . . [d]eterminations of the Secretary, including prior scope rulings . . . ; and [d]eterminations of the [U.S. International Trade] Commission . . . .”). The court explained that the Department’s reliance on the petition, certain materials pertinent to the investigation, and the injury determination of the U.S. International Trade Commission was misplaced, Commerce again having mistaken references to door thresholds that are aluminum extrusions for references to assemblies containing an aluminum extrusion as a component. *Worldwide I*, 44 CIT at \_\_, 466 F. Supp. 3d. at 1376–78.

In light of the multiple errors the court identified, *Worldwide I* ordered Commerce to reconsider the Scope Ruling and to give “full and fair” consideration to the issue of whether the finished merchandise exclusion applies to *Worldwide’s* door thresholds, “upon making findings that are supported by substantial record evidence.” *Id.*, 44 CIT at \_\_, 466 F. Supp. 3d. at 1380.

In response to the court's opinion and order in *Worldwide I*, Commerce submitted the First Remand Redetermination on December 23, 2020. See *First Remand Redetermination*. In it, Commerce disagreed with the court that the finished merchandise exclusion was relevant to the Department's analysis but addressed, under protest, the issue of whether this exclusion applied to Worldwide's door thresholds. Commerce concluded that it did not.

The Department's analysis in the First Remand Redetermination began with findings of fact that are not contested in this case. Commerce found that Worldwide's door thresholds are produced "for installation within a door frame or residential or commercial building." *Worldwide II*, 45 CIT at \_\_, 537 F. Supp. 3d. at 1411 (quoting *First Remand Redetermination* at 23). Commerce reached the related finding that "'Worldwide's door thresholds do not function on their own, but rather are incorporated into a larger downstream product,' to which Commerce also referred as a 'completed door unit.'" *Id.*, 45 CIT at \_\_, 537 F. Supp. 3d. at 1411 (internal citations omitted) (quoting *First Remand Redetermination* at 36). In the First Remand Redetermination, Commerce described that product as one that "requires additional parts, such as door jambs, a door panel, glass, hinges, weatherstripping, and other hardware parts." *Id.*, 45 CIT at \_\_, 537 F. Supp. 3d at 1414 (citing *First Remand Redetermination* at 36).

Based on its factual findings on the applications for which Worldwide's door thresholds are produced, Commerce reached two conclusions of law in the First Remand Redetermination. Commerce concluded, first, that these products do not qualify for the finished merchandise exclusion because they are "partially assembled merchandise" and "intermediate products" for purposes of the subassemblies provision in the Orders. *Id.*, 45 CIT at \_\_, 537 F. Supp. 3d at 1411 (citing *First Remand Redetermination* at 23). The subassemblies provision states that "[t]he scope includes the aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below."<sup>2</sup> *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. Second, Commerce concluded that because they were described by the subassemblies provision, Worldwide's door thresholds could not qualify for

<sup>2</sup> The reference to the "kit" is a reference to the "finished goods kit" exclusion, under which the antidumping and countervailing duty orders exclude an imported good in unassembled form that includes all the parts required for assembly of a final finished good. *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650, 30,651 (Int'l Trade Admin. May 26, 2011) ("AD Order"); *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653, 30,654 (Int'l Trade Admin. May 26, 2011) ("CVD Order"). Because the door thresholds at issue are imported in fully assembled, not disassembled form, this exclusion does not apply.

the finished merchandise exclusion. According to the First Remand Redetermination, “[a] subassembly is merchandise which is designed for the sole purpose of becoming part of a larger whole”; Commerce concluded that each of Worldwide’s door thresholds, which “must work in tandem with other components to be functional” and is “a component of a larger downstream product,” cannot, for those reasons, qualify for the finished merchandise exclusion. *First Remand Redetermination* at 23–24 (citation omitted).

In *Worldwide II*, the court rejected certain of the reasoning by which Commerce supported its ultimate conclusion in the First Remand Redetermination that the aluminum extrusion components within the door thresholds were subject to the Orders. “Under the Department’s analysis, only goods that are not ‘designed for the sole purpose of becoming part of a larger whole’ . . . can satisfy the finished merchandise exclusion, but this rationale is contrary to the terms by which that exclusion is expressed in the scope language.” *Worldwide II*, 45 CIT at \_\_\_, 537 F. Supp. 3d. at 1414 (quoting *First Remand Redetermination* at 24). The court pointed to two of the exemplars of products the scope language listed as qualifying for the finished merchandise exclusion, finished windows with glass and doors with glass or vinyl, as products that “are specifically designed for the sole purpose of becoming part of a larger whole.” *Id.* *Worldwide II* addressed in particular the “doors with glass or vinyl” exemplar:

The Remand Redetermination appears to overlook a critical distinction: the exemplar in the finished merchandise exclusion explicitly refers to “doors with glass or vinyl,” not “finished door units” or “completed door units” consisting of assembled combinations of a door, a door frame, and other parts such as door jambs, weatherstripping, and necessary hardware. A “door” assembled from one or more aluminum extrusions and components of vinyl or glass[] is itself only a component of what Commerce itself described as a finished or completed door unit. Like one of Worldwide’s door thresholds, it is “designed for the sole purpose of becoming part of a larger whole.”

*Id.* (quoting *First Remand Redetermination* at 24). The court stated that “[t]he Department’s role in a scope ruling is to interpret, not modify, the scope language, and it may not interpret an order contrary to its terms.” *Id.* (citing *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002)). “Even the products Commerce itself considered to satisfy the finished merchandise exclusion, i.e., a complete, assembled door unit, and a ‘final finished door with glass,’ . . . do not ‘function on their own,’ . . . and cannot function until incorpo-

rated into a wall or other part of a building.” *Id.* The court concluded that “[t]he [First] Remand Redetermination does not offer a plausible explanation of why the articles mentioned in the ‘door’ and ‘window’ exemplars of the finished merchandise exclusion satisfy that exclusion but that Worldwide’s door thresholds . . . do not.” *Id.*

In the First Remand Redetermination, Commerce, relying solely on statements by defendant-intervenors that did not pertain specifically to Worldwide’s door thresholds, and despite certain record evidence that *did* pertain to Worldwide’s products, inferred from these statements, but did not expressly find, “that the particular door thresholds at issue in this litigation . . . are so designed and manufactured as to require cutting or machining prior to assembly of a door unit or other structure.” *Worldwide II*, 45 CIT at \_\_, 537 F. Supp. 3d at 1412. The court attached significance to whether Worldwide’s imported door thresholds required cutting or machining prior to use because that issue “is directly relevant to the applicability of the finished merchandise exclusion, which pertains to ‘finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled *and completed* at the time of entry.’” *Id.*, 45 CIT at \_\_, 537 F. Supp. 3d at 1413 (quoting *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added)). The court directed Commerce to reach “a finding from the record evidence that the door thresholds at issue in this case either are, or are not, so designed and produced as to require cutting or machining prior to use.” *Id.*, 45 CIT at \_\_, 537 F. Supp. 3d at 1414.

### C. The Second Remand Redetermination

The Second Remand Redetermination is not a decision in a form the court may sustain. The concluding paragraph of the Second Remand Redetermination is as follows:

As a result of this redetermination, we have determined, under protest, that Worldwide’s door thresholds are outside the scope of the *Orders* pursuant to the finished merchandise exclusion. Should the court sustain these Final Results of Redetermination, we will issue a revised scope ruling accordingly.

*Second Remand Redetermination* at 16. The Department’s proposed resolution seeks court approval for a decision that, unlike the agency determination contested in this litigation, is not a scope ruling or determination but is merely preliminary to such a decision. Because it is not the actual scope ruling or determination Commerce plans to issue, the Second Remand Redetermination would not be self-effectuating should the court sustain it, and the agency decision that

would follow if it were sustained would escape direct judicial review. In this circumstance, the court finds the Department's proposed resolution of this litigation unsatisfactory. Not only would it deny the court the opportunity to review the agency's actual decision on remand, it also would not allow the parties to comment on that decision before the court reviews it. Moreover, the court must rule on an agency decision, including one submitted in response to court order, by considering the decision according to the reasoning the agency puts forth. See *Michigan v. EPA*, 576 U.S. 743, 758 (2015) (It is a "foundational principle of administrative law" that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943))). The proposed resolution Commerce has offered does not allow the court to perform its essential judicial review function, and the court, therefore, rejects it. The court directs Commerce to issue a third remand redetermination that, like the agency determination contested in this litigation, is a scope ruling or determination for the court's review, and it must be in a form that would go into effect if sustained upon judicial review.

The Second Remand Redetermination is flawed in presenting no reasoning for ruling that the door thresholds are outside the scope of the Orders other than its incorrect conclusion that the court ordered Commerce to do so. The Second Remand Redetermination misinterprets *Worldwide II* in this respect as well as others. Commerce devoted most of the substantive discussion in the Second Remand Redetermination to its disagreements with certain of the issues the court decided previously. Then, in the concluding paragraph of its analysis, Commerce stated that:

In any event, although Commerce respectfully disagrees with the Court's interpretation of the scope language, consistent with the court's opinion and analysis, we continue to find [as Commerce did in draft results it issued to the parties] in these Final Results of Redetermination that Worldwide's door thresholds are finished merchandise excluded from the scope of the *Orders*, under protest.

#### *Second Remand Redetermination at 16.*

In expressing its disagreements with the court, Commerce stated, erroneously, that "in *Worldwide II*, the Court found unpersuasive Commerce's determination that Worldwide's door thresholds were subassemblies which must be further incorporated into a larger downstream product (e.g., a door unit or door frame)." *Id.* at 11. The Second Remand Redetermination stated, further, that "the Court also

held that Commerce misinterpreted the scope language in concluding that, because Worldwide's door thresholds were intermediate products, rather than final finished goods in and of themselves, the finished merchandise exclusion was inapplicable." *Id.* (footnote omitted). It then concluded that "[t]hus, the Court disagreed with Commerce's finding that Worldwide's door thresholds were subassemblies covered by the scope of the *Orders* and not excluded under the finished merchandise exclusion." *Id.* The Department's interpretation of *Worldwide II* errs in three respects.

First, the court did not decide whether Worldwide's door thresholds are "subassemblies" within the meaning of the subassemblies provision in the scope language of the *Orders*. Had the court actually decided—as Commerce apparently believed the court had—that the subassemblies provision in the scope language did *not* describe Worldwide's imported door thresholds, the court would not have proceeded to address the issue of whether the finished merchandise exclusion applied to those goods. For if Worldwide's door thresholds are *not* described by the subassemblies provision, there can be no reason to decide whether the finished merchandise exclusion applies. If the scope language had not contained the subassemblies provision, the only imported products that could have been held to fall within the scope of the *Orders* are those that may be described at the time of importation as "aluminum extrusions" within the definition of that term as set forth in the scope language of the *Orders*, which expressly defines aluminum extrusions as "shapes or forms, produced by an extrusion process." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. It is uncontested that Worldwide's door thresholds are imported in assembled form with non-aluminum components. Thus, in the form in which they are imported, Worldwide's door thresholds—as opposed to a single component within each—cannot conform to the scope definition of "extrusions," and Commerce has offered no plausible reasoning under which they could be held to do so.

Second, the court did not rule that Commerce incorrectly found that the door thresholds are designed to be incorporated into a larger downstream product, which they plainly are. Instead, as the court discussed previously, the *Worldwide II* opinion took issue with the Department's failing to recognize that two of the exemplars in the finished merchandise exclusion also are goods designed for incorporation into a downstream product or structure. *Worldwide II*, 45 CIT at \_\_\_, 537 F. Supp. 3d at 1414.

Third, the court did not decide whether the finished merchandise exclusion applied to Worldwide's door thresholds. To the contrary, the

court remanded the First Remand Redetermination so that Commerce could reach its own decision on that issue, after making an actual finding on the issue of whether these products are so designed and manufactured as to require cutting and machining prior to incorporation into another structure.

On the latter issue, the Second Remand Redetermination stated, first, that it considered this issue irrelevant when it issued the Scope Ruling, informing the court that “. . . the fact that the door thresholds themselves may not have undergone further cutting or fabrication was not central to Commerce’s original analysis finding that the door thresholds were subassemblies based on the further assembly and incorporation of other components/parts to form downstream finished merchandise.” *Second Remand Redetermination* at 14–15 (citing *Scope Ruling* at 33, 37). Then, alluding to the reasoning underlying the Department’s decision in the First Remand Redetermination, the Second Remand Redetermination stated that “[t]he central question Commerce analyzed was not whether record evidence indicates the door thresholds themselves may undergo further cutting or fabrication, but whether they are intermediate products that require further incorporation of other components to form a downstream finished product.” *Id.* at 15 (citing *First Remand Redetermination* at 25). The Second Remand Redetermination did not return to the factual issue the court identified. It is reasonable to presume that had Commerce believed that substantial evidence supported a finding that Worldwide’s door thresholds required cutting or fabrication prior to use, it would have so stated in the Second Remand Redetermination.<sup>3</sup>

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<sup>3</sup> Because Commerce did not actually state a finding of fact that Worldwide’s door thresholds required such modification prior to use, the court was not in a position in *Worldwide II* to conclude that Commerce had done so. The court considered it appropriate, therefore, to direct Commerce to resolve the factual dispute.

In comments on the Second Remand Redetermination, defendant-intervenors argue that Commerce again should have concluded that the finished merchandise exclusion does not apply and that the aluminum extrusion components in each of Worldwide’s door thresholds are subject to the Orders. Among their arguments is that they “submitted information demonstrating that door thresholds are highly customizable and generally require further finishing and fabrication before assembly into a finished door unit.” Def.-Intervenors’ Comments on Final Results of Second Redetermination Pursuant to Ct. Remand 8 (Jan. 12, 2022), ECF Nos. 89 (conf.), 90 (public). Arguing that Commerce reached the correct result in the First Remand Redetermination, defendant-intervenors assert that “[t]he information provided by Defendant-Intervenors *describing the exact type of product at issue* is relevant evidence that Commerce, as the fact-finder, properly considered in weighing the entire record evidence and finding that Worldwide’s products do not meet the ‘finished merchandise’ exclusion requirements.” *Id.* at 12 (emphasis added) (citation omitted). Commerce did not indicate agreement with this argument.

### III. CONCLUSION AND ORDER

The Second Remand Redetermination is unsatisfactory because it is not in a form in which the court could sustain it. Commerce must issue a new determination that decides the issue of whether or not the aluminum extrusion components in Worldwide's door thresholds are within the scope of the Orders. It must be consistent with this Opinion and Order and, in particular, must be in a form that would go into effect if sustained upon judicial review.

Therefore, upon consideration of the Second Remand Redetermination and all papers and proceedings had herein, and upon due deliberation, it is hereby

**ORDERED** that the Second Remand Redetermination is remanded to Commerce; it is further

**ORDERED** that Commerce, within 30 days from the date of issuance of this Opinion and Order, shall submit a third redetermination upon remand ("Third Remand Redetermination") that complies with this Opinion and Order; it is further

**ORDERED** that plaintiff and defendant-intervenors shall have 15 days from the filing of the Third Remand Redetermination in which to submit comments to the court; and it is further

**ORDERED** that should plaintiff or defendant-intervenors submit comments, defendant shall have 10 days from the date of filing of the last comment to submit a response.

Dated: August 10, 2022

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU, JUDGE

## Slip Op. 22–92

COLUMBIA ALUMINUM PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE AND ENDURA PRODUCTS, INC., Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge  
Court No. 19–00013

[Ordering a remand to the issuing agency of a determination that is not in a form the court could sustain upon judicial review]

Dated: August 10, 2022

*Jeremy W. Dutra*, Squire Patton Boggs (US) LLP, of Washington, DC, for plaintiff. With him on the brief was *Peter Koenig*.

*Aimee Lee*, Assistant Director, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Nikki Kalbing*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

*Robert E. DeFrancesco, III*, Wiley Rein LLP, of Washington, DC, for defendant-intervenors. With him on the brief were *Alan H. Price* and *Elizabeth S. Lee*.

## OPINION AND ORDER

### Stanceu, Judge:

Plaintiff Columbia Aluminum Products, LLC (“Columbia”) brought this action to contest a determination (the “Scope Ruling”) issued by the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) on its imported “door thresholds,” each of which is an assembly containing an aluminum extrusion among various other components. In this litigation, Commerce previously took the position that an aluminum extrusion component within each door threshold is within the scope of antidumping and countervailing duty orders on aluminum extrusions from the People’s Republic of China (the “Orders”).

Before the court is the Department’s most recent decision (“Second Remand Redetermination”), *Final Results of Redetermination Pursuant to Ct. Remand* (Dec. 13, 2020), ECF No. 67–1 (“*Second Remand Redetermination*”), which Commerce submitted in response to the court’s opinion and order in *Columbia Aluminum Products, LLC v. United States*, 45 CIT \_\_, 536 F. Supp. 3d 1346 (2021) (“*Columbia II*”). In an effort to respond to the court’s order while changing its position only under protest, Commerce stated in the Second Remand Redetermination that the aluminum extrusion components within the imported door thresholds are not subject to the Orders.

Plaintiff has commented in favor of the Second Remand Redetermination. Defendant-intervenors, the Aluminum Extrusions Fair Trade Committee and Endura Products, Inc., a U.S. producer of aluminum extrusions, have commented in opposition.

The court issues another remand order to Commerce. The Department's latest decision is not itself a new scope ruling in a form the court could sustain. Instead, Commerce informs the court that if the court were to sustain the Second Remand Redetermination, Commerce would issue a new scope ruling accordingly. Under this proposal, Commerce would issue its final ruling outside of the court's direct review. In addition, the agency determination before the court misconstrues the court's opinion in *Columbia II* in certain respects. The court orders Commerce to submit for the court's consideration, on an expedited basis, a new determination that would go into effect if sustained upon judicial review.

## I. BACKGROUND

Background on this case is presented in the court's prior opinions and is summarized and supplemented herein. *Id.*, 45 CIT at \_\_, 536 F. Supp. 3d at 1348–49, *Columbia Aluminum Products, LLC v. United States*, 44 CIT \_\_, \_\_, 470 F. Supp. 3d 1353, 1354–56 (2020) (“*Columbia I*”).

Columbia brought this action to contest the Scope Ruling, which Commerce issued as *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Rulings on Worldwide Door Components Inc., MJB Wood Group Inc., and Columbia Aluminum Products Door Thresholds*, P.R. Doc. 39 (Int'l Trade Admin. Dec. 19, 2018). The Scope Ruling construed the scope of *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) (“AD Order”), and *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) (“CVD Order”).

The court remanded the Scope Ruling to Commerce in *Columbia I*, ruling that Commerce had misinterpreted the scope language of the Orders in two respects and, finding Commerce's response to the court's opinion and order in *Columbia I* (the “First Remand Redetermination”), *Final Results of Redetermination Pursuant to Court Remand* (Dec. 23, 2020), ECF No. 48–1 (“*First Remand Redetermination*”), flawed as well, issued a second remand order in *Columbia II*.

In response to the court's order in *Columbia II*, Commerce filed the Second Remand Redetermination with the court on December 13,

2021. See *Second Remand Redetermination*. Plaintiff submitted comments in support on January 12, 2022. Pl. Columbia Aluminum Products, LLC's Comments on Commerce's Final Remand Determination, ECF No. 70. Defendant-intervenors filed their comments in opposition on January 12, 2022. Def.-Intervenors' Comments on Final Results of Second Redetermination Pursuant to Ct. Remand, ECF Nos. 71 (conf.), 72 (public). Defendant replied to the comments on February 11, 2022. Def.'s Resp. to Comments on Second Remand Redetermination, ECF No. 77.

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a.<sup>1</sup> Among the decisions that may be contested according to section 516A is a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." *Id.* § 1516a(a)(2)(B)(vi). In reviewing an agency determination, including one issued in response to court order, the court must set aside any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

### B. The Court's Decisions in *Columbia I* and *Columbia II*

The Orders apply generally to "aluminum extrusions," which are defined in the Orders as "shapes and forms, produced by an extrusion process." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. As the court's previous decisions have recognized, the door thresholds at issue in this litigation are not themselves aluminum extrusions. Nevertheless, the Orders contain a provision (the "subassemblies" provision) that enlarges the scope of the Orders to include aluminum extrusion components present in certain imported "partially assembled merchandise." Another provision in the scope language of the Orders, the "finished merchandise exclusion," excludes from the scope of the Orders certain assembled and completed merchandise containing aluminum extrusions as parts.

At issue in this litigation are ten models of imported door thresholds, each of which is not itself an aluminum extrusion but is instead

<sup>1</sup> Citations to the United States Code and to the Code of Federal Regulations are to the 2018 editions.

an assembly of various components. *Columbia I*, 44 CIT at \_\_, 470 F. Supp. 3d at 1355. One of those components in each door threshold is fabricated from a single piece of extruded aluminum and, were it imported separately, would fall within the scope of the Orders. Each of the ten models of door thresholds contains, in addition to the aluminum extrusion component, various other, non-aluminum components (made of various materials such as plastic or wood). *Id.*

In *Columbia I*, the court held that the contested Scope Ruling misinterpreted the scope language of the Orders in three respects. The Scope Ruling relied on a sentence in the scope language, “[s]ubject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture.” *AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654. From this sentence, the Scope Ruling concluded that “. . . the aluminum extruded components of . . . Columbia’s door thresholds may be described as parts for final finished products, *i.e.*, parts for doors, which are assembled after importation (with additional components) to create the final finished product, and otherwise meet the definition of in-scope merchandise.” *Scope Ruling* at 33. Rejecting this reasoning, *Columbia I* stated that “[t]he Scope Ruling erred in relying on that sentence from the scope language, which is inapplicable to the issues presented by Columbia’s imported products.” *Columbia I*, 44 CIT at \_\_, 470 F. Supp. 3d. at 1357. The court noted that Commerce failed to recognize that the subject of the quoted sentence was “[s]ubject *aluminum extrusions*,” which Columbia’s door thresholds, at the time of importation, were not. *Id.*, 44 CIT at \_\_, 470 F. Supp. 3d. at 1357 (quoting *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added)). “The sentence refers to the way that goods may be described ‘at the time of importation,’ but according to the uncontested facts, Columbia’s door thresholds are not ‘aluminum extrusions’ at the time of importation; rather, they are door thresholds that contain an aluminum extrusion as a component in an assembly.” *Id.* With respect to the scope language sentence at issue, which contains the words “may be described at the time of importation as parts for final finished products,” *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654, the court reasoned that the aluminum extrusion component in each door threshold is not itself the imported article and that it had become part of the imported assembly prior to, and not after, importation. *Columbia I*, 44 CIT at \_\_, 470 F. Supp. 3d. at 1357 (quoting *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added)).

*Columbia I* ruled that Commerce also erred in misinterpreting the following sentence from the scope language in the Orders: “Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, *door thresholds*. . . .” *Id.*, 44 CIT at \_\_\_, 470 F. Supp. 3d. at 1359 (quoting *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (emphases added)). Mentioning that “the plain language of the scope of the *Orders* specifies that ‘door thresholds’ are included within the scope ‘if they otherwise meet the scope definition . . .,’” the Scope Ruling erroneously concluded that “[i]n light of the above, we find that . . . Columbia’s door thresholds are within the scope of the *Orders*.” *Scope Ruling* at 34. As *Columbia I* pointed out, Commerce overlooked that the subject of this sentence in the scope language of the Orders also is “[s]ubject extrusions,” which Columbia’s door thresholds are not. *Columbia I*, 44 CIT at \_\_\_, 470 F. Supp. 3d. at 1358 (quoting *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added)). The court noted that “the inclusion of ‘door thresholds’ in the scope language as an exemplar is confined to door thresholds that *are* aluminum extrusions” and that “a good that *contains* an extruded aluminum component as one of a number of components is not the same as a good that *is* an extrusion.” *Id.*, 44 CIT at \_\_\_, 470 F. Supp. 3d. at 1359.

The court identified a third error in the interpretation Commerce applied to the scope language, which was to refuse to consider whether Columbia’s door thresholds were excluded from the scope of the Orders under the “finished merchandise exclusion.” *Id.* This express exclusion from the scope applies to “finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.” *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

Commerce concluded in the Scope Ruling that “the express inclusion of ‘door thresholds’ within the scope of the *Orders* (regardless of whether the door thresholds are ready for use at the time of importation) renders the reliance of . . . Columbia upon the finished merchandise exclusion inapposite.” *Scope Ruling* at 35–36. *Columbia I* rejected the Department’s reasoning because it misinterpreted the scope language of the Orders. *Columbia I*, 44 CIT at \_\_\_, 470 F. Supp. 3d. at 1359. “The scope language does not expressly include all door thresholds in which there is an extruded aluminum component. Instead, as the court has discussed, the inclusion of ‘door thresholds’ in the scope language as an exemplar is confined to door thresholds that *are* aluminum extrusions.” *Id.* (citing *AD Order*, 76 Fed. Reg. at

30,651; *CVD Order*, 76 Fed. Reg. at 30,654).

*Columbia I* also concluded that Commerce “erred in reasoning that ‘finding door thresholds excluded under the finished merchandise exclusion would render the express inclusion of “door thresholds” meaningless.’” *Id.*, 44 CIT at \_\_, 470 F. Supp. 3d. at 1359 (quoting *Scope Ruling* at 36). As the court recognized, “[d]oor thresholds that are fabricated from aluminum extrusions are ‘extrusions’ for purposes of the scope language and are expressly included in the scope by operation of the reference to ‘door thresholds’; other door thresholds, which are not themselves ‘extrusions’ for purposes of the Orders, are not.” *Id.*, 44 CIT at \_\_, 470 F. Supp. 3d. at 1359. *Columbia I* added that:

Rather than rendering the express inclusion of door thresholds meaningless, excluding the assembled goods at issue from the Orders according to the finished merchandise exclusion would have no effect at all on the express inclusion of door thresholds, for a straightforward reason: a door threshold that is fabricated from an aluminum extrusion could never qualify under the finished merchandise exclusion in the first place because the finished merchandise exclusion applies only to assembled goods.

*Id.* (citing *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654).

*Columbia I* also rejected the Department’s conclusion that the Scope Ruling was supported by sources described in its regulation, 19 C.F.R. § 351.225(k)(1) (providing that the Secretary of Commerce may take into account “[t]he descriptions of the merchandise contained in the petition . . . ; . . . the initial investigation . . . ; [d]eterminations of the Secretary, including prior scope rulings . . . ; and [d]eterminations of the [U.S. International Trade] Commission . . . .”). The court explained that the Department’s reliance on the petition, certain materials pertinent to the investigation, and the injury determination of the U.S. International Trade Commission was misplaced, Commerce again having mistaken references to door thresholds that are aluminum extrusions for references to assemblies containing an aluminum extrusion as a component. *Columbia I*, 44 CIT at \_\_, 470 F. Supp. 3d. at 1360–61.

In light of the multiple errors the court identified, *Columbia I* ordered Commerce to reconsider the Scope Ruling and to give “full and fair” consideration to the issue of whether the finished merchandise exclusion applies to Columbia’s door thresholds, “upon making findings that are supported by substantial record evidence.” *Id.*, 44 CIT at \_\_, 470 F. Supp. 3d. at 1362.

In response to the court’s opinion and order in *Columbia I*, Commerce submitted the First Remand Redetermination on December 23, 2020. See *First Remand Redetermination*. In it, Commerce, relying solely on statements by defendant-intervenors that did not pertain specifically to Columbia’s door thresholds, and despite certain record evidence that *did* pertain to Columbia’s products, suggested, but did not expressly find, “that the specific door thresholds at issue in this proceeding are so designed and manufactured as to require cutting or machining prior to incorporation into a door frame or other structure.” *Columbia II*, 45 CIT at \_\_\_, 536 F. Supp. 3d at 1353 (citing *First Remand Redetermination* at 44–45). The court attached significance to whether Columbia’s imported door thresholds required cutting or machining prior to use because that issue “bears on the language in the finished merchandise exclusion referring to ‘finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled *and completed* at the time of entry.’” *Id.*, 45 CIT at \_\_\_, 536 F. Supp. 3d at 1354 (quoting *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added)). Recognizing the importance of this factual question, the court ordered Commerce to “make a factual determination to resolve this issue based on a consideration of the record evidence, viewed in the entirety.” *Id.*, 45 CIT at \_\_\_, 536 F. Supp. 3d at 1354.

*Columbia II* also found fault with certain reasoning in the First Remand Redetermination pertaining to the finished merchandise exclusion. Commerce determined that Columbia’s door thresholds were described by the “subassemblies” provision in the scope language, under which “[t]he scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods ‘kit’ defined further below.”<sup>2</sup> *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. Under the subassemblies provision, only the aluminum extrusion component (or components) of such “partially assembled merchandise” is within the scope of the Orders, not the entire good as imported. *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. According to the First Remand Redetermination, “[a] subassembly is merchandise which is designed for the sole purpose of becoming part of a larger

<sup>2</sup> The reference to the “kit” is a reference to the “finished goods kit” exclusion, under which the antidumping and countervailing duty orders exclude an unassembled package of all the necessary parts to assemble a final finished good. *Aluminum Extrusions from the People’s Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650, 30,651 (Int’l Trade Admin. May 26, 2011) (“*AD Order*”); *Aluminum Extrusions From the People’s Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653, 30,654 (Int’l Trade Admin. May 26, 2011) (“*CVD Order*”). Because the door thresholds at issue are imported in fully assembled, not disassembled form, this exclusion does not apply.

whole”; Commerce concluded that each of Columbia’s door thresholds, which “must work in tandem with other components to be functional” and is “a component of a larger downstream product,” cannot, for those reasons, qualify for the finished merchandise exclusion. *First Remand Redetermination* at 23–24 (citation omitted).

The court noted that Commerce, in the First Remand Redetermination, “reasoned that goods falling within the subassemblies provision of the Orders cannot also be considered goods qualifying for the finished merchandise exclusion, i.e., Commerce considers these two categories to be mutually exclusive.” *Columbia II*, 45 CIT at \_\_\_, 536 F. Supp. 3d at 1352 (citing *First Remand Redetermination* at 17–22). “Thus, Commerce employed an analysis under which any goods it deems to be described by the subassemblies provision are, *per se*, ineligible for the finished merchandise exclusion.” *Id.*, 45 CIT at \_\_\_, 536 F. Supp. 3d at 1352. The court did not sustain this reasoning, nor did the court reject it. Instead, the court stated that “[t]he court need not decide whether this analysis is a correct interpretation of the scope language, for even if it is, the Department’s decision still must be remanded to Commerce because it relies upon an impermissible finding or inference.” *Id.* Thus, *Columbia II* did not decide the question of whether or not Columbia’s imported door thresholds were described by the subassemblies provision in the scope of the Orders. The court proceeded in *Columbia II* to discuss the reasons why Commerce must decide the issue of whether Columbia’s door thresholds “are so designed and manufactured as to require cutting or machining prior to incorporation into a door frame or other structure,” *id.*, 45 CIT at \_\_\_, 536 F. Supp. 3d at 1353, and then decide whether or not the finished merchandise exclusion applied to the Columbia’s imported door thresholds.

With regard to the finished merchandise exclusion, Commerce reasoned in the First Remand Redetermination that the exemplars mentioned in the scope language on the finished merchandise exclusion are defined by the scope language as finished merchandise and therefore, unlike Columbia’s door thresholds, are not “intermediate product[s]” described by the subassemblies provision. *Id.*, 45 CIT at \_\_\_, 536 F. Supp. 3d at 1355–56 (quoting *First Remand Redetermination* at 44). The court identified flaws in the Department’s reasoning, which failed to recognize that two exemplars, finished windows with glass and doors with glass or vinyl, also describe products designed to become part of a larger whole; for example, an assembled door is designed to become part of a larger structure, such as a door frame assembly, and a finished window part of a dormer or wall, with both ultimately destined to become part of a building. Commerce never-

theless insisted in the First Remand Redetermination that because of the specific mention of the door and the window in the language of the finished merchandise exclusion, “[t]here is no need to further analyze whether the enumerated products in the finished merchandise exclusion work in conjunction with other products, and no requirement that, for example, a window with glass or a door with glass or vinyl be assembled into a house to satisfy the finished merchandise exclusion.” *Id.*, 45 CIT at \_\_, 536 F. Supp. 3d at 1356 (quoting *First Remand Redetermination* at 46). The court opined in *Columbia II* that “[t]his reasoning is based on a serious misinterpretation of the scope language setting forth the finished merchandise exclusion.” *Id.*, 45 CIT at \_\_, 536 F. Supp. 3d at 1356. “Contrary to the express terms of that exclusion, Commerce interprets the exemplars therein as separate, individual exclusions” rather than as what they are, i.e., exemplars. *Id.*

At its conclusion, *Columbia II* directed Commerce to “reconsider in the entirety the decision reached in the [First] Remand Redetermination as to the finished merchandise exclusion and reach a new determination that complies with the instructions in this Opinion and Order.” *Id.*, 45 CIT at \_\_, 536 F. Supp. 3d at 1357.

### C. The Second Remand Redetermination

The Second Remand Redetermination is not a decision in a form the court could sustain. The concluding paragraph of the Second Remand Redetermination states as follows:

As a result of this redetermination, we have determined, under protest, that Columbia’s door thresholds are outside the scope of the *Orders* pursuant to the finished merchandise exclusion. Should the court sustain these Final Results of Redetermination, we will issue a revised scope ruling accordingly.

*Second Remand Redetermination* at 17. The Department’s proposed resolution seeks court approval for a decision that, unlike the agency determination contested in this litigation, is not a scope ruling or determination but is merely preliminary to such a decision. Because it is not the actual scope ruling or determination Commerce plans to issue, it would not be self-effectuating should the court sustain it, and the agency decision that would follow if it were sustained would escape direct judicial review. In this circumstance, the court finds the Department’s proposed resolution of this litigation unsatisfactory. Not only would it deny the court the opportunity to review the agency’s actual decision on remand, it also would not allow the parties to comment on that decision before the court reviews it. Moreover, the

court must rule on an agency decision, including one submitted in response to court order, by considering the decision according to the reasoning the agency puts forth. See *Michigan v. EPA*, 576 U.S. 743, 758 (2015) (It is a “foundational principle of administrative law” that judicial review of agency action is limited to “the grounds that the agency invoked when it took the action.” (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943))). The proposed resolution Commerce has offered does not allow the court to perform its essential judicial review function, and the court, therefore, rejects it. The court directs Commerce to issue a third remand redetermination that, like the agency determination contested in this litigation, is a scope ruling or determination for the court’s review, and it must be in a form that would go into effect if sustained upon judicial review.

The Second Remand Redetermination is flawed in presenting no reasoning for ruling that the door thresholds are outside the scope of the Orders other than its incorrect conclusion that the court ordered Commerce to do so. The Second Remand Redetermination misinterprets *Columbia II* in this respect as well as others. Commerce devoted most of the substantive discussion in the Second Remand Redetermination to its disagreements with certain of the issues the court decided previously. Then, in the concluding paragraph, Commerce stated that:

In any event, although Commerce respectfully disagrees with the Court’s interpretation of the scope language, consistent with the court’s opinion and analysis, we continue to find [as Commerce did in draft results it issued to the parties] in these Final Results of Redetermination that Columbia’s door thresholds are finished merchandise excluded from the scope of the *Orders*, under protest.

*Second Remand Redetermination at 16.*

In expressing its disagreements with the court, Commerce stated, erroneously, that “in *Columbia II*, the Court found unpersuasive Commerce’s determination that Columbia’s door thresholds were sub-assemblies which must be further incorporated into a larger downstream product.” *Id.* at 10–11. The Second Remand Redetermination concluded, further, that “the court disagreed with Commerce’s finding that Columbia’s door thresholds were subassemblies covered by the scope of the *Orders* and not excluded under the finished merchandise exclusion.” *Id.* at 11. The Department’s interpretation of *Columbia II* errs in three respects.

First, the court did not decide in *Columbia II* whether Columbia’s door thresholds are “subassemblies” within the meaning of the sub-

assemblies provision in the scope language of the Orders. Instead, the court reasoned that Commerce, not the court, must decide this question. See *Columbia II*, 45 CIT at \_\_\_, 536 F. Supp. 3d at 1355–56. Moreover, it was illogical for Commerce to presume that the court had ruled that the door thresholds were not “subassemblies.” Had the court actually decided—as Commerce apparently believed the court had—that the subassemblies provision in the scope language did *not* describe Columbia’s imported door thresholds, the court would not have proceeded to address the issue of whether the finished merchandise exclusion applied to those goods. For if Columbia’s door thresholds are *not* described by the subassemblies provision, there can be no reason to decide whether the finished merchandise exclusion applies. If the scope language had not contained the subassemblies provision, the only imported products that could have been held to fall within the scope of the Orders are those that may be described at the time of importation as “aluminum extrusions” within the definition of that term as set forth in the scope language of the Orders, which expressly defines aluminum extrusions as “shapes or forms, produced by an extrusion process.” *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. It is uncontested that Columbia’s door thresholds are imported in assembled form with non-aluminum components. Thus, in the form in which they are imported, Columbia’s door thresholds—as opposed to a single component within each—cannot conform to the scope definition of “extrusions,” and Commerce has offered no plausible reasoning under which they could be held to do so.

Second, the court did not rule that Commerce incorrectly found that the door thresholds are designed to be incorporated into a larger downstream product, which they plainly are. Instead, as the court discussed previously, the *Columbia II* opinion took issue with the Department’s failing to recognize that two of the exemplars in the finished merchandise exclusion also are goods designed for incorporation into a downstream product or structure and the Department’s misinterpreting the exemplars as specific, limited exclusions. *Columbia II*, 45 CIT at \_\_\_, 536 F. Supp. 3d at 1356.

Third, the court did not decide whether the finished merchandise exclusion applied to Columbia’s door thresholds. To the contrary, the court remanded the First Remand Redetermination so that Commerce could reach its own decision on that issue, after making an actual finding on the issue of whether these products are so designed and manufactured as to require cutting and machining prior to incorporation into another structure.

On the latter issue, Commerce stated, first, that it considered this issue irrelevant when it issued the Scope Ruling, informing the court that “. . . the fact that the door thresholds themselves may not have undergone further cutting or fabrication was not central to Commerce’s original analysis finding that the door thresholds were sub-assemblies based on the further assembly and incorporation of other components/parts to form downstream finished merchandise.” *Id.* (citing *Scope Ruling* at 33, 37). Then, alluding to the reasoning underlying the Department’s decision in the First Remand Redetermination, the Second Remand Redetermination states that “[t]he central question Commerce analyzed was not whether record evidence indicates the door thresholds themselves may undergo further cutting or fabrication, but whether they are intermediary products that require further incorporation of other components to form a downstream finished product.” *Id.* (citing *First Remand Redetermination* at 25). The Second Remand Redetermination did not return to the factual issue the court identified. It is reasonable to presume that had Commerce believed that substantial evidence supported a finding that Columbia’s door thresholds required cutting or fabrication prior to use, it would have so stated in the Second Remand Redetermination.<sup>3</sup>

### III. CONCLUSION AND ORDER

The Second Remand Redetermination is unsatisfactory because it is not in a form in which the court could sustain it. Commerce must issue a new determination that decides the issue of whether or not the aluminum extrusion components in Columbia’s door thresholds are within the scope of the Orders. It must be consistent with this Opin-

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<sup>3</sup> Commerce did not actually state a finding of fact that Columbia’s door thresholds required such modification, and, given the vagueness with which Commerce discussed the issue in the First Remand Redetermination, the court was not in a position to conclude that Commerce had done so. The court considered it appropriate, therefore, to direct Commerce to resolve the factual dispute.

In comments on the Second Remand Redetermination, defendant-intervenors argue that Commerce again should have concluded that the finished merchandise exclusion does not apply and that the aluminum extrusion components in each of Columbia’s door thresholds are subject to the Orders. Among their arguments is that they “submitted information demonstrating that door thresholds are highly customizable and generally require further finishing and fabrication before assembly into a finished door unit.” Def.-Intervenors’ Comments on Final Results of Second Redetermination Pursuant to Ct. Remand 8 (Jan. 12, 2022), ECF Nos. 71 (conf.), 72 (public). Arguing that Commerce reached the correct result in the First Remand Redetermination, defendant-intervenors assert that “[t]he information provided by Defendant-Intervenors *describing the exact type of product at issue* is relevant evidence that Commerce, as the fact-finder, properly considered in weighing the entire record evidence and finding that Columbia’s products do not meet the ‘finished merchandise’ exclusion requirements.” *Id.* at 11 (emphasis added). Commerce did not indicate agreement with this argument.

ion and Order and, in particular, must be in a form that would go into effect if sustained upon judicial review.

Upon consideration of the Second Remand Redetermination and all papers and proceedings had herein, and upon due deliberation, it is hereby

**ORDERED** that the Second Remand Redetermination is remanded to Commerce; it is further

**ORDERED** that Commerce, within 30 days from the date of issuance of this Opinion and Order, shall submit a third redetermination upon remand (“Third Remand Redetermination”) that complies with this Opinion and Order; it is further

**ORDERED** that plaintiff and defendant-intervenors shall have 15 days from the filing of the Third Remand Redetermination in which to submit comments to the court; and it is further

**ORDERED** that should plaintiff or defendant-intervenors submit comments, defendant shall have 10 days from the date of filing of the last comment to submit a response.

Dated: August 10, 2022

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU, JUDGE



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