U.S. Customs and Border Protection

RECEIPT OF APPLICATION FOR "LEVER-RULE" PROTECTION

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

ACTION: Notice of receipt of application for "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from LifeScan IP Holdings, LLC seeking "Lever-Rule" protection for certain blood glucose monitoring test trips that bear the federally registered and recorded "ONE TOUCH ULTRA" trademark and are intended for sale outside of the United States.

FOR FURTHER INFORMATION CONTACT: Morgan McPherson, Intellectual Property Enforcement Branch, Regulations & Rulings, Morgan.N.McPherson@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from LifeScan IP Holdings, LLC, seeking "Lever-Rule" protection. Protection is sought against importations of foreign made blood glucose monitoring test strips intended for sale outside the United States that bear the recorded "ONE TOUCH ULTRA" mark, U.S. Trademark Registration No. 2,538,658 / CBP Recordation No. TMK 03–00074. Specifically, LifeScan IP Holdings, LLC, seeks "Lever-Rule" protection against importation into the U.S. of foreign made Ultra Strips products intended for sale in Mexico and Chile. See below for a list of the specific products that have been granted "Lever-rule" protection.

Model No.	Item	Product	Intended Market	Country of Origin on Packaging	Description
2077105	Strips	Ultra Strips	Mexico & Chile	United Kingdom	OTUltra Strip 50 LAM p/s (LE)
2116005	Strips	Ultra Strips	Mexico & Chile	United Kingdom	OTUltra Strip 25 LAM p/s (LE)

Model No.	Item	Product	Intended Market	Country of Origin on Packaging	Description
2214705	Strips	Ultra Strips	Mexico	United Kingdom	OTUltra Strip 10 LAM p/s (LE)

In the event that CBP determines that the test strips under consideration are physically and materially different from the test strips authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2(f), indicating that the above-referenced trademark is entitled to "Lever-Rule" protection with respect to those physically and materially different test strips.

Dated: April 16, 2024

ALAINA VAN HORN
Chief, Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade

U.S. Court of International Trade

Slip Op. 24–29

FUSONG JINLONG WOODEN GROUP CO., LTD. et al., Plaintiffs, YIHUA LIFESTYLE TECHNOLOGY CO., LTD. et al., Consolidated Plaintiffs, and LUMBER LIQUIDATORS SERVICES, LLC et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and AMERICAN MANUFACTURERS OF MULTILAYERED WOOD FLOORING, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Consol. Court No. 19–00144
PUBLIC VERSION

[U.S. Department of Commerce's final results are remanded.]

Dated: March 11, 2024

Alexandra H. Salzman, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiffs Fusong Jinlong Wooden Group Co., Ltd., Fusong Qianqiu Wooden Product Co., Ltd., and Dalian Qianqiu Wooden Product Co., Ltd. With her on the brief was *Gregory S. Menegaz* and *J. Kevin Horgan*.

Daniel M. Witkowski and, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, D.C., argued for Consolidated Plaintiff Sino-Maple (Jiangsu) Co., Ltd. With him on the brief was *Matthew R. Nicely* and *Dean A. Pinkert*, Hughes, Hubbard & Reed LLP, of Washington, D.C.

David J. Craven, Craven Trade Law LLC, of Chicago, IL, argued for Consolidated Plaintiffs Huzhou Chenghang Wood Co., Ltd., Hangzhou Hanje Tec Co., Ltd., Hunchun Xingjia Wooden Flooring Inc., Dunhua Shengda Wood Industry Co., Ltd., Zhejiang Fuerjia Wooden Co., Ltd., A&W (Shanghai) Woods Co., Ltd., and Dun Hua Sen Tai Wood Co., Ltd.

Adams C. Lee, Harris Bricken McVay Sliwoski LLP, of Seattle, WA, present but did not argue for Consolidated Plaintiff Zhejiang Dadongwu GreenHome Wood Co., Ltd.

Lizbeth Mohan, Fox Rothschild LLP, of Washington, D.C., argued for Consolidated Plaintiff Baishan Huafeng Wooden Product Co. With her on the brief were *Ronald M. Wisla* and *Brittney R. Powell*.

Kavita Mohan, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., argued for Consolidated Plaintiff Scholar Home (Shanghai) New Material Co., Ltd. With her on the brief were *Elaine F. Wang*, *Francis J. Sailer*, *Ned H. Marshak*, and *Jordan C. Kahn*.

Sarah M. Wyss and *Jill A. Cramer*, Mowry & Grimson, PLLC, of Washington, D.C., present but did not argue for Consolidated Plaintiff Yihua Lifestyle Technology Co., Ltd. Of counsel on the brief was *John R. Magnus*, TradeWins LLC, of Washington, D.C.

Gregory S. McCue and *Adriana M. Campos-Korn*, Steptoe & Johnson, LLP, of Washington, D.C., present but did not argue for Consolidated Plaintiffs Struxtur, Inc. and Evolutions Flooring, Inc.

Mark R. Ludwikowski, Clark Hill PLC, of Washington, D.C., argued for Plaintiff-Intervenor Lumber Liquidators Services, LLC. With him on the brief were *William C. Sjoberg* and *Courtney G. Taylor*.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was

Rachel A. Bogdan, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Stephanie M. Bell, Wiley Rein LLP, of Washington, D.C. argued for Defendant-Intervenor American Manufacturers of Multilayered Wood Flooring. With her on the brief were *Timothy C. Brightbill*, *Maureen E. Thorson*, and *Tessa V. Capeloto*.

OPINION AND ORDER

Eaton, Judge:

Before the court are the issues from *Fusong Jinlong Wooden Group Co. v. United States* ("*Fusong I*"), upon which decision was reserved. *See* 46 CIT __, __, 617 F. Supp. 3d 1221, 1227 n.8 (2022). *Fusong I* concerned the final results of the U.S. Department of Commerce's ("Commerce" or the "Department") sixth administrative review of the antidumping duty order on multilayered wood flooring from the People's Republic of China ("China") covering the period of December 1, 2016, through November 30, 2017. *See Multilayered Wood Flooring From the People's Republic of China*, 84 Fed. Reg. 38,002 (Dep't of Commerce Aug. 5, 2019) ("Final Results") and accompanying Issues and Decision Mem. (July 29, 2019), PR 484 ("Final IDM").

In *Fusong I*, Plaintiffs Fusong Jinlong Wooden Group Co., Ltd. et al. ("Fusong"), Consolidated Plaintiffs Sino-Maple (Jiangsu) Co., Ltd. ("Sino-Maple"), Metropolitan Hardwood Floors, Inc. et al. ("Metropolitan Hardwood"), Huzhou Chenghang Wood Co., Ltd. et al. ("Huzhou"), Zhejiang Dadongwu GreenHome Wood Co., Ltd. ("GreenHome"), Yihua Lifestyle Technology Co., Ltd. ("Yihua"), Linyi Anying Co., Ltd. and Linyi Youyou Co., Ltd. (collectively, "Linyi"), Struxtur, Inc. and Evolutions Flooring, Inc. (collectively, "Struxtur"), Scholar Home (Shanghai) New Material Co., Ltd. ("Scholar Home"), and Baishan Huafeng Wooden Product Co. ("Baishan Huafeng"), together with Plaintiff-Intervenors Benxi Wood Company et al. ("Benxi Wood") and Lumber Liquidators Services, LLC ("Lumber Liquidators"), challenged several aspects of Commerce's Final Results as unsupported by substantial evidence and not in accordance with law. *See* Pls.' Mem. Supp. Mot. J. Agency R., ECF No. 51–2 ("Fusong's Br."); Consol. Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 57 ("Sino-Maple's Br."); Consol. Pls.' Mem. Supp. Mot. J. Agency R., ECF No. 59–2 ("Metropolitan Hardwood's Br."); Consol. Pls.' Mem. Supp. Mot. J. Agency R., ECF No. 50–1 ("Huzhou's Br."); Consol. Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 56–2 ("GreenHome's Br."); Consol. Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 47–2 ("Yihua's Br.");[1] Consol. Pls.' Mem. Supp. Mot. J. Agency R., ECF No. 53 ("Linyi's Br."); Consol. Pls.'

[1] On May 22, 2023, the court granted Yihua's attorney's motion to withdraw as counsel. *See* Order (May 22, 2023), ECF No. 134. Yihua has not notified the court of new counsel. Nor has the company shown any interest in continuing with these proceedings.

Mem. Supp. Mot. J. Agency R., ECF No. 52 ("Struxtur's Br."); Consol. Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 48 ("Scholar Home's Br."); Consol. Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 60–2 ("Baishan Huafeng's Br."); Pl.-Ints.' Mem. Supp. Mot. J. Agency R., ECF No. 55–2 ("Benxi Wood's Br."); Pl.-Int.'s Mem. Supp. Mot. J. Agency R., ECF No. 54–2 ("Lumber Liquidators' Br.").

Defendant the United States ("Defendant"), on behalf of Commerce, and Petitioner and Defendant-Intervenor American Manufacturers of Multilayered Wood Flooring opposed the motions. *See* Def.'s Resp. Pls.' Mots. J. Agency R., ECF No. 70 ("Def.'s Resp. Br."); Def.-Int.'s Resp. Pls.' Mots. J. Agency R., ECF No. 69.

On December 22, 2022, the court issued its decision in *Fusong I*, which sustained, in part, and remanded, Commerce's Final Results. The court remanded to Commerce the sole issue of whether its use of Jiangsu Senmao Bamboo and Wood Industry Co., Ltd.'s ("Senmao") highest transaction-specific dumping margin as Sino-Maple's adverse facts available ("AFA") rate was authorized by the statute, 19 U.S.C. § 1677e(d). *See Fusong I*, 46 CIT at __, 617 F. Supp. 3d at 1243–46. The court reserved decision on certain challenges to Commerce's calculation of the rate assigned to the respondents not selected for individual examination (the "separate rate"). *See id.* at __, 617 F. Supp. 3d at 1227 & n.8.

After *Fusong I* was issued, but before the remand results deadline, Defendant filed a motion for reconsideration. *See* Def.'s Mot. for Recons. ("Mot. Recons."), ECF No 120. By its motion, Defendant asked the court to revise its *Fusong I* opinion "to hold that Commerce lawfully selected a transaction specific margin pursuant to 19 U.S.C. § 1677e(d)" as Sino-Maple's AFA rate, or, in the alternative, that the court "revise its remand instruction to direct Commerce to provide an explanation of its interpretation of [the statute] prior to [issuing] any redetermination." Mot. Recons. at 16–17. After additional briefing and oral argument, the court granted Defendant's motion and, upon reconsideration, found that "Commerce's method for selecting an adverse facts available rate for Sino-Maple was lawful." Order (Oct. 4, 2023) at 2, ECF No. 145 (granting Mot. Recons.). Since this was the sole issue remanded to Commerce in *Fusong I*, and it was resolved on reconsideration, the court concluded that "the Department [was] relieved of [its] obligation to conduct a remand redetermination and file its results." *Id.*

Plaintiff Fusong, Consolidated Plaintiffs Metropolitan Hardwood, Huzhou, GreenHome, Yihua, Struxtur, and Linyi, together with Plaintiff-Intervenors Benxi Wood and Lumber Liquidators (collectively, the "Separate Rate Companies") are the non-individually ex-

amined respondents that challenge Commerce's calculation of the separate rate assigned to them. The Separate Rate Companies argue that (1) Commerce's use of a simple-average method for calculating the separate rate was unlawful under 19 U.S.C. § 1673d(c)(5)(B) and amounts to an unexplained departure from prior agency practice; (2) Commerce's use of Sino-Maple's AFA margin in its separate rate calculation resulted in a rate that is aberrational and not reflective of the non-individually examined separate rate respondents' potential dumping margins; and (3) Commerce's use of Sino-Maple's AFA margin, in calculating the separate rate, violated the excessive fines clause of the Eighth Amendment of the U.S. Constitution. Because the court is remanding the simple-average method used to determine the separate rate, it will not address the latter two arguments pending the outcome of the remand.

Thus, the court now turns to the remaining issue from *Fusong I* that concerned Commerce's simple-average calculation method. For the reasons discussed below, the court remands, for further explanation or reconsideration, Commerce's use of a simple-average method for determining the separate rate.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018) and will uphold Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

BACKGROUND

This opinion presumes familiarity with the facts of the case, as set out in *Fusong I*, and recounts only the facts relevant to the issues from *Fusong I* on which the court reserved decision.

When conducting the underlying administrative review, Commerce determined that "it would not be practicable in light of its resources to individually examine all companies for which an administrative review was initiated," and therefore selected Senmao and Sino-Maple—the two largest exporters of the subject wood flooring by volume—as mandatory respondents.[2] Final IDM at 23. After conducting its review, Commerce determined a 0% rate for Senmao and an

[2] Commerce initially selected Senmao and Fine Furniture (Shanghai) Limited ("Fine Furniture") as mandatory respondents. *See* Mandatory Respondent Selection Mem. (June 19, 2018) at 8, PR 258, CR 159. It later issued an additional mandatory respondent memorandum stating its intention to rescind the review with respect to Fine Furniture and to select Sino-Maple— the next largest exporter—as a mandatory respondent in its place. *See* Selection of Additional Mandatory Respondent Mem. (July 30, 2018) at 2–3, PR 276.

85.13% rate for Sino-Maple.[3] *See* Final Results, 84 Fed. Reg. at 38,003. Sino-Maple's rate was based entirely on AFA. *See* Final IDM at 12.

Commerce also determined that some of the Chinese exporters and producers not selected for individual review (i.e., the Separate Rate Companies) were eligible for a separate rate by demonstrating both *de jure* and *de facto* independence from the Chinese government.[4] *See id.* at 23 ("Fifty-eight additional exporters remain subject to review as non-individually examined, separate rate respondents."). In other words, the Separate Rate Companies had rebutted the Department's nonmarket economy presumption by establishing their independence from state control.

Commerce took the simple average of Senmao's 0% rate and Sino-Maple's 85.13% AFA rate to arrive at a separate rate of 42.57%. *See* Final IDM at 23. Commerce then assigned the 42.57% rate (the "all-others" rate) to the Separate Rate Companies. *See id.* at 25–26. The Separate Rate Companies argue that Commerce's method for calculating the separate rate is unsupported by substantial evidence and otherwise not in accordance with law.

LEGAL FRAMEWORK

Where Commerce determines that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," it is directed, under the statute, to impose an antidumping duty "in an amount equal to the amount by which the

[3] Commerce preliminarily selected an AFA rate for Sino-Maple of 96.51%, which was the highest transaction-specific margin determined for Senmao—the other mandatory respondent in this review. A review of the record, however, demonstrated that this rate resulted from a clerical error. Thus, in the Final Results, Commerce amended Sino-Maple's AFA rate to reflect the correctly determined highest transaction-specific margin for Senmao, 85.13%. *See* Final IDM at 12.

[4] "Over the years, Commerce has developed an administrative practice of applying a rebuttable presumption that all companies within a nonmarket economy country are controlled by the government of that country, *i.e.*, the 'NME Policy.'" *Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1224, 1239 (2021). "As part of its NME Policy, Commerce presumes that all Chinese exporters are part of the 'NME Entity,' a single country-wide concept employed by the Department as a sort of legal fiction." *Fusong I*, 46 CIT at __, 617 F. Supp. 3d at 1231 n.21. "The NME Entity is neither 'China' nor the 'Chinese government,' but rather consists of all the Chinese exporters and producers of subject merchandise. As noted, this policy has been open to question." *Id.* at __, 617 F. Supp. 3d at 1231–32 n.21.

normal value[5] exceeds the export price[6] (or the constructed export price[7]) for the merchandise." 19 U.S.C. § 1673. That excess amount is the "dumping margin." *Id.* § 1677(35); *see also Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1372 (Fed. Cir. 2013).

The statute directs that Commerce must calculate an individual dumping margin for each known exporter of the subject merchandise during the relevant period of review. *See* 19 U.S.C. §§ 1675, 1677f-1(c)(1). However, if this is not practicable, because of the large number of respondents involved in the review, Commerce may limit its examination to "a reasonable number of exporters" that constitutes either (1) a "statistically valid" representative sample of all known exporters or (2) the exporters "accounting for the largest volume of the subject merchandise from the exporting country." *Id.* § 1677f-1(c)(2).

In proceedings involving nonmarket economy countries, like China, Commerce presumes that the exporters operate under foreign government control and assigns them a single country-wide rate—which is often based on AFA. *See* 19 C.F.R. § 351.107(d); *see also Albemarle Corp. v. United States*, 821 F.3d 1345, 1348 (Fed. Cir. 2016). This presumption is rebuttable, however, and an exporter that demonstrates *de jure* and *de facto* independence from state control may apply to Commerce for a different, separate rate. *See Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 42 CIT __, __, 350 F. Supp. 3d 1308, 1314 (2018) ("Commerce assigns each exporter of subject merchandise a single countrywide rate, unless the exporter

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[5] Normal value refers to

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . . .

19 U.S.C. § 1677b(a)(1)(B)(i).

[6] Export price refers to

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under [19 U.S.C. § 1677a(c)].

19 U.S.C. § 1677a(a).

[7] Constructed export price refers to

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under [19 U.S.C. § 1677a(c), (d)].

19 U.S.C. § 1677a(b).

requests an 'individualized antidumping duty margin' and 'demonstrate[s] an absence of state control' over its export-related activities, both in law (*de jure*) and in fact (*de facto*)." (citations omitted)). When Commerce limits its examination to fewer than all known exporters under 19 U.S.C. § 1677f-1(c)(2), this separate rate is assigned to all non-individually examined exporters that have demonstrated sufficient independence from state control (i.e., the Separate Rate Companies). *See id.*

While the statute is silent as to how Commerce must determine a separate rate for non-individually examined respondents in administrative reviews, the Department looks to 19 U.S.C. § 1673d(c)(5) for guidance. This provision states the method for determining an "all-others" rate[8] in an investigation. *See Albemarle*, 821 F.3d at 1352. Section 1673d(c)(5)(A) sets out the "general rule" that the all-others rate assigned to the separate rate respondents is calculated by using the "*weighted average* of the estimated weighted average dumping margins" determined for individually examined companies, "excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title [i.e., on the basis of facts available or AFA]." 19 U.S.C. § 1673d(c)(5)(A) (emphasis added).

When the margins calculated for all individually examined respondents are zero, de minimis, or based entirely on facts available or AFA, section 1673d(c)(5)(B) sets out the "exception," which provides that Commerce "may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated [i.e., the Separate Rate Companies], including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." 19 U.S.C. § 1673d(c)(5)(B) (providing the exception to the general rule under § 1673d(c)(5)(A)).

Simple averaging of dumping margins, however, is not what is expected in situations covered by 19 U.S.C. § 1673d(c)(5)(B). The Statement of Administrative Action, which Congress has approved as an authoritative interpretation of the statute,[9] states that, in accor-

[8] The "all-others" rate is the rate assigned to all exporters and producers of the subject merchandise in an investigation who were granted separate rate status, but which Commerce did not select as mandatory respondents. *See Shanxi Hairui Trade Co. v. United States*, 39 F.4th 1357, 1360 (Fed. Cir. 2022).

[9] "The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

dance with section 1673d(c)(5)(B), "[t]he *expected method* in . . . cases [where all the rates for the individually examined respondents are zero, de minimis, or determined entirely on the basis of facts available or AFA] will be to *weight-average* the zero and *de minimis* margins and margins determined pursuant to the facts available [or AFA], provided that volume data is available." Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA"), H.R. Doc. No. 103–316 at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201 (emphasis added).

Thus, when, in an administrative review, Commerce is unable to calculate a rate for the separate rate respondents using the general rule set out in § 1673d(c)(5)(A), the SAA's "expected method" becomes the default calculation method. *See PrimeSource Bldg. Prods., Inc. v. United States*, 46 CIT __, 581 F. Supp. 3d 1331, 1337–38 (2022). In other words, in an administrative review, when the margins calculated for the mandatory respondents are zero, de minimis, or based entirely on facts available or AFA, Commerce is expected to weight average, by volume,[10] these rates, to determine the rate for the Separate Rate Companies.

Weight averaging aids Commerce in its primary goal of determining "dumping margins as accurately as possible" for the non-individually examined respondents by calculating an antidumping rate that better reflects the actual experience of those respondents. *See generally Yangzhou Bestpak*, 716 F.3d at 1379 ("An overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible." (citation omitted)). This Court has stated, in another context (concerning Commerce's calculation of benchmark prices), that using a weighted-average method, if possible, is preferable to using a simple-average method. Thus, in *Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, this Court explained that when calculating a benchmark price, it is preferable to use a weighted-average method because doing so will not "introduce[e] the distortions that naturally result from using a simple average." 41 CIT __, __, 277 F. Supp. 3d 1354, 1357 (2017). In fact, Commerce itself has stated that "[u]sing weighted-average prices where possible reduces the potential distortionary effect of any specific transaction (*e.g.*, extremely small transactions) in the data." *Certain Oil Country Tubular Goods From the Republic of Turkey*, 79 Fed. Reg. 41,964 (Dep't of Commerce July 18, 2014) and accompanying Issues and Decision Mem. at cmt. 4.

[10] "Commerce uses *quantity/volume* data, not *sales values*, to weight-average respondent rates." *Pro-Team Coil Nail Enter., Inc. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1281, 1293 n.12 (2021).

It may be that Commerce could find, when applying the exception under § 1673d(c)(5)(B), that it cannot use the "expected method." This Court has held that, in such cases, "the burden of proof lies with the party [i.e., Commerce] seeking to depart from the expected method." *PrimeSource*, 46 CIT at __, 581 F. Supp. 3d at 1338. Thus, "Commerce may depart from the 'expected method' and use 'any [other] reasonable method,' but only if [it] reasonably concludes that the expected method is not feasible or results in an average that would not be reasonably reflective of potential dumping margins [for the separate rate respondents]." *Linyi Chengen Imp. & Exp. Co. v. United States*, 44 CIT __, __, 487 F. Supp. 3d 1349, 1356–57 (2020) (citations omitted). "Commerce must determine that the expected method is not feasible or would not be reasonably reflective of the potential dumping margins for non-investigated exporters or producers based on substantial evidence." *Id.* at __, 487 F. Supp. 3d at 1357. Naturally, in order for a court to determine if Commerce has acted reasonably, the Department must provide the reasons for its actions.

DISCUSSION

At issue is whether the Department's chosen method for determining the Separate Rate Companies' rate, by taking a simple average of the two individually examined mandatory respondents' dumping rates—a 0% rate and an 85.13% rate (based entirely on AFA)—is supported by substantial evidence and otherwise in accordance with law.

I. Commerce Departed from the Expected Method When It Calculated the Separate Rate by Taking a Simple Average of Senmao's and Sino-Maple's Margins

As an initial matter, Commerce claims that it used the "expected method" when it calculated the separate rate by taking "the *simple average* of the zero percent rate calculated for Jiangsu Senmao and the 85.13 AFA rate for Sino-Maple." Def.'s Resp. Br. at 38 (emphasis added) ("[I]n accordance with the 'expected method' for calculating a separate rate margin, Commerce assigned to all eligible non-selected respondents the simple average of the zero percent rate calculated for Jiangsu Senmao and the 85.13 AFA rate for Sino-Maple, or 42.57 percent.").

Commerce's claim is not quite right. As explained above, the "expected method" is the default method that Commerce is "expected" to follow when determining a separate rate under the "any reasonable method" exception to the general rule set forth in 19 U.S.C. § 1673d(c)(5)(A). *See* 19 U.S.C. § 1673d(c)(5)(B); *see also* SAA at 873. Under the expected method, Commerce shall "*weight-average* [by

volume] the zero and the *de minimis* margins and margins determined pursuant to the facts available [or AFA], *provided that volume data is available*." SAA at 873 (emphasis added). Here, Commerce took a *simple average* of the mandatory respondents' zero and AFA margins. This is a departure from the expected method, which calls for a *weighted-average* calculation. *See id.*; *see also Pro-Team Coil Nail Enter., Inc. v. United States*, 46 CIT __, __, 587 F. Supp. 3d 1364, 1370 n.7 (2022), *appeal docketed*, No. 22–2241 (Fed. Cir. Sept. 22, 2022) ("By using the simple average, Commerce diverged from the expected method, which calls for using the weighted average of the selected respondents' rates.").

Thus, despite Commerce's assertion that it followed the expected method, it did not actually do so.

II. Commerce's Departure from the Expected Method Is Remanded for Further Explanation or Reconsideration

When Commerce departs from the expected method, it must show, as supported by substantial record evidence, that calculating the separate rate using the expected method is not "feasible or [would result] in an average that would not be reasonably reflective of potential dumping margins for [the separate rate respondents]." *Linyi Chengen Imp. & Exp. Co.*, 44 CIT at __, 487 F. Supp. 3d at 1356–57; *id.* at __, 487 F. Supp. 3d at 1357 ("Commerce must determine that the expected method is not feasible or would not be reasonably reflective of the potential dumping margins for non-investigated exporters or producers based on substantial evidence." (citation omitted)). Here, Commerce found that using a weighted average of the mandatory respondents' margins (i.e., the expected method) was not feasible because "volume data were not available for the mandatory respondent that failed to cooperate." Final IDM at 27. That is, for Commerce, using the expected method was not feasible because the volume data for Sino-Maple, which would be necessary for a weighted-average calculation, was incomplete.[11] *See id.* at 8, 25.

Although Commerce maintains that volume data was unavailable for Sino-Maple because the company failed to report some of its U.S. sales, the record is not entirely devoid of information from which the Department might determine Sino-Maple's U.S. sales volumes for purposes of calculating a weighted average. During the review, Commerce issued quantity and value questionnaires to the thirty largest

[11] Commerce determined that the volume data for Sino-Maple was incomplete for the same reasons it applied AFA, i.e., because Sino-Maple failed to report some of its U.S. sales with respect to one of its U.S. affiliates, Alpha Floors. *See* Final IDM at 8, 25; *see also* Sino-Maple Preliminary Adverse Facts Available Mem. (Dec. 17, 2018), PR 409, CR 270.

producers/exporters, by volume, of subject entries. *See* Mandatory Respondent Selection Mem. (June 19, 2018) at 6–7, PR 258, CR 159. This data was broken down by exporter, and Commerce relied on it when selecting the mandatory respondents. *Id.* at 10, attach. Sino-Maple was one of the companies that was issued a quantity and value questionnaire, to which it timely responded. *See* Sino-Maple's Resp. Q & V Quest. (May 28, 2018), CR 127. The company included in its response the total quantity (in both cubic meters and kilograms) and value (in U.S. dollars) for its U.S. sales of the merchandise during the relevant period of review. *Id.* attach. I.

While Commerce maintains that volume data was not available for Sino-Maple, it did not explain why the company's reported quantity information, which the Department found reliable for mandatory respondent selection purposes, was not also reliable for calculating a weighted average under the expected method for determining the rate assigned to the Separate Rate Companies. *See, e.g.*, *Pro-Team Coil Nail Enter., Inc. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1281, 1293–94 (2021) (remanding Commerce's use of a simple average to determine the rate for non-individually investigated companies, where Commerce "did not explain why the Customs data [on the record], which were reliable for purposes of respondent selection, were not also reliable for purposes of using the 'expected method'").

The court is aware that although much quantity information was on the record, the volume data in Sino-Maple's response to Commerce's quantity and value questionnaire did not represent the entirety of the company's U.S. sales during the period of review. As discussed in more detail in *Fusong I*, Sino-Maple identified certain sales that it had not initially reported, which the company, upon consulting legal counsel, later believed to be subject to antidumping duties in the administrative review.[12] *See Fusong I*, 46 CIT at __, 617 F. Supp. 3d at 1229–30. Sino-Maple provided Commerce with the total aggregate *quantity* and value for the unreported sales but requested additional time to report the sales value information on an individual (per transaction) basis. *Id.* at __, 617 F. Supp. 3d at 1230–31. Commerce denied Sino-Maple's request for extra time. *Id.* at __, 617 F. Supp. 3d at 1230. Nonetheless, the aggregate *quantity* information for these sales were placed on the record.

It is, of course, true that the court, in *Fusong I*, stated that "[a]lthough Sino-Maple reported the *total aggregate quantity* and value for the missing U.S. sales, that information was of little worth to

[12] "[A]fter reviewing certain sales with its counsel, Sino-Maple wished to report additional imports into the United States by [its affiliate] Alpha Floors of multilayered wood flooring from a third-country manufacturer as constructed export price sales." *Fusong I*, 46 CIT at __, 617 F. Supp. 3d at 1229.

Commerce's antidumping duty determination because the company failed to report the sales [value] data for each of the individual entries that compose the aggregate." *Id.* at __, 617 F. Supp. 3d at 1235 (emphasis added). In other words, the court upheld Commerce's decision to disregard Sino-Maple's reported U.S. sales information in favor of using facts available because the transaction-specific U.S. sales value data was necessary to Commerce's calculation of Sino-Maple's individual rate. *Id.* at __, 617 F. Supp. 3d at 1235–36.

While the transaction-specific sales value data for the unreported sales was necessary to Commerce's calculation of an individual rate for Sino-Maple, it does not appear to have been necessary for Commerce to use for the expected method (i.e., a weighted average by quantity/volume of Senmao's and Sino-Maple's rates) when calculating the rate for the Separate Rate Companies. Rather, the aggregate quantity or "volume" data for Sino-Maple's unreported sales, along with the import volumes from its quantity and value questionnaire response, both of which were placed on the record, would seem to be sufficient to employ the expected method. In fact, Commerce provided a chart with a breakdown of the total import quantity information for both Sino-Maple's reported and unreported U.S. sales during the period of review.[13] Commerce claims that it could not calculate a weighted average of Senmao's and Sino-Maple's margins using the expected method because "the volume data for Sino-Maple [was] incomplete, and therefore, unusable for purposes of calculating a weighted-average." Final IDM at 25. Yet, Commerce appears to have placed on the record the information it claims is missing.

Further, Commerce suggests that it was not required to explain why it departed from the expected method but needed merely state a reason without further explanation. Having stated its reason (that usable volume information was missing from the record), the Department submits it was not required to provide an explanation because the path to its decision was reasonably discernable. *See* Def.'s Resp. Br. at 49 ("To the extent Commerce did not explicitly articulate why it departed from using a weighted average, its 'path . . . may be reasonably discerned.'" (citation omitted)). Thus, Commerce claims

[13] The breakdown of Sino-Maple's "reported" and "unreported" U.S. sales for the relevant period of review, found in Sino-Maple Preliminary Adverse Facts Available Mem. at 3, is as follows:

Amounts	**Reported**	**Unreported**
Quantity (m2)	515,766	211,757
Value (USD)	$12,437,253	$5,301,981
Percentage	71%	29%

that stating that "volume data for Sino-Maple are incomplete, and therefore, unusable for purposes of calculating a weighted-average," without more, fulfills any obligation to legally justify its departure from the expected method. This, however, is not the law. As noted, this Court has held that the Department must adequately explain its reasons for departing from the expected method for the departure to be supported by substantial evidence. Here, for instance, an explanation would include why Commerce did not use the volume information on the record. *See, e.g.*, *Pro-Team Coil Nail Enter., Inc.*, 45 CIT at __, 532 F. Supp. 3d at 1293–94 (remanding, on substantial evidence grounds, where Commerce "did not explain why the Customs data [on the record], which were reliable for purposes of respondent selection, were not also reliable for purposes of using the 'expected method' for determining the rate for non-individually investigated companies"); *Linyi Chengen Imp. & Exp. Co.*, 44 CIT at __, 487 F. Supp. 3d at 1359 (concluding "that Commerce's explanations, without citations to any credible record documents, do not rise to the level of substantial evidence required to support Commerce's departure from the expected method and apply the 'any reasonable method' exception in 19 U.S.C. § 1673d(c)(5)(B)").

The court finds that Commerce has not adequately explained its reason for departing from the expected method. Moreover, the Department has not supported with substantial evidence its finding that "volume data for Sino-Maple [was] incomplete." Final IDM at 25. As mentioned, Commerce did not explain why Sino-Maple's reported sales volume data, which the Department found reliable for mandatory respondent selection purposes, was not also reliable for calculating a weighted average under the expected method. Nor did Commerce explain why it could not rely on the chart that it created, which was derived from record evidence and placed on the record— depicting the total volume of Sino-Maple's reported and unreported U.S. sales during the period of review. As such, the court cannot see how Commerce's statements (1) comply with the law or (2) are supported by substantial evidence.

The court thus remands the issue of the "expected method." Because the remaining issues (i.e., whether Commerce's use of Sino-Maple's AFA margin in its separate rate calculation resulted in a rate that is aberrational and not reflective of the Separate Rate Companies' potential dumping margins and amounts to an excessive fine or penalty under the Eighth Amendment) are dependent on Commerce's reconsideration of its calculation of the separate rate on remand, the court reserves decision on these matters until the results of redetermination are before the court.

CONCLUSION AND ORDER

For the reasons stated above, this matter is remanded to Commerce for further proceedings in conformity with this Opinion and Order. Thus, it is hereby

ORDERED that Commerce shall submit a redetermination upon remand that complies in all respects with this Opinion and Order, is supported by substantial evidence, and otherwise in accordance with law; it is further

ORDERED that Commerce must explain, and support with substantial evidence, its decision to use a simple average of Senmao's 0% rate and Sino-Maple's 85.13% rate as the rate assigned to the Separate Rate Companies. If Commerce finds it cannot do so, it shall reconsider its decision to depart from the expected method; it is further

ORDERED that the court reserves decision on the remaining issues until the results of redetermination are before the court; and it is further

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

Dated: March 11, 2024
New York, New York

/*s*/ *Richard K. Eaton*
JUDGE

Slip Op. 24–41

GARG TUBE EXPORT LLP AND GARG TUBE LIMITED, Plaintiffs, v. UNITED STATES, Defendant. and NUCOR TUBULAR PRODUCTS INC. and WHEATLAND TUBE, Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 21–00169
PUBLIC VERSION

[Sustaining in part and remanding in part Commerce's final results and remand redetermination.]

Dated: April 8, 2024

Ned H. Marshak, Dharmendra N. Choudhary, and *Jordan C. Kahn*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for plaintiffs Garg Tube Export LLP and Garg Tube Limited.

Robert R. Kiepura, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. On the brief were *Brian M. Boyton*, Assistant Attorney General, *Patricia M. McCarthy,* Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Brishailah Brown*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, *Robert E. DeFrancesco III*, and *Theodore P. Brackemyre*, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor Nucor Tubular Products Inc.

OPINION AND ORDER

Kelly, Judge:

Before the Court is Plaintiffs Garg Tube Export LLP and Garg Tube Limited's ("Garg") motion for judgment on the agency record challenging the U.S. Department of Commerce's ("Commerce") final determination in its 2018–19 administrative review ("AR 18/19") of the antidumping duty ("AD") order on Welded Carbon Steel Standard Pipes and Tubes from India, 86 Fed. Reg. 14,872 (Mar. 19, 2021) ("Final Results") as amended by the Final Results of Redetermination Pursuant to Court Remand, filed by Defendant United States on March 20, 2023, ECF No. 42–2 ("Remand Results"). Garg challenges the reasonableness of Commerce's decision to (1) rely on an adverse inference when selecting from facts available with respect to the missing cost of production information for Garg's unaffiliated supplier, and (2) employ its differential pricing methodology. For the following reasons, the Court sustains Commerce's determination in part, and remands in part for further explanation or reconsideration.

BACKGROUND

Commerce initiated this administrative review on July 15, 2019. *See Initiation of Antidumping and Countervailing Duty Administrative Review*, 84 Fed. Reg. 33,739 (Dep't Commerce July 15, 2019). On October 10, 2019, Garg filed its Section A Questionnaire Response. *See* [Garg] Sect. A Resp. To Origin. Questionnaire at 1, PD 38–41, CD 5–8, bar code 3898821–01 (Oct. 10, 2019).[1] Garg identified an unaffiliated Indian company as one of its suppliers.[2] *Id.* at Exh. 14. Garg reported that its unaffiliated supplier did not have knowledge of the ultimate destination of the pipe and tube that it sold to Garg. *See id.* at 38. Commerce requested cost information directly from Garg's unaffiliated supplier. *See* re: Letter from Commerce to [Garg's] Suppliers Requesting Costs at 1, PD 136–38, CD 63–65 bar codes 3971275–01, 3971278–01, 3971282–01 (May 5, 2020). On December 19, 2019, Commerce also asked Garg to obtain cost information from its unaffiliated supplier. *See* [Commerce's] Order for [Garg] Suppl. Questionnaire at 1, PD 94, CD 35, bar code 3922259–01 (Dec. 19, 2019). On July 24, 2024, Commerce published the preliminary results. *See Welded Carbon Steel Standard Pipes and Tubes from India; 2018–2019*, 85 Fed. Reg. 44,860 (July 24, 2020) (preliminary results) and accompanying preliminary decision memo. at 8 ("Prelim. Decision Memo.").

In the preliminary results, Commerce relied upon facts otherwise available as a substitute for the missing information that Garg's unaffiliated supplier did not supply. *See* Prelim. Decision Memo. at 10 (citing 19 U.S.C. § 1677e(a)(2)(A)–(C)).[3] Commerce also concluded that the unaffiliated supplier did not act to the best of its abilities and resorted to partial facts available with adverse inferences. *Id*. (citing 19 U.S.C. § 1677e(b)). In calculating the missing cost data, Commerce used the production cost data for the product control number with the highest calculated cost of production. *Id.* Commerce reasoned that the new methodology would further induce cooperation. *Id.* at 11. Commerce also concluded that a particular market situation existed in India affecting the material costs for hot-rolled coil—the primary

[1] On June 23, 2021, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination. *See* ECF No. 241–2. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices, and all references to such documents are preceded by "PD" or "CD" to denote public or confidential documents.

[2] Although Commerce identified multiple unaffiliated suppliers, Garg only challenges Commerce's determination with respect to [[ ]]. Pls.' Mot. J. Agency Rec. & Cmts. On Remand Redetermination at 1, 4, July 31, 2023, ECF No. 53 ("Garg Mot."); Def. Resp. [Garg Mot.] at 11 n.2, Nov. 20, 2023 ("Def. Resp.").

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

material input in the production of pipe and tube—but that it lacked information to quantify a PMS adjustment for Garg's reported cost of production. *Id.* at 13–15.

On March 19, 2021, Commerce published its final results for the underlying review covering the period of December 1, 2019, to November 30, 2020. *See Final Results* and accompanying issues and decision memo. at 1 ("Final Decision Memo."). Commerce continued to apply an adverse inference when selecting facts available to calculate the unaffiliated supplier's missing cost information and concluded that Garg did not act to the best of its ability "in attempting to obtain the [supplier's] costs" because its efforts "did not serve as a strong inducement for the [supplier] in question to cooperate." *Id.* at 41. Commerce also continued to employ its new methodology to calculate an adverse inference. *See id.*at 42. Commerce made a cost-based particular market situation adjustment to calculate the dumping margin for Garg. *Id.* at 19–23.

On February 2, 2023, Commerce requested, and the Court granted, remand for redetermination to comply with the U.S. Court of Appeals for the Federal Circuit's decision in *Hyundai Steel Co., Ltd. v. United States*, 19 F.4th 1346, 1352 (Fed. Cir. 2021). *See* Def.'s Consent Mot. To Remand at 1, Feb. 2, 2023, ECF No. 37; Order at 1, Feb. 2, 2023, ECF No. 40. Commerce filed its draft remand results on February 13, 2023, to which Garg responded on February 21, 2023. *See* [Commerce's] Draft Redetermination Pursuant to Court Remand at 1, PRD 1, bar code 4341219–01 (Feb. 13, 2023); Garg's Cmts. on Draft Remand at 1, PRD 3, bar code 4343901–01 (Feb. 21, 2023) ("Garg Draft Remand Cmts."). Commerce filed its Remand on March 20, 2023. *See* Remand Results at 1.

Garg filed its Motion for Judgment on the Agency Record and Comments on Remand redetermination on July, 31, 2023. Garg Mot. at 1. Defendant filed its response brief on November 20, 2023. Def. Resp. at 1. Defendant-Intervenors Nucor Tubular Products Inc. and Wheatland Tube ("Defendant-Intervenors") filed their response brief on the same day. *See* [Def.-Ints.] Resp. [Garg Mot.] & Cmts. On [Remand Results] at 1, Nov. 20, 2023, ECF No. 59, ("Def.-Ints. Resp."). Garg filed its reply brief on January 19, 2024. See [Garg] Reply To [Def. & Def.-Ints. Resp.] at 1, Jan. 19, 2024, ECF No. 61 ("Garg Reply").

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the court authority to review actions

contesting the final determination in an administrative review of an AD order. The Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C.§ 1516a(b)(1)(B)(i). The Court reviews the record as a whole made before the agency and may not supply a reasoned basis for the agency's action that the agency itself has not given. *See* 19 U.S.C. § 1516a(b)(1)–(2); *SEC v. Chenery Corp.*, 332 U. S. 194, 196 (1947). The Court will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

DISCUSSION

I. Facts Available with an Adverse Inference[4]

Garg challenges Commerce's application of an adverse inference in selecting among the facts available, arguing that it was not supported by substantial evidence and contrary to law. Garg Mot. at 18–28.[5] Defendant argues that Commerce's use of an adverse inference in relying on the facts otherwise available with respect to the missing cost of production information for Garg's unaffiliated supplier is reasonable. Def. Resp. at 13–25. For the following reasons, Commerce's decision on the issue is remanded for further explanation or reconsideration.

Commerce ordinarily calculates a dumping margin based on information submitted by parties. *See Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1137–38 (Fed. Cir. 2016). Where information necessary to calculate a respondent's dumping margin is not available on the record, Commerce uses "facts otherwise available" in place of the missing information. *See* 19 U.S.C. § 1677e(a). Typically, when adopting facts otherwise available, Commerce selects neutral facts from the record. *See* 19 U.S.C. § 1677e(b) (outlining criteria for when Commerce may use an adverse inference when selecting among the facts available).

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[4] Parties and Commerce sometimes use the shorthand "AFA" or "adverse facts available" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. AFA, however, encompasses a two-part inquiry established by statute. *See* 19 U.S.C. § 1677e(a)–(b). It first requires Commerce to identify information missing from the record, and second, to explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *Id.*

[5] Garg does not challenge Commerce's use of a new methodology in calculation of an adverse inference to be applied to the facts available. *See* Garg Reply at 8 ("Garg is not challenging the methodology used by Commerce to calculate AFA, assuming that this Court agrees that AFA should apply").

Where Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," 19 U.S.C. § 1677e(b)(1), Commerce may apply "an inference that is adverse to the interests of that party in selecting among the facts otherwise available." 19 U.S.C. § 1677e(b)(1)(A). However, the statute requires Commerce to "find[] that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" before resorting to the practice. 19 U.S.C. § 1677e(b)(1). A respondent cooperates to the "best of its ability" when it "has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Commerce may use Section 1677e(b) to support an inference adverse to an interested party "when '[it] makes the separate determination that [the party] has failed to cooperate by not acting to the best of its ability.'" *Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1232 (Fed. Cir. 2014) (quoting *Nippon Steel*, 337 F.3d at 1381); *see also Canadian Solar Int'l Ltd. v. United States*, 378 F. Supp. 3d 1292, 1319 (Ct. Int'l Trade 2019) ("*Canadian Solar I*") (determining that Commerce cannot apply an adverse inference pursuant to § 1677e(b) against a cooperative party based upon *Mueller*); *cf.* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 835 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4199 ("[Under 19 U.S.C. § 1677e(b), Commerce] may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully"); *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014) (finding hypothetical countervailing duty rate derived from adverse inferences was improperly imposed against the cooperating party "since a remedy reaching a cooperating party would have no impact on the non-cooperating parties"); *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010) ("Congress intended for Commerce to use [adverse inferences] to induce cooperation with its [AD] investigations").

Alternatively, the Court of Appeals for the Federal Circuit has concluded that Commerce may incorporate an adverse inference under Section 1677e(a) to calculate a cooperative respondent's margin in certain circumstances. *Mueller*, 753 F.3d at 1233. In *Mueller*, the Court of appeals explained that 19 U.S.C. § 1677e(a) "does not provide for the specific facts that should be used as a gap-filling mechanism."

Id. at 1234. Commerce may apply an adverse inference under the section if doing so will "yield an accurate rate, promote cooperation, and thwart duty evasion." *Canadian Solar Int'l Ltd. v. United States*, 415 F. Supp. 3d 1326, 1333 (Ct. Int'l Trade 2019) ("*Canadian Solar II*"); *see also Mueller* 753 F.3d 1232–36. When imposing an adverse inference under the section, Commerce's "predominant concern must be accuracy." *Canadian Solar II*, 415 F. Supp. 3d at 1333 (citing *Mueller*, 753 F.3d at 1232–36) (footnotes omitted).[6] Moreover, Commerce may rely on inducement or evasion rationales where reasonable under the circumstances and where this "predominant interest in accuracy is properly taken into account." *Mueller*, 753 F.3d at 1233.

Here, Commerce's application of facts available with an adverse inference is not reasonable on this record. In both the preliminary and final results, Commerce found the unaffiliated supplier failed to cooperate with the requests for information from Commerce and Garg as set forth in 19 U.S.C. § 1677e(b). Prelim. Decision Memo. at 10; Final Decision Memo. at 39–41. However, Commerce's basis for its decision to apply facts available with an adverse inference against Garg is unclear. Commerce, as in the prior review, invokes *Mueller* "as the controlling judicial precedent." Final Decision Memo. at 39; *Garg Tube Exp. LLP v. United States*, 527 F. Supp. 3d 1362, 1372 (Ct. Int'l Trade 2021). However, *Mueller* involves imposition of facts available with an adverse inference in cases falling under subsection (a) rather than subsection (b). *See Garg Tube Exp. LLP*, 527 F. Supp. 3d at 1372 (citing *Mueller*, 753 F.3d at 1332–36). Here, as in the prior review, Commerce later invokes the wording of 19 U.S.C. § 1677e(b) when observing that Garg "did not act to the best of its ability in attempting to obtain the [supplier's] costs." *See* Final Decision Memo at 41; *Garg Tube Exp. LLP*, 527 F. Supp. 3d at 1372.

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[6] As explained in *Canadian Solar I*,

> Mueller was a cooperative respondent that lacked all the production cost information necessary for Commerce to calculate its antidumping margin. *Mueller*, 753 F.3d at 1230. Commerce requested data directly from Mueller's two main suppliers, but only one supplier provided the information. *Id.* Commerce used facts otherwise available pursuant to 19 U.S.C. § 1677e(a), concluding that the unavailable production cost data was related to acquisition cost data on the record.

378 F. Supp. 3d at 1316. Commerce inferred that all merchandise sold to Mueller by the uncooperative supplier came at a discount and therefore selected and used the most discounted transaction data from the one responsive supplier. *Id.* (citing *Mueller*, 753 F.3d at 1230). Commerce selected this data and calculated the unaffiliated supplier's cost of production which ultimately resulted in a higher dumping rate for Mueller. *Id.* Applying the inducement and evasion rationale, *Mueller* recognizes that a refusal to export goods produced by an uncooperative supplier "would potentially induce [the supplier] to cooperate." *Mueller*, 753 F.3d at 1235. However, "if the [respondent] has no control over the noncooperating suppliers," a resulting adverse inference might be unfair to the respondent. *Id.* (citing *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 Fed. Cir. 2011).

Defendant submits that although Commerce did not specifically invoke 19 U.S.C. § 1677e(b) as a basis for its decision to apply an adverse inference to facts available, it is nonetheless reasonably discernible that Commerce applied Section 1677e(b) to both Garg and its supplier. Def. Resp. at 20–21. The Defendant argues "Commerce's determination is reasonably discernible because it found that Garg Tube 'failed to act to the best of its ability' because its efforts 'did not serve as a strong inducement for the suppliers in question to cooperate.' *See id.* at 21 (citing Final Decision Memo. at 41). The Court cannot agree. It is unclear whether this statement indicates that Commerce applied Section 1677e(b) against the unaffiliated supplier, against Garg, or whether Commerce here acted pursuant to 19 U.S.C. § 1677e(a). *See id.* at 20 (acknowledging that "some of the [conflicting language in the final decision memorandum regarding the applicability of *Mueller* and Garg's cooperation] appears in the final decision memorandum in this review"). Although Defendant makes an argument that this determination is based on Section 1677e(b), it is not reasonably discernible that Commerce based its determination on Section 1677e(b). The Court must review the decision made by the agency. *See Chenery Corp.*, 332 U.S. at 196–97.

To the extent that Commerce relies upon 19 U.S.C. § 1677e(b), Commerce must also further support its determination. Defendant argues that Garg did not adequately compel its supplier to submit the required information. *See* Def. Resp. at 18. In particular, Defendant argues that Garg was on notice from the prior review that the supplier information would be required. *Id.* at 18–19. Defendant cites both the preliminary and the final decision memoranda to support its argument. *Id.* (citing Prelim. Decision at 10–11; Final Decision Memo. at 42). However, neither determination claims that Garg should have been aware that they needed to compel its unaffiliated supplier to submit the information as a condition of conducting business. *See generally* Prelim. Decision Memo.; Final Decision Memo. Commerce's reasoning instead focuses on the degree of the efforts made by Garg to compel supplier cooperation. Final Decision Memo. at 41 (noting Garg told its supplier once that its refusal to provide the requested cost data could affect their business relationship). Garg argues that the timing of this and the prior administrative review undercuts the Defendant's argument. Garg Reply at 6. However, Commerce never offered the grounds supplied by Defendant to justify its determination in either the preliminary or the final results. Therefore, the Court will only address the decision made by the agency. *See Chenery Corp.*, 332 U.S. at 196–97.

Further, to the extent that Commerce applies 19 U.S.C. § 1677e(a), Commerce must further support its determination. Commerce must address the factors invoked by *Mueller*, including how applying an adverse inference will lead to an "accurate rate, promote cooperation, and thwart duty evasion." *Canadian Solar II*, 415 F. Supp. 3d at 1333 (citing *Mueller*, 753 F.3d at 1232–36). Although Commerce does explain how the supplier's information is necessary to calculate an accurate rate, *see* Final Decision Memo. at 39, it does not explain how selecting an adverse inference leads to greater accuracy as required by *Mueller*. *See* 753 F.3d at 1233. Commerce merely states that "partial AFA to [Garg] is necessary to induce cooperation by [Garg's] suppliers in future segments." Final Decision Memo. at 41. However, *Mueller* specifically explains that an adverse inference based upon an inducement rationale where the respondent lacks control over the supplier is potentially unfair. 753 F.3d at 1235 ("if the cooperating entity has no control over the non-cooperating suppliers, a resulting adverse inference is potentially unfair to the cooperating party"). Commerce fails to explain Garg's control over its supplier that might warrant an adverse inference based upon inducement. Additionally, Commerce fails to explain how an adverse inference would thwart duty evasion. *See id.*

On Remand, Commerce should explicitly invoke the statutory provision on which it relies. If it relies upon 19 U.S.C. § 1677e(a), as applied by *Mueller*, it should explain the control exerted by Garg over its supplier as well as how the use of an adverse inference in selecting facts under Section 1677e(a) promotes accuracy or thwarts duty evasion. *See* 753 F.3d at 1235. If Commerce relies on 19 U.S.C. § 1677e(b), it must explain why, based on this record, Garg did not act to the best of its ability and do all that it could to cooperate. *See Canadian Solar II*, 415 F. Supp. 3d at 1333–34.

II. Differential Pricing

Garg challenges Commerce's application of its differential pricing methodology, arguing that (1) Commerce erred by applying the Cohen's *d* test;[7] (2) Garg exhausted its administrative remedies by challenging differential pricing in its comments to the draft remand; and (3) Commerce's calculation for the Cohen's *d* denominator is unreasonable and unsupported by substantial evidence. Garg Mot. at 28–36. Defendant counters that Garg failed to exhaust its administrative remedies to challenge Commerce's differential pricing meth-

[7] Commerce applies the Cohen's *d* test as part of its differential pricing methodology which it has adopted to effectuate 19 U.S.C. § 1677f-1(d)(1)(B). *See* 19 U.S.C. § 1677f1(d)(1)(B); *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1337, 1342 n.2 (Fed. Cir. 2017).

odology by waiting to raise the argument until remand, and that nonetheless Garg has misinterpreted the Court of Appeal's decision in *Stupp Corp. v. United States*, 5 F.4th 1341 (Fed. Cir. 2021) ("*Stupp III*"). Def. Resp. at 25–33. Because Garg has failed to exhaust its administrative remedies, Commerce's differential pricing determination is sustained. Before an action may be heard by the Court, parties must exhaust their administrative remedies. 28 U.S.C. § 2637; *see Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007); *see also Boomerang Tube LLC v. United States*, 856 F.3d 908, 912–13 (Fed. Cir. 2017) (citing *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172 (2016), for the assertion that the word "shall" connotes a requirement in the context of 28 U.S.C. § 2637(d)). The exhaustion doctrine functions to "promote[] judicial efficiency and conserve judicial resources, by affording the agency the opportunity to rectify its own mistakes (and thus to moot controversy and obviate the need for judicial intervention)." *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 342 F. Supp. 2d 1191, 1206 (Ct. Int'l Trade 2004) (alterations in original). The Supreme Court has explained "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Comp. Cmm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946); *see also Gerber Food (Yunnan) Co. Ltd.*, 601 F. Supp. 2d at 1379 (citing *Aragon*, 329 U.S. at 155).

There are certain exceptions to a party's duty to exhaust. A court, in its discretion, may determine that a parties need not exhaust their remedies if they can prove that an attempt to do so would be futile; that they "would be required to go through obviously useless motions in order to preserve their rights." *Corus Staal BV*, 502 F.3d at 1379, 1381 (stating that application of exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade and explaining futility exception) (internal citations and quotations omitted); *see Mittal Steel Point Lisas Ltd.*, 548 F.3d at 1384. However, the futility exception is narrow, and the probability of an adverse decision does not alleviate a party's requirement by statute or regulation to exhaust its administrative remedies. *Corus Staal BV*, 502 F.3d at 1379 (citing *Commc'ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 432–33 (D.C. Cir. 1994)). Similarly, intervening judicial decisions that materially affect an issue before the Court serve as a basis to excuse a party's duty to exhaust. *See Siemens Gamesa Renewable Energy v. United States*, 621 F. Supp. 3d 1337, 1348 (Ct. Int'l Trade 2023) (citing *Hormel v. Helvering*, 312 U.S. 552,

558–59 (1941); *Gerber Food (Yunnan) Co. Ltd.*, 601 F. Supp 2d. at 1380; *cf. Papierfabrik Aug. Koehler AG v. United States*, 36 CIT 1632, 1635 (2012) ("the intervening judicial decision exception applies because there was a change in the controlling law on the use of zeroing").

Moreover, the Court may also excuse exhaustion where the issue presented involves a "pure question of law." *See Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007); *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1146 (Fed. Cir. 2013). Such questions do not necessitate exhaustion because decisions on the merits can be made by "statutory construction alone" without further development of the factual record. *Agro Dutch Indus. Ltd.*, 508 F.3d at 1029 n.3. Simply because a question involves a statute does not render it a pure question of law. *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (rejecting the application of the pure question of law exception where the the issue required further factual development of the record). Rather, the Court implements a non-exhaustive list of requirements, necessitating that the plaintiff shall: "(a) raise a new argument; (b) this argument shall be of purely legal nature; (c) the inquiry shall require neither further agency involvement nor additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce party time and resources." *See Consol. Bearings Co. v. United States*, 166 F. Supp. 2d 580, 587 (Ct. Int'l Trade 2001) (collecting cases), *rev'd and remanded on other grounds*, 348 F.3d 997.

Here, Garg has failed to exhaust its administrative remedies with respect to its challenge to Commerce's differential pricing methodology. In the underlying review, Commerce applied its differential pricing methodology in its preliminary determination filed on July 20, 2020. *See* Prelim. Decision Memo. at 3–6. On December 7, 2020, Garg submitted its case brief to Commerce that contained "issues to be considered by [Commerce] in reaching its final determination." *See* Letter Barnes, Richardson & Colburn, LLP to Sec. Commerce Pertaining Antidumping Duty Review of Certain Welded Carbon Steel Standard Pipes and Tubes from India: [Garg's] Case Br. at 1, PD 222, CF 89, bar code 4062562–01 (Dec. 7, 2020) ("Garg Agency Br."). However, at no point in Garg's agency brief did it challenge Commerce's application of its differential pricing methodology in the preliminary determination. *See generally* Garg Agency Br. The final results reflect Garg's decision, as Commerce again relied on the differential pricing methodology used in the preliminary determination without adjustments for any challenges by Garg. *See* Final Decision Memo. at 3, 32–43; Def. Resp. at 6–7.

It was only after Commerce filed its draft remand results that Garg contested Commerce's use of differential pricing for the first time. *See* Remand Results at 4; Garg Remand Cmts. at 2–10. Garg's challenge at this point in the proceeding was untimely. *See* 28 U.S.C. § 2637(d) ("the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies"); 19 C.F.R. § 351.309(c)(2) ("The case brief must present all arguments that continue in the submitter's view to be relevant to [Commerce's] final determination"). Therefore, Garg failed to exhaust administrative remedies before challenging Commerce's use of differential pricing methodology in its determination.

Furthermore, Garg fails to demonstrate that any exceptions to the exhaustion requirement applies. First, Garg's challenge does not fall within the futility exception. Garg alleges that any attempts to "frontally attack Cohen's *d*" would have been futile prior to *Stupp III* because "the law regarding Cohen's *d* appeared to have been settled" based upon consistent affirmation by the courts. Garg Mot. at 33–34; *see* 5 F.4th at 1341.[8] Thus, Garg appears to argue that decisions of this Court foreclosed any argument challenging Commerce's differential pricing methodology. However, decisions by this Court are not binding. *See Kaptan Demir Endustrisi ve Ticaret A.S. v. United States*, 592 F. Supp. 3d 1332, 1337 n.1 (Ct. Int'l Trade 2022) (citing *Algoma Steel Corp. v. United States*, 862 F.2d 240, 243 (Fed.Cir. 1989)). The futility exception is narrowly construed, precluding invocation where an "adverse decision may have been likely." *Corus Staal BV*, 502 F.3d at 1379; *see id.* at 1378–81. That Garg believed Commerce would reject its argument is insufficient to fall within the bounds of the exception.

In a similar vein, Garg's appeal to the intervening judicial decision exception fairs no better. Garg reiterates that the Court of Appeals' decision in *Stupp III* "called into question" the "previously settled principle [] that Cohen's *d* conformed to law." *See* Garg Mot. at 34; 5 F.4th at 1360. To apply, a judicial decision must interpret existing law that would "materially alter the result" of the case. *See Gerber Food (Yunnan) Co.*, 601 F. Supp. 2d at 1380 (citing *Hormel*, 312 U.S. at 558–59). It is unclear why Garg believes *Stupp* "would materially alter the result" of the case. In *Stupp III*, the Court of Appeals vacated

[8] On January 8, 2019, the Court rendered its decision in *Stupp Corp. v. United States*, 359 F. Supp. 3d 1293, 1313 (Ct. Int'l Trade 2019) ("*Stupp I*"), which sustained Commerce's application of the Cohen's *d* differential pricing methodology. On March 7, 2019, the Court denied the defendant-intervenor's motion to reconsider Commerce's use of Cohen's *d*. *See Stupp Corp. v. United States*, 365 F. Supp. 3d 1373, 1379 (Ct. Int'l Trade 2019) ("*Stupp II*"). On July 15, 2021, The Court of Appeals vacated and remanded to Commerce this Court's decisions in *Stupp I* and *Stupp II* with instructions to further explain or reconsider its use of Cohen's *d* in its differential pricing methodology.

this Court's decision sustaining Commerce's use of the Cohen's *d* test with instructions to further explain the reasonableness of its application. *See* 5 F.4th at 1360; *see also Stupp Corp. v. United States*, 619 F. Supp. 3d 1314, 1318 (Ct. Int'l Trade 2023) ("*Stupp IV*"). The Court of Appeals did not hold that application of the test itself was unlawful. *See Stupp III*, 5 F.4th at 1360 ("we invite Commerce to clarify its argument [regarding application of Cohen's *d*]"). Consistent with the Court of Appeal's instruction, this Court again affirmed Commerce's use of the Cohen's *d* test as reasonable in light of the remand order.[9] *See Stupp IV*, 619 F. Supp. 3d at 1328. Moreover, as stated, a decision by this Court sustaining the use of a test used by Commerce does not render the law settled. *See Kaptan Demir Endustrisi ve Ticaret*, 592 F. Supp. 3d at 1337 n.1 (citing *Algoma Steel Corp.*, 862 F.2d at 243) (recognizing that decisions by other trial courts are persuasive rather than controlling). Finally, Garg's argument that the "pure question of law" exception applies is also unpersuasive. Garg's asserts that *Stupp III* raised issues constituting pure questions of law "which do not require Commerce or the parties to evaluate the record in Garg's appeal." Garg Mot. at 34. Garg's characterization of the issue as purely one of law is incorrect. The exception applies where there is a "clear statutory mandate that does not implicate Commerce's interpretation of the statute under the second step of *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)." *Fuwei Films (Shandong) Co. v. United States*, 35 CIT 1229, 1230–31 (2011). To the contrary, the question posed by Garg involves whether Commerce's methodology under the statute is reasonable, which necessarily involves a mix question of law and fact requiring further involvement by the agency. Thus, the pure question of law exception is inapplicable. Garg has failed to exhaust its administrative remedies, precluding judicial review of its challenge to Commerce's use of Cohen's *d* in its differential pricing methodology. Accordingly, Commerce's determination on the issue is sustained.

CONCLUSION

Commerce's decision to apply an adverse inference when selecting facts available is not supported by substantial evidence. Garg has failed to exhaust its administrative remedies with respect to its arguments regarding Commerce's differential pricing methodology and therefore Commerce's determination regarding its differential pricing methodology is sustained.

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[9] The parties in *Stupp* have again appealed the Court's decision, currently pending before the Court of Appeals. Notice of Docketing Appeal: *Stupp Corp. v. United States*, No. 23–1663 (Mar. 27, 2023).

For the foregoing reasons, it is

ORDERED that Commerce's final determination and remand redetermination is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its second remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the second remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to comments on the second remand redetermination; and it is further

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing its second remand redetermination.

Dated: April 8, 2024
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 24–45

BIOPARQUES DE OCCIDENTE, S.A. DE C.V., AGRICOLA LA PRIMAVERA, S.A. DE C.V., AND KALIROY FRESH LLC, Plaintiffs, CONFEDERACION DE ASOCIACIONES AGRICOLAS DEL ESTADO DE SINALOA, A.C., CONSEJO AGRICOLA DE BAJA CALIFORNIA, A.C., ASOCIACION MEXICANA DE HORTICULTURA PROTEGIDA, A.C., ASOCIACION DE PRODUCTORES DE HORTALIZAS DEL YAQUI Y MAYO, AND SISTEMA PRODUCTO TOMATE, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and THE FLORIDA TOMATO EXCHANGE, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 19–00204

[Remanding the U.S. Department of Commerce's resumed antidumping duty investigation of fresh tomatoes from Mexico.]

Dated: April 17, 2024

Jeffrey M. Winton, *Michael J. Chapman*, *Amrietha Nellan*, *Jooyoun Jeong*, *Ruby Rodriguez*, and *Vi N. Mai*, Winton & Chapman PLLC, of Washington, D.C., for Plaintiffs Bioparques de Occidente, S.A. de C.V., Agricola La Primavera, S.A. de C.V., and Kaliroy Fresh LLC.

Bernd G. Janzen, *Devin S. Sikes*, *Paul S. Bettencourt*, and *Yujin K. McNamara*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, D.C., for Consolidated Plaintiffs Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C., Consejo Agricola de Baja California, A.C., Asociacion Mexicana de Horticultura Protegida, A.C., Asociacion de Productores de Hortalizas del Yaqui y Mayo, and Sistema Producto Tomate.

Douglas G. Edelschick, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Emma T. Hunter*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Robert C. Cassidy, Jr., *Charles S. Levy*, *Chase J. Dunn*, *James R. Cannon, Jr.*, *Mary Jane Alves*, *Jonathan M. Zielinski*, and *Nicole Brunda*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor The Florida Tomato Exchange.

OPINION AND ORDER

Choe-Groves, Judge:

This case involving imported fresh tomatoes from Mexico spans 28 years. In summary, the U.S. Department of Commerce ("Commerce") initiated an investigation into whether fresh tomatoes from Mexico were being sold in the United States at less than fair value. Commerce issued a preliminary determination in 1996 that the Mexican tomatoes were being, or were likely to be, sold in the U.S. at less than fair value.

Commerce and the Mexican tomato growers entered into a series of agreements (in 1996, 2002, 2008, and 2013) to suspend the investi-

gation for over two decades. In May of 2019, Commerce withdrew from the 2013 suspension agreement. Commerce and the Mexican tomato growers entered into a new agreement to suspend the investigation in September 2019. In October 2019, the U.S. domestic tomato growers requested that Commerce resume the suspended investigation.

Commerce resumed the investigation in October 2019, selected new mandatory respondents, and collected new economic data from 2018 and 2019. Commerce issued a final determination on October 25, 2019. No antidumping duty order was issued because according to the U.S. Court of Appeals for the Federal Circuit ("CAFC") in *Bioparques de Occidente, S.A. de C.V. v. United States* ("*Bioparques II*"), 31 F.4th 1336, 1343–48 (Fed. Cir. 2022), the 2019 suspension agreement still "remains in effect."[1]

Commerce explained that notwithstanding its October 2019 continuation and completion of the investigation, and issuance of a final determination, the 2019 suspension agreement remains in effect. Commerce stated in its final determination that it would not issue an antidumping duty order so long as the 2019 agreement remains in force, continues to meet the requirements of section 734(c) and (d) of the Tariff Act of 1930, as amended, and the parties to the agreement carry out their obligations under the 2019 agreement in accordance with its terms.

The Court now reviews the *Final Determination* from October 2019. *Fresh Tomatoes from Mexico* ("*Final Determination*"), 84 Fed. Reg. 57,401 (Dep't of Commerce Oct. 25, 2019) (final determination of sales at less than fair value), and accompanying Final Issues and Decisions Memorandum ("Final IDM"), PR 496.[2] The Mexican tomato growers argue that Commerce should have used the original data collected from 1995 and 1996 when it resumed the suspended investigation 23 years later, and Defendant and Defendant-Intervenor contend that Commerce was permitted to use new data collected from new respondents when it reinitiated the 1996 investigation in 2019. For the reasons explained below, the Court remands the *Final Determination* for further consideration.

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[1] This Court previously dismissed the complaints in these cases under USCIT Rule 12(b)(1) for lack of subject matter jurisdiction because an antidumping duty order had not been issued under the terms of the 2019 suspension agreement. The CAFC affirmed in part and remanded in part. *Bioparques II*, 31 F.4th at 1343–48. The CAFC held that an affirmative final determination in a continued investigation that involves exports from a Free Trade Agreement country is reviewable by the U.S. Court of International Trade. The CAFC also recognized that the 2019 suspension agreement is in effect and remains in force and valid.

[2] Citations to the administrative record reflect the public record ("PR") document numbers filed in this case, ECF No. 100.

Plaintiffs Bioparques de Occidente, S.A. de C.V. ("Bioparques"), Agricola La Primavera, S.A. de C.V. ("Agricola La Primavera"), and Kaliroy Fresh LLC (collectively, "Plaintiffs") and Consolidated Plaintiffs Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C., Consejo Agricola de Baja California, A.C., Asociacion Mexicana de Horticultura Protegida, A.C., Asociacion de Productores de Hortalizas del Yaqui y Mayo, and Sistema Producto Tomate (collectively, "Consolidated Plaintiffs"), challenge the final determination in the antidumping duty investigation of fresh tomatoes from Mexico conducted by Commerce. *Final Determination*; Compl., ECF No. 9; Am. Compl., ECF No. 64; *see also* Compl., Court No. 19–00203, ECF No. 14; Am. Compl., Court No. 19–00203, ECF No. 59; Compl., Court No. 19–00210, ECF No. 9; Am. Compl., Court No. 19–00210, ECF No. 69. Before the Court are Consolidated Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record and Amended Rule 56.2 Motion for Judgment on the Agency Record and Plaintiffs' Motion for Judgment on the Agency Record. Consol. Pls.' R. 56.2 Mot. J. Agency R., ECF No. 81; Mot. Pls. J. Agency R., ECF Nos. 82, 83; Consol. Pls.' Am. R. 56.2 Mot. J.Agency R. ("Consol. Pls.' Br."), ECF No. 92; *see also* Br. Pls. Supp. R. 56.2 Mot. J. Agency R. ("Pls.' Br."), ECF Nos. 82–1, 83–1. Defendant United States filed Response of Defendant United States to Plaintiffs' and Consolidated Plaintiffs' Rule 56.2 Motions for Judgment on the Agency Record. Resp. Def. Pls.' Consol. Pls.' R. 56.2 Mot. J. Agency R. ("Def.'s Br."), ECF No. 93. Defendant-Intervenor The Florida Tomato Exchange ("Defendant-Intervenor") filed its Response Opposing Plaintiffs' Motion for Judgment on the Agency Record. Def.-Interv.'s Resp. Opp'n Pls.' Mot. J. Agency R. ("Def.-Interv.'s Br."), ECF Nos. 94, 95. Plaintiffs filed Reply Brief of Plaintiffs. Reply Br. Pls. ("Pls.' Reply"), ECF No. 98. Consolidated Plaintiffs filed Consolidated Plaintiffs' Reply Brief in Support of its Amended Rule 56.2 Motion for Judgment on the Agency Record. Consol. Pls.' Reply Br. Supp. Am. R. 56.2 Mot. J. Agency R. ("Consol. Pls.' Reply"), ECF No. 99.

BACKGROUND

The Court presumes familiarity with the facts and procedural history set forth in its prior Orders and Opinions and recounts the facts relevant to the Court's review of the pending motions. *See Bioparques de Occidente, S.A. de C.V. v. United States* ("*Bioparques III*"), 47 CIT __, __, 633 F. Supp. 3d 1340, 1343–45 (2023); *Bioparques de Occidente, S.A. de C.V. v. United States* ("*Bioparques I*"), 44 CIT __, __, 470 F. Supp. 3d 1366, 1368–70 (2020).

I. Antidumping Duty Investigation and Suspension Agreements

In April 1996, Commerce initiated an antidumping duty investigation to determine whether imports of fresh tomatoes from Mexico were being, or were likely to be, sold in the United States at less than fair value. *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 18,377 (Dep't of Commerce Apr. 25, 1996) (initiation of antidumping duty investigation). After an affirmative preliminary injury determination from the U.S. International Trade Commission ("ITC"), Commerce made a preliminary determination that imports of fresh tomatoes from Mexico were being sold in the United States at less than fair value. *Fresh Tomatoes from Mexico* ("*Preliminary Determination*"), 61 Fed. Reg. 56,608 (Dep't of Commerce Nov. 1, 1996) (notice of preliminary determination of sales at less than fair value and postponement of final determination). Concurrent with Commerce's preliminary determination, Commerce published a notice in the Federal Register announcing an agreement under 19 U.S.C. § 1673c(c) with certain producers and exporters who accounted for substantially all of the imports of fresh tomatoes from Mexico into the United States to suspend the antidumping duty investigation on fresh tomatoes from Mexico. *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,618 (Dep't of Commerce Nov. 1, 1996) (suspension of antidumping investigation). Between 1996 and 2013, Commerce and the producers and exporters of tomatoes from Mexico entered into three further suspension agreements. *See Fresh Tomatoes from Mexico*, 67 Fed. Reg. 77,044 (Dep't of Commerce Dec. 16, 2002) (suspension of antidumping investigation); *Fresh Tomatoes from Mexico*, 73 Fed. Reg. 4831 (Dep't of Commerce Jan. 28, 2008) (suspension of antidumping investigation); *Fresh Tomatoes from Mexico* ("*2013 Suspension Agreement*"), 78 Fed. Reg. 14,967 (Dep't of Commerce Mar. 8, 2013) (suspension of antidumping investigation).

Commerce gave notice to the signatory growers on February 6, 2019 of Commerce's intent to withdraw from the *2013 Suspension Agreement*. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 7872, 7874 (Dep't of Commerce Mar. 5, 2019) (intent to terminate suspension agreement, rescind the sunset and administrative reviews, and resume the antidumping duty investigation); *Fresh Tomatoes from Mexico* ("*May 2019 Withdrawal Notice*"), 84 Fed. Reg. 20,858, 20,860 (Dep't of Commerce May 13, 2019) (termination of suspension agreement, rescission of administrative review, and continuation of the antidumping duty investigation). Commerce withdrew from the *2013 Suspension Agreement* on May 7, 2019 and resumed the underlying antidumping investigation. *May 2019 Withdrawal Notice*, 84 Fed. Reg. at 20,860.

Commerce published a notice on September 24, 2019 that a new suspension agreement had been reached between Commerce and the signatory parties and that the antidumping duty investigation had been suspended. *Fresh Tomatoes from Mexico* ("*2019 Suspension Agreement*"), 84 Fed. Reg. 49,987, 49,989 (Dep't of Commerce Sept. 24, 2019) (suspension of antidumping duty investigation). The ITC subsequently announced the suspension of its antidumping investigation. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 54,639 (ITC Oct. 10, 2019) (suspension of antidumping investigation).

In October 2019, U.S. domestic tomato industry representatives requested that Commerce continue the investigation. In response to these requests, Commerce "continued and completed this investigation in accordance with section 734(g) of the Tariff Act of 1930, as amended." *Final Determination*, 84 Fed. Reg. at 57,402. Commerce published its affirmative *Final Determination* on October 25, 2019, determining that fresh tomatoes from Mexico were being, or were likely to be, sold in the United States at less than fair value. *Id.* The ITC issued an affirmative injury determination on December 12, 2019. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 67,958 (ITC Dec. 12, 2019). As noted earlier, no antidumping duty order has been issued.

II. Litigation

Plaintiffs filed three separate actions challenging Commerce's continued investigation and *Final Determination*, beginning with filing the Summons in Court Number 19–00204 on November 22, 2019 and in Court Number 19–00210 on December 3, 2019. Summons, ECF No. 1; Summons, Court No. 19–00210, ECF No. 1. Plaintiffs filed the Complaint in Court Number 19–00204 on December 20, 2019 and the Complaint in Court Number 19–00210 on December 23, 2019. Compl., ECF No. 9; Compl., Court No. 19–00210. Plaintiffs filed the Summons and Complaint concurrently in Court Number 20–00035 on February 5, 2020. Summons, Court No. 20–00035, ECF No. 1; Compl., Court No. 20–00035, ECF No. 4.

Plaintiffs allege ten causes of action.[3] *See* Am. Compl. at 6–8; Am. Compl. at 6–8, Court No. 19–00210; Compl. at 6–7, Court No. 20–00035. Specifically, Plaintiffs challenge as unlawful Commerce's withdrawal from the *2013 Suspension Agreement* (claim 1(b)); Commerce's resumption of the suspended antidumping duty investigation (claims 1(a) and 1(c)); Commerce's ending of the investigation into the respondents that were the subject of Commerce's 1996 preliminary

[3] Though otherwise identical to the claims asserted in Court Numbers 19–00204 and 19–00210, Plaintiffs' Complaint in Court Number 20–00035 does not include a count 10. *See* Compl. at 7, Court No. 20–00035.

determination and selection of new respondents for the continued investigation (claim 2); the procedures Commerce followed in the resumed investigation (claim 3); and the correctness of certain aspects of the *Final Determination* (claims 4–10). Am. Compl. at 6–8; Am. Compl. at 6–8, Court No. 19–00210; Compl. at 6–7, Court No. 20–00035. In all, Plaintiffs ask the Court to declare unlawful and vacate Commerce's withdrawal from the *2013 Suspension Agreement* and the subsequent *Final Determination*. Am. Compl. at 8; Am. Compl. at 8, Court No. 19–00210; Compl. at 7, Court No. 20–00035.

Defendant filed motions to dismiss pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction and USCIT Rule 12(b)(6) for failure to state a claim upon which relief can be granted in each of the cases. Def.'s Mot. Dismiss, ECF No. 30; Def.'s Mot. Dismiss, Court No. 19–00210, ECF No. 31; Def.'s Mot. Dismiss, Court No. 20–00035, ECF No. 20. The Court granted the motions and dismissed Plaintiffs' claims with prejudice. *Bioparques I*, 44 CIT at __, 470 F. Supp. 3d at 1373.

III. Appeal

Plaintiffs appealed the Court's judgment to the CAFC. Pls.' Notice of Appeal, ECF No. 47. The CAFC affirmed in part and remanded in part. *Bioparques II*, 31 F.4th at 1343–48. The CAFC affirmed the dismissal of Plaintiffs' claims challenging the termination of the *2013 Suspension Agreement* and the negotiation of the *2019 Suspension Agreement*. *Id.* at 1343. The CAFC also held that because the *Final Determination* constituted "an affirmative final determination in a continued investigation that involves exports from [a free trade agreement] country"[4] and is reviewable under 19 U.S.C. § 1516a(g)(3)(A)(i), the Court has jurisdiction to consider Plaintiffs' challenges to the *Final Determination* under 28 U.S.C. § 1581(c). *Id.* at 1346–48.

On remand, the Court consolidated Plaintiffs' three cases with the related case *Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C. et al v. United States*, Court No. 19–00203. Consol. Order (Sept. 1, 2022), ECF No. 63. Plaintiffs filed Amended Complaints on September 1, 2022 in Court Numbers 19–00204 and 19–00210. Am. Compl.; Am. Compl., Court No. 19–00210.

[4] Mexico is a "free trade area country." At the time Plaintiffs filed their Complaint in January 2020, "free trade area country" included "Mexico for such time as the [North American Free Trade Agreement ("NAFTA")] is in force with respect to, and the United States applies the NAFTA to, Mexico." 19 U.S.C. § 1516a(f)(8), (10) (2006). The statute was amended following the replacement of the NAFTA with the United States-Mexico-Canada Agreement ("USMCA") to define "free trade area country" to include "Mexico for such time as the USMCA is in force with respect to, and the United States applies the USMCA to, Mexico." 19 U.S.C. § 1516a(f)(9) (2020).

IV. Motions to Dismiss

On remand, Defendant and Defendant-Intervenor filed motions to dismiss, seeking dismissal of the remaining claims of Plaintiffs and Plaintiff-Intervenors for lack of subject matter jurisdiction. Def.'s Mot. Dismiss, ECF No. 65; Def.-Interv.'s Mot. Dismiss, ECF No. 66. The Court granted the motions in part and dismissed Plaintiffs' and Plaintiff-Intervenors' claims 1(b) in Court Numbers 19–00204 and 19–00210, challenging Commerce's withdrawal from the *2013 Suspension Agreement*, and Court Number 20–00035 in its entirety. *Bioparques III*, 47 CIT at __, 633 F. Supp. 3d at 1348–49. The Court denied the motions in part related to all remaining claims in Court Numbers 19–00204 and 19–00210. *Id.* at __, 633 F. Supp. 3d at 1347–49.

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), which grant the Court authority to review actions contesting the final results in an investigation. The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Waiver

Defendant contends that Plaintiffs and Consolidated Plaintiffs waived counts 1(a), 6, 8, and 9 of their Amended Complaints by failing to raise them in their motions for judgment on the agency record. Def.'s Br. at 11–12. Plaintiffs and Consolidated Plaintiffs do not contest waiver in their response. *See* Pls.' Reply; Consol. Pls.' Reply.

"Generally, 'arguments not raised in the opening brief are waived.'" *Hyundai Steel Co. v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1273, 1277 (2020) (quoting *SmithKline Beecha, Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006)). Plaintiffs' count 1(a) challenges Commerce's authority to resume or continue its investigation based on the withdrawal of the U.S. domestic industry from the original petition that led to the investigation and *2013 Suspension Agreement*. Am. Compl. at 6. Count 6 challenges Commerce's substitution of the product-matching methodology used in the original investigation with a new methodology. *Id.* at 8. Counts 8 and 9 challenge Com-

merce's calculation of general and administrative expenses. *Id.* Plaintiffs and Consolidated Plaintiffs did not address these issues in their motions for judgment on the agency record. Therefore, the Court deems these counts waived.

II. Timeliness of the Requests for Continuation

After an investigation has been suspended, an interested party may request a continuation of the investigation "within 20 days after the date of publication of the notice of suspension of an investigation." 19 U.S.C. § 1673c(g). Commerce first suspended its investigation of fresh tomatoes from Mexico on November 1, 1996. *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,618. Commerce subsequently suspended the resumed investigation multiple times, most recently on September 24, 2019. *See 2019 Suspension Agreement*, 84 Fed. Reg. 49,987; *Fresh Tomatoes from Mexico*, 78 Fed. Reg. 14,967; *Fresh Tomatoes from Mexico*, 73 Fed. Reg. 4831; *Fresh Tomatoes from Mexico*, 67 Fed. Reg. 77,044. Defendant-Intervenor filed a request that Commerce continue the investigation on October 11, 2019. *Final Determination*, 84 Fed. Reg. at 57,402; Def.-Interv.'s Request Continue Suspended Less than Fair Value Investigation (Oct. 11, 2019), PR 492. Red Sun Farms filed a request for a continuation of the investigation on October 15, 2019. *Final Determination*, 84 Fed. Reg. at 57,402; Red Sun Farms' Request Continue Investigation (Oct. 15, 2019), PR 493.

Plaintiffs argue that Commerce was not authorized to continue its antidumping investigation in October 2019 because the request for continuation was not filed by an interested party within 20 days after Commerce published its original notice of suspension on November 1, 1996. Pls.' Br. at 14–16. Plaintiffs propose that section 1673c(g) should be read to require that any request for continuation be filed within 20 days of the original suspension of an investigation. *Id.* at 14. Because Red Sun Farms did not file its continuation request until October 2019, Plaintiffs assert that the request was filed 24 years too late. In support of this interpretation, Plaintiffs point to 19 U.S.C. § 1673c(j), which provides that Commerce "shall consider all of the subject merchandise without regard to the effect of any agreement" in a continued investigation. *Id.* at 15; 19 U.S.C. § 1673c(j). Plaintiffs argue that because section 1673c(j) precludes consideration of events that occurred during the pendency of a suspension agreement, interpreting section 1673c(g) to allow for continuation after a resumed investigation "would result in an absurd outcome in which an interested party can take advantage of the termination and renegotiation of suspension agreements in an investigation to extend the time limit under subsection (g) indefinitely." Pls.' Br. at 15–16. Defendant ar-

gues that the plain language of 19 U.S.C. § 1673c(g) provides that Commerce may continue an investigation within 20 days of any notice of suspension being published and does not limit continuations to only the first notice of suspension. Def.'s Br. at 13, 14–17.

In interpreting a statute, courts must give effect to the plain meaning of the statutory language. *See Star Athletica, LLC v. Varsity Brands*, 580 U.S. 405, 414 (2017) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992)). The inquiry begins with the text, "giving each word its "ordinary, contemporary, common meaning." *Id.* (quoting *Walters v. Metro. Ed. Enters., Inc.*, 519 U.S. 202, 207 (1997)).

19 U.S.C. § 1673c(g) reads:

> **Investigation to be continued upon request**
>
> If the administering authority, within 20 days after the date of publication of the notice of suspension of an investigation, receives a request for the continuation of the investigation from—
>
> (1) an exporter or exporters accounting for a significant proportion of exports to the United States of the subject merchandise, or
>
> (2) an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9) of this title which is a party to the investigation,
>
> then the administering authority and the Commission shall continue the investigation.

19 U.S.C. § 1673c(g). The language of the statute does not expressly restrict an exporter or interested party to requesting a continuation of an investigation only following the *initial* notice of suspension. The statute uses the more general language of "the notice of suspension of *an* investigation." 19 U.S.C. § 1673c(g) (emphasis added). "In defining the plain meaning of a statute, courts must avoid 'add[ing] conditions' to the applicability of a statute that do not appear in the provision's text." *Hymas v. United States*, 810 F.3d 1312, 1324 (2016) (alteration in original) (quoting *Norfolk Dredging Co. v. United States*, 375 F.3d 1106, 1111 (Fed. Cir. 2004)).

Plaintiffs argue that interpreting subsection (g) to allow a party to request a continuation of a resumed investigation would conflict with subsection (j). Pls.' Br. at 15. 19 U.S.C. § 1673c(j) reads:

> In making a final determination under section 1673d of this title, or in conducting a review under section 1675 of this title, in a case in which the administering authority has terminated a

> suspension of investigation under subsection (i)(1), or continued an investigation under subsection (g), the Commission and the administering authority shall consider all of the subject merchandise without regard to the effect of any agreement under subsection (b) or (c).

19 U.S.C. § 1673c(j). In discerning Congress' statutory intent, the Court does not interpret one provision in isolation but considers the statute as a whole. *See Star Athletica*, 508 U.S. at 414 (citations omitted). Plaintiffs suggest that under subsection (j), allowing investigations to continue following periods of suspension "would result in an absurd outcome in which an interested party can take advantage of the termination and renegotiation of suspension agreements in an investigation to extend the time limit under subsection (g) indefinitely." Pls.' Br. at 15.

The Court concludes that there is no inconsistency between 19 U.S.C. § 1673c(j) and 19 U.S.C. § 1673c(g) as proposed by Plaintiffs. Subsection (j) does not expressly impose any type of temporal limitation on Commerce's ability to resume its investigation only after the initial suspension, and the Court will not read any such limitation into the statute. *See* 19 U.S.C. § 1673c(j). If Commerce and parties are permitted to repeatedly suspend an investigation over several years, it is reasonable that the interested parties might request a continuation of the investigation following each new negotiated suspension. The Court concludes that Commerce's determination that Defendant-Intervenor and Red Sun Farms filed timely requests for continuation in October 2019 following the suspension agreement entered into in September 2019 was in accordance with law.

III. Commerce's Resumed Investigation

Commerce's original investigation of fresh tomatoes from Mexico covered sales during the period of March 1, 1995 through February 29, 1996 and involved six mandatory respondents. *See Preliminary Determination*, 61 Fed. Reg. at 56,608–10. In May 2019, Commerce withdrew from the *2013 Suspension Agreement* and continued the underlying antidumping duty investigation. *May 2019 Withdrawal Notice*, 84 Fed. Reg. 20,858. In the notice of withdrawal, Commerce described the new period of investigation as follows:

> The original period of investigation was March 1, 1995, through February 29, 1996. Due to the unusual procedural posture of this proceeding, in which we are terminating a suspension agreement and continuing an investigation that covers a period

> of investigation that dates back more than 23 years, Commerce will be requesting information corresponding to the most recent four full quarters, *i.e.*, April 1, 2018 through March 31, 2019.

Id. at 20,860–61. Commerce also explained respondent selection as:

> In light of the unusual procedural posture of this proceeding, Commerce finds it appropriate to reconsider respondent selection. Commerce intends to evaluate U.S. Customs and Border Protection [] data for U.S. imports of fresh tomatoes from Mexico for the most recent four quarters under the appropriate Harmonized Tariff Schedule of the United States [] numbers listed in the "Scope of the Investigation" section above and select mandatory respondents in accordance with section 777A(c) of the Act.

Id. at 20,861. Commerce indicated that it would issue its final determination within 135 days after the withdrawal from and termination of the *2013 Suspension Agreement* became effective. *Id.* at 20,860.

Plaintiffs argue that Commerce did not "resume" its prior investigation, but instead initiated a completely new investigation based on new data and new respondents. Pls.' Br. at 16–18. Defendant counters that Plaintiffs have not provided statutory or regulatory support for this argument. Def.'s Br. at 17–20.

When Commerce determines that a suspension agreement has been violated, no longer eliminates the injurious effect of dumping, or is no longer in the public interest, if the investigation was not completed, Commerce shall "resume the investigation as if its affirmative preliminary determination were made on the date of its determination." 19 U.S.C. § 1673c(i)(1)(B); 19 C.F.R. § 351.209(b)(2), (c)(4). The term "resume" is not defined by statute or regulation. *See* 19 U.S.C. § 1677 (definitions; special rules); 19 C.F.R. § 351.102 (definitions).

Plaintiffs contend that the term "resume," as used in the statute and regulations, requires Commerce to base its final determination on the data and mandatory respondents from the suspended 1996 investigation. Pls.' Br. at 17. Defendant counters that Commerce did resume the 1996 investigation but, because of the "unusual procedural posture of this proceeding" determined that more recent economic information and new mandatory respondents should be selected. Def.'s Br. at 18; *see also Final Determination*. Defendant contends that Commerce did not start a "new" investigation, but merely "resumed" the prior investigation consistent with Commerce's applicable regulations. Def.'s Br. at 19. Defendant also explains that Commerce applied the 1996 regulations in its analysis. *Id.*

When resolving an issue of statutory interpretation, the Court begins with the language of the statute and "the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 195 (1985); *see also Obsidian Sols. Grp., LLC v. United States*, 54 F.4th 1371, 1374 (Fed. Cir. 2022) ("When tasked with interpreting a statute, we start by exhausting all traditional tools of interpretation to determine its meaning. The starting point is the text itself.").

Section 1673c(i)(1) provides in relevant part:

> If the administering authority determines that an agreement accepted under subsection (b) or (c) is being, or has been, violated, or no longer meets the requirements of such subsection (other than the requirement, under subsection (c)(1), of elimination of injury) and subsection (d), then, on the date of publication of its determination, it shall . . . if the investigation was not completed, *resume the investigation as if its affirmative preliminary determination were made on the date of its determination under this paragraph*.

19 U.S.C. § 1673c(i)(1)(B) (emphasis added). The Court finds this language to be unambiguous. Congress' use of the verb "resume" evidences an intention that Commerce should *continue* the investigation already begun prior to the initial suspension; in addition, the phrase "date of its determination" modifies "affirmative preliminary determination." Here, the *Preliminary Determination* was made on November 1, 1996, and thus under 19 U.S.C. § 1673c(i)(1)(B), Commerce should resume the investigation as if its affirmative preliminary determination was made on the date of its determination—November 1, 1996. To read the statute as permitting drastic changes in the period of investigation or to allow the selection of completely new mandatory respondents following the suspension would render meaningless the preliminary determination prior to the initial suspension agreement.

Moreover, the Court recognizes that adopting Defendant's proposed interpretation risks creating prejudice for newly selected respondents. In a normal antidumping duty investigation, Commerce is required to issue its preliminary determination within 140 days of the initiation of the investigation and the final determination is to be issued within 75 days thereafter. 19 U.S.C. §§ 1673b(b)(1), 1673d(a)(1). Commerce may extend these deadlines subject to some limitations. *Id.* §§ 1673b(c), 1673d(a)(2). Under this timeline, a newly initiated investigation will normally last at least 215 days. In a

resumed investigation, because it is presumed that an affirmative preliminary determination was issued prior to suspension, the final determination is due to be issued within 75 days of the resumption. *Id.* §§ 1673b(c), 1673c(i)(1)(b). This results in a compressed timeline, and newly added mandatory respondents would be limited in their ability to produce and challenge new data. Without having the benefit of the preliminary determination phase that was completed in 1996, the newly selected mandatory respondents in 2019 did not have the opportunity to provide initial information to Commerce, review a preliminary determination, and submit administrative briefs in response, and then challenge the final determination in court.

Defendant argues that Commerce never expressly purported to initiate a new investigation and that the regulations in effect during the original 1996 investigation permitted Commerce to consider data from a later period of time. Def.'s Br. at 18–19. The relevant regulation reads:

> [Commerce] normally will examine not less than 60 percent of the dollar value or volume of the merchandise sold during a period of at least 150 days prior to and 30 days after the first day of the month during which the petition was filed or the Secretary initiated the investigation under § 353.11, but [Commerce] may examine the merchandise for any additional or alternative period [Commerce] concludes is appropriate.

19 C.F.R. § 353.42 (1996). Defendant contends that the regulation provides Commerce with a degree of discretion to look beyond the normal temporal borders of its investigations; however, the regulation cannot be read to overwrite or conflict with the clear intention of Congress expressed in Section 1673c(i)(1)(B). Congress clearly expressed its intention in Section 1673c(i)(1)(B) for a resumed investigation to be a *continuation* of the investigation conducted prior to suspension, building from an existing preliminary determination. The statutory language of section 1673c(i)(1)(B) is particularly relevant that, "if the investigation was not completed, [Commerce shall] *resume the investigation as if its affirmative preliminary determination were made on the date of its determination under this paragraph*." 19 U.S.C. § 1673c(i)(1)(B) (emphasis added).

Commerce cannot avoid this statutory requirement by arguing that the Court should accept that the investigation was "resumed" merely because Commerce never used the phrase "new investigation." The preliminary determination examined six mandatory respondents for the period from 1995–1996. The *Final Determination* examined three completely different mandatory respondents for the period from

2018–2019. Thus, based on the facts in this case, the Court finds that Commerce's selection of new mandatory respondents and changing the period of investigation from 1995–1996 to 2018–2019 *de facto* initiated a new investigation. Because Commerce started a new investigation rather than resumed the affirmative preliminary determination, Commerce's *Final Determination* is not in accordance with law.

The Court also notes that in at least two prior instances when Commerce resumed the investigation in this case in 2008 and 2013, Commerce's notices resuming the investigation indicated that the period of investigation would be the same March 1995 to February 1996 timeframe considered in the original 1996 investigation and affirmative preliminary determination. Pls.' Br. at 11; *Fresh Tomatoes from Mexico*, 73 Fed. Reg. 2887, 2888 (Dep't of Commerce Jan. 16, 2008) (notice of termination of suspension agreement, termination of five-year sunset review, and resumption of antidumping investigation); *Fresh Tomatoes from Mexico*, 78 Fed. Reg. 14,771, 14,967 (Dep't of Commerce Mar. 7, 2013) (termination of suspension agreement, termination of five-year sunset review, and resumption of antidumping investigation). Clearly at least twice before in this case, Commerce recognized that it needed to resume the investigation by using the same period of investigation in the affirmative preliminary determination.

Even though it may be difficult in 2024 to investigate the fresh tomato market in 1995–1996, and there may be concerns whether all of the relevant record evidence is still available,[5] Commerce is required by statute to *resume* the prior investigation that was suspended after issuing the affirmative preliminary determination. This means that Commerce's *Final Determination* must resume its investigation flowing from the affirmative preliminary determination issued on November 1, 1996, including focusing its analysis on the evidence submitted regarding the original period of investigation of March 1, 1995 through February 29, 1996, and reviewing the original six mandatory respondents, thereby complying with the statutory requirement to "*resume the investigation as if its affirmative preliminary determination were made on the date of its determination under this paragraph*." 19 U.S.C. § 1673c(i)(1)(B) (emphasis added).

The Court concludes that Commerce's *Final Determination* is not in accordance with law and remands the matter to Commerce for further consideration in accordance with this Opinion.

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[5] Apparently, Commerce is no longer able to locate a number of record documents from the 1996 investigation. Pls.' Br. at 11.

IV. Remaining Issues

The Court is remanding the *Final Determination* in light of Commerce's erroneous examination of the 2018–2019 period of investigation with new mandatory respondents. Plaintiffs challenge numerous additional aspects of the *Final Determination*, including whether sales during the suspension period should have been disregarded, Commerce's use of the differential pricing analysis, Commerce's use of the investigation period of 2018–2019 rather than monthly averages, and inclusion of high-priced home market sales in the normal value calculation. Because Commerce will change its analysis when it resumes the investigation for the appropriate period of 1995–1996, much of the Court's analysis on these remaining issues regarding the 2019 investigation would be rendered inapplicable. Thus, the Court defers its analysis of most of the remaining issues until after Commerce's remand redetermination in the resumed investigation.

CONCLUSION

Accordingly, it is hereby

ORDERED that counts 1(a), 6, 8, and 9 of Plaintiffs' and Consolidated Plaintiffs' Amended Complaints are dismissed as waived; it is further

ORDERED that the Court sustains Commerce's determination that the requests for continuation filed by Defendant-Intervenor and Red Sun Farms were timely; it is further

ORDERED that the *Final Determination* is remanded to Commerce to reconsider consistent with this Opinion the selection of new respondents and consideration of recent data in its resumed investigation; and it is further

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

(1) Commerce shall file its remand determination on or before August 16, 2024;
(2) Commerce shall file the administrative record on or before August 30, 2024;
(3) Comments in opposition to the remand determination shall be filed on or before September 27, 2024;
(4) Comments in support of the remand determination shall be filed on or before October 25, 2024; and
(5) The joint appendix shall be filed on or before November 22, 2024.

Dated: April 17, 2024
New York, New York

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

Slip Op. 24–46

GREEN FARMS SEAFOOD JOINT STOCK COMPANY, Plaintiff, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA and eight of its individual members, Defendant-Intervenors.

Court No. 22–00092

CATFISH FARMERS OF AMERICA and eight of its individual members, Plaintiffs, v. UNITED STATES, Defendant, and NAM VIET CORPORATION, NTSF SEAFOODS JOINT STOCK COMPANY, and GREEN FARMS SEAFOOD JOINT STOCK COMPANY, Defendant-Intervenors.

Court No. 22–00125
Before: M. Miller Baker, Judge

[In both cases, the court remands to Commerce for further proceedings.]

Dated: April 17, 2024

Robert L. LaFrankie, Crowell & Moring LLP of Washington, DC, on the briefs for Green Farms Seafood Joint Stock Company.

Nazak Nikakhtar, *Maureen E. Thorson*, and *Stephanie M. Bell*, Wiley Rein LLP of Washington, DC, on the briefs for Catfish Farmers of America and its members.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Reginald T. Blades, Jr.*, Assistant Director; and *Kara M. Westercamp*, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the brief for the United States. Of counsel for the United States was *Hendricks Valenzuela*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific PLLC of Washington, DC, on the brief for NTSF Seafoods Joint Stock Company.

Matthew McConkey, Mayer Brown LLP of Washington, DC, on the brief for Nam Viet Corporation.

OPINION

***Baker*, Judge:**

These overlapping cases arise out of the Department of Commerce's 17th administrative review of its antidumping order on catfish imports from Vietnam. In Case 22–92, Green Farms Seafood Joint Stock Company—a Vietnamese fish producer and exporter—argues that its tariff is too high. In Case 22–125, Catfish Farmers of America and several of its constituent members contend that the tariff assigned to another exporter—and by extension to Green Farms—is too low. The government, caught in a crossfire in this latest skirmish in the enduring Twenty Years' Catfish War, asserts the Department reached the Goldilocks solution—just right. For the reasons explained below, the court sends both cases back to the agency's drawing board.

I

In 2003, Commerce imposed an antidumping duty order on catfish from Vietnam. *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47,909 (Dep't Commerce Aug. 12, 2003). Because Vietnam has a nonmarket economy, the order mandated specific tariffs on entities that demonstrated independence from the government and otherwise applied a single country-wide rate. *See id.* at 47,909–10.[1] The order has undergone many administrative reviews; the one here covered August 1, 2019, through July 31, 2020. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 63,081, 63,084–85 (Dep't Commerce Oct. 6, 2020).

In that review, Commerce found that three companies demonstrated independence from the Vietnamese government and thus were eligible for separate rates: NTSF Seafoods Joint Stock Company, East Sea Seafoods Joint Stock Company, and Green Farms. Appx1037. All other producers received the country-wide rate of $2.39 per kilogram. Appx1094.

As mandatory respondents, NTSF and East Sea were each individually investigated. Based on a comparison of the former's reported data to costs of producing fish in India—the surrogate market-economy country chosen by Commerce over the objections of Catfish Farmers—the Department found that NTSF did not dump its catfish in the U.S. market and thus assigned the company a zero margin. Appx1093.

East Sea, on the other hand, ceased cooperating with the review after establishing its eligibility for a separate rate, prompting Commerce to apply facts otherwise available with an adverse inference. *Id.* That resulted in the agency assigning the company a margin of $3.87 per kilogram. *Id*.

Finally, because Green Farms was not individually investigated, the Department determined that company's rate by averaging NTSF's and East Sea's margins, even though Green Farms contended that the latter should be excluded from the calculation. Appx1069–1070. The consequence was that the agency assigned Green Farms a tariff of $1.94 per kilogram. Appx1070.

II

Invoking jurisdiction conferred by 28 U.S.C. § 1581(c), Green Farms and Catfish Farmers both sued under 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii) to challenge Commerce's final determination. Case

[1] For the statutory and regulatory background, *see Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1334–41 (CIT 2020) (addressing issues from 14th review).

22–92, ECF 9 (complaint); Case 22–125, ECF 9 (complaint). Each then intervened in the other case on the side of the government. Case 22–92, ECF 16; Case 22–125, ECF 30. Nam Viet Corporation and NTSF also intervened in Catfish Farmers' case to support the government. Case 22–125, ECF 20, 25.

After the court consolidated the cases for briefing, the plaintiffs moved for judgment on the agency record. Case 22–92, ECF 39; Case 22–125, ECF 49. The government opposed, Case 22–92, ECF 44; Case 22–125, ECF 54, as did the intervenors, Case 22–92, ECF 38; Case 22–125, ECF 51. The plaintiffs replied. Case 22–92, ECF 40; Case 22–125, ECF 50. The court decides the motions on the papers.

In § 1516a(a)(2) actions such as these, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

In addition, the Department's exercise of discretion in § 1516a(a)(2) cases is subject to the default standard of the Administrative Procedure Act, which authorizes a reviewing court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see SolarWorld Americas, Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020) (explaining that in § 1516a cases brought under section 516A of the Tariff Act of 1930, APA "section 706 review applies since no law provides otherwise") (citing 28 U.S.C. § 2640(b)).

III

In Case 22–92, Green Farms raises two overarching issues. First, it challenges Commerce's determination that East Sea is eligible for a

separate rate.[2] Second, it asserts that even if East Sea is so eligible, the latter's adverse-inference tariff should not affect the calculation of Green Farms's margin.

A

Green Farms maintains that the Department's grant of a separate rate to East Sea is both contrary to law, ECF 39, at 15–32, and unsupported by substantial evidence, *id.* at 33–39. The court considers those questions in turn.

1

Green Farms contends that Commerce has a "written policy" requiring separate-rate applicants to respond to " '*all* parts of the questionnaire as mandatory respondents' to remain eligible for separate rate status." ECF 39, at 21 (emphasis in original) (quoting Appx7674). The company contends that "[t]he policy is clear. 'All' means 'all.' East Sea failed to answer 'all' parts of the questionnaire it received as a mandatory respondent. Therefore, under Commerce's written policy, it can 'no longer be eligible for separate rate status.' " *Id.* (quoting Appx7674).

The government responds that independence from government control is a separate question from analysis of sales and cost data. ECF 44, at 49 (quoting Appx1061 and citing *Nat'l Nail Corp. v. United States*, 279 F. Supp. 3d 1372, 1377 (CIT 2018)). The court agrees. "This Court has consistently held that it is unreasonable for Commerce to impute the unreliability of a company's questionnaire responses and submissions concerning its factors of production and/or U.S. sales to its separate-rate responses when there is no evidence on the record indicating that the latter were false, incomplete, or otherwise deficient." *Yantai Xinke Steel Structure Co. v. United States*, 36 CIT 1035, 1054 (2012), *superseded by statute on other grounds,* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129

[2] Green Farms assumes that if Commerce denies East Sea a separate rate on remand, the Department will then calculate Green Farms's margin using NTSF's zero tariff, either alone or in conjunction with calculated separate rates in preceding administrative reviews. *See* ECF 39, at 51–52; ECF 40, at 29–31. Catfish Farmers contest this assumption, arguing that in this scenario Commerce would assign the country-wide rate of $2.39 per kilogram to East Sea and use only that to calculate Green Farms's tariff. *See* ECF 38, at 22–25. If that's right, Green Farms would then be worse off, as its current margin is only $1.94/kilogram.

Because the court reviews, not prophesies, agency action, *cf. Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("[T]his is a court of final review and not first view . . . .") (quoting *Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367, 399 (1996) (Ginsburg, J., concurring in part and dissenting in part)), it need not consider this hypothetical question now. If on remand the Department finds East Sea ineligible for a separate rate, Commerce can address this dispute in the first instance, and any dissatisfied party can then seek relief here.

Stat. 362, 383–84 (2015), *as recognized in Deosen Biochem. Ltd. v. United States*, 307 F. Supp. 3d 1364, 1372 (CIT 2018).

Moreover, even if the Department has the policy that Green Farms ascribes to it, an agency can deviate from its practices if it "show[s] that there are good reasons" for doing so. *Huvis Corp. v. United States*, 570 F.3d 1347, 1354 (Fed. Cir. 2009). As the government argues, "Commerce provided both notice and explanation for why it granted [East Sea] a separate rate." ECF 44, at 50 (citing Appx1010–1011, Appx1060–1064).

The Department reasoned that because the Vietnam-wide margin is lower than the adverse-inference tariff, denying East Sea a separate rate would benefit the uncooperative company and allow respondents to manipulate the investigation. Appx1062. The agency noted that the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act[3] allows for an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Id.* (quoting SAA, H.R. Doc. 103–316, at 870). Complying with the SAA and preventing respondents from benefiting from a lack of cooperation are valid reasons for a change in practice, if that's what happened here. The court therefore rejects Green Farms's argument that Commerce erred as a matter of law in granting East Sea a separate rate.

2

Green Farms also contends that substantial evidence does not support the Department's finding that East Sea is eligible for a separate rate. ECF 39, at 33–39. The company advances three arguments.

First, Green Farms asserts that East Sea's separate-rate certification was deficient and did not include sufficient information to establish eligibility, and it also contends that it was improper in any event for East Sea to submit a "certification" instead of the longer-form "application."[4] ECF 39, at 33–35. The court need not address these points because Commerce did not rely on the certification. Rather, the Department noted that East Sea had also submitted a response to

[3] *See* H.R. Doc. No. 103–316, vol. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. Congress declared the SAA "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[4] The certification is a streamlined renewal form used by companies that recently received separate rates, while the application is for companies seeking such relief for the first time or that lost a separate rate previously received. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 63,081, 63,082 & n.3 (Dep't Commerce Oct. 6, 2020) (explaining process).

Section A of the mandatory-respondent questionnaire that, taken together with the material submitted in the certification, established eligibility. Appx1011; Appx1061; *see also* Appx1061 n.175 (noting Green Farms's argument and stating that "it was unnecessary to require [East Sea] to remedy this deficiency because Commerce solicited extensive, similar information in its Section A questionnaire").

Second, the company maintains that the Department disregarded *Catfish Farmers*' comments about alleged deficiencies in East Sea's certification. ECF 39, at 33–35. Catfish Farmers themselves make no such argument, instead urging the court to sustain East Sea's separate rate. The government, meanwhile, notes that Catfish Farmers submitted the comments in question before Commerce issued its preliminary determination. ECF 44, at 53.

The final determination, in turn, makes clear that Catfish Farmers proffered no objection to the Department's preliminary conclusions. Appx1059–1060. In other words, Catfish Farmers abandoned their arguments. After the agency issues its preliminary determination, the parties have 50 days to file case briefs that "must present all arguments that continue in the submitter's view to be relevant to the Secretary's determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results." 19 C.F.R. § 351.309(c)(2). "Both Commerce and reviewing courts normally find an argument not presented in a party's case brief to be waived unless the argument could not have been raised in the case brief." *NTSF Seafoods Joint Stock Co. v. United States*, Ct. Nos. 20–00104, 20–00105, Slip Op. 22–38, at 24, 2022 WL 1375140, at *8 (CIT Apr. 25, 2022).

Because Catfish Farmers elected not to include their pre-preliminary arguments in their case brief, Green Farms needed to assert them. It failed to do so; instead, it now complains that "Commerce does not even mention CFA's deficiency comments, much less consider them." ECF 39, at 35. But that is what ordinarily happens when a party abandons its arguments: The Department reasonably chose not to address Catfish Farmers' forsaken comments when Green Farms declined to adopt them as its own.

Finally, Green Farms contends that Commerce did not "adequately explain[ ] its decision, or how the evidence supports its findings under each of the factors relevant to determining the absence of both '*de jure*' and '*de facto*' control." *Id.* at 37. The court agrees.

In its preliminary determination, the Department simply said that East Sea's evidence "supports a preliminary finding that [it] is eligible for a separate rate" and that it "provided an adequate response to Commerce's questionnaire as it related to the company's indepen-

dence from the Vietnamese Government and separate rate eligibility." Appx1011. The agency further identified the relevant factors it considers in examining *de jure* and *de facto* independence, but in finding those factors satisfied it merely repeated the factors themselves and gave blanket citations to the company's separate-rate certification. Appx1010–1011 & nn.63, 66.[5] Merely reciting the legal standard, without analysis, is not substantial evidence. *Ninestar Corp. v. United States*, Ct. No. 23–00182, Slip Op. 24–24, at 28, 2024 WL 864369, at *13 (CIT Feb. 27, 2024) (citing *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1405 (D.C. Cir. 1995) ("When an agency merely parrots the language of a statute without providing an account of how it reached its results, it has not adequately explained the basis for its decision.")).

The final determination, in turn, simply listed the broad categories of information East Sea provided and then concluded, "We found no basis to determine that the separate-rate information submitted was not reliable." Appx1061. Later, Commerce repeated that East Sea "did provide sufficient information necessary to determine its independence from the Government of Vietnam." Appx1063. The final determination contained no analysis of its own—rather, it said that the Department "continue[d] to find" that East Sea had established a right to a separate rate. Appx1060. But Commerce's preliminary discussion was conclusory.

In layman's terms, the Department didn't show its work, and the requirement that it do so is "a 'basic principle' in administrative law that is 'indispensable to sound judicial review.' " *Ninestar*, Slip Op. 24–24, at 28, 2024 WL 864369, at *13 (quoting *Amerijet Int'l, Inc. v. Pistole*, 743 F.3d 1343, 1350 (D.C. Cir. 2014)). The court therefore remands to provide Commerce with the opportunity to "offer a fuller explanation of the agency's reasoning at the time of the agency action." *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (cleaned up).

B

Green Farms alternatively asserts that even if Commerce properly granted East Sea a separate rate, the Department nonetheless erred by using it to calculate Green Farms's tariff. ECF 39, at 39–53. The company contends that East Sea's adverse-inference rate is not reasonably reflective of economic reality or Green Farms's potential dumping margins. *Id.* at 39–43.

Commerce observed that the statute instructs the agency to ordi-

[5] The referenced footnotes merely cite "NTSF SRC; ESSSRC; and Green Farms SRA." Neither refers to specific pages or material.

narily disregard any rates that are zero, *de minimis*, or based entirely on facts available when setting a separate rate for companies not individually examined, such as Green Farms. Appx1011 (citing 19 U.S.C. § 1673d(c)(5)(A)).[6] Here, however, the tariffs for the only companies individually examined—NTSF's zero margin and East Sea's adverse-inference rate—fell within those "disregard" categories. Appx1011. The Department noted that in such situations, it "may use 'any reasonable method' for assigning the rate to all other respondents, including 'averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.' " *Id.* (quoting 19 U.S.C. § 1673d(c)(5)(B)). Commerce therefore preliminarily calculated Green Farms's rate by taking the simple average[7] of NTSF's and East Sea's margins. *Id.*

Green Farms argued that the Department should disregard East Sea's margin in that calculation because the agency's "normal practice" is to exclude adverse-inference rates. Appx1067. Instead, Green Farms urged Commerce to simply assign it NTSF's zero margin. *Id.* The company also contended that the inclusion of an adverse-inference rate meant the calculated margin did not "reasonably reflect" its economic reality. *Id.*

The Department found its methodology consistent with the statutory command and noted that the SAA states that "the expected method" when all individually examined respondents receive dumping margins that are zero, *de minimis*, or based entirely on facts available "will be to weight average the zero and *de minimis* margins *and margins determined pursuant to facts available*, provided that volume data is available." Appx1069 (emphasis in original). Commerce noted that the statute permits the use of other "reasonable methods" if the "expected method is not feasible," but it found the "expected method"—as modified to use a simple average—feasible here. *Id.* The Department observed that Green Farms cited no evidence to show otherwise and further found that relying solely on NTSF's rate would contradict the statutory instruction to use both mandatory respondents' margins. *Id.*

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[6] Neither the Tariff Act nor Commerce's regulations address how the Department should establish the separate rate for companies not individually examined in an antidumping investigation or administrative review of imports from a nonmarket-economy country. In such cases, agency practice is to use the statutory method for determining an "all-others" rate in market-economy cases. *See Am. Mfrs. of Multilayered Wood Flooring v. United States*, Ct. No. 21–00595, Slip Op. 24–13, at 4 n.3, 2024 WL 489474, at *1 n.3 (CIT Feb. 8, 2024).

[7] Commerce explained that it used a simple average, rather than the weighted average specified in the statute, "because publicly ranged shipment data were not available for" East Sea. Appx1069 n.222. No party challenges that aspect of the decision.

Finally, Commerce explained that the margin it assigned—$1.94/kg—"is far more similar to Green Farms' cash deposit rate during the [period of review] (*i.e.*, $1.37 per kg) than any of the rates proposed by Green Farms," so the Department found "no basis to conclude that the rate calculated in accordance with [§ 1673d(c)(5)(B)] is not appropriate." Appx1070.

The government and Catfish Farmers convincingly argue that Commerce correctly followed the statutory command and the SAA by averaging NTSF's zero rate and East Sea's adverse-inference tariff. But that's not the end of the matter. Although the statute and the SAA *permit* Commerce to "use a simple average methodology to calculate the separate rate," *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013), " 'it is possible for the application of a particular methodology to be unreasonable in a given case,' " *id*. (quoting *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1085 (Fed. Cir. 2001)). " 'Form should be disregarded for substance and the emphasis should be on economic reality.' " *Id*. (brackets omitted) (quoting *United States v. Eurodif S.A.*, 555 U.S. 305, 317–18 (2009)).

Green Farms argues, among other things, that *Bestpak* is "particularly instructive." ECF 40, at 25. The court agrees. In that case, there were likewise two mandatory respondents, only one of which cooperated. 716 F.3d at 1374. Also as here, Commerce calculated the margin for a non-investigated separate rate company, Bestpak, by averaging the cooperating respondent's zero margin with the non-cooperating respondent's adverse-inference tariff. *Id*. at 1375. The Federal Circuit remanded because the record contained no information tying this rate to "Bestpak's commercial activity." *Id*. at 1380. Assigning Bestpak half of the adverse-inference rate "with no other information [was] unjustifiably high and may amount to being punitive, which is not permitted by the statute." *Id*. at 1379.

Here, the Department's only record-based justification for assigning Green Farms a margin of $1.94/kg—half the adverse-inference rate—is its similarity to the company's cash deposit tariff during the period of review. *See* Appx1070. But as Green Farms argues, its cash deposit rate "is irrelevant," ECF 40, at 33, because "[t]he very point of the . . . review process (and separate rate application) is to afford [the company] the opportunity to update this cash deposit rate with newer and updated data . . . . Otherwise there would be no point in participating in [the] review." *Id*. The court agrees that Commerce's use of the cash deposit rate to justify Green Farms's margin is "wholly

circular and arbitrary." *Id*. As in *Bestpak*, "a review of the administrative record reveals a lack of substantial evidence showing that" Green Farms's tariff "reflects economic reality." 716 F.3d at 1378.

* * *

The court grants Green Farms's motion for judgment on the agency record. On remand, Commerce must reconsider East Sea's eligibility for a separate rate. Insofar as the Department reaffirms that determination, it must then reconsider the calculation of Green Farms's margin.

IV

In Case 22–125, Catfish Farmers challenge Commerce's use of India, rather than Indonesia, as the primary surrogate country to calculate NTSF's rate, and seek that margin's recalculation; they relatedly ask the court to remand Green Farms's margin for reconsideration because it was based in part on NTSF's tariff. *See* ECF 49, at 10–36.[8]

Catfish Farmers observe that a case from the 16th administrative review involves "a substantively identical challenge to the agency's economic comparability analysis." ECF 49, at 17. They are correct. Commerce's discussion of India versus Indonesia here repeats its analysis in that case[9] and another involving the 15th review,[10] and it is deficient for the same reason as in those cases—the Department's misapplication of the statutory standard.

Despite having invited interested parties "to propose for consideration other countries [not on its 'surrogate country list'] that are at a level of economic development *comparable to* Vietnam," Appx7798 (emphasis added), Commerce asserted that it need not consider whether the Indonesian data are superior because "Indonesia is not at the *same level of economic development* as Vietnam," Appx1077 (emphasis added). But the Department never considered whether Indonesia is at a *comparable level*, as Catfish Farmers contend. That omission invalidates the analysis because, as the court has explained, Commerce may not ignore Catfish Farmers' evidence and argument.

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[8] Catfish Farmers' complaint asserts certain other claims in Counts I, II, III, and V, but their motion fails to address them. The government invokes waiver, *see* ECF 54, at 3 n.2, which Catfish Farmers do not dispute. The court therefore sustains the aspects of Commerce's decision challenged in those counts.

[9] *See Catfish Farmers of Am. v. United States*, Ct. No. 21–00380, Slip Op. 23–97, 2023 WL 4560815 (CIT July 7,2023).

[10] *See Catfish Farmers of Am. v. United States*, Ct. No. 20–00105, Slip Op. 24–23, 2024 WL 775181 (CIT Feb. 26, 2024).

See NTSF, Slip Op. 22–38, at 39–40, 2022 WL 1375140, at *13 (explaining that the finding that India is economically comparable to Vietnam "is irrelevant to whether, as Catfish Farmers argued before the Department, Indonesia is *also* economically comparable") (emphasis in original).

As the court has now twice before explained, the Department's discretion does not permit it to disregard the statutory "comparable level of economic development" standard. *See* Slip Op. 23–97, at 16–18, 2023 WL 4560815, at *6; Slip Op. 24–23, at 5–6, 2024 WL 775181, at *2 (noting that because the statute requires the use of "comparable" countries, "[a] more demanding rule that excludes [them] is therefore not in accordance with law"); *see also* 19 U.S.C. § 1677b(c)(4)(A) (requiring the use of price or cost data from "one or more market economy countries that are . . . at a level of economic development *comparable* to that of the nonmarket economy country") (emphasis added). Because Catfish Farmers argue that Indonesia is economically comparable to Vietnam, on remand Commerce must either explain why it disagrees[11] or else compare the two countries' data to assess which set is superior. Insofar as NTSF's and (by extension) Green Farms's rates are based on Indian data, Commerce must recalculate them if it selects a different primary surrogate country.[12]

* * *

The court grants Catfish Farmers' motion for judgment on the agency record and remands for Commerce to examine whether Indonesia is at a level of economic development comparable to Vietnam and, if so, to analyze whether India or Indonesia offers superior surrogate data. The court also directs the Department to reconsider NTSF's tariff because it is based on Indian data. If that reconsideration results in a change to that company's margin, Commerce must then reconsider Green Farms's rate.

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[11] The government argues, "Commerce reasonably determined that the record of this review did not demonstrate that Indonesia was at a level of economic development comparable to Vietnam, regardless of surrogate country decisions in past segments of this order." ECF 54, at 30. That statement mischaracterizes what the Department did. Commerce made no finding about Indonesia's economic comparability to Vietnam—instead, the agency simply claimed that because the former country is not on the "surrogate country list," it is not at the *same* level, without reference to whether it might still be *comparable.* Appx1077; *cf.* Slip Op. 24–23, at 5, 2024 WL 775181, at *2 (noting that "comparable" is "broader" than "same" because "it includes the merely similar as well as the identical").

[12] While Catfish Farmers raise other challenges to specific aspects of the Indian data Commerce used, it is unnecessary to address them in view of the court's direction that the Department reconsider its surrogate country selection.

Dated: April 17, 2024
New York, NY

/s/ M. Miller Baker
M. MILLER BAKER, JUDGE

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