Index

Customs Bulletin and Decisions
Vol. 54, No. 35, September 9, 2020

U.S. Customs and Border Protection

General Notices

U.S. Court of International Trade
Slip Opinions

GPO U.S. G.P.O.: 2020—411-528/80150

U.S. Court of International Trade

Slip Op. 20–118

VENUS WIRE INDUSTRIES PVT. LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, and CARPENTER TECHNOLOGY CORPORATION, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 18–00113
PUBLIC VERSION

[Remanding the U.S. Department of Commerce's final results in the changed circumstances review of the antidumping duty order on stainless steel bar from India, as amended by the results of redetermination pursuant to court remand.]

Dated: August 14, 2020

Eric C. Emerson and *St. Lutheran M. Tillman*, Steptoe & Johnson LLP, of Washington, DC, for Plaintiffs.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara Hogan*, Assistant Director. Of counsel on the brief was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Grace W. Kim and *Laurence J. Lasoff*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") redetermination upon court-ordered remand. *See* Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 61–1. Plaintiffs, Venus Wire Industries Pvt. Ltd. and its affiliates Precision Metals, Sieves Manufacturers (India) Pvt. Ltd., and Hindustan Inox Ltd. (collectively, "Venus"), commenced this action challenging Commerce's final results in the changed circumstances review of the antidumping duty order on stainless steel bar from India. *See* Compl., ECF No. 9; *Stainless Steel Bar From India*, 83 Fed. Reg. 17,529 (Dep't Commerce Apr. 20, 2018) (final results of changed circumstances review and reinstatement of certain companies in the antidumping duty order) ("*Final Results*"), ECF No. 20–5, and accompanying Issues and Deci-

sion Mem., A-533–810 (Apr. 16, 2018) ("I&D Mem."), ECF No. 20–6.[1] Venus, an exporter of subject merchandise, contested Commerce's determinations (1) that Venus is not the producer of subject merchandise made from inputs that are covered by the scope of the underlying antidumping duty order; and (2) to use total facts otherwise available with an adverse inference (referred to as "total adverse facts available" or "total AFA") to determine Venus's rate. [Venus's] Mem. of P&A in Supp. of their Mot. For J. on the Agency R. ("Pls.' Mem."), ECF No. 33. In a previous opinion, the court remanded Commerce's determination that Venus is not the producer of subject merchandise manufactured from in-scope inputs and deferred Venus's challenge to Commerce's use of total AFA; familiarity with that opinion is presumed. *See generally Venus Wire Indus. Pvt. Ltd. v. United States* ("*Venus I*"), 43 CIT ___, 424 F. Supp. 3d 1369 (2019).

Commerce has now issued a remand determination in which it provides additional explanation in support of its conclusion that Venus is not the producer of certain subject merchandise and made no changes to the *Final Results*. Remand Results at 3–11, 14–20. Venus opposes Commerce's Remand Results. *See* Pls.' Comments on the Remand Redetermination ("Pls.' Opp'n Cmts."), ECF No. 64. Defendant United States ("the Government") and Defendant-Intervenors[2] support Commerce's Remand Results. *See* Def.'s Resp. to Pls.' Comments on the Remand Redetermination ("Def.'s Reply Cmts."), ECF No. 65; Def.-Ints.' Reply to Pls.' Comments on the Remand Redetermination ("Def.-Ints.' Reply Cmts."), ECF No. 66.

For the reasons discussed herein, the court remands Commerce's *Final Results*, as amended by the Remand Results, for reconsideration of the agency's determination to use total AFA consistent with this Opinion.

---

[1] The administrative record associated with the *Final Results* is divided into a Public Administrative Record ("PR"), ECF No. 20–2, and a Confidential Administrative Record ("CR"), ECF Nos. 20–3, 20–4. The administrative record for the Remand Results is likewise divided. *See* Public Remand R., ECF No. 62–2; Confidential Remand R., ECF No, 62–3. Parties submitted joint appendices containing record documents cited in their Rule 56.2 briefs. *See* Public J.A. ("PJA"), ECF No. 50; Confidential J.A. ("CJA"), ECF No. 46; Confidential Joint Submission of R. Documents ("Suppl. CJA"), ECF No. 53. Because parties did not cite to additional record documents in their respective comments on the Remand Results, there is no joint appendix on file with respect to the Remand Results. The court references the confidential version of the relevant record documents, unless otherwise specified.

[2] Defendant-Intervenors consist of Carpenter Technology Corporation; Crucible Industries LLC; Electralloy, a Division of G.O. Carlson, Inc.; North American Stainless; Outokumpu Stainless Bar, LLC; Universal Stainless & Alloy Products, Inc.; and Valbruna Slater Stainless, Inc. (collectively, "Defendant-Intervenors" or, when in reference to the underlying administrative proceeding, "Petitioners").

BACKGROUND

I. Prior Proceedings[3]

Commerce published the antidumping duty order on stainless steel ("SS") bar ("SSB" or "SS bar") from India on February 21, 1995. *See Stainless Steel Bar from Brazil, India and Japan*, 60 Fed. Reg. 9,661 (Dep't Commerce Feb. 21, 1995) (antidumping duty orders) ("*SS Bar Order*").[4] On September 13, 2011, Commerce conditionally revoked the *SS Bar Order* with respect to subject merchandise produced or exported by Venus. *See Stainless Steel Bar from India*, 76 Fed. Reg. 56,401, 56,402–03 (Dep't Commerce Sept. 13, 2011) (final results of the antidumping duty admin. review, and revocation of the order, in part) ("*Revocation Finding*").[5] Commerce subsequently initiated this "changed circumstances" review of Venus on December 16, 2016, in response to Petitioners' allegations that the company "had resumed selling SS bar in the United States at less than fair value." *Venus I*, 424 F. Supp. 3d at 1372.

In the instant changed circumstances review, Commerce "requested Venus to describe the materials used in the production of subject merchandise." *Id*. Venus reported using SS wire rod or SS black bar to produce the subject merchandise. *Id.* Elsewhere in its questionnaire responses, Venus referred to its input of SS black bar variously as hot rolled SS rounds, SS rounds, straight rounds, or hot rolled bar. *Id.* In response to Commerce's third supplemental questionnaire,

---

[3] While familiarity with *Venus I* is presumed, the court summarizes the background relevant to the court's disposition of the issues considered herein.

[4] The merchandise covered by the scope of the *SS Bar Order* consists of

> articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons or other convex polygons. SSB includes cold-finished SSBs that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

SS Bar Order, 60 Fed. Reg. at 9,661.

[5] Commerce's authority to revoke an order is grounded in 19 U.S.C. § 1675. By its terms, Commerce "may revoke, in whole or in part, . . . an antidumping duty order" upon completion of a periodic or changed circumstances review. 19 U.S.C. § 1675(d)(1). Pursuant to the regulation in effect at the time of revocation, Commerce could revoke an order in part when it finds that (A) an exporter or producer has "sold the merchandise at not less than normal value for a period of at least three consecutive years"; (B) the exporter or producer has agreed in writing to immediate reinstatement of the order if Commerce determines that, subsequent to revocation, the exporter or producer sells subject merchandise at less than fair value; and (C) continued application of the order is unnecessary to offset dumping. 19 C.F.R. § 351.222(b)(2)(i) (2011). Commerce determined that Venus met each of these requirements. *Revocation Finding*, 76 Fed. Reg. at 56,403.

Venus acknowledged that the input referred to as "SS rounds" is covered by the scope of the *SS Bar Order*. *Id.*

Following issuance of the preliminary determination in which Commerce proposed to reinstate Venus in the *SS Bar Order* and found that Venus's unaffiliated suppliers of SS rounds were the producers of SS bar made using SS rounds, Commerce requested Venus to obtain cost information from those suppliers. *See id*. at 1373; Decision Mem. for the Prelim. Results of the Antidumping Duty Changed Circumstances Review of Stainless Steel Bar from India (Oct. 12, 2017) ("Prelim. Mem.") at 1, 5, PR 377, CJA Tab 19. In response, Venus reported its "significant efforts to obtain the cost of the stainless steel rounds purchased from unaffiliated suppliers during the [period of review]." Req. for Extension to 4th Suppl. Resp. (Nov. 14, 2017) ("Venus 4th Suppl. DQR") at 1, CR 318–19, PR 398, CJA Tab 24. Venus personnel visited several suppliers and sent its suppliers emails "cautioning them of cessation of future business" if they refused to provide their cost information. *Id.* at 3; *see also id.* at Ex. 1 (documenting Venus's efforts).[6] "Despite these efforts, only one of Venus's suppliers submitted its cost information to Commerce." *Venus I*, 424 F. Supp. 3d at 1373; *see also* Venus 4th Suppl. DQR at 1–2.

For the *Final Results*, Commerce concluded that Venus was not the producer of subject merchandise manufactured from SS rounds;[7] reinstated Venus in the *SS Bar Order*; and assigned Venus a weighted-average dumping margin of 30.92 percent based on the use of total AFA. 83 Fed. Reg. at 17,530; I&D Mem. at 11–17; Final Analysis Mem. at 1–3.

In making its determination, Commerce applied a test for identifying the producer of the subject merchandise that it first used in its investigation of narrow woven ribbon with woven selvedge from Taiwan. I&D Mem. at 11 & n.35 (citing *Narrow Woven Ribbons with Woven Selvedge from Taiwan*, 75 Fed. Reg. 41,804 (Dep't Commerce July 19, 2010) (notice of final determination of sales at less than fair value) ("*NWR*"), and accompanying Issues and Decision Mem., A-583–844 (undated) ("NWR Decision Mem.") at 48–49, available at https://enforcement.trade.gov/frn/summary/taiwan/2010–17538–1.pdf (last visited August 14, 2020)). Pursuant to *NWR*, Commerce considers "whether raw materials were added, and whether further

[6] Specifically, Venus informed its suppliers that refusal to cooperate would result in Venus "[[

]]." Venus 4th Suppl. DQR, Ex. 1 at ECF p. 532; *see also id.*, Ex. 1 at ECF p. 571 (further cautioning "the cessation of future business"). Venus also offered to cover the cost of preparing and filing the cost information. *Id.*, Ex. 1 at ECF pp. 534, 552.

[7] Commerce found that Venus was the producer of subject merchandise manufactured from SS wire rod. Final Results Analysis Mem. for [Venus]. (Apr. 16, 2018) ("Final Analysis Mem.") at 4, CR 327, PR 424, CJA Tab 32.

processing was performed that changed the physical nature and characteristics of the product." NWR Decision Mem. at 48. Here, Commerce concluded that "because Venus's processing 'does not affect three of the six essential physical characteristics' of the subject merchandise . . . and does not require the addition of new materials," Venus was not "the producer of the subject merchandise." *Venus I*, 424 F. Supp. 3d at 1375 (quoting I&D Mem. at 12–13).[8] Commerce rejected Venus's argument that the agency should instead apply its substantial transformation test,[9] explaining that "substantial transformation is not the proper analysis [when] both products at issue [i.e., input and output] fall within the same class or kind of merchandise." I&D Mem. at 13.

Regarding Commerce's use of total AFA, the agency explained that "necessary information" in the form of cost data from all except one of Venus's unaffiliated suppliers was missing from the record. *Id.* at 16. Commerce further determined that "[Venus] and its unaffiliated suppliers [] withheld information that [the agency] requested . . . , failed to provide the information [] requested by the deadlines for submission of the information or in the form and manner [] requested . . . , and have significantly impeded this proceeding." *Id*. Commerce also found that Venus "significantly impeded this proceeding" by failing "to clearly identify that it purchases SS Bar as an input until directly asked in the third supplemental questionnaire." *Id*. For those reasons, Commerce determined that it was necessary to select from among the facts otherwise available. *Id.* Commerce further determined that an adverse inference was appropriate when selecting from among the facts available. *Id.* at 16–17.

Commerce reasoned that Venus "failed to act to the best of its ability by failing to clearly identify that it purchase[d] SS Bar as an input until directly asked in the third supplemental questionnaire. *Id.* at 16. Commerce further found that Venus "did not act to the best of its ability in attempting to obtain its unaffiliated suppliers' cost data," *id.*, because "it could have done more to induce its suppliers to cooperate," Final Analysis Mem. at 3. Commerce explained that Venus "is an experienced company [that] is seeking to maintain its exclusion from the order" and, thus, "it is reasonable to expect that,

[8] The six essential physical characteristics of SS bar are: grade, remelting, shape, type of finish, type of final finishing operation, and size. I&D Mem. at 12. Of those, Venus's processing may affect finish, type of final finishing operation, and size. *Id.*

[9] The factors Commerce considers in its substantial transformation analysis generally consist of "(1) the class or kind of merchandise; (2) the nature and sophistication of processing in the country of exportation; (3) the product properties, essential component of the merchandise, and intended end-use; (4) the cost of production/value added; and (5) level of investment." *Venus I*, 424 F. Supp. 3d at 1378 n.11 (quoting *Bell Supply Co. v. United States*, 888 F.3d 1222, 1228–29 (Fed. Cir. 2018)).

before doing business with these suppliers, [Venus] would ensure that it would have their full cooperation in any antidumping proceeding with Commerce." *Id*. Commerce faulted Venus for its delay in specifying potential consequences for noncooperation to its suppliers and for the language Venus used to warn its suppliers about the possibility of those consequences. *Id.*[10] Commerce opined that its findings were consistent with the U.S. Court of Appeals for the Federal Circuit's ("Federal Circuit") opinion in *Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1233 (Fed. Cir. 2014). I&D Mem. at 16 & n.65 (citation omitted); Final Analysis Mem. at 3 & n.17 (citation omitted). Commerce selected the rate of 30.92 percent, calculated in a prior administrative review of the *SS Bar Order,* to use as Venus's margin. I&D Mem. at 17 & n.66 (citation omitted).[11]

Following oral argument,[12] the court concluded that Commerce had failed to adequately explain why its "substantial transformation test is irrelevant under the circumstances presented by this case." *Venus I*, 424 F. Supp. 3d at 1380. The court noted that Commerce has used its substantial transformation test—and, indeed, found that a substantial transformation has occurred—when there was no change in the class or kind of merchandise with respect to the input and output products. *Id.* at 1378 (citing, *inter alia*, Issues and Decision Mem. for the Final Determination in the Antidumping Duty Investigation of [D]iamond [S]awblades and Parts Thereof from the People's Republic of China, A-570–900 (May 22, 2006) ("*DSBs From China*") at 17–19, *available at* https://enforcement.trade.gov/frn/summary/prc/E6–7763–1.pdf (last visited August 14, 2020) (substantial transformation occurred when diamond cores were attached to diamond segments to produce finished diamond sawblades notwithstanding that the upstream and downstream products were within the same class or kind of merchandise); *3.5" Microdisks and Coated Media Thereof From Japan*, 54 Fed. Reg. 6,433, 6,434–35 (Dep't Commerce Feb. 10,

---

[10] Specifically, Commerce faulted Venus for indicating that any [[ ]]. Final Analysis Mem. at 3. Because Venus's warnings only "[[ ]]," Commerce found that the warnings "did not serve as a strong inducement to cooperate." *Id.*

[11] Commerce explained that subject merchandise that Venus processed using SS bar purchased from unaffiliated suppliers accounted for [[ ]] percent of its U.S. sales. Final Analysis Mem. at 3. In contrast, the remaining [[ ]] percent of U.S. sales consisted of SS bar Venus produced from SS wire rod. *Id.* at 3–4. Commerce rejected Venus's suggestion that the agency should calculate a margin for the [[ ]] of sales for which Venus was the producer and average that margin with the AFA rate used for sales in which Venus was not the producer. *Id*. Commerce considered it "unreasonable to attempt a 'plug' constituting such a [[ ]] of [Venus's] U.S. sales." *Id.* at 4.

[12] The court held oral argument on September 10, 2019. Docket Entry, ECF No. 56.

1989) (final determination of sales at less than fair value) ("*Microdisks From Japan*") (processing performed in Canada on coated media from Japan did not alter the class or kind of merchandise but was sufficiently significant to render Canada as the country of origin for antidumping purposes)). The court explained that the substantial transformation test "appears at least facially relevant to Commerce's identification of the producer of the subject merchandise" because "[r]egardless of whether the manufacturing or processing steps occur in country B or are performed by company B, Commerce's inquiry is directed at the circumstances under which an input becomes an output and whether that output should be attributed to country B or company B." *Id.* at 1379.

The court further faulted Commerce for summarily dismissing the relevance of several scope rulings in which the agency determined that the processing of SS wire rod into SS bar constituted a substantial transformation, given the "parallels" between that process and the processing of SS rounds into SS bar. *Id.* at 1380; *see also* Scope Rulings, Suppl. CJA at ECF pp. 7–89.[13] The court declined to address Venus's challenge to the application of the *NWR* test and Commerce's use of total AFA to determine Venus's rate pending Commerce's redetermination. *Venus I*, 424 F. Supp. 3d at 1371, 1376.

II. Commerce's Determination on Remand

On remand, Commerce clarified the tests it applies in different situations. Commerce explained that it uses its substantial transformation test only when country of origin is at issue (including anticircumvention proceedings pursuant to 19 U.S.C. § 1677j in which country of origin is also at issue). Remand Results at 3–7, 14–15. In contrast, Commerce uses its *NWR* test in order to determine "the producer of subject merchandise that is *made in the subject country* from an input product that is the *same class or kind* of product as the imported article." *Id.* at 3 (emphasis added); *see also id.* at 15 (ex-

[13] The scope determinations submitted in the supplemental confidential joint appendix include, among others, (1) Final Recommendation Mem.—Scope Ruling Req. by Ishar Bright Steel Ltd. on Whether Stainless Steel Bar is Subject to the Scope of the Antidumping and Countervailing Duty Orders on Stainless Steel Wire Rod from Subject Countries (Feb. 7, 2005) ("UAE SSWR Scope Ruling"); (2) Scope Req. from Rodacciai S.p.A.—Final Scope Ruling Concerning the Stainless Steel Wire Rod from Spain Order [and] Initiation and Prelim. Scope Ruling Concerning the Stainless Steel Bar from Spain Order (May 12, 2015) ("Spain Final SSWR Scope Ruling"); and (3) Scope Req. from Rodacciai S.p.A.—Final Scope Ruling Concerning the Stainless Steel Bar from Spain Order (July 10, 2015) ("Spain Final SSB Scope Ruling"). Each of those rulings address the conversion of SS wire rod into SS bar for purposes of determining country of origin and the applicability of orders covering SS wire rod or SS bar. *See* UAE SSWR Scope Ruling at 1; Spain Final SSWR Scope Ruling at 1; Spain Final SSB Scope Ruling at 1. For ease of reference, the court will refer to these rulings collectively as the "SSWR/SSB Scope Rulings."

plaining that the *NWR* test applies when the input and output products are the same class or kind of merchandise and country of origin is not at issue). When subject merchandise is manufactured in the subject country from an input product that is *not* the same class or kind as the output product, Commerce stated unequivocally that "the producer is the entity that manufactured the output product." *Id.* at 11.

Commerce further explained that the respective criteria encompassed by the substantial transformation and *NWR* tests "are specific to the two different types of questions that they address." *Id.* at 3. While a change in the class or kind of merchandise is not necessarily dispositive in a substantial transformation analysis, the agency explained, "it is an important factor and, in practice, has largely informed the ultimate outcome except in unusual situations." *Id.* at 7. For that reason, Commerce stated, the agency's determinations in the SSWR/SSB Scope Rulings were largely informed by changes in the class or kind of merchandise. *Id.* at 5–6, 17–18.[14] Thus, having explained "why the substantial transformation test is irrelevant under the circumstances presented by this case," Commerce "made no changes to the *Final Results*." *Id.* at 20.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),[15] and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017).

The two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), guides judicial review of Commerce's interpretation and implementation of the antidumping and countervailing duty statutes. *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1344 (Fed. Cir. 2017); *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d

[14] Commerce explained that in "country of origin determinations in which both the input and output products are within the same class or kind of merchandise," it almost always finds that the country of origin of the output product is "the country in which the input product was produced." Remand Results at 7. According to Commerce, the agency's respective determinations in *DSBs From China* and *Microdisks From Japan* are two exceptions to this trend. *Id.* at 7 & n.25, 9–10.

[15] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the U.S. Code are to the 2018 edition, unless otherwise stated.

1372, 1379–82 (Fed. Cir. 2001) (affording *Chevron* deference to agency methodology in furtherance of its statutory interpretations). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Apex Frozen Foods*, 862 F.3d at 1344 (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, "that is the end of the matter," and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron*, 467 U.S. at 842–43). However, "if the statute is silent or ambiguous," the court must determine whether the agency's action "is based on a permissible construction of the statute." *Id.* (quoting *Chevron*, 467 U.S. at 843).

DISCUSSION

I. Commerce's Determination that Venus is Not the Producer of Subject Merchandise Made from SS Bar

A. Parties' Contentions

Venus contends that, in the Remand Results, Commerce again relied on the absence of a class or kind demarcation to reject the use of the substantial transformation test, Pls.' Opp'n Cmts. at 3, 6, 7, and failed to address the instances in which Commerce "used a substantial transformation test" when "the input and output products are within the same class or kind [of merchandise]," *id.* at 4. Venus further rejects Commerce's characterization of the basis for its decisions in the SSWR/SSB Scope Rulings. *Id.* at 8–10.[16]

The Government contends that Commerce complied with the court's order to explain why it utilized the *NWR* test instead of the

[16] Venus argues that Commerce's assertion that it uses the substantial transformation test when country of origin is at issue constitutes "impermissible *post hoc* rationalization" because "Commerce did not identify where in its Final Results it had relied upon a country of origin distinction to reject the substantial transformation test." Pls.' Opp'n Cmts. at 3–4. According to Venus, the court previously "concluded that Commerce's reliance on the 'country of origin' explanation constituted an in impermissible *post hoc* rationalization." *Id.* at 3 & n.9 (citing *Venus I*, 424 F. Supp. 3d at 1379 n.12). Venus misconstrues the court's opinion. For its *Final Results*, Commerce relied on the absence of class or kind distinctions to reject the substantial test, I&D Mem. at 13, whereas the Government (i.e., the U.S. Department of Justice, which represents Commerce in this case) took the position *in litigation* that the substantial transformation test did not apply when country of origin was not at issue, Confidential Def.'s Resp. to Pls.' Mots. For J. Upon the Agency R. ("Def.'s Resp.") at 17, ECF No. 39. Thus, the court characterized the Government's—not Commerce's—argument as *post hoc*. *Venus I*, 424 F. Supp. 3d at 1379 n.12 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962)). In the Remand Results, Commerce explained that its substantial transformation test *is* limited to country of origin determinations. Remand Results at 3–7, 14–15. Accordingly, Commerce's explanation is not a *post hoc* rationalization. *See, e.g.*, *Fengchi Imp. & Exp. Co., Ltd. of Haicheng City v. United States*, 39 CIT ___, ___, 98 F. Supp. 3d 1309, 1315 (2015) ("The remand proceeding is an administrative proceeding, meaning that Commerce's comments are not the post hoc rationalization of its counsel.").

substantial transformation test. Def.'s Reply Cmts. at 6–8; *see also id.* at 9–11 (contending further that Commerce adequately addressed agency rulings applying the substantial transformation test when there was no change in the class or kind of merchandise because, in those rulings, country of origin was at issue). The Government also contends that Venus failed to support its contention that Commerce's analysis in the SSWR/SSB Scope Rulings turned on the degree of processing and not the change in class or kind of merchandise. *Id.* at 8–9; *see also* Def.-Ints.' Reply Cmts. at 2–8 (advancing similar arguments).

B. Commerce Permissibly Used the *NWR* Test to Determine the Producer of the Subject Merchandise

Commerce's task on remand was to further "address[] why the substantial transformation test is irrelevant under the circumstances presented by this case." *Venus I*, 424 F. Supp. 3d at 1380. Commerce responded by clarifying when certain analytical tests are utilized. *See* Remand Results at 3–11. Commerce explained that its "practice" is to use the substantial transformation test "only" when country of origin is at issue. *Id.* at 14. Indeed, Commerce has used a substantial transformation analysis in the context of country of origin determinations since at least 1949, *see Foreign Trade Statistics: Country of Origin for Statistical Purposes*, 14 Fed. Reg. 6,446 (Dep't Commerce Oct. 21, 1949) (proposed rules), and in antidumping proceedings specifically since at least 1980, *see Calcium Pantothenate From Japan*, 45 Fed. Reg. 59,933, 59,934 (Dep't Commerce Sept. 11, 1980) (results of admin. review of antidumping finding) (finding merchandise transshipped through an intermediate country subject to antidumping duties "unless the merchandise has undergone substantial transformation or reprocessing which results in a product with a new character or use"). In this context, Commerce uses its substantial transformation analysis to determine whether a product originates in a country covered by an antidumping duty order and is, thus, within the "class or kind of foreign merchandise" subject to antidumping duties pursuant to 19 U.S.C. § 1673(1). *E.I. Du Pont de Nemours & Co. v. United States*, 22 CIT 370, 373, 8 F. Supp. 2d 854, 858 (1998). Venus has not pointed to any Commerce determination where the agency has used its substantial transformation analysis for any other purpose.

In contrast, the *NWR* test may guide Commerce's identification of "the producer of the subject merchandise when in-scope inputs are used to manufacture subject merchandise [in the subject country] for purposes of 19 U.S.C §§ 1677b and 1677(28)." *Venus I*, 424 F. Supp. 3d

at 1377.[17] Venus's insistence that Commerce declined to use the substantial transformation test because its input and output products (i.e., SS rounds and SS bar) are in the same class or kind of merchandise is incorrect. *See, e.g.*, Pls.' Opp'n Cmts. at 3. Rather, because country of origin was not at issue, the absence of a class or kind demarcation led Commerce to use the *NWR* test to identify the producer of the subject merchandise; but when such demarcation is present, Commerce would conclude that the producer of the output is the producer for the relevant statutory purpose. Remand Results at 15, 16 (referring to a change in class or kind of merchandise under those circumstances as "dispositive"); *cf.* Final Analysis Mem. at 4 (summarily concluding that Venus is the producer of SS bar made from SS wire rod).

It is well-settled that the court may not "substitute its judgment for that of the agency regarding which methodology is best suited to [the task at hand]," absent "demonstrated unreasonableness of the agency's chosen methodology." *Gold East Paper (Jiangsu) Co., Ltd. v. United States*, 35 CIT ___, ___, 121 F. Supp. 3d 1304, 1312 (2015). This is true even if "the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951); *see also Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992) (in matters of statutory interpretation, the court's review is limited to determining whether the agency's construction is permissible; "[w]hether [the court] would come to the same conclusion, were [it] to analyze the statute anew, is not the issue").

To that end, Venus does not argue that the *NWR* test is inherently unreasonable; rather, Venus suggests that it produced an unreasonable result that is inconsistent with Commerce's determinations in

---

[17] In *Venus I*, the court explained the relevance of those provisions to Commerce's margin calculations:

> An antidumping duty is the amount by which the normal value of a product—generally, its price in the exporting country—exceeds the export price, as adjusted. 19 U.S.C. § 1673; *see also id.* § 1677b(a)(1)(B)(i) (defining normal value). In certain situations, Commerce calculates normal value using the constructed value of the merchandise. *Id.* § 1677b(a)(4)
>
> . . . . .
>
> To ascertain constructed value, Commerce typically requires information from both the producer and the exporter of the subject merchandise. *See id.* § 1677(28); 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, 4172 ("SAA") ("[When] different firms perform the production and selling functions, Commerce may include the costs, expenses, and profits of each firm in calculating cost of production and constructed value."). Consequently, Commerce must identify the producer of the subject merchandise in order to obtain the information necessary to calculate the cost of production and constructed value. I&D Mem. at 11.

424 F. Supp. 3d at 1374 (footnote omitted).

the SSWR/SSB Scope Rulings. *See* Pls.' Opp'n Cmts. at 8–10. According to Venus, Commerce's assertion that the SSWR/SSB Scope Rulings turned on class or kind distinctions represents an effort to avoid engaging in an analysis of whether the conversion of SS rounds into SS bar constitutes a substantial transformation. *Id.* at 8–9.

In the UAE SSWR Scope Ruling, Commerce reasoned that the cold-working process performed on the SS wire rod changed the physical characteristics Commerce "considers in determining a class or kind of merchandise," with the exception of grade. UAE SSWR Scope Ruling at 12; *see also id.* (finding that "[t]he production process . . . transforms the input from one class or kind of merchandise," SS wire rod, "into another," SS bar). Commerce relied on this finding in subsequent scope rulings. *See* Spain Final SSWR Scope Ruling at 23–25; Spain Final SSB Scope Ruling at 24–25. Thus, although Commerce discussed the processing necessary to transform SS wire rod into SS bar, it did so in the context of examining whether the input and output products were distinct articles governed by separate orders. *See* UAE SSWR Scope Ruling at 11–12 (noting that Commerce and the U.S. International Trade Commission "have consistently held" that SS bar and SS wire rod "are separate and distinct products[]" and therefore concluding that the SS wire rod input and SS bar output at issue were "covered by the scope language of separate [antidumping duty] and [countervailing duty] orders"); Spain Final SSB Scope Ruling at 25. After concluding that they were distinct products covered by separate orders, Commerce determined the country of origin of the SS bar based on where the change in class or kind of merchandise occurred. *See* Spain Final SSB Scope Ruling at 25–26 (adhering to prior scope rulings that identified country of origin based on where the conversion of SS wire rod into SS bar occurred).

Thus, notwithstanding certain factual similarities between the conversion of SS wire rod into SS bar and the conversion of SS rounds into SS bar, Commerce's analysis in the SSWR/SSB Scope Rulings is not directly applicable to this case given the physical differences between the starting inputs and the inclusion of SS rounds in the same class or kind of merchandise as SS bar. *See* Remand Results at 6 & n.20 (explaining that SS wire rod is coiled whereas SS bar (which includes SS rounds) is formed into straight lengths) (citing UAE SSWR Scope Ruling at 13). In the SSWR/SSB Scope Rulings, Commerce directed its analysis to whether there was a change in the class or kind of merchandise because that is a factor in the substantial transformation test and the input in question there was a distinct

class or kind of merchandise from the output. *See supra* note 9. Even if Commerce applied its substantial transformation test here, it would not find such a change in the class or kind of merchandise and would need to consider the remaining factors. *See, e.g.*, Remand Results at 14. The court cannot—and need not—speculate as to the results of that analysis. In sum, Commerce's determination is not undermined by the SSWR/SSB Scope Rulings.

The question presented in this case is whether—pursuant to *Chevron* prong two—Commerce's use of the *NWR* test to identify the producer of the subject merchandise was a permissible method of carrying out its statutory obligations. *See Apex Frozen Foods*, 862 F.3d at 1344; *Pesquera Mares Australes*, 266 F.3d at 1379–82. As part of that inquiry, the court directed Commerce to address "why the substantial transformation test is irrelevant under the circumstances presented by this case." *Venus I*, 424 F. Supp. 3d at 1380. While the court discerns Commerce's rationale for selecting the *NWR* test in this case, Commerce has not fully answered the question such that it may disregard the substantial transformation test in *all* instances when country of origin is not at issue (though different circumstances may require Commerce to do so). Whether the *NWR* test or substantial transformation test (or some other analytical framework) is best suited to the task at hand may depend, at least in part, on the breadth of the scope of the subject merchandise at issue.[18]

Although Commerce seeks to distinguish other proceedings, such as *DSBs From China*, on the basis that country of origin was at issue, an equally pertinent distinction may be found in the language of the underlying scope. In that proceeding, the scope of the antidumping duty order covered, *inter alia*, "all finished circular sawblades . . . *and parts thereof*." *Diamond Sawblades and Parts Thereof From the People's Republic of China and the Republic of Korea*, 74 Fed. Reg. 57,145, 57,145 (Dep't Commerce Nov. 4, 2009) (antidumping duty

[18] While Commerce relies on class or kind demarcations (or lack thereof) to guide its analytical approach when country of origin is not at issue, Remand Results at 14–15, such demarcations are not carved in stone. Class or kind distinctions derive from Commerce's scope language, which, in turn, is derived at least in part from the underlying petition and the wishes of the petitioner(s). *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002) (explaining that "[t]he purpose of the petition is to propose an investigation" into a particular product, and "[a] purpose of the investigation is to determine what merchandise should be included in the final order," i.e., within the scope of that order). A product that is outside of a particular scope may nevertheless bear substantial similarities to a product that is in-scope. Indeed, a product regarded as distinct and, therefore, excluded from one or more investigations may be included within the scope of a subsequent investigation. *See Hitachi Metals, Ltd. v. United States*, 42 CIT ___, ___, 350 F. Supp. 3d 1325, 1334–39 (2018), *aff'd*, 949 F.3d 710 (Fed. Cir. 2020). Thus, if Commerce wishes to rely on the significance of class or kind distinctions, it must ensure a level of discipline in establishing the parameters of any given class or kind.

orders) (emphasis added); *see also Microdisks From Japan*, 54 Fed. Reg. at 6,434 (in which the scope of the investigation covered "3.5" microdisks and coated media thereof"). While it is beyond the purview of this litigation, Commerce may need to do more to justify its use of the *NWR* test over the substantial transformation test to ascertain the producer of the finished product when parts are sourced from and assembled within the subject country in a case in which the scope encompasses a finished product "and parts thereof." In contrast, here, where the scope is limited to the finished product, Commerce reasonably relied on the *NWR* test. In sum, the court will sustain Commerce's decision, as articulated in the Remand Results, to use the *NWR* test in this case. The court now turns to Venus's remaining challenges to the *Final Results*.

II. Venus's Challenges to Commerce's Application of the *NWR* Test

A. Parties' Contentions

Venus contends that Commerce's *NWR* analysis ignored that (1) "the physical and mechanical properties of a metal product can be drastically altered without adding new materials, such as through reheating and straightening," and (2) Venus's production processes consume other inputs, such as "power, fuel, labor, lubricants and grinding wheels." Pls.' Mem. at 14; *see also* Confidential [Venus's] Reply Br. in Supp. of their Rule 56.2 Mot. For J. on the Agency R. ("Pls.' Reply") at 1–2, ECF No. 44. Venus further contends that Commerce failed to address adequately Venus's argument that its processing changed proportionally more product characteristics than occurred in *NWR* because the agency "merely bootstrap[ped] its decision" to the fact that Venus adds no additional materials. Pls.' Mem. at 15.[19]

The Government and Defendant-Intervenors contend that Commerce's determination pursuant to the *NWR* test is supported by substantial evidence. *See* Def.'s Resp. at 15–17; Confidential Def.-Ints.' Resp. in Opp'n to Pls.' Mot. for J. on the Agency R. ("Def.-Ints.' Resp.") at 14–16, ECF No. 42. Defendant-Intervenors further contend that Venus offers no support for its argument that the number of changed characteristics "[is] determinative with respect to further manufacturing." Def.-Ints.' Resp. at 15.

[19] Venus also argues that Commerce's use of the *NWR* test has not risen to the level of agency practice and, thus, Commerce was not bound to use it. Pls.' Mem. at 15. Assuming that is true, the question presented in this case is whether Commerce permissibly relied on the *NWR* test, not whether Commerce had to rely on the *NWR* test, and whether the agency's findings are supported by substantial evidence.

B. Commerce's Findings Pursuant to the *NWR* Test are Supported by Substantial Evidence

In its preliminary decision memorandum, Commerce detailed its findings with respect to the application of the *NWR* test; that is, Commerce considered whether Venus added new materials and the number of essential physical characteristics altered by Venus's processing. Prelim. Mem. at 7. Thereafter, Venus filed a case brief in which it argued, *inter alia*, that Commerce's analysis and findings with respect to the substantial transformation of SS wire rod into SS bar must inform the agency's determination here because its cold working processes are "nearly identical" to those at issue in the Spain Final SSB Scope Ruling. Admin. Case Br. of Venus Wire Industries Pvt. Ltd. (Jan. 9, 2018) ("Venus's Case Br.") at 7–9, CR 324, PR 407, CJA Tab 25; *see also id.* at 8 (summarizing certain changes to the hot rolled input as a result of its cold finishing operation). As discussed, Commerce disagreed with Venus regarding the relevance of the SSWR/SSB Scope Rulings. I&D Mem. at 13–14; Remand Results at 5–7.

Before the court, Venus seeks to reframe its argument as one that challenges the parameters of the *NWR* test. That is, separate and apart from its arguments regarding the applicability of the SSWR/SSB Scope Rulings, Venus now argues that Commerce should have considered changes to "physical and mechanical properties" beyond the physical characteristics Commerce considered "essential." *See* Pls.' Mem. at 14. As noted, Venus did not squarely present this argument to the agency. *See* Venus's Case Br. at 7–9. Venus further acknowledged at oral argument that it failed to urge the agency to account for the consumption of other inputs in its analysis. *See* Oral Arg. at 11:22:30–11:23:40 (reflecting the time stamp from the recording).

"[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). While exhaustion is not jurisdictional, *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1363–64 (Fed. Cir. 2019), the statute "indicates a congressional intent that, absent a strong contrary reason, the [CIT] should insist that parties exhaust their remedies before the pertinent administrative agencies," *id.* at 1362 (quoting *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017)) (alteration original) (emphasis added). The doctrine of administrative exhaustion generally requires a party to present "all arguments" in its administrative case brief before raising

those issues before this court. 19 C.F.R. § 351.309(c)–(d); *see also Dorbest Ltd v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010). This permits the agency to address the issue in the first instance, prior to judicial review. *See Boomerang*, 856 F.3d at 912–13.

Because Venus did not present to Commerce these arguments regarding the relevance of additional metallurgical changes to the SS rounds or the consumption of other inputs for determining whether Venus is the producer, there is no corresponding agency decision for the court to review. Rather, Venus essentially requests the court to reconsider the agency's decision in light of these additional facts and belated arguments, which it cannot do. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015).[20]

Further, while Venus takes issue with Commerce's reliance on the absence of new materials to tip the balance in favor of finding that Venus is not the producer, Pls.' Mem. at 15, this fact, in conjunction with the fact that three out of six essential physical characteristics remained unchanged by Venus's processing, constitutes substantial evidence supporting Commerce's determination, *see* I&D Mem. at 12 & nn.44–45 (citations omitted); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) ("Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'") (quoting *Consol. Edison Co. v. NLRB.*, 305 U.S. 197, 229 (1938)). While Venus may disagree with Commerce's conclusion, "mere disagreement with Commerce's weighing of the evidence[] . . . mistakes the function of the court, which is to determine whether the Remand Results are supported by substantial evidence, . . . not to 'reweigh the evidence or . . . reconsider questions of fact anew.'" *Haixing Jingmei Chemical Products Sales Co. v. United States*, 42 CIT ___, ___, 335 F. Supp. 3d 1330, 1346 (2018) (quoting *Downhole Pipe*, 776 F.3d at 1377) (internal citation omitted). Accordingly, Commerce's determination that Venus is not the producer of the subject merchandise, and corresponding determi-

[20] In its reply, Venus attempts to rebut an argument purportedly made by the Government that an exporter must change a majority of the essential physical characteristics for Commerce to find that the exporter is the producer. *See* Pls.' Reply at 3–4. The Government merely observed, however, that "[b]ecause [Venus's] processing did not add any materials to the purchased input, it did not alter a majority of the essential physical characteristics of the input." Def.'s Resp. at 15. The Government did not apply a bright line rule requiring changes to a majority of the essential physical characteristics for the exporter to be considered the producer pursuant to the *NWR* test—and, more importantly, neither did Commerce. *See* I&D Mem. at 13 ("[O]ur analysis is based on a totality of the circumstances."). Moreover, Venus's arguments that its processing altered a majority of the four essential physical characteristics that are susceptible to change, and that the two essential physical characteristics that cannot change "should be less relevant to the [agency's] analysis," Pls.' Reply at 3, are foreclosed because of Venus's failure to administratively exhaust these arguments before Commerce, 28 U.S.C. § 2637(d); 19 C.F.R. § 351.309(c)–(d).

nation that Venus's unaffiliated suppliers of SS rounds are the producers, is supported by substantial evidence and accords with the law.

III. Commerce's Use of Total AFA

A. Parties' Contentions

Venus contends that Commerce erred in applying total AFA because the company "attempted all reasonable steps to induce its unaffiliated suppliers to provide [Venus] with the requested cost data." Pls.' Mem. at 18. Venus further contends that Commerce improperly applied the *Mueller* court's analysis by failing to make three key findings, that: (1) Venus "had sufficient control over its unaffiliated suppliers such that [Venus] could induce their cooperation," *id.* at 23; (2) Venus's unaffiliated suppliers could "evade a higher [antidumping] margin by using [Venus] as an exporter," *id.* ; or (3) use of total AFA to determine Venus's margin "would directly and adversely affect its non-cooperating unaffiliated suppliers' interests," *id.* at 23–24. In sum, according to Venus, Commerce's determination lacks "any case-specific analysis of the relationships between [Venus] and its unaffiliated suppliers," which relationships are marked "by competition in various markets or constituted a small portion of the suppliers[']sales [such] that [Venus] lacked the leverage needed to induce their cooperation." *Id.* at 24.

With respect to the reporting of its inputs, Venus contends that it used terminology generally accepted in the industry to refer to inputs of SS black bar in its initial questionnaire responses. *Id.* at 25. Consequently, Venus contends that it was not until Commerce's third supplemental questionnaire that the agency requested Venus "to identify whether its inputs were subject merchandise," at which time Venus responded. Pls.' Reply at 15.

The Government and Defendant-Intervenors contend that Venus failed to demonstrate that it lacked leverage over its unaffiliated suppliers. Def.'s Resp. at 25; Def.-Ints.' Resp. at 21. According to the Government, Venus "had a mechanism to induce cooperation" from the suppliers, "namely, the threat of no longer purchasing inputs from those suppliers unless" they provided the requested cost information, Def.'s Resp. at 26, and Commerce reasonably determined that Venus's warnings were insufficient, *id*. at 27; *see also* Def.-Ints.' Resp. at 21–22. Defendant-Intervenors further contend that Commerce properly used total AFA in order to prevent Venus "and its suppliers [from] collud[ing] with each other to evade antidumping duties by selling its goods through an Indian company with no dumping margin." Def.-Ints.' Resp. at 23.

With respect to Venus's reporting of its inputs, Defendant-Intervenors contend that Venus obfuscated its purchase of subject raw materials when it used different terms for the same input and failed to inform Commerce that it purchased subject merchandise from unaffiliated suppliers. *Id*. at 23–24 & n.15 ("[I]t is well established that . . . the burden falls on the interested party to place relevant information within its possession on the record.") (quoting *Yama Ribbons and Bows Co. v. United States*, 36 CIT 1250, 1254, 865 F. Supp. 2d 1294, 1299 (2012)).[21]

B. Legal Framework

When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce," "fails to provide" requested information by the submission deadlines, "significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall ... use the facts otherwise available." 19 U.S.C. § 1677e(a).[22]

Additionally, if Commerce determines that a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent 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 uses total AFA when it must fill gaps in the record not only in reference "to the facts pertaining to specific sales or information," but in reference "to the facts respecting all of [a respondent's] production and sales information that the [agency] concludes is needed for an investigation or review." *Nat'l Nail Corp. v. United States*, 43 CIT ___, ___, 390 F. Supp. 3d 1356, 1357 (2019) (citation omitted). In other words, Commerce generally uses total adverse facts available when "none of the reported data is reliable or usable." *Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citation omitted).

---

[21] Although the Government asserts that Commerce "reasonably" concluded that an adverse inference was merited in relation to Venus's reporting of its inputs, Def.'s Resp. at 19, it does not present arguments supporting its characterization, *id.* at 22–28.

[22] Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d). *See* 19 U.S.C. § 1677e(a). Section 1677m(d) provides the procedures Commerce must follow when a party files a deficient submission and is not at issue here. *See id*. § 1677m(d).

C. Commerce's Decision to Use Total AFA Will be Remanded for the Agency's Reconsideration

As discussed above, when Commerce is missing crucial data (such as the cost of production data at issue here), it turns to its statutory authority to use the "facts otherwise available" or "adverse facts available," as appropriate. 19 U.S.C. § 1677e. "Subsection 1677e(a) . . . may be used whether or not any party has failed to cooperate fully with the agency in its inquiry." *Mueller*, 753 F.3d at 1232. In contrast, subsection 1677e(b) permits Commerce to make 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." *Id.* (quoting *Nippon Steel,* 337 F.3d at 1381). Here, Commerce determined that Venus and certain of its unaffiliated suppliers failed to cooperate to the best of their abilities and used its authority pursuant to subsection 1677e(b) to select an adverse rate. I&D Mem. at 16–17. With respect to Venus, Commerce offered two rationales for using total AFA: Venus's failure to cooperate to the best of its ability in obtaining cost information from its unaffiliated suppliers and Venus's failure to identify its inputs of SS rounds until responding to Commerce's third supplemental questionnaire. *Id.*; Final Analysis Mem. at 3. The court addresses each rationale, in turn.

1. Failure to Obtain Cost Information from Unaffiliated Suppliers

With respect to Venus's failure to obtain cost information from its unaffiliated suppliers, Commerce relied on the Federal Circuit's *Mueller* decision as the basis for its finding. I&D Mem. at 16 & n.65 (citing *Mueller*, 753 F.3d at 1233); Final Analysis Mem. at 3 & n.17 (citing same). *Mueller* concerned a cooperating mandatory respondent, Mueller Comercial de Mexico, S. de R.L. de C.V. ("Mueller"), which exported subject merchandise purchased from two suppliers, Tuberia Nacional, S.A. de C.V. ("TUNA") and Ternium Mexico, S.A. de C.V. ("Ternium"), both of which were also mandatory respondents. 753 F.3d at 1229. To calculate Mueller's cost of production, Commerce requested information from TUNA and Ternium. *Id.* at 1230. While TUNA reported its cost information, Ternium did not. *Id.* Commerce rescinded its review of TUNA owing to the absence of direct shipments and assigned Ternium a dumping margin based on AFA of 48.33 percent due to Ternium's failure to cooperate in the administrative review. *Id.* at 1229. In order to calculate Mueller's margin, Commerce used its authority pursuant to 19 U.S.C. § 1677e(a) to rely on the facts otherwise available. *Id.*; *see also Canadian Solar Int'l Ltd. v. United States* ("*Canadian Solar I*"), 43 CIT ___, ___, 378 F.

Supp. 3d 1292, 1316–18 (2019) (discussing *Mueller*). In selecting from among the facts otherwise available, Commerce identified the three most heavily discounted sales transactions between TUNA and Mueller and inferred that all transactions between Ternium and Mueller reflected that discount. *Mueller*, 753 F.3d at 1230. Commerce's use of this adverse inference resulted in a higher dumping margin for Mueller. *Id.*

Commerce supported its use of an adverse inference based, in part, on its finding that "Mueller could and should have induced Ternium's cooperation by refusing to do business with Ternium, and Ternium would not be sufficiently deterred if Mueller were unaffected by Ternium's non-cooperation . . . [because] Ternium could otherwise evade its antidumping rate by funneling its goods through Mueller." *Id*. at 1233.[23] The Federal Circuit held that Commerce may rely on inducement and evasion rationales to calculate a margin for a cooperating party when "the application of those policies is reasonable on the particular facts and the predominant interest in accuracy is properly taken into account." *Id.*

With respect to the inducement rationale, the appellate court noted that "Mueller had an existing relationship with supplier Ternium" and, thus, "could potentially have refused to do business with Ternium in the future as a tactic to force Ternium to cooperate." *Id.* at 1235. The court cautioned, however, that when a "cooperating entity has no control over the non-cooperating suppliers, a resulting adverse inference is potentially unfair to the cooperating party." *Id*. (citing *SKF USA Inc. v. United States,* 630 F.3d 1365, 1375 (Fed. Cir. 2011)). With respect to the evasion rationale, the court noted "the possibility that Ternium could evade its own AFA rate of 48.33 percent by exporting its goods through Mueller if Mueller were assigned a favorable dumping rate." *Id.*

Although *Mueller* addressed Commerce's authority to use the facts otherwise available pursuant to subsection 1677e(a), *id.* at 1230,[24] the appellate court found that subsection 1677e(a) allowed Commerce to take into account policy considerations typically reserved to sub-

[23] Commerce also found that "the use of the adverse inference to calculate Ternium's surrogate production cost actually yielded the most accurate calculation of Mueller's antidumping rate." *Mueller*, 753 F.3d at 1232. The Federal Circuit rejected this rationale as unsupported by substantial evidence and, thus, remanded the matter to the agency. *Id.* at 1232–33.

[24] Commerce necessarily relied on subsection 1677e(a) because Mueller was a cooperating respondent. *See Mueller*, 753 F.3d at 1232. The statute does not permit Commerce to use "an adverse inference against a cooperative respondent under subsection 1677e(b)." *Canadian Solar I*, 378 F. Supp. 3d at 1319; *see also* 19 U.S.C. § 1677e(b)(1)(A) (permitting Commerce to use an inference adverse to the interests of the party that "failed to cooperate by not acting to the best of its ability to comply with a request for information").

section 1677e(b), *id.* at 1234 ("The statute on its face does not preclude Commerce from relying on the same considerations under subsection (a) for an AFA determination as used under subsection (b)."). Accordingly, even though discussed in connection with subsection 1677e(a), Commerce may adopt *Mueller*'s inducement and evasion rationales when acting pursuant to its authority in subsection 1677e(b). Regardless, in this case, Commerce's decision to use total AFA requires reconsideration by the agency.

For its conclusion that Venus failed to act to the best of its ability to obtain its unaffiliated suppliers' cost information,[25] Commerce relied on its subsidiary finding that Venus's emails to its suppliers "did not serve as a strong inducement to cooperate." Final Analysis Mem. at 3.[26] However, Commerce's reliance on *Mueller*'s observation that the existence of a buyer-seller relationship means that an exporter could potentially refuse to do business with its supplier to induce cooperation placed undue emphasis on Venus's warnings to its suppliers, thereby truncating the *Mueller* analysis and leading the agency to disregard relevant record evidence. Final Analysis Mem. at 3; *Mueller*, 753 F.3d at 1235. Thus, as discussed below, Commerce's determination is unsupported by substantial evidence and not in accordance with the law.

To begin with, Commerce created an arbitrary linguistic line when it measured Venus's degree of cooperation based on Venus's use of a certain word in its emails to unaffiliated suppliers. *See* Final Analysis Mem. at 3.[27] While Commerce clearly permits some equivocation by a

---

[25] Commerce's reliance on *Mueller* to find that Venus failed to cooperate to the best of its ability sets this case apart from others where Commerce has faulted a mandatory respondent's suppliers for failing to cooperate but otherwise treated the respondent as a cooperating party. *Cf. Canadian Solar Int'l Ltd. v. United States* ("*Canadian Solar II*"), 43 CIT ___, ___, 415 F. Supp. 3d 1326, 1332–35 & n.13 (2019) (remanding Commerce's use of an inference adverse to the interests of a cooperative respondent, this time pursuant to subsection 1677e(a), as lacking "[t]he accuracy analysis required by *Mueller*" and substantial evidence supporting the use of inducement/evasion rationales); *Itochu Building Prods. v. United States*, 41 CIT ___, ___, 222 F. Supp. 3d 1141, 1157 (2017) (affirming Commerce's decision, on remand, to apply an AFA rate to a cooperative respondent when the agency further explained its determination and pointed to substantial evidence supporting its reliance on inducement/evasion rationales); *Itochu Building Prods. Co. v. United States*, Slip Op. 17–73, 2017 WL 2703810, at *16 (CIT June 22, 2017) (remanding Commerce's use of an inference adverse to the interests of a cooperative respondent when the agency failed to "conduct the necessary case-specific analysis to determine whether it was appropriate to apply an adverse inference to [the respondent] for its supplier's failure to cooperate").

[26] Specifically, Commerce explained that Venus's emails "only [[ ]]." Final Analysis Mem. at 3.

[27] Commerce found that Venus's use of the word "[[ ]]" in relation to the possibility that Venus would "[[ ]]" did not represent "a strong inducement to cooperate," whereas language indicating a "[[ ]]" of "[[ ]]" would have sufficed. Final Analysis Mem. at 3.

respondent in its attempts to induce cooperation, *see id.*, the agency has not provided any explanation supporting the distinction it seeks to draw in this case.

Further, while *Mueller* recognizes that an unwillingness to export goods produced by an uncooperative supplier "would potentially induce [the supplier] to cooperate," the appellate court also stated that "if the [respondent] has no control over the non-cooperating suppliers, a resulting adverse inference is potentially unfair to the [respondent]." *Mueller*, 753 F.3d at 1235 (citing *SKF*, 630 F.3d at 1375).[28] The concept of "control," as discussed in *Mueller,* does not require actual control, but, instead, it requires Commerce to consider record evidence concerning the practical ability of a respondent to induce the supplier's cooperation. 753 F.3d at 1235; *cf. Xiping*, 222 F. Supp. 3d at 1158 (sustaining Commerce's determination that an exporter could induce a downstream purchaser's cooperation when the record demonstrated that the purchaser was not able to use a different supplier due to the "nature of their relationship" and the exporter's market dominance).[29]

Here, Commerce did not adequately consider evidence tending to show that Venus's efforts to induce cooperation failed, at least in part, because of circumstances beyond Venus's control; *to wit*, the suppliers' own concerns that providing the cost information did not serve the suppliers' respective interests. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."); Venus 4th Suppl. DQR, Ex. 1.[30] Moreover, Commerce failed to point to any evidence indicating that Venus could induce its unaffiliated sup-

---

[28] The *SKF* court sustained Commerce's authority to use unaffiliated supplier data to calculate constructed value rather than a respondent's acquisition costs. 630 F.3d at 1372–75. However, the court remanded the determination for Commerce to address the respondent's concern that the agency may ultimately apply an adverse inference if the suppliers failed to provide their cost information, noting that the "[u]se of adverse inferences may be unfair considering [the respondent] has no control over its unaffiliated supplier's actions." *Id.* at 1375.

[29] While *Mueller* cautions that an adverse inference pursuant to subsection 1677e(a) could be unfair to a *cooperating* entity when that entity lacks control over an unaffiliated supplier, 753 F.3d at 1235, Commerce's invocation of subsection 1677e(b) does not absolve the agency from addressing record evidence concerning Venus's practical ability to obtain its suppliers' cooperation as part of its consideration whether Venus acted to the best of its ability. Setting aside the issue of fairness, in the context of unaffiliated entities, the concepts of inducement and control overlap. Commerce may not, therefore, limit its inquiry to the precise steps Venus took without considering the circumstances under which those steps were taken. In other words, Commerce may not rely on *Mueller*'s inducement rationale without considering whether a respondent may, in fact, be able to induce an unaffiliated supplier's cooperation.

[30] As noted, only one of Venus's [[ ]] unaffiliated suppliers of SS rounds provided Commerce with its cost information. Venus 4th Suppl. DQR at 1. The remaining [[ ]]

pliers' cooperation. *Cf. Canadian Solar II*, 415 F. Supp. 3d at 1334 (rejecting Commerce's reliance on a respondent's "market presence, continued growth, and supplier-specific accounts, to substantiate its claim that [the respondent] could have induced its suppliers' cooperation" because "[s]uch facts do not reasonably indicate the presence of a long-term relationship creating leverage") (second alteration in original) (citation omitted). Instead, Commerce appeared to assume that Venus had leverage over its unaffiliated suppliers and simply failed to properly apply it.[31] Commerce's reasoning is inconsistent with *Mueller*, which recognizes the possibility of inducing cooperation, but not the certainty. 753 F.3d at 1235 (observing that "if Mueller and other entities were not willing to export goods produced by Ternium, this would *potentially* induce Ternium to cooperate") (emphasis added).

In addition, while *Mueller* does not require Commerce to consider inducement and evasion rationales in tandem, record evidence demonstrating that an unaffiliated supplier is not evading its own antidumping rate by supplying subject merchandise to an exporter with a lower rate is relevant to whether an exporter may reasonably be able to induce cooperation from that supplier. 753 F.3d at 1234–35 (approving "Commerce's use of an evasion *or* inducement rationale") (emphasis added); *cf. Xiping*, 222 F. Supp. 3d at 1158–59 (sustaining Commerce's determination that the respondent "was in a position to induce [the] cooperation" of a noncooperating downstream purchaser

gave various reasons for their reticence. Venus's largest supplier, [[ ]], stated that assisting Venus "[[ ]]" because [[ ]] and Venus compete in various markets. *Id*., Ex. 1 at ECF pp. 530–31. The company further averred that its [[ ]] prevented it from cooperating. *Id.*, Ex. 1 at ECF p. 531. Venus's second largest supplier, [[ ]], explained that its "[[ ]]." *Id.*, Ex. 1 at ECF p. 539. According to [[ ]], the company "[[ ]]." *Id.* While Venus explained that [[ ]], the company did not supply the requested information. *See id.*, Ex. 1 at ECF p. 540. Venus's third largest supplier, [[ ]], expressed concern that [[ ]]. *Id.*, Ex. 1 at ECF p. 555. Venus attempted to alleviate that concern, *see id.*, Ex. 1 at ECF pp. 551–52, and it appeared that [[ ]] might cooperate, *id.*, Ex. 1 at ECF p. 551. However, [[ ]] also indicated its preference that [[ ]], *id.*, Ex. 1 at ECF p. 551, and ultimately did not submit the requested information.

[31] Commerce opined that Venus should have "ensure[d] that it would have [the suppliers'] full cooperation in any antidumping proceeding with Commerce" before purchasing from them. Final Analysis Mem. at 3. However, in the eight administrative reviews that Commerce previously conducted of Venus, Commerce treated Venus as the producer of the subject merchandise. *See* I&D Mem. at 12–13 (nevertheless rejecting Venus's argument based on prior reviews in part because Venus's status as producer was never disputed in those reviews). Moreover, for several years preceding the instant review, Venus was nominally not subject to the *SS Bar Order* due to its partial revocation in 2011. *Revocation Finding*, 76 Fed. Reg. at 56,403. Thus, Venus could not have known that it would need the suppliers' cost information when it purchased the SS rounds that it converted into the SS bar subject to this review.

of subject merchandise because the noncooperating company "was not in a position to evade a dumping margin assigned to [the respondent] by sourcing from a different supplier").

Here, record evidence suggests that Venus's ability to induce cooperation from its largest supplier was unsupported by any need for that company to evade its own higher dumping margin. Final Analysis Mem. at 2;[32] *cf. Mueller*, 753 F.3d at 1235 (noting the "possibility that Ternium could evade its own AFA rate of 48.33 percent by exporting its goods through Mueller if Mueller were assigned a favorable dumping rate"). Commerce failed to account for this evidence that fairly detracted from its determination that Venus "could have done more to induce its suppliers to cooperate." Final Analysis Mem. at 3.[33]

In sum, Commerce's determination that Venus failed to act to the best of its ability to obtain its unaffiliated suppliers' cost information is unsupported by substantial evidence and otherwise not in accordance with law.[34]

2. Venus's Reporting of its Subject Inputs

As discussed, in order to use an adverse inference, Commerce must 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* from the [agency]." 19 U.S.C. § 1677e(b)(1) (emphasis added). Commerce's

---

[32] At the time of the changed circumstances review, [[ ]] had a [[ ]] percent dumping margin. Final Analysis Mem. at 2. Commerce indicated that [[ ]] and [[ ]] would potentially be subject to [[ ]] dumping margins. *Id.* However, the degree to which those companies would benefit from Commerce's calculation of a company-specific margin for Venus, such that they would be tempted to evade their own margins, is unclear given that Commerce has not calculated a company-specific margin for Venus based on its suppliers' cost information.

[33] Because Commerce did not consider or rely on an evasion rationale, Defendant-Intervenors' argument that Commerce properly used total AFA in order to prevent Venus and its suppliers from colluding with each other to evade the imposition of antidumping duties amounts to impermissible "*post hoc* rationalization[] for agency action." *Burlington*, 371 U.S. at 168–69 (the court may only sustain the agency's decision "on the same basis articulated in the order by the agency itself").

[34] Venus relies on *Itochu* to argue that Commerce failed to make the necessary finding that applying an adverse inference to Venus would "directly and adversely affect the noncooperating supplier's interests." Pls.' Mem. at 21 (citing *Itochu*, 2017 WL 2703810, at *16). In *Mueller*, the Federal Circuit required Commerce to recalculate Mueller's dumping margin using the facts otherwise available pursuant to 19 U.S.C. § 1677e(a) with a "primary objective" of calculating "an accurate rate for Mueller" that nevertheless reflects "policy considerations that motivated the decision under review—namely, [the agency's] desire to encourage Mueller to induce Ternium's cooperation and Commerce's concern that calculating too low a rate for Mueller might allow Ternium to evade its own dumping duty by channeling sales through Mueller." 753 F.3d at 1235–36. Here, however, Commerce relied on subsection 1677e(b)—not subsection 1677e(a)—and *Mueller* does not support the need for Commerce find a direct adverse effect on Venus's noncooperating suppliers in order to draw an adverse inference against Venus.

finding that Venus "failed to clearly identify that it purchase[d] SS bar as an input until directly asked in the third supplemental questionnaire" presupposes that Venus had the obligation to do so. However, "[t]o avoid the threat of [section] 1677e(b), a submitter need only provide complete answers to the questions presented in an information request." *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1574 (Fed. Cir. 1990); *see also JSW Steel Ltd. v. United States*, 42 CIT ___, ___, 315 F. Supp. 3d 1379, 1383 (2018) ("[W]hile Commerce has latitude to request a wide range of information, it is only entitled to receive what it actually requests.").[35]

Here, although Commerce initially posed various questions to Venus regarding its raw materials and production processes, at that time, the agency never requested Venus to state whether any of its inputs consisted of subject merchandise. *See, e.g.*, Submission of Resp. to Section A of the Questionnaire in Changed Circumstances Review ("Venus AQR") at A-24, CR 22, PR 65, CJA Tab. 6; Resp. to Section D of the Questionnaire (May 18, 2017) ("Venus 2nd Suppl. DQR") at 12–13, CR 201, PR 260, Suppl. CJA. Documentation supplied by Venus suggested that it consumed subject merchandise as an input, and Commerce requested clarification. *See* I&D Mem. at 16. Venus subsequently confirmed that it used subject SS rounds to produce the SS bar exported to the United States. *See id*; Resp. to SQR3-Questionnaire (July 10, 2017) at ECF pp. 476–77, CR 250, PR 307, CJA Tab 15. Commerce cannot fault Venus for failing to answer a question before it was requested to do so. *See, e.g.*, *Olympic Adhesives, Inc*., 899 F.2d at 1572–75.

Additionally, to the extent that Commerce concluded that Venus failed to act to the best of its ability by obfuscating its use of subject merchandise, *see* I&D Mem. at 10 (stating that Venus "used multiple terms for the same input"), Commerce has not explained why the record supports that finding. The scope of the *SS Bar Order* explicitly covers "articles of stainless steel in straight length that have been . . . hot-rolled, . . . having a uniform solid cross-section . . . in the shape of circles, segments of circles, [and] ovals." 60 Fed. Reg. at 9,661. Early in the review, Venus described one of its inputs as "S.S. Rounds – Hot Rolled." Venus AQR, Annex. A-8. Commerce does not explain

[35] Commerce asserted that "[t]he onus is on the respondent to build a clear record." I&D Mem. at 10 & n.34 (citing *Yama Ribbons*, 36 CIT at 1254, 865 F. Supp. 2d at 1299); *Peer Bearing Co.-Changshan v. United States*, 32 CIT 1307, 1310, 587 F. Supp. 2d 1319, 1325 (2008)); *cf.* Def.-Ints.' Resp. at 24 n.15 (citation omitted). While *Yama Ribbons* and *Peer Bearing* support the notion that a respondent bears the burden of providing complete, accurate, and timely responses to Commerce's questionnaires, and cannot later complain about an adverse determination when the respondent withheld beneficial information, neither case suggests that a respondent is required to supply information beyond what Commerce requests in its questionnaires.

why the term "rounds[,] bars[,] and rods of stainless steel" that Venus used in the documentation that alerted Commerce to the possibility that the input was subject merchandise, *see, e.g.*, Venus 2nd Suppl. DQR, Annex. SQR-85 at ECF p. 304, was any clearer than the terminology Venus used in its Section A Questionnaire Response. Moreover, Venus's use of the term "Stainless Steel Black Bars" in the narrative portion of its Section A Questionnaire Response, Venus AQR at A-24, is consistent with terminology used in a declaration accompanying Petitioners' request for the changed circumstances review, Pet'rs' Req. for Changed Circumstances Review (Sept. 29, 2016), CR 1, PR 1, CJA Tab 1; *id.*, Ex. AD-IN-4.A ¶ 3, Suppl. CJA (referring to the production of SS bar from "black bar"). This consistency suggests that the term "black bar" is an accepted industry term. *See* Pls.' Mem. at 24–25. Thus, in the event that Commerce continues to rely on an obfuscation rationale, the agency must explain why the record supports that finding and address the contrary evidence discussed above.

In sum, Commerce's decision to use an adverse inference on the basis that Venus did not identify its consumption of subject inputs until requested to do so is unsupported by substantial evidence. Accordingly, while the court sustains Commerce's Remand Results to the extent that they further explain why Commerce determined that Venus was not the producer of the imported SS bar, the court will remand the *Final Results* as amended by the Remand Results for Commerce to reconsider its use of total AFA.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby:

ORDERED that Commerce's *Final Results*, as amended by the Remand Results, are remanded to the agency for reconsideration with respect to the agency's use of total AFA consistent with this opinion; it is further

ORDERED that Commerce shall file its remand results on or before November 12, 2020; it is further

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

ORDERED that any comments or responsive comments must not exceed 5,000 words.

Dated: August 14, 2020
New York, New York

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

Slip Op. 20–122

HEJIANG MACHINERY IMPORT & EXPORT CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 19–00039
PUBLIC VERSION

[The court remands Commerce's determination for further explanation and consideration of evidence.]

Dated: August 21, 2020

Adams C. Lee, Harris Bricken McVay LLP, of Seattle, WA, argued for plaintiff.

Kelly A. Krystyniak, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice and *Nikki Kalbing*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC, argued for defendant. With them on the brief and supplemental briefs were *Joseph H. Hunt*, Assistant Attorney General, *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *L. Misha Preheim*, Assistant Director and *Patricia McCarthy* for *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *James Henry Ahrens II*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Justice of Washington, DC.

OPINION

Katzmann, Judge:

This case involves whether an exporter in a non-market economy ("NME") has sufficiently established independence from government control to qualify for a separate duty rate and avoid a countrywide antidumping duty rate. It also presents questions about whether nominal ownership of majority shareholder rights by a labor union may prevent a company from rebutting a presumption of government control.

Plaintiff Zhejiang Machinery Import & Export Corporation ("ZMC" or "Plaintiff"), an exporter of tapered roller bearings and parts thereof ("TRBs"),[1] brought an action against the United States ("the Government") to challenge a final determination by the United States Department of Commerce ("Commerce"). *See* Pl.'s Mem. of Points in Supp. of Mot. for J. on Agency R. at 1, Aug. 22, 2019, ECF No. 24 ("Pl.'s Br."); *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 84 Fed. Reg. 6,132, 6,132– 34 (Dep't Commerce Feb. 26, 2019), ("*Final Results*"). In its *Final Results*, Commerce denied ZMC a separate rate and applied the country-wide rate after finding ZMC failed to show an absence of de

[1] "TRBs are a type of antifriction bearing made up of an inner ring (cone) and an outer ring (cup). Cups and cones sell either individually or as a preassembled 'set.'" *NTN Bearing Corp. of Am. v. United States*, 127 F.3d 1061, 1063 (Fed. Cir. 1997).

facto control by the government of China ("GOC"). *See Final Results*. ZMC requests that the court remand both this decision, because it is "unsupported by substantial evidence and is otherwise not in accordance with law," and Commerce's decision to reject one of ZMC's submissions, for the same reason. Am. Compl. at 5, May 24, 2019, ECF No. 17; *see* 30th Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China: Rejection of Untimely-Filed New Factual Information (Dec. 3, 2018), P.R. 253 ("Rejection Letter"). The Government responds that the court should deny ZMC's motion because substantial evidence supports Commerce's decisions and because ZMC failed to exhaust administrative remedies for several of its arguments. Def.'s Opp'n to Pl.'s Mot. for J. on the Agency R. at 7, 12, 25, Nov. 11, 2019, ECF No. 28 ("Def.'s Br."). The court remands this matter to Commerce for a more reasoned explanation of its denial of a separate rate and for consideration of the evidence it rejected.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2). The court sustains Commerce's antidumping determinations, findings, and conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

BACKGROUND

I. Legal and Regulatory Framework

Commerce may impose remedial duties on imported goods sold in the United States if the agency determines that a domestic industry is "materially injured, or is threatened with material injury" because the goods are sold at a less-than-fair value. 19 U.S.C. § 1673; *see, e.g.*, *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1394 (2018) ("*Rongxin III*"). The measure of the remedial "antidumping duty is 'the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.'" *Rongxin III*, 331 F. Supp. 3d at 1394 (quoting 19 U.S.C. § 1673). Commerce may conduct a yearly review of the antidumping duty at the request of an interested party and recalculate a new antidumping duty amount. 19 U.S.C. § 1675(a)(1)–(2).

When the antidumping duties apply to goods from an NME country, "Commerce presumes that all respondents to the proceeding are government-controlled and therefore subject to a single country-wide

antidumping duty rate." *Rongxin III*, 331 F. Supp. 3d at 1394 (citing *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1349–50 (Fed. Cir. 2015)); *see also Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). To rebut this presumption and receive a rate separate from the country-wide rate, respondents must demonstrate that the government lacks both de jure and de facto control over their activities. *Rongxin III*, 331 F. Supp. 3d at 1394.

A respondent may show an absence of de jure government control by presenting evidence of "legislation and other governmental measures that suggest sufficient company legal freedom." *AMS Assocs., Inc. v. United States*, 719 F.3d 1376, 1379 (Fed. Cir. 2013) (citation omitted). A respondent may show an absence of de facto government control by establishing that it does each of the following: "(1) sets its prices independently of the government and of other exporters, (2) negotiates its own contracts, (3) selects its management autonomously, and (4) keeps the proceeds of its sales (taxation aside)." *Rongxin III*, 331 F. Supp. 3d at 1394 (citing *AMS Assocs.*, 719 F.3d at 1379); *see also Yantai CMC Bearing Co. v. United States*, 41 CIT__, __, 203 F. Supp. 3d 1317, 1326 (2017). If a respondent fails to demonstrate its independence, for which it has the burden of establishing, Commerce may deny it a separate rate and instead apply the country-wide antidumping rate. *See, e.g.*, *Sigma Corp.*, 117 F.3d at 1405–06.

Commerce's antidumping determinations must be supported by substantial evidence; otherwise, the court will hold them unlawful. *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 (Fed. Cir. 1984); *see also Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 982 (Fed. Cir. 1994) (citing 19 U.S.C. § 1516a(b)(1)(B)). Substantial evidence is measured by being "more than a mere scintilla." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (quoting *Atl. Sugar*, 744 F.2d at 1562). Substantiality of the evidence is also met by "something less than the weight of the evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). Furthermore, a determination by Commerce "is supported by substantial evidence if a reasonable mind might accept the evidence as sufficient to support the finding." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citing *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

II. Factual and Procedural History

In 2009, Commerce updated the antidumping duty rate on TRBs for the People's Republic of China ("PRC") to 92.84 percent, after first

setting an antidumping duty on TRBs in 1987. *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 74 Fed. Reg. 3,987, 3,989 (Dep't Commerce Jan. 22, 2009) ("the *Order*"); *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 52 Fed. Reg. 22,667, 22,667 (Dep't Commerce June 15, 1987); *see also* Decision Memorandum for the Preliminary Results of the 2016–2017 Antidumping Duty Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China at 14 (Dep't Commerce July 12, 2018), P.R. 223 ("Preliminary Decision Memo"). In June 2017, Commerce published a notice of opportunity to request review of the *Order*. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review*, 82 Fed. Reg. 26,441, 26,441 (Dep't Commerce June 7, 2017).

In response, a domestic interested party requested that Commerce conduct an administrative review of ZMC's entries during the period of June 1, 2016 to May 31, 2017. Administrative Review of Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China (06/01/16–05/31/17): The Timken Company's Request for Administrative Review (June 30, 2017), P.R. 5; *see also* Def.'s Br. at 2. The domestic interested party then submitted files indicating GOC ownership of ZMC, and ZMC responded with its own submissions. *See* Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: The Timken Company's Submission of Factual Information in Response to Certain Separate Rate Certifications Filed on August 31, 2017 (Sept. 14, 2017), P.R. 93; *see, e.g.*, Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China: Factual Information Regarding Zhejiang Machinery (Oct. 2, 2017), P.R. 109 ("Oct. Submission"); 2016–2017 Administrative Review of Tapered Rollers Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Separate Rate Supplemental Questionnaire (Apr. 13, 2018), P.R. 169; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China: Supplemental Questionnaire Response & Separate Rate Application (May 4, 2018), P.R. 184 ("May Submission").

Included in ZMC's submissions were details of its ownership structure. ZMC stated it was 100 percent owned by its parent company, Zhejiang Sunny I/E Corp ("Sunny"). Oct. Submission at 2. ZMC fur-

ther noted that Sunny, in turn, was owned by Zhejiang Province Metal & Minerals Import and Export Co., Ltd., and Sunny's labor union, with the labor union as majority owner. *Id.* Zhejiang Province Metal & Minerals Import and Export Co., Ltd., was fully owned by Zhejiang International Business Group Co., Ltd., whose complete owner was the Zhejiang Provincial State-owned Assets Supervision and Administration Commission ("SASAC"). May Submission at 8. ZMC also stated that Sunny's labor union was listed as the nominal owner of the majority of Sunny's shares in Sunny's Articles of Association ("Sunny's Articles" or "Sunny's AoAs") because the ultimate owners of those shares were members of Sunny's employee stock ownership committee ("ESOC"), which is not allowed legal personhood under Chinese law and therefore could not be assigned shares. *Id.* at 4–5.

Commerce preliminarily determined that ZMC failed to demonstrate that the GOC lacked de facto control over its export activities. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 83 Fed. Reg. 32,263, 32,263 (Dep't Commerce July 12, 2018) ("*Preliminary Results*"); *see also* Preliminary Decision Memo at 11. Commerce's primary support for this decision was that Sunny's labor union and the GOC-owned SASAC together own 100 percent of Sunny, which in turn owns 100 percent of ZMC. *Id.* at 11. Commerce argued that because all labor unions are under the "control and direction of the" All-China Federation of Trade Unions ("ACFTU") according to Chinese law and because the ACFTU is "a government affiliated and [Communist Party of China] organ[,]" the GOC has the potential to control ZMC's export activities. *Id.* at 11 (internal citations, brackets, quotation marks omitted); *see also* Def.'s Br. at 4. Accordingly, Commerce concluded the GOC's actual or potential control over ZMC meant ZMC failed to rebut the presumption of de facto government control over its export activities and was therefore ineligible for a separate rate for its exports of TRBs. Preliminary Decision Memo at 11; *see also Preliminary Results*.

Six weeks after Commerce published the *Preliminary Results*, on August 23, 2018, ZMC submitted a case brief that included, among other information, a revision of the original translation of the ESOC's Articles of Association ("ESOC Articles") it had provided to Commerce. Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China: Case Brief at 3, P.R. 241 ("Aug. Submission"); *see also* Pl.'s Br. at 20; Def.'s Br. at 5. This revised translation changed [[

]] whereas the original translation indicated [[

]], Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China: Resubmission of Case Brief at Ex. 7 (Dec. 6, 2018), P.R. 162 ("Dec. Submission"). *See also* Pl.'s Br. at 21.

Several months later, on December 3, 2018, Commerce determined that the brief submitted in August 2018 included untimely factual information, rejected it, and allowed ZMC the opportunity to submit a revised brief. *See* Rejection Letter. ZMC did so several days later, submitting a brief without the revised translation. *See*Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China: Resubmission of Case Brief (Dec. 6, 2018), P.R. 255 ("Revised Case Brief").

In the Revised Case Brief, ZMC again noted the labor union that owns a majority of Sunny is a proxy owner for Sunny's ESOC, which in turn effectively controls the majority shareholder rights of Sunny. Revised Case Brief at 2–3. ZMC claimed that the labor union lacks the authority to make shareholder decisions or to control the management of Sunny, and therefore ZMC, because: (1) the ESOC has the authority to "protect and promote the interests of Sunny's private employees"; (2) the ESOC's members elect leaders to form the ESOC Council by majority vote, in which each member receives one vote; and (3) the Council elects three out of Sunny's five board members. *Id.* at 3–6 (citing *Advanced Tech. & Materials Co. v. United States*, 36 CIT 1576, 1588, 885 F. Supp. 2d. 1343, 1355 (2012) ("*Diamond Sawblades I*")). ZMC also noted that no member of the ESOC "holds any positions or membership in" the ACFTU and all but one member of the ESOC hold no "position with Sunny's labor union." Revised Case Brief at 4. The member who holds a union position, [[ ]], is [[ ]] and is [[ ]]. *Id.* at 5. ZMC stated in its Revised Case Brief that no ESOC members are "affiliated with[] the Chinese government," *id.* at 3, and that Sunny's three Council-appointed directors are not affiliated with the GOC or "hold positions with" Sunny's labor union, *id.* at 5. Moreover, although ZMC did not directly address Commerce's contention that the ACFTU effectively controls all labor union actions, it did note that [[ ]]. *Id.*

In February 2019, approximately six months after ZMC submitted the revised translation, which Commerce rejected, Commerce published its final determination, in which it maintained its decision in its *Preliminary Results*. *Final Results*; *see also* Mem. from J. Maeder to G. Taverman, re: Issues and Decision Mem. for the Antidumping

Duty Administrative Review at 4–14 (Dep't Commerce Feb. 19, 2019), P.R. 262 ("IDM"). In addition to repeating the primary reasons set forth in its *Preliminary Results*, Commerce also found the SASAC and the labor union had the ability to control Sunny's management, and therefore ZMC's activities, per the reasoning in *Diamond Sawblades I*.[2] IDM at 10 (quoting *Diamond Sawblades I*, 36 CIT at 1588–89). Commerce further disagreed with ZMC's contention that it should disregard the labor union's nominal ownership because "the individual owners of Sunny's ESOC are all labor union members . . . even if they do not all currently hold official positions in" the union. *Id.* at 11 (citing Revised Case Brief at 2).

Commerce also noted that the labor union has the "inherent ability" to exercise shareholder rights, including appointment of Sunny's board members, as majority owner. *Id.* Commerce reasoned that ZMC's argument—that the ESOC has control over selecting Sunny's management—did not rebut the presumption of government control because Chinese law: (1) did not allow the ESOC to be registered as an owner; (2) required Sunny's labor union to be registered under the local branch of the ACFTU, which it was; and (3) gave the GOC-affiliated ACFTU a "legal monopoly on all trade union activities." IDM at 12–13 (citing 30th Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: China's Status as a Non–Market Economy at 21 (Dep't Commerce Oct. 26, 2017), P.R. 226 ("NME Status Memo")).

Finally, Commerce noted two other reasons for rejecting ZMC's arguments. First, the SASAC still controlled two seats on Sunny's board and could block some corporate decisions. *Id.* at 13 (citing Oct. Submission at Ex. 1). Second, ZMC's Revised Case Brief was silent as to the composition of Sunny's Audit Department, which governs the ESOC. IDM at 13. Commerce thus concluded that ZMC had "failed[ed] to rebut Commerce's presumption of government control in China" and found ZMC ineligible for a separate rate. *Id.*

On March 25, 2019, ZMC filed a complaint to challenge Commerce's *Final Results* as unsupported by substantial evidence and otherwise not in accordance with the law. Compl. at 5, Mar. 25, 2019, ECF No. 2. ZMC amended its complaint on May 24, 2019, adding a challenge

[2] The court in *Diamond Sawblades I* identified "the possession of autonomy from the government regarding the 'selection' of management" as one of four factors typically considered in the de facto prong analysis. *Advanced Tech. & Materials Co. v. United States*, 36 CIT 1576, 1588, 885 F. Supp. 2d. 1343, 1355 (2012) ("*Diamond Sawblades I*"). Although a determination on this factor does not preclude Commerce from analyzing other factors, *see Shandong Rongxin Imp. & Exp. Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1327, 1348 (2017), government control may exist even through a "chain of indirect ownership," *Yantai CMC Bearing Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1317, 1323 (2017).

to Commerce's rejection of ZMC's August Submission. Am. Compl. at 5. On August 22, 2019, ZMC filed a Rule 56.2 motion for judgment on the agency record. *See* Pl.'s Br. The Government responded on November 11, 2019, detailing its opposition to ZMC's motion. *See* Def.'s Br. ZMC replied on January 7, 2020. *See* Pl. Zhejiang Machinery I&E's Reply Br., ECF No. 31 ("Pl.'s Reply"). In advance of oral argument, on July 1, 2020 the court posed questions to the parties for their written responses. *See* Ct.'s Letter Regarding Questions for Oral Arg., ECF No. 37. The parties submitted responses to those questions on July 13, 2020. *See* Pl.'s Resp. to Pre-Oral Argument Questions, ECF No. 38, ("Pl.'s Answers"); Def.'s Resp. to the Court's Questions for Oral Argument, ECF No. 39 ("Def.'s Answers"). The court submitted supplemental questions to the parties on July 14, 2020. *See* Ct.'s Letter Regarding Suppl. Questions for Oral Arg., July 14, 2020, ECF No. 40. The court held oral argument via teleconference on July 15, 2020. ECF No. 41. The parties provided answers to the supplemental questions on July 17, 2020. *See* Pl. ZMC's Resps. to Addt'l Pre-Oral Arg. Questions and Commerce's Oral Arg. Statements, ECF No. 42 ("Pl.'s Suppl. Answers"); Def.'s Resps. to the Ct.'s Suppl. Questions for Oral Arg., ECF No. 43 ("Def.'s Suppl. Answers").

DISCUSSION

ZMC argues that (1) Commerce's denial of a separate rate was not supported by substantial evidence on the record; and (2) Commerce's rejection of its August Submission was arbitrary and capricious because it contained corrective information. The Government responds that (1) three arguments ZMC now raises—regarding union membership, GOC control over the ACFTU, and capital contributions of the ESOC members—fail to meet administrative exhaustion requirements; (2) Commerce appropriately rejected ZMC's August Submission as untimely new factual information; and (3) Commerce's denial of ZMC's separate rate, based on the GOC's potential to control ZMC through majority labor union ownership of Sunny, was supported by substantial evidence on the record. ZMC replies, in part, that it did not fail to exhaust administrative remedies or, in the alternative, that the court in its discretion should not require administrative exhaustion in this case.

For the reasons stated below, the court remands to Commerce its determination that ZMC failed to establish an absence of de facto government control over its activities so that Commerce may: (1) consider the revised translation; (2) address how the labor union could exercise its rights as majority shareholder in light of the evidence regarding the ESOC; and (3) address how the revised transla-

tion impacts its analysis. The court takes no position, however, on the correctness of Commerce's determination. The court finds only that Commerce failed to meet its obligation to consider corrective information and provide a reasoned explanation for its determination. The court, therefore, cannot sustain Commerce's *Final Results* here.

I. Commerce's Rejection of ZMC's August Submission Was Not Supported by Substantial Evidence or in Accordance with Law.

After Commerce's publication of its *Preliminary Results* in July 2018, ZMC submitted a case brief in August 2018 that included a revised translation of one Article in the ESOC's Articles. Specifically, the revised translation changed [[ ]] whereas the original translation indicated [[ ]] December Submission at Ex. 7. ZMC explained that the original version it submitted "incorrectly added the term, 'labor union,' in Articles 1 and 2, which does not appear in the official Chinese version." Aug. Submission at 3. In December 2018, Commerce rejected the brief pursuant to 19 C.F.R. § 351.302(d)(1)(i), explaining that the translation constituted "new factual information," which ZMC had submitted after the May 4, 2018 deadline. Rejection Letter at 1. ZMC then submitted its Revised Case Brief without this information, which Commerce accepted.

ZMC argues that this rejection was not supported by substantial evidence on the record or not in accordance with law, Am. Compl. at 5–6, and that it was arbitrary and capricious, Pl.'s Br. at 33. ZMC argues that the information was not new, but rather corrective, to which no time limits apply. Pl.'s Br. at 34. ZMC further claims "interests of accuracy" outweigh Commerce's burden in limiting its consideration of new factual information and therefore that Commerce should have accepted the August Submission, making its rejection arbitrary. *Id.* at 34–35 (citing *Goodluck India Ltd. v. United States*, 43 CIT __, __, 393 F. Supp. 3d 1352, 1357 (2019)).

The Government argues that according to Commerce's regulations—which ensure adequate time to review information—the brief contained factual information submitted more than three months late. Def.'s Br. at 26. The Government distinguishes *Goodluck*, *NTN Bearing*, and *Fischer* from its rejection of ZMC's brief by noting that cases in which courts found Commerce abused its discretion involved rejected information related to a "rote task readily subject to inadvertent or ministerial error" and not a translation of language. Def.'s Br. at 27. *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1205 (Fed. Cir. 1995); *Fischer S.A. v. United States*, 34 CIT

334, 348, 700 F. Supp. 2d 1364, 1366 (2010), *aff'd in part*, *rev'd in part*. Because translation between Mandarin and English is a complex task, the Government argues deeming such information as corrective would "undermine the integrity" of Commerce's administrative proceedings. Def.'s Br. at 27–28. The Government also notes that had it accepted the revised translation, the *Final Results* may have been delayed because it would have had to allow interested parties to comment on the new factual information. *See* Def.'s Suppl. Answers at 2.

A. The Regulatory Definitions of New Factual Information Fail to Cover Submission of the Revised Translation.

Commerce's own regulations govern submission of factual information during its administrative reviews, including in a determination of whether a respondent has established independence from its government in an NME economy. *See* 19 C.F.R. § 351.301. The type of factual information to be submitted determines the "time limit for submission to Commerce." *Goodluck*, 393 F. Supp. 3d at 1357. Miscellaneous new factual information, for example, must be submitted "30 days before the scheduled date of the preliminary determination in an investigation, or 14 days before verification, whichever is earlier." 19 C.F.R. § 351.301(c)(5). The five definitions included in 19 C.F.R. § 351.102(b)(21) cover various types of "factual information;" 19 C.F.R. § 351.102(b)(21)(i) specifically defines "factual information" as "[e]vidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires, or, to rebut, clarify, or correct such evidence submitted by any other interested party . . . ."[3]

Commerce did not note the definition under which the revised translation fell when rejecting ZMC's August Submission pursuant to 19 C.F.R. § 351.302(d)(1)(i) for untimely factual information. *See*

[3] 19 C.F.R. § 351.102(b)(21) also defines "factual information" as:

> (ii) Evidence, including statements of fact, documents, and data submitted either in support of allegations, or, to rebut, clarify, or correct such evidence submitted by any other interested party;
>
> (iii) Publicly available information submitted to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2), or, to rebut, clarify, or correct such publicly available information submitted by any other interested party;
>
> (iv) Evidence, including statements of fact, documents and data placed on the record by the Department, or, evidence submitted by any interested party to rebut, clarify or correct such evidence placed on the record by the Department; and
>
> (v) Evidence, including statements of fact, documents, and data, other than factual information described in paragraphs (b)(21)(i)–(iv) of this section, in addition to evidence submitted by any other interested party to rebut, clarify, or correct such evidence.

Rejection Letter at 1; *see also* Def.'s Br. at 25. At oral argument and in its answers to the court's supplemental questions, the Government claimed the revised translation belonged to the definition for factual information corresponding to 19 C.F.R. § 351.102(b)(21)(i) above. Def.'s Suppl. Answers at 1. It is inaccurate, however, to assign the first part of 19 C.F.R. § 351.102(b)(21)(i) to the revised translation because it was not submitted "in response to initial and supplemental questionnaires." Nor does the second part of 19 C.F.R. § 351.102(b)(21)(i) apply because ZMC submitted the translation to clarify or correct information it had submitted *itself*, and not to rebut, clarify, or correct "evidence submitted by any other interested party." Even if the court were to find the Government's designation to be an impermissible post hoc rationalization not relied on by Commerce in its own explanation, none of Commerce's four other regulatory definitions of factual information cover ZMC's revised translation in its August Submission.[4] *See Hoogovens Staal BV v. United States*, 22 CIT 139, 145, 4 F. Supp. 2d 1213, 1219 (1998) (citation omitted) (noting courts will not consider post hoc rationalizations).

ZMC's revised translation in its August Submission thus fails to fall under any of Commerce's own regulatory definitions for submissions of factual information; yet Commerce nonetheless identified the re-

[4] The translation does not fall under 19 C.F.R. § 351.102(b)(21)(iii) because it is not "publicly available." Because ZMC submitted the translation to clarify or correct information it had submitted *itself*, and not to rebut, clarify, or correct "evidence submitted by any other interested party," 19 C.F.R. § 351.102(b)(ii) and 19 C.F.R. § 351.102(b)(21)(v) do not apply.

19 C.F.R. § 351.102(b)(ii) could plausibly be read to include evidence submitted "in support of [any] allegations" made by any party, which would seem to cover the revised translation; however, this reading of 19 C.F.R. § 351.102(b)(ii) is flawed. First, a definition that included information that covers information submitted to support *any* allegation made by any party is simply too wide a definition to be meaningful and would render the other definitions redundant. Second, in its definitions Commerce consistently modifies nouns to specify whether the evidence is submitted by other parties or placed on the record by Commerce itself. *Compare* 19 C.F.R. § 351.102(b)(ii) (describing evidence "submitted by any other interested party) *with* 19 C.F.R. § 351.102(b)(iv) (detailing evidence "placed on the record by [Commerce]"). Thus, one would expect the phrase "submitted by any other interested party" in 19 C.F.R. § 351.102(b)(ii) to modify both "allegations" and "such evidence" in the definition. Therefore, since ZMC submitted the information in response to information it had submitted *itself*, the revised translation also does not fall under 19 C.F.R. § 351.102(b)(ii).

The only remaining plausible definition, 19 C.F.R. § 351.102(b)(iv)—which covers "evidence submitted by any interested party to rebut, clarify or correct such evidence placed on the record by [Commerce]"—also does not cover the revised translation. Were ZMC to have submitted the original translation for it to be "placed on the record by the [Commerce]," then 19 C.F.R. § 351.102(b)(21)(iv) would plausibly cover the revised translation, making it new factual information according to Commerce's own definition. Commerce's own usage of such language, however, makes this reading of 19 C.F.R. § 351.102(b)(21)(iv) unconvincing. In its own IDM, Commerce refers to "[s]everal articles from the AOAs that Zhejiang Machinery placed on the record." Thus, since ZMC placed the original translation of the ESOC on the record and not Commerce, the submission of the revised translation fails to meet the definition under 19 C.F.R. § 351.102(b)(21)(iv).

vised translation as factual information in its Rejection Letter. Although Commerce's own interpretations of its regulations are sometimes entitled to deference, *Royal Thai Gov't v. United States*, 436 F.3d 1330, 1340 (Fed. Cir. 2006) (citation omitted), here Commerce did not even identify which definition applies to the revised translation, Rejection Letter at 1. Because Commerce failed to identify a definition, the court's deference here would need to rest on Commerce's mere reference to the revised translation as new factual information. Because Commerce has failed to give more than an "ad hoc statement" as to why the revised translation constitutes factual information, deference is not appropriate. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (citations omitted).

Moreover, if the agency's regulation is unambiguous as to an interpretation, then "a court should not afford *Auer* deference." *Kisor*, 139 S. Ct. at 2415 (discussing the deference courts may give to regulatory agencies when the agencies interpret their own regulations, which the Court refers to as *Auer* deference); *see also Auer v. Robbins*, 519 U.S. 452 (1997). This is a case where deference is inappropriate because: (1) as discussed above, "uncertainty does not exist" as to whether the language of 19 C.F.R. § 351.102(b)(21) covers the revised translation ZMC submitted; and (2) Commerce's interpretation in its Rejection Letter does not "reflect 'fair and considered judgement'" of the definitions of factual information. *Kisor*, 139 S. Ct. at 2415–16 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

Consequently, because Commerce's regulatory definitions of factual information do not cover the revised translation, and because Commerce's classification of the revised translation as factual information is not entitled to deference, the court finds that ZMC's submission of the revised translation was not a submission of new factual information.

B. Relevant Caselaw also Distinguishes the Revised Translation from Submissions of New Factual Information.

The caselaw generally distinguishes submissions of new factual information from submissions of other information, including minor corrections. Submissions of new, substantial information occur when: (1) the respondent submits information requested by Commerce to fill a gap in a response after withholding the information, *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1305 (Fed. Cir. 2014); (2) the information submitted implicates the accuracy of the respondent's underlying production or cost reconciliations, *Goodluck*, 393 F. Supp. 3d at 1365 (citation omitted); or (3) the submission requires a "substantial

revision" of a respondent's response, *id.* at 1365 (citation omitted). New factual information submissions do not occur when the respondent is rectifying minor reporting mistakes, even if those errors have a cascading impact on other calculations. *See id.* at 1364–67 (citing *NTN Bearing*, 74 F.3d at 1205).

ZMC's submission was not a result of the company withholding information from Commerce, nor did it require a "substantial revision" of ZMC's response in the manner described in the caselaw. *See Goodluck*, 393 F. Supp. 3d at 1365 (citation omitted) (noting the respondent's submission of corrective information would not result in revision to whole sets of already-submitted data because it did not impact underlying data). Although the revised translation could potentially "implicate the accuracy" of other elements of ZMC's submitted translations, it does not do so in the same manner as a submission that implicated the accuracy of underlying production or cost reconciliation data because mistranslation of a single phrase does not affect other elements of ZMC's submissions. In fact, ZMC consistently disclaimed ESOC involvement in the labor union, even if it never explicitly claimed that the ESOC members were not also labor union members. *See, e.g.*, Revised Case Brief at 4, 9, 11; May Submission at Ex. 6.

The Government's claim that ZMC's rejected submission is distinguishable from other instances where Commerce's rejection of information was deemed an abuse of discretion is unpersuasive. Even if the rejection of a revised translation presents a case of first impression, a revised translation of a few words is similar to other instances where courts deemed information corrective. Although the Government is correct that the respondent's errors in *NTN Bearing*, *Fischer*, and *Goodluck* all concerned errors in numerical entries, whereas ZMC's concerns a language translation error, *see* Def.'s Br. at 27, each involves translation from thousands of individual pieces of information into another set of information that Commerce can more readily employ in its investigation. This includes translating kilograms to gallons, *Fischer*, 700 F. Supp. 2d at 1366, or original sales data into data coded for product or geographical characteristics, *NTN Bearing*, 74 F.3d at 1207–08; *Goodluck*, 393 F. Supp. 3d at 1364.

In this case, ZMC claimed a translator made the perhaps questionable mistake of adding in a term that did not exist in the original Mandarin version in what turned out to be a significant segment of the translation, but as the Government admits, "[l]anguage translation . . . between languages as dissimilar as Mandarin and English, is a complex analytical task." Def.'s Br. at 27. A translator's task of coding Mandarin characters or groups of characters to one of tens of

thousands of words and phrases in English is likely just as complicated, and therefore just as difficult and prone to error, as coding sales data to one of a limited number of numerical entries. Given the "desire for accuracy in antidumping duty determinations," a revised translation of a few words stemming from an error committed in a difficult task is just as eligible to be deemed corrective information as are the types of errors from *NTN Bearing*, *Fischer*, and *Goodluck*. *See Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006) ("*Timken U.S.*").

Moreover, Commerce's suggestion that language translation errors are different than errors from "rote tasks" or clerical errors because translation involves errors in "judging subtle distinctions resulting from connotation and context" resembles a distinction Commerce has made in the past with which the Federal Circuit has disagreed. Def.'s Br. at 27. The court in *Timken U.S.* criticized Commerce's use "of the so-called 'Colombian Flowers Test,'" which required "the error be of a 'clerical' nature, not a 'methodological error, a substantive error, or an error in judgment'" to allow a correction. 434 F.3d at 1348. The court specifically stated that "[t]o the extent that Commerce cites *NTN Bearing* for the source of its distinction between 'clerical' and other errors, we surmise that Commerce erroneously extrapolated one where none was stated or intended." *Id.* at 1353. Commerce may "correct any type of importer error—clerical, methodology, substantive, or one in judgment . . . ." *Id.* Because the Government now raises a similar distinction, the court finds its claim unpersuasive.

Therefore, because ZMC's revised translation does not meet any of Commerce's own definitions for "factual information" and is similar to other submissions courts have accepted as corrective information Commerce may accept, the court finds the revised translation is not factual information but is instead corrective.

C. Commerce's Rejection of ZMC's Submission of Corrective Information Was Not Supported by Substantial Evidence or in Accordance with Law.

Commerce must follow its "procedures for the correction of ministerial errors in final determinations," while ensuring "opportunity for interested parties to present their views regarding any such errors." 19 U.S.C. § 1673d(e). These statutory requirements, however, "cover only an error committed by Commerce itself." *Alloy Piping Prod., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284, 1290 (Fed. Cir. 2003). There is no regulation by Commerce "addressing whether an importer can correct errors in the information it has submitted" or "restrict[ing] the types of importer errors that are eligible for such correction." *Timken U.S.*, 434 F.3d at 1353.

Commerce is not barred from "correct[ing] any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections." *Id.* Furthermore, failure by Commerce to accept corrective information from respondents may be an abuse of discretion because Commerce's duty is to determine dumping margins accurately. *NTN Bearing*, 74 F.3d at 1207–08 (Fed. Cir. 1995) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1189 (Fed. Cir. 1990)); *see also Timken U.S.* 434 F.3d at 1353 (noting the Federal Circuit has "only balanced the desire for accuracy . . . with the need for finality at the final results stage" in its assessment of Commerce's rejection of corrective information). In regard to accepting or denying corrective information, if "Commerce acted differently in [a given] case than it has consistently acted in similar circumstances without reasonable explanation[,] then Commerce's actions will have been arbitrary." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003).

The court finds Commerce's rejection of ZMC's revised translation was an abuse of discretion. It is Commerce's responsibility to determine dumping margins "as accurately as possible," in part because antidumping duties are not punitive, but remedial. *NTN Bearing*, 74 F.3d at 1207–08 (Fed. Cir. 1995) (quoting *Rhone Poulenc*, 899 F.2d at 1191); *see Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–04 (Fed. Cir. 1990). Even if Commerce had reasons other than the finding it drew from the original translation for its *Final Results*, "Commerce's duty to determine [ZMC's] dumping margin as accurately as possible" still required Commerce to accept information that may have corrected evidence on the agency record. *Fischer*, 700 F. Supp. 2d at 1376. Commerce's citation to potentially uncorrected evidence in its *IDM* as part of its reasoning further supports that it abused its discretion in rejecting the revised translation. *See id.*; Def.'s Br. at 20 n.2 (noting that the agency record upon which Commerce's final determination is based reflects the original translation). Commerce's response in its IDM states in part:

> [W]e disagree that evidence on the record supports Zhejiang Machinery's argument that the labor union and the ESOC are unconnected . . . . Zhejiang Machinery relies on the fact that Sunny's directors do not hold positions in the labor union; however, it disregards the inconvenient fact that 1) the labor union is the controlling shareholder in Sunny; and 2) the individual owners of Sunny's ESOC are all labor union members. We find it relevant that the owners of Sunny's ESOC are all members of

> Sunny's labor union . . . . Indeed, Sunny's AOAs confirm the accuracy of these conclusions and further support them.

IDM at 11 (footnotes omitted). Since the revised translation in ZMC's August Submission calls into question a major component of Commerce's response to ZMC, and Commerce itself indicated its reliance on the "accuracy" of the original translation, the rejection undermines the accuracy of Commerce's final determination.[5] Failure to consider the revised translation "to correct information already provided was a violation of Commerce's duty to determine [ZMC's] dumping margin as accurately as possible . . . ." *Fischer* 700 F. Supp. 2d at 1376. Interests of accuracy, then, weigh in favor of a finding that Commerce abused its discretion.

Furthermore, in this case ZMC submitted its corrective information far before concerns of finality would have emerged. *Cf. Chengde Malleable Iron Gen. Factory v. United States*, 31 CIT 1253, 1260, 505 F. Supp. 2d 1367, 1374 (2007) (holding that the "requirement of administrative finality necessarily outweighed [the importer-plaintiff's] belated concern for correctness."). Interests of finality typically do not arise until Commerce's issuance of its final determination. *Timken U.S.*, 434 F.3d at 1354 (holding Commerce should have accepted new evidence because the respondent submitted it before Commerce "issued the final results"); *Alloy Piping*, 334 F.3d at 1293 (holding Commerce was not required to correct a non-apparent error if a respondent requests to correct the error after the final determination); *NTN Bearing*, 74 F.3d at 1208 (holding Commerce's rejection of new information was an abuse of discretion because it would not have delayed the final determination). Here, ZMC submitted its revised translation in August 2018, a full six months before Commerce issued its *Final Results* in February 2019. The submission, therefore, did not arrive during the final stages of the investigation. This is also supported by the fact that Commerce waited until December 2018 to reject ZMC's August Submission. Rejection Letter at 1. Thus, the record does not support any tension "'between finality and correct

[5] In its IDM, Commerce notes that "Sunny's AoAs" confirm its conclusion about ESOC membership in the labor union. IDM at 11. Commerce does not refer to the "ESOC's Articles of Association (AOAs)" for this conclusion but references them elsewhere in the IDM. IDM at 5. Upon first glance, Commerce seems to be referencing Sunny's Articles of Association ("Sunny's Articles"), which also appear in the agency record along with the ESOC Articles whose translation ZMC attempted to revise. Following the reference to "Sunny's AoAs," however, is a footnote that cites to "Zhejiang Machinery Supp SRA at Exhibit 7, Article 1," where the ESOC Articles appear. *See* Dec. Submission at Ex. 7. Therefore, it is reasonable to assume that the reference to "Sunny's AoAs," IDM at 11, refers to either to Sunny's Employee Stock Ownership Committee Articles of Association, the ESOC Articles, or to the collection of Articles of Association involving Sunny, including Sunny's Articles and the ESOC Articles. In either scenario, the ESOC Articles are included.

result' at later stages of an investigation." *Goodluck*, 393 F. Supp. 3d at 1358 (citing *NTN Bearing*, 74 F.3d at 1208).

Even if finality of the translation itself is of concern, the Government itself claims the conclusions drawn from the original translation are only "relevant" to the final determination and are not dispositive. Def.'s Br. at 30 (quoting IDM at 11). A revised translation of a few, merely relevant words would hardly "have required beginning anew nor have delayed making the final determination." *Timken U.S.*, 434 F.3d at 1353 (quoting *NTN Bearing*, 74 F.3d at 1208). Moreover, the interest of finality discussed in the caselaw refers to finality of the determination, not finality of the evidence submitted to make such a determination. *See, e.g.*, *id.*, at 1352; *Alloy Piping*, 334 F.3d at 1293; *NTN Bearing*, 74 F.3d at 1208. Therefore, interests of finality as applicable to the rejection of corrective information are moot.

Because there were no concerns of finality and because Commerce violated its duty to ensure accuracy in its determinations, it should consider the revised translation to make sure its antidumping duty for ZMC is remedial and not punitive. *See Fischer S.A. Comercio, Industria & Agricultura v. United States*, 471 F. App'x 892, 895 (Fed. Cir. 2012). Therefore, the court holds that Commerce's rejection of the August Submission containing the revised translation was an abuse of its discretion. *See also Fischer* 700 F. Supp. 2d at 1376.

The Government's final point—that as a matter of policy, requiring Commerce to accept this information would "expand the exception for 'corrective information' beyond its current limits to a position that would undermine the integrity of Commerce's proceedings," Def.'s Br. at 28—is also uncompelling. The same claim could be made if Commerce rejects corrective information and then bases its conclusions on uncorrected information in the administrative record. It is the respondent's responsibility to "provide Commerce with 'accurate, credible, and verifiable information.'" *Kaiyuan Grp. Corp. v. United States*, 28 CIT 698, 720, 343 F. Supp. 2d 1289, 1310 (2004) (quoting *Gourmet Equip. Corp. v. United States*, 24 CIT 572, 574 (2000)). Commerce, however, should not reject proposed corrections well before its final determination and then base its conclusions on potentially erroneous information because antidumping duties are "remedial, rather than punitive, compensatory, or retaliatory." *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103, 1103 n.5, (Fed. Cir. 1990) (explaining that a contrary reading of the Tariff Act of 1930 would be "inconsistent with the General Agreement on Tariffs and Trade"). *See also NTN Bearing*, 74 F.3d at 1208 (citations omitted); *Guangdong Wireking Housewares & Hardware Co. v. United States*,

37 CIT 319, 325, 900 F. Supp. 2d 1362, 1370 (2013), *aff'd*, 745 F.3d 1194 (Fed. Cir. 2014)) (noting the remedial nature of antidumping duties is "well established").

Moreover, the revised translation ZMC submitted was simple, limited, and only consisted of changes to a few words. *See* Aug. Submission at 3. It did not resemble cases in which the courts have sustained Commerce's decisions to reject more complex submissions. *See e.g.*, *Shandong Jinxiang Zhengyang Imp. & Exp. Co. v. United States*, 44 CIT __, __, 29 F. Supp. 3d 1373, 1379 (2020) ("Substantial record evidence demonstrates that Zhengyang failed to provide legible translations . . . and instead attempted to make an untimely submission of factual information in the form of modified, re-translated, or reorganized exhibits and tables." (internal quotation marks and citations omitted)); *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1295, 1313–14 (2017) (Respondent "provided [a] timely submission of the partially translated" document and "could have submitted a fully translated [] statement but chose not to do so within the deadline."). Therefore, in this case, the Government's concern that accepting corrective information would "undermine the integrity," Def.'s Br. at 28, of Commerce's process fails to outweigh the concern that, by rejecting potentially corrective translations of a few words, Commerce is applying punitive rather than remedial antidumping duties to ZMC. The court therefore rejects this policy argument.

In conclusion, the court finds that the revised translation in ZMC's August Submission was corrective information and that Commerce's rejection of it was an abuse of discretion.

II. ZMC Has Failed To Exhaust Administrative Remedies as to its Claims Regarding Commerce's NME Status Memo but not Union Membership of the ESOC Members or ESOC Member Capital Contributions.

Before a respondent can challenge a determination made by Commerce, 28 U.S.C. § 2637(d) states that the "Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." *See also* 19 C.F.R. § 351.309(c)(2). Respondents can meet this requirement with a "presentation of all issues and arguments in a party's administrative case brief" to Commerce. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (citing 19 C.F.R. § 351.309(c)(2)); *see also Luoyang Bearing Corp., v. United States*, 44 CIT __, __, Slip Op. 20–78 at 9–10 (June 1, 2020). Respondents do not meet exhaustion requirements "by merely mentioning a broad issue without raising a particular argument[;] [however,] plain-

tiff's brief statement of the argument is sufficient if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it." *Timken Co. v. United States*, 26 CIT 434, 460, 201 F. Supp. 2d 1316, 1340–41 (2002) ("*Timken Co.*") (citing *Hormel v. Helvering*, 312 U.S. 552 (1941); *Rhone Poulenc*, 899 F.2d at 1191).

The court may exercise discretion to excuse a respondent from this exhaustion requirement in certain narrow circumstances. *See* 28 U.S.C. § 2637(d) (requiring exhaustion only "where appropriate"). Examples of these narrow circumstances include when the respondent can demonstrate that raising the issue before the agency would have been futile and when the issue is purely a question of law. *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1146 (Fed. Cir. 2013); *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007); *see also Zhongce Rubber Grp. Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1276, 1279–80 (2018), *aff'd*, 787 F. App'x 756 (Fed. Cir. 2019). Although the futility exception exists where parties would otherwise be required to "go through obviously useless motions . . . [t]he mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies." *Corus Staal*, 502 F.3d at 1379 (citations omitted). Other exceptions to the exhaustion requirement are when a subsequent court decision might affect the agency's decision or when the respondent had reason to believe the agency would not follow precedent. *Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186, 240 F. Supp. 2d 1268, 1297 (2002).

A. ZMC Did Not Exhaust Administrative Remedies for its Claims Countering Commerce's Conclusions from the NME Status Memo Regarding GOC Control of Labor Unions.

ZMC argues that Commerce's NME Status Memo does not show that the GOC controls the ACFTU, and in turn, Sunny's labor union, because the NME Status Memo's analysis concerned the GOC's ability to influence wage bargaining through the ACFTU and not union activity in general. Pl.'s Br. at 25–27. The Government counters that ZMC has failed to exhaust administrative remedies for this claim as required by 28 U.S.C. § 2637(d) because Commerce noted the ACFTU's control over labor unions in its *Preliminary Results* and ZMC failed to contest that claim in its Revised Brief. Def.'s Br. at 14–16.

In its answers to the court's questions, ZMC notes two occasions where it mentioned the NME Status Memo. Pl.'s Suppl. Answers at 1–2. It also raises these in its Reply Brief:

> ZMC challenged the Department's reliance on its NME Status Memo and specifically argued that the presumption of the Chinese government's control of Sunny's labor union was flawed . . . . ZMC Case Brief at 2.
>
> . . .
>
> ZMC specifically noted the flaw in the NME Status Memo assertion that the Chinese government favored management over ordinary workers and management dominates and controls trade unions . . . . ZMC Case Brief at 10.

Pl.'s Reply. at 3–4. The court addresses each of these mentions in turn to analyze whether ZMC has "merely mention[ed] a broad issue" or has if it has "rais[ed] a particular argument" to alert Commerce "to the argument with reasonable clarity and avails the agency with an opportunity to address it."[6] *Timken Co.*, 201 F. Supp. 2d at 1340–41 (citations omitted).

---

[6] ZMC notes five other mentions where it claims it made arguments that sufficiently exhausted administrative remedies. *See* Pl.'s Reply at 3–4. Two of these mentions, however, refer neither to the NME Status Memo nor to a connection between the GOC and any other group, so the court does not analyze them. The other three mentioned in ZMC's Reply Brief are:

> ZMC demonstrated that the alleged connection between the Chinese government's control over all unions through the ACFTU and the ACFTU's role of controlling Sunny's union was not possible . . . . ZMC Case Brief at 4–5.
>
> The three Sunny directors . . . were all not affiliated with any level of the Chinese government and did not hold any position with . . . any . . . labor union. ZMC Case Brief at 6.
>
> ZMC explained that there was "no organizational affiliation, let alone subordination, between the ESOC and Sunny's labor union or any level of Chinese government." ZMC Case Brief at 8.

Pl.'s Reply at 3.

ZMC claims the first mention above implicates the connection between the GOC, the ACFTU, and all unions, including Sunny's. Pl.'s Reply at 4. The claims in ZMC's Revised Case Brief, however, implicate direct connections between the GOC and individuals that either chose Sunny's management or the managers themselves, and not connections between the GOC, the ACFTU, and the labor union. This mention does not directly address ZMC's present argument that the NME Status Memo does not sufficiently support Commerce's finding that the GOC influences all labor union activity through the ACFTU. Simply claiming that none of the ESOC members are also members of the ACFTU likewise does not implicate the particular argument regarding conclusions drawn from the NME Status Memo, nor would Commerce have been able to address that argument based on this mention in the Revised Case Brief. Consequently, this mention fails to exhaust administrative remedies for the ZMC Status Memo claim.

ZMC argues the next two mentions above also gave Commerce the opportunity to address the claim about the NME Status Memo. Pl.'s Reply at 2–3. Like the first mention above, however, these claims merely address direct connections with the GOC and are, at best, "broad mention[s]" that the ESOC, Sunny, and Sunny's labor union are not connected to the GOC. *Timken Co. v. United States*, 26 CIT 434, 460, 201 F. Supp. 2d 1316, 1340 (2002). Because ZMC fails to make a "presentation of all issues and arguments" related to the lack

ZMC's first mention of the NME Status Memo in its Revised Case Brief is in a recitation of Commerce's Preliminary Decision Memo where ZMC notes, "relying on its China Non-Market Economy ('NME') Status Memo, the Department found Sunny's labor union to be government controlled . . . ." Revised Case Brief at 2 (footnotes omitted). While ZMC did mention Commerce's reliance on its NME Status Memo, ZMC follows this mention with only a summary discussion of how the ESOC, and not the labor union, exercises majority shareholder rights over Sunny. *Id.* Aside from a simple mention that Commerce relied on its NME Status Memo, ZMC does not discuss the connection between the GOC and the ACFTU that it now claims is more limited than Commerce suggests. Pl.'s Br. at 25–28. This first mention raises no particular argument that would have alerted Commerce to ZMC's present claim that Commerce's dependence on the NME Status Memo is flawed, and therefore ZMC failed to exhaust administrative remedies as to this argument. *See Timken Co.*, 201 F. Supp. 2d at 1340–44 (citations omitted).

As to the second mention, ZMC claims that it "specifically noted the flaw in the NME Status Memo assertion that the Chinese government favored management over ordinary workers and management dominates and controls trade unions." Pl.'s Reply at 3; *see also* Pl.'s Suppl. Answers at 1 (citing Revised Case Brief at 9). ZMC's Revised Case Brief states,

> According to the Department's China NME Status Memo, the Chinese government favors management over ordinary workers and management dominates and controls trade unions. If Sunny's ESOC were controlled by management, one would expect employees with union positions to dominate the ESOC membership as well as ESOC Council. However, that is not the case.

Revised Case Brief at 9 (citing NME Status Memo at 26). Via footnote, ZMC continues, "[t]he China NME Status Memo found that the Chinese government favors management over ordinary workers, causing the former to 'largely dominate and control trade unions.'" *Id.* at n.64 (quoting NME Status Memo at 26).

This mention does raise this issue: if the GOC had control over the ESOC in a manner the NME Status Memo suggests, then union members with union positions would dominate the ESOC. The mention fails, however, to take direct issue with the NME Status Memo itself as ZMC now does. Instead, it relies on the NME Status Memo to

of GOC influence, including the claim that the NME Status Memo is an insufficient basis for the relationship Commerce found between the GOC and all labor unions, these mentions also fail to exhaust administrative remedies. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010).

claim that, because the ESOC and its Council are not dominated by union leaders, the GOC conversely must not be controlling the ESOC and therefore Sunny and ZMC. ZMC claims this mention challenges the validity of the NME Status Memo's assertions. Pl.'s Suppl. Answers at 1. However, ZMC makes this particular claim in the context of arguing the ESOC and the labor union are not connected to the GOC. Revised Case Brief at 8–9. ZMC does not expand on this claim to form the argument it now raises that the NME Status Memo is an insufficient basis for Commerce's conclusion that the GOC controls all labor union activities. *See* Pl.'s Br. at 25–28. In fact, in its Revised Case Brief, ZMC seems to rely on the "Trade Unions and Collective Bargaining" section of the NME Status Memo as an authority to support its own conclusions, whereas now it claims that section is inappropriate for Commerce to use as a basis for its conclusions. Pl.'s Br. at 26–28. Because ZMC did not make a "presentation of all issues and arguments in [its] administrative case brief" related to its critique of Commerce's use of its NME Status Memo, here too it failed to exhaust administrative remedies as to that claim. *Dorbest Ltd.*, 604 F.3d at 1375.

Neither of the mentions regarding the NME Status Memo that ZMC now claims were sufficient to exhaust administrative remedies actually do so. Even taken together, these mentions from the Revised Case Brief do not "alert[] the agency to the argument with reasonable clarity and avail[] the agency with an opportunity to address it." *Timken Co.*, 201 F. Supp. 2d at 1340–41. Nor has ZMC addressed the claim related to the NME Status Memo conclusions in a manner as specific as previous respondents where courts have found plaintiffs exhausted administrative remedies. *See Itochu Bldg.*, 733 F.3d at 1143, 1146–48 (holding a respondent exhausted administrative remedies because "it set forth its position in comments, met with eight department officials to discuss the issue, and submitted legal support for its position"). For the same reason, ZMC's claim that it repeatedly addressed the single, broad "material issue" in this case—whether ZMC sufficiently rebutted the presumption of government control—is unpersuasive. Pl.'s Suppl. Answers at 2, 8 (quoting Def.'s Answers at 13); *see also Dorbest Ltd.*, 604 F.3d at 1375 (noting a respondent can meet the administrative exhaustion requirement through a "presentation of all issues and arguments").

Because ZMC, in its Revised Case Brief, failed to raise the criticisms it now raises—concerning Commerce's reliance on its NME Status Memo in the *Preliminary Results*—the court finds ZMC has failed to exhaust administrative remedies as required in 28 U.S.C. § 2637(d).

B. The Court Will Not Exercise its Discretion To Excuse ZMC from the Exhaustion Requirement for its Claim Regarding Commerce's NME Status Memo.

ZMC argues that if it failed to exhaust administrative remedies, the court should excuse the requirement because the invocation of the doctrine requires "it serve some practical purpose when applied." Pl.'s Reply at 5 (citing *Itochu Bldg.*, 733 F.3d at 1145). ZMC claims that invoking the doctrine here would serve none of its intended purposes, set forth in *Public Citizen Health Research Group v. Commissioner, FDA*, 740 F.2d 21, 29 (D.C. Cir. 1984)). *See* Pl.'s Reply at 5. ZMC notes *Public Citizen* presents four primary purposes for the doctrine: (1) ensuring respondents do not flout administrative processes; (2) protecting autonomy of agencies to make decisions; (3) developing relevant issues to aid judicial review; and (4) serving interests of judicial economy. *Id.*

Requiring administrative exhaustion here, however, fits several of the practical purposes of the doctrine. First, ZMC claims that it "did not flout the Department's established administrative processes and try to raise arguments for the first time"; yet as discussed above, it did not raise the issue previously with sufficient clarity to exhaust administrative remedies. Pl.'s Reply at 5. Second, in this case administrative exhaustion requires respondents to raise criticisms of how Commerce bases its *Preliminary Results* on its own evidence—including NME Status Memos—to Commerce before raising them to the court, thereby protecting Commerce's "interest in being the initial decisionmaker" when evaluating criticism to its own reports. *Itochu Bldg.*, 733 F.3d at 1145 (citation omitted). Third, had ZMC raised this argument and prompted a response from Commerce, it would have more fully developed a record for the court. *Id. Cf. Corus Staal*, 502 F.3d at 1380 ("[R]equiring Corus to set forth its factual and legal arguments in detail in its case brief would have had potential value . . . by . . . providing the agency an opportunity to set forth its position in a manner that would facilitate judicial review."). Finally, had Commerce admitted it had made an error in its *Preliminary Results* based on this criticism, such an occurrence would have promoted judicial efficiency. *Itochu Bldg.*, 733 F.3d at 1145 (citation omitted).

ZMC's claim that the futility exception for administrative exhaustion applies is unpersuasive. Pl.'s Answers at 7–8. Even if "Commerce in both the preliminary and final determination, and now here before this Court, presents the same explanation as to why it denied ZMC's separate rate status," Pl.'s Answers at 8, it does not excuse ZMC's requirement to exhaust administrative remedies because "[t]he mere

fact that an adverse decision may have been likely does not excuse a party from a . . . requirement that it exhaust administrative remedies," *Corus Staal*, 502 F.3d at 1379 (citation omitted). *Cf. Itochu Bldg.*, 733 F.3d at 1144 (citation omitted).[7]

Therefore, the court will not use its discretion to excuse the administrative exhaustion requirement for ZMC's present claim regarding the inadequacy of the NME Status Memo for Commerce's finding that the GOC controls labor union activity. Because ZMC failed to exhaust its administrative remedies as to this argument, and no judicial exception to the requirement is warranted here, the court will not consider ZMC's argument.

C. ZMC Did Exhaust Administrative Remedies for its Claim that the Record Does Not Support Commerce's Finding that All ESOC Members Are Labor Union Members.

ZMC argues the evidence on the record is insufficient to support Commerce's finding that all ESOC members were also members of Sunny's labor union, Pl.'s Br. at 23, which Commerce deems relevant to its final determination, IDM at 11. The Government argues that ZMC failed to exhaust administrative remedies as to this claim as well. Def.'s Br. at 14–16. ZMC again responds that it did not fail to exhaust administrative remedies as to this claim. Pl.'s Reply at 2–4.

This claim is related to the issue discussed above regarding whether Commerce's rejection of the revised translation in ZMC's August Submission for untimeliness was proper. In that submission, ZMC did specifically raise evidence to counter the original translation that Commerce used as a basis for its finding that all ESOC members were also union members, and ZMC claimed Commerce "should rely on [the] correct translation." Aug. Submission at 3. Assuming that the rejection of the revised translation was improper, then this argument in the August Submission alone should have alerted Commerce to ZMC's argument that the administrative record was insufficient for a finding that all ESOC members were union members. *See Timken Co.*, 201 F. Supp. 2d at 1340–41.

---

[7] The other the "specific narrow circumstances" where it may be appropriate to excuse administrative exhaustion requirements also do not apply. *Luoyang Bearing Corp. v. United States*, 44 CIT __, __, Slip Op. 20–78 at 4 (June 1, 2020). ZMC admits that it is "not asserting that this is a 'pure question of law;'" therefore, that exception also does not apply. Pl.'s Reply at 6 (quoting Def.'s Br. at 14); *see also Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1146 (Fed. Cir. 2013) (citation omitted). Moreover, ZMC does not point to subsequent court decisions that might have affected Commerce's decision, nor does ZMC claim it had reason to believe the agency would not follow precedent in making certain conclusions from its NME Status Memo. *See Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26, 240 F. Supp. 2d 1268, 1297 (2002).

Moreover, ZMC repeatedly raised the argument that the ESOC was independent of the labor union in its Revised Case Brief. It notes, for instance, that: (1) "the labor union has no authority to exercise ESOC's shareholder rights," Revised Case Brief at 3; (2) that "[o]nly a single ESOC member has a position with Sunny's labor union," *id.* at 4; and (3) that "[t]he ESOC is organized and acts independently from the company's labor union," *id.* at 7. These statements availed Commerce of the opportunity to address the argument that the ESOC's members operate independently from the labor union, which Commerce did in its *Final Results*, replying that the ESOC members "are all members of Sunny's labor union." IDM at 11. Therefore, ZMC did not fail to exhaust administrative remedies as to its present claim that Commerce's "conclusion that all Sunny ESOC members were members of Sunny's labor union [is] factually unsupported by the record . . . ." Pl.'s Br. at 23.

The court, therefore, will consider ZMC's arguments regarding ESOC membership in the labor union and Commerce's related conclusions regarding labor union control.

D. ZMC Did Exhaust Administrative Remedies for its Argument Regarding Capital Contribution of ESOC Members.

At oral argument and in its answers to the court's supplemental questions, ZMC argued "[t]he twenty individuals who comprise the ESOC and who did pay money for the Sunny shares are the actual shareholders who are entitled to vote at Sunny shareholder general meetings." Pl.'s Suppl. Answers at 3. The Government argued that this argument "was not raised before Commerce and thus cannot be raised now." Def.'s Suppl. Answers at 6 (citation omitted).

ZMC did present evidence before Commerce's *Final Results* that supports this argument. It raised evidence that shareholders exercise voting rights in proportion to their capital contribution. *See* Oct. Submission at Ex. 1 (listing Article 17 of Sunny's Articles). It also listed the individual shareholdings of each of the ESOC members in its May Submission. *See* May Submission at Ex. 6. Based on this evidence, ZMC noted: (1) "Sunny is ultimately owned by . . . Sunny's individual employees, *id.* at 4; (2) "[t]he total direct shareholding of these twenty individual shareholders is [[ ]]," *id.* at 5; and that (3) "Sunny is majority owned by its employees," *id.* at 5. Furthermore, ZMC noted that "[t]he employee stock ownership committee benefits and strengthens the individual shareholders' majority rights and

controls over Sunny." *Id.* ZMC's Revised Case Brief cites this mention for a claim that the ESOC represents shareholders and "protect[s] and promote[s] the interests of Sunny's private employees." Revised Case Brief at 3.

ZMC then provided more than a single, "brief statement of the argument" that the individual members of the ESOC that owned Sunny shares controlled Sunny's shareholder rights. Since it follows that the shares those individuals own, which ZMC provided for each individual, are "in proportion to their capital contribution," Oct. Submission at Ex. 1, Commerce was alerted "to the argument with reasonable clarity and avail[ed] . . . with an opportunity to address it." *Timken Co.*, 201 F. Supp. 2d at 1340–41 (citation omitted). Since Commerce had the opportunity to address this argument and these facts before its *Final Results*, ZMC exhausted administrative remedies as to this claim. The court, therefore, will consider this argument.

III. Commerce's Reasoning in its Final Determination Is Not Supported by Substantial Evidence on the Record.

ZMC argues Commerce's *Final Results* are unsupported by substantial evidence because the GOC lacks the potential to influence Sunny. ZMC contends: (1) Sunny's union lacked structure to be controlled; (2) the ESOC actually controls Sunny; and (3) record evidence does not support that all ESOC members are union members. Pl.'s Reply at 8–9, 11, 19. The Government responds that (1) the labor union "maintains the potential to exercise" control over Sunny and ZMC, regardless of the ESOC, Def.'s Br. at 17; and (2) Commerce's finding that all ESOC members are union members is only relevant to, but not necessary for, the *Final Results*, *id.* at 19–20.

Commerce determined in its IDM that ZMC failed to rebut the presumption of de facto government control because: (1) the GOC can control Sunny's labor union through the ACFTU; (2) the labor union has the potential to control selection of Sunny's management; and (3) the ESOC that ZMC claims exercises majority shareholder rights is connected to the labor union. *See* IDM at 11–12. Below, the court addresses each of these basic components of Commerce's determination.

A. Substantial Evidence Supports Commerce's Finding that the GOC Has the Ability To Control Sunny's Labor Union through the ACFTU.

ZMC argues the record does not support Commerce's conclusions that the GOC influences all labor union activities through the ACFTU, Pl.'s Br. at 25–28, and that the ACFTU can influence Sunny's

labor union, *id.* at 14–16. As discussed above, ZMC claims that the NME Status Memo upon which Commerce relies is an insufficient basis for Commerce's conclusion that the GOC controls all union activities through the ACFTU. *See* Pl.'s Br. at 25–28.

In addition to its administrative exhaustion argument, Def.'s Br. at 14–16, the Government maintains the GOC-affiliated ACFTU has a "legal monopoly" on Sunny's labor union according to Chinese law, *id.* at 18–19. *See also* IDM at 12–13 (quoting NME at 21). The Government further argues that the NME Status Memo does support Commerce's conclusion and that it is the only relevant information on the record. Def.'s Br. at 20–23 (citing NME Status Memo at 20–23). ZMC concedes that it did not offer evidence to show the ACFTU did not control all labor union activity, but instead argues the ACFTU could not have controlled Sunny's labor union because the labor union lacked any structure that could be controlled. Pl.'s Reply at 13–15.

"[I]f a reasonable mind might accept the evidence as sufficient to support" Commerce's conclusions, then substantial evidence supports the conclusions. *Maverick Tube Corp.*, 857 F.3d at 1359 (citation omitted). "[E]ven if there is some evidence that detracts from [Commerce's] conclusion," if the conclusion is supported by the administrative record as a whole, it is supported by substantial evidence. *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001) (citation omitted), *aff'd sub nom.*, *Shandong Huarong Gen. Grp. Corp. v. United States*, 60 F. App'x 797 (Fed. Cir. 2003). Substantial evidence may also even support a conclusion if "there is a 'possibility of drawing two inconsistent conclusions from the evidence.'" *Aluminum Extrusions Fair Trade Comm. v. United States*, 36 CIT 1370, 1373, 34 ITRD 2119 (2012) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

First, the court need not consider ZMC's argument here—that the NME Status Memo is an insufficient basis to conclude the GOC controls unions through the ACFTU—because ZMC failed to exhaust administrative remedies as to that argument. *See* Section II.A., *supra*. Moreover, the NME Status Memo itself provides substantial evidence for Commerce's finding, as it states: (1) the ACFTU has a "legal monopoly on all trade union activities;" (2) "[t]he Chinese government prohibits independent unions;" and (3) the ACFTU "preside[s] over a network of subordinate trade unions." NME Status Memo at 21 (citing to *Trade Union Law of the People's Republic of China*, Article 4, 9–10 (adopted by the National People's Congress on Apr. 3, 1992, amended Oct. 27, 2001, further amended Aug. 27, 2009)); *see also* May Submission at 105–07 (explaining that Chinese law states "[l]abor unions must . . . uphold . . . the leadership of the

Chinese Communist Party," that "the establishment of any grassroots labor union . . . must be reported to the immediately superior labor union organization for approval," and that the "[h]igher level labor unions may dispatch their members to assist and provide guidance to enterprise employees in organizing . . . labor unions."). The NME Status Memo further states that the GOC controls the ACFTU because union leaders hold Chinese Communist Party or government offices. NME Status Memo at 21.

Accepting the NME Status Memo as accurate because of a lack of contradictory evidence, it provides a substantial amount of evidence that the GOC controls or at least has the potential to control all union activity. Because this amount of evidence is enough such that "a reasonable mind might accept [it] as sufficient" for Commerce's conclusion that the GOC can control union activity through the ACFTU, that conclusion is supported by substantial evidence. *Maverick Tube Corp.*, 857 F.3d at 1359 (citation omitted).

ZMC's second argument—that the labor union lacks any structure on the record that the ACFTU could influence—is unpersuasive. Unlike the first argument, there is no administrative exhaustion concern with this argument, because here ZMC is simply pointing to a lack of evidence on the administrative record of the labor union's structure. Pl.'s Br. at 14; *see also* Def.'s Br. at 12 (not claiming ZMC failed to exhaust administrative remedies with respect to this argument). Admittedly, there is a paucity of information concerning the structure or operations of the labor union beyond that the labor union: (1) is a nominal shareholder, Pl.'s Br. at 20; (2) is registered with the ACFTU, *id.* at 6; (3) is a legal person, *id.*; and (4) has a leader, *id.* at 14. However, two possible inferences can be drawn from what is available. ZMC's conclusion from the evidence seems to indicate that the labor union is nothing more than a proxy and an organization that exists only on paper. *See id.* at 14–16; Pl.'s Reply at 13–14. Commerce concludes the opposite, that the labor union is at least substantial enough to have "union activity" that the ACFTU must approve and can control. IDM at 12.

Even though these conclusions conflict, Commerce's is nonetheless supported by substantial evidence such that a reasonable mind might accept it to support Commerce's conclusion. *See Aluminum Extrusions*, 36 CIT at 1373; *Maverick Tube Corp.*, 857 F.3d at 1359 (citation omitted). Commerce explains that the "labor union is governed by the Labor Union Law of the People's Republic of China and is registered before the Zhejiang Federation of Trade Unions, a local branch of the AFCTU [sic]." IDM at 9 (citing May Submission at 7). The Labor Union Law that governs Sunny's labor union supports Commerce's

characterization, requiring labor unions to "to protect . . . [the] interests of," "mobilize," "organize," and "educate employees." May Submission at 106. It follows that, since Sunny's labor union is registered and approved by a superior labor union, it has an organization capable of meeting those responsibilities and "upholding[ing] . . . the Chinese Communist Party." *Id.* It is unlikely that a labor union would have been approved to be registered, especially after the "verification" process identified on its Registration Certificate, if that union's only purpose was to exist as a paper proxy for an organization not allowed legal personhood. May Submission at 102.

Moreover, [[

]] is sufficient structure for the ACFTU to exert its influence. *See id.*; Pl.'s Br. at 5; *see also* May Submission at 118 (Article 38 of the General Principles of the Civil Law of the PRC states "the responsible person who acts on behalf of the legal person in exercising its functions and powers shall be its legal representative."). Because of these positions and because of the requirements of labor unions for approval by superior unions, Commerce's conclusion that the labor union has sufficient activity to be influenced by the ACFTU is also supported by substantial evidence. ZMC, which has the burden of rebutting the presumption of government control, only pointed to a lack of evidence instead of raising evidence to the contrary; it did not provide evidence that "fairly detract[ed] from [the] weight" of the substantial evidence on the record. *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997)); *see Sigma Corp.*, 117 F.3d at 1405–06.

Because substantial evidence on the record supports Commerce's conclusions that the GOC can control labor union activity through the ACFTU and that Sunny's labor union had sufficient activities that the ACFTU could influence, this first logical step for Commerce's *Final Results* is supported by substantial evidence.

B. Commerce Did Not Sufficiently Explain How the Labor Union Has the Potential To Exercise Majority Shareholder Rights in Light of Evidence Supporting the ESOC's Ability To Do So.

As discussed above, Commerce has adequately established GOC influence through the ACFTU to the labor union. It is plausible then that, if the labor union actually had the potential to control the majority of Sunny's shares, there could exist a "rational connection between the facts found and the choice [Commerce] made," *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, (1962), that "a reasonable mind might accept the evidence as sufficient to support

the finding," *Maverick Tube*, 857 F.3d at 1359. Below the court addresses whether Commerce has "articulate[d] a satisfactory explanation for" this key step in its analysis. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Although the responsibility to rebut the presumption of government control lies with the respondent, *Yantai CMC Bearing*, 203 F. Supp. 3d at 1322 (citing *AMS Assocs.*, 719 F.3d at 1379), the court must analyze whether Commerce has responded appropriately to the respondent's arguments. *See, e.g.*, *Itochu Bldg. Prods., Co. v. United States*, 40 CIT __, __,163 F. Supp. 3d 1330, 1337 (2016); *Aluminum Extrusions*, 36 CIT at 1373; *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 1174, 1177, 704 F. Supp. 1068, 1071 (1988). Pursuant to 19 U.S.C. § 1677f(i), Commerce is required "in antidumping and countervailing proceedings [to] address 'relevant arguments,'" including those "material to the agency's determination . . . ." *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1354 (Fed. Cir. 2005) ("*Timken U.S. Corp.*") (citations omitted). Specifically, 19 U.S.C. § 1677f(i)(3)(B) requires that Commerce "shall include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties . . . ."

In its IDM, Commerce explains that it "would expect that a majority shareholder . . . to have the ability to control . . . the selection of management," IDM at 8, and in other instances claims that "as the majority shareholder, Sunny's labor union has the inherent ability to . . . appoint board members," *id.* at 11. The focal point of ZMC's response, both in its administrative brief and its briefs to the court, was that the ESOC, and not the labor union, actually exercised the majority shareholder rights. *See* Revised Case Brief at 1; Pl.'s Br. at 17. Moreover, ZMC noted at oral argument and in its responses to the court's supplemental questions that the individuals who each owned a percentage of Sunny's shares actually controlled Sunny. Pl.'s Suppl. Answers at 3 (citing May Submission at Ex. 6). The evidence ZMC presents detracts from Commerce's expectation about the abilities of parties nominally listed as majority shareholders. *See CS Wind Vietnam*, 832 F.3d at 1373. Moreover, as the focal point of ZMC's response, Commerce is required to respond to this argument, as it is both relevant and material to its determination. *See* 19 U.S.C. § 1677f(i)(3)(B); *Timken U.S. Corp.*, 421 F.3d at 1354; *Asociacion Colombiana de Exportadores de Flores*, 704 F. Supp. at 1071.

The Government argues that Commerce's explanation in its IDM was adequate because "potential control . . . is, for all intents and purposes, actual control" and Commerce explained the labor union

had "the ability to control" Sunny. Def.'s Br. at 24 (quoting *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 42 CIT __, __, 284 F. Supp. 3d 1350, 1359 (2018)); *see also* IDM at 11. The Government further argues that ZMC's claim that the ESOC actually exercises majority shareholder rights "disregards this case law" and improperly advocates that only actual exercise be established. *Id.*

In its latest brief, ZMC claims Commerce has repeatedly failed to address the argument that the ESOC exercises majority shareholder rights and effectively controls Sunny, and that Commerce has created an "irrebuttable presumption" of government control that contradicts Commerce's prior precedent. Pl.'s Reply at 7; *see also Diamond Sawblades Mfrs.*, 866 F.3d at 1311 ("[W]e consistently have sustained Commerce's application of a rebuttable presumption of government control.").

ZMC is correct in claiming Commerce failed to adequately address the argument that the labor union cannot exercise majority shareholder rights because the ESOC does. Although the caselaw supports the sufficiency of the "potential control" standard, ZMC claimed that the labor union does not have even the potential to control Sunny because the labor union "has no ability . . . to exercise[] legal authority or control over shareholder rights" by virtue of the ESOC's activities. Revised Case Brief at 10. Commerce does not directly address this argument that is adverse to its own determination. Instead of explaining how the labor union could go about expressing its majority shareholder rights in light of the ESOC, either legally or through other means, Commerce simply repeats the reasoning in the Preliminary Decision Memo in its *Final Results*. *See* Preliminary Decision Memo at 8; IDM at 8 ("As we explained in the *Preliminary Results*. . . . where a government entity holds a majority equity ownership . . . [it] means that the government exercises, or has the potential to exercise, control over the company's operations.") In the *Diamond Sawblades* proceedings, it was more apparent how the state-owned enterprise that held a majority share had the potential to control the respondent whereas here, the respondent claims a government-affiliated majority shareholder actually lacks any potential to control the respondent. *See Advanced Tech. & Materials Co. v. United States,* 37 CIT 1487, 938 F. Supp. 2d 1342, 1345 (2013), *aff'd*, 581 F. App'x 900 (Fed. Cir. 2014). Because ZMC makes the relevant argument that its situation is not one in which "the majority shareholder can typically control the operations of a company," *An Giang Fisheries*, 284 F. Supp. 3d at 1359, contrary to what Commerce "would expect," IDM at 10, Com-

merce should address it. Moreover, even in the *Diamond Sawblades* proceedings, Commerce eventually explained how the state-owned enterprise had the potential to exercise government control over the respondent's management and its decision was then upheld. *See Advanced Tech.*, 938 F. Supp. 2d at 1345.

Because Commerce failed to address ZMC's relevant and material argument regarding the labor union's inability to control majority shareholder rights, Commerce did not meet the requirements in 19 U.S.C. § 1677f(i)(3)(B) and failed to explain its determination with sufficient clarity. *See Timken U.S. Corp.*, 421 F.3d at 1353 ("[A]n agency must explain its action with sufficient clarity to permit 'effective judicial review.'" (quoting *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973))). Therefore, the court remands this issue to Commerce for further explanation.

C. Commerce's Conclusion That All ESOC Members are Also Labor Union Members Is Not Supported by the Evidence.

The final logical component of Commerce's explanation of its *Final Results* is whether the ESOC and the labor union are connected. If they are, since ZMC claims the ESOC actually exercises majority shareholder rights, this may support a finding of potential government control.

In its Revised Case Brief, ZMC argued the ESOC is independent from the labor union. Revised Case Brief at 7. Commerce responded that "individual owners of Sunny's ESOC are all labor union members." IDM at 11 (referring to the original translation of the ESOC Articles). Although the Government argues Commerce's ultimate conclusion does not depend on this finding, Commerce nonetheless did consider this finding as "relevant," and presented it as only one of two responses to ZMC's argument that the ESOC and labor union are unconnected. *Id.*; *see* Def.'s Br. at 20 n.2. ZMC claims, however, that this assertion is based on the incorrect translation that it attempted to correct. Pl.'s Reply at 20.

As discussed above, Commerce improperly rejected the revised translation in ZMC's August Submission. Had Commerce not rejected the revised translation, it could have met its responsibility to "examine the relevant data and articulate a satisfactory explanation for" deciding which translation to choose. *Motor Vehicle Mfrs.*, 63 U.S. at 43. Moreover, since ZMC essentially made a relevant argument in submitting the revised translation that is adverse to Commerce's *Preliminary Results*, Commerce should be required to address it for the same reasons stated above. *See* 19 U.S.C. § 1677f(i)(3)(B); *Timken*

U.S. Corp., 421 F.3d at 1354 (citations omitted); *see also Aluminum Extrusions*, 36 CIT at 1373.

Since Commerce itself designates this argument as "relevant" to its analysis, it should be required to address the revised translation. The Government claims the finding that all members of the ESOC are also labor union members is not necessary to Commerce's overall conclusion. Def.'s Br. at 20; *see also Asociacion Colombiana de Exportadores de Flores*, 704 F. Supp. at 1071 (explaining whether Commerce is required to address an issue depends on if the final determination may be "sufficiently reviewed without specific discussion of the issue," among other considerations). However, Commerce itself lists this finding alongside what the Government now claims is Commerce's main claim and notes the ESOC Articles support this finding. IDM at 11. The Government's present argument that this finding is unimportant, then, is at best a post hoc rationalization that cannot be used to meet Commerce's responsibility to explain its determination. *See Hoogovens Staal BV*, 4 F. Supp. 2d at 1219 (citation omitted). Instead, because Commerce itself deems the finding as relevant to its determination, it should be required to address the revised translation. *Timken U.S. Corp.*, 421 F.3d at 1354 (citations omitted) (holding that 19 U.S.C. § 1677f(i) "requires that issues material to the agency's determination be discussed.").

Therefore, the court remands to Commerce its determination to address the revised translation in ZMC's August Submission that contradicts its relevant finding or to otherwise explain whether the finding is actually necessary for its ultimate conclusion that ZMC failed to rebut the presumption of de facto government control.

CONCLUSION

For the reasons discussed above, the court finds: (1) Commerce's rejection of ZMC's August Submission to be unsupported by substantial evidence and not in accordance with the law; (2) ZMC failed to exhaust administrative exhaustion requirements as to its argument that Commerce's NME Status Memo is an insufficient basis for the conclusion that the GOC controls all labor activities through the ACFTU; (3) ZMC did not fail to exhaust administrative exhaustion requirements as to its arguments that ESOC members are not all labor union members and regarding the capital contributions of the ESOC members; (4) Commerce failed to adequately address how the labor union could exercise majority shareholder rights to control selection of management in light of the evidence concerning the ESOC's activities; and (5) Commerce failed to address the material issue that its finding—that all ESOC members are members of the

labor union, based on the original translation of the ESOC Articles—could be incorrect. Therefore, the court remands to Commerce its determination that ZMC failed to establish a lack of de facto government control over its activities to: (1) consider the revised translation; (2) address how the labor union had the potential to exercise majority shareholder rights in light of the ESOC; and (3) address how the revised translation impacts its analysis. The court takes no position on the issue of whether, with more robust analysis, explanation, and consideration of the evidence, Commerce's determination may be supported by substantial evidence. Commerce shall file with the court and provide to the parties its remand results within 90 days of the date of this order; thereafter the parties shall have 30 days to submit briefs addressing the revised final determination with the court, and the parties shall have 30 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: August 21, 2020
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 20–123

KENT INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 15–00135

[Plaintiff's motion for summary judgment denied; Defendant's cross-motion for summary judgment granted.]

Dated: August 25, 2020

Philip Yale Simons, *Jerry P. Wiskin*, and *Patrick C. Reed*, Simons & Wiskin of South Amboy, NJ for Plaintiff Kent International, Inc.

Monica P. Triana, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With her on the brief were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-in-Charge International Trade Field Office, and *Aimee Lee*, Assistant Director. Of counsel on the brief was *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, NY.

OPINION

Gordon, Judge:

Plaintiff Kent International, Inc. ("Kent") challenges the classification by U.S. Customs and Border Protection ("Customs" or "CBP") of

its entries of imported child safety seats for bicycles ("subject merchandise") under the Harmonized Tariff Schedule of the United States ("HTSUS"). Before the court are cross-motions for summary judgment. *See* Pl.'s Amended Mot. for Summ. J., ECF No. 52 ("Pl.'s Br."); Def.'s Cross-Mot. for Summ. J. and Opp. to Pl.'s Mot. for Summ. J., ECF No. 55 ("Def.'s Br."); *see also* Pl.'s Reply & Resp. to Def.'s Cross-Mot. for Summ. J., ECF No. 58–2 ("Pl.'s Resp."); Def.'s Reply in Supp. of Cross-Mot. for Summ. J., ECF No. 59 ("Def.'s Reply"). Customs classified the subject merchandise as "Parts and accessories of vehicles of heading 8711 to 8713: . . . Other: . . . Other" under HTSUS subheading 8714.99.80, at a 10% duty rate. Plaintiff argues that Customs violated the "treatment" provisions of 19 U.S.C. § 1625(c), as well as the "established and uniform practice" provisions of 19 U.S.C. § 1315(d), and that the subject merchandise should be classified under HTSUS heading 9401. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012). For the reasons set forth below, Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted.

I. Undisputed Facts

The following facts are not in dispute. *See generally* Plaintiff's Statement of Material Facts Not in Dispute, ECF No. 51–4 ("Pl.'s Facts Stmt."); Defendant's Response to Plaintiff's Statement of Material Facts, ECF No. 55–3 ("Def.'s Resp. to Facts"); Defendant's Statement of Undisputed Material Facts, ECF No. 55–2 ("Def.'s Facts Stmt."); Plaintiff's Response to Defendant's Statement of Undisputed Material Facts, ECF No. 58–1 ("Pl.'s Resp. to Facts"). The merchandise at issue is Plaintiff's child safety seats for bicycles. Def.'s Facts Stmt. ¶ 1; Pl.'s Resp. to Facts at 1. Customs issued ruling NY L86862 dated August 9, 2005 to Kent classifying its child bicycle safety seats under HTSUS heading 8714 ("2005 Kent Ruling"). Pl.'s Facts Stmt. ¶ 1; Def.'s Resp. to Facts at 1. Starting in April 2008 through at least October 2010, Kent submitted multiple protests, including two separate applications for further review ("AFRs"), to Customs seeking reclassification and re-liquidation under HTSUS heading 9401 of entries of child bicycle safety seats at the Port of New York/Newark. *See* Def.'s Facts Stmt. ¶¶ 8–14; Pl.'s Resp. to Facts at 2. From August 2008 through December 2010, Customs granted all of these protests, but did not make a determination on Kent's AFRs. *Id.*

On October 14, 2010, Kent made requests for post-entry amendments ("PEAs") as to 9 entries of "bicycle child carrier seats and parts thereof," seeking to amend each entry, which had not yet been liquidated, claiming that the proper tariff classification was under head-

ing 9401. Def.'s Facts Stmt. ¶ 15; Pl.'s Resp. to Facts at 2. The PEAs were granted by Customs at the Port of New York/Newark on November 12, 2010. *Id.* In sum, between August 2008 and November 2010, Customs approved 14 protests covering 35 entries and 9 PEAs covering 9 entries classifying Kent's child bicycle safety seats under HTSUS heading 9401. Def.'s Facts Stmt. ¶¶ 8–15; Pl.'s Resp. to Facts at 2. Beginning with Kent's protest covering entries made in December 2010, Customs stopped granting, and instead suspended, Kent's protests challenging the classification of its child bicycle safety seats at the Port of New York/Newark. Def.'s Facts Stmt. ¶ 18; Pl.'s Resp. to Facts at 2.

The 45 entries of Kent's child bicycle safety seats at issue in this action, submitted under cover of 17 separate protests, were made at the Port of Long Beach between December 4, 2008 and March 31, 2014 and were liquidated between October 16, 2009 and February 13, 2015 under HTSUS heading 8714. *See* Def.'s Facts Stmt. ¶ 20; Pl.'s Resp. to Facts at 2. The 17 protests filed at the Port of Long Beach were received by CBP between December 24, 2009 and March 12, 2015, and all of those protests were subsequently denied. *See* Def.'s Facts Stmt. ¶ 21; Pl.'s Resp. to Facts at 2. In several of the protests filed in 2009 and 2010 at the Port of Long Beach, Kent asked that the port suspend making a decision pending a determination on the second AFR made at the Port of New York/Newark. Def.'s Facts Stmt. ¶ 22; Pl.'s Resp. to Facts at 2. Despite the 2010 approval of the New York/Newark protests, including the protest in which Kent filed the second AFR, Kent was informed by Customs at the Port of Long Beach in 2011 that it planned to deny the pending protests and uphold the classification of the merchandise under HTSUS heading 8714, consistent with the 2005 Kent Ruling that was never revoked by Customs Headquarters. Def.'s Facts Stmt. ¶¶ 23, 24; Pl.'s Resp. to Facts at 2. Kent filed Protest No. 2704–11–100728, which included an AFR, at the Port of Long Beach on April 11, 2011 with respect to the merchandise in issue. Def.'s Facts Stmt. ¶ 25; Pl.'s Resp. to Facts at 2.

Customs issued ruling NY N016953 to one of Kent's competitors, Bell Sports, dated September 21, 2007 classifying its child bicycle seats under HTSUS heading 9401. Pl.'s Facts Stmt. ¶ 23; Def.'s Resp. to Facts at 8. Customs issued ruling NY N066722 to a second of Kent's competitors, Todson, Inc. ("Todson"), on July 16, 2009 classifying its child bicycle seats under HTSUS heading 9401. Pl.'s Facts Stmt. ¶ 21; Def.'s Resp. to Facts at 8. Customs issued ruling NY N166197 to another of Kent's competitors, Britax Child Safety Inc. ("Britax"), on

June 6, 2011 classifying its child bicycle seats under HTSUS heading 9401. Pl.'s Facts Stmt. ¶ 22; Def.'s Resp. to Facts at 8.

On June 26, 2014, following notice and comment, Customs issued ruling HQ H180103 revoking the three rulings issued to Bell Sports, Todson and Britax. Def.'s Facts Stmt. ¶ 33; Pl.'s Resp. to Facts at 3. In HQ H180103, Customs determined, consistent with the 2005 Kent Ruling, that "the child bicycle seat designed for attachment to an adult bicycle is classified in heading 8714, HTSUS," dutiable at 10% ad valorem. *Id.* This revocation was published in the *Customs Bulletin* on July 23, 2014 and became effective on September 22, 2014. *Id.* On February 11, 2015, in response to Kent's April 2011 AFR, Customs issued ruling HQ H170637 ("2015 Kent Ruling"). Def.'s Facts Stmt. ¶ 34; Pl.'s Resp. to Facts at 3. In that ruling, Customs found that "Kent's child bike seats are properly classified under heading 8714, HTSUS, as accessories to bicycles," and also denied Kent's claims that Customs violated a treatment or an established and uniform practice. *Id.*

II. Standard of Review

The court reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine issue as to any material fact." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering whether material facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

III. Background

This action has been the subject of three previous opinions, and the court assumes familiarity with those decisions. *See Kent Int'l, Inc. v. United States*, 40 CIT ___, 161 F. Supp. 3d 1340 (2016) ("*Kent I*") (addressing various procedural matters); *Kent Int'l, Inc. v. United States*, 41 CIT ___, 264 F. Supp. 3d 1340 (2017) ("*Kent II*") (denying Defendant's motion to dismiss Plaintiff's "treatment" and "established and uniform practice" claims); *Kent Int'l, Inc. v. United States*, 43 CIT ___, 393 F. Supp. 3d 1218 (2019) ("*Kent III*") (ruling for Defendant on merits of classifying Plaintiff's child bicycle safety seats under HTSUS heading 8714 as accessories of bicycles).

IV. Discussion

A. Treatment under 19 U.S.C. § 1625(c)

In the *Motorola* line of cases, this Court and the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") discussed 19 U.S.C. § 1625(c), as well as the implementing regulation adopted by Customs that further clarifies the meaning of the statutory phrase "treatment previously accorded by the Customs Service to substantially identical transactions," 19 C.F.R. § 177.12(c). *See Motorola, Inc. v. United States*, 28 CIT 1310, 350 F. Supp. 2d 1057 (2004); *Motorola, Inc. v. United States*, 436 F.3d 1357 (Fed. Cir. 2006) ("*Motorola II*"); *Motorola, Inc. v. United States*, 30 CIT ___, 462 F. Supp. 2d 1367 (2006) ("*Motorola III*"); *Motorola, Inc. v. United States*, 509 F.3d 1368 (Fed. Cir. 2007). "To establish a violation of § 1625(c)(2), [an importer] must show that: (1) an interpretative ruling or decision; (2) effectively modified; (3) a 'treatment' previously accorded by Customs to 'substantially identical transactions'; and (4) the interpretative ruling or decision had not been subject to the notice and comment process set forth in § 1625(c)(2)." *See Motorola III*, 30 CIT at ___, 462 F. Supp. 2d at 1372.

Additionally, the implementing regulation addresses what an importer must demonstrate to establish a "treatment":

> (c) Treatment previously accorded to substantially identical transactions –
>
> (1) General. The issuance of an interpretive ruling that has the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions must be in accordance with the procedures set forth in paragraph (c)(2) of this section. The following rules will apply for purposes of determining under this section whether a treatment was previously accorded by Customs to substantially identical transactions of a person:
>
> (i) There must be evidence to establish that:
>
> (A) There was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment;
>
> (B) The Customs officer making the actual determination was responsible for the subject matter on which the determination was made; and

(C) Over a 2-year period immediately preceding the claim of treatment, Customs consistently applied that determination on a national basis as reflected in liquidations of entries or reconciliations or other Customs actions with respect to all or substantially all of that person's Customs transactions involving materially identical facts and issues;

(ii) The determination of whether the requisite treatment occurred will be made by Customs on a case-by-case basis and will involve an assessment of all relevant factors. In particular, Customs will focus on the past transactions to determine whether there was an examination of the merchandise (where applicable) by Customs or the extent to which those transactions were otherwise reviewed by Customs to determine the proper application of the Customs laws and regulations. For purposes of establishing whether the requisite treatment occurred, Customs will give diminished weight to transactions involving small quantities or values, and Customs will give no weight whatsoever to informal entries and to other entries or transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review;

(iii) Customs will not find that a treatment was accorded to a person's transactions if:

(A) The person's own transactions were not accorded the treatment in question over the 2-year period immediately preceding the claim of treatment;

(B) The issue in question involves the admissibility of merchandise;

(C) The person made a material false statement or material omission in connection with a Customs transaction or in connection with the review of a Customs transaction and that statement or omission affected the determination on which the treatment claim is based; or

(D) Customs advised the person regarding the manner in which the transactions should be presented to Customs and the person failed to follow that advice; and

(iv) The evidentiary burden as regards the existence of the previous treatment is on the person claiming that treatment. The evidence of previous treatment by Customs must include a list of all materially identical transactions by entry number (or

> other Customs assigned number), the quantity and value of merchandise covered by each transaction (where applicable), the ports of entry, the dates of final action by Customs, and, if known, the name and location of the Customs officer who made the determination on which the claimed treatment is based. In addition, in cases in which an entry is liquidated without any Customs review (for example, the entry is liquidated automatically as entered), the person claiming a previous treatment must be prepared to submit to Customs written or other appropriate evidence of the earlier actual determination of a Customs officer that the person relied on in preparing the entry and that is consistent with the liquidation of the entry.

19 C.F.R. § 177.12(c). In *Motorola II*, the Federal Circuit recognized that the term "treatment" in § 1625(c) was ambiguous and held that § 177.12(c)(1)(ii) contained a permissible interpretation of the term that was entitled to deference under *Chevron*. *See Motorola I* I, 436 F.3d at 1366–67; *see also Motorola III*, 30 CIT at ___, 462 F. Supp. 2d. at 1373–74 (considering application of § 177.12(c)(1)(ii) on remand).

Plaintiff advances two different lines of argument for its claim that Customs violated the treatment statute. First, Plaintiff contends that Customs did not afford Kent a treatment that had been established with respect to Plaintiff's own entries of the subject merchandise. *See* Pl.'s Br. at 12–21. Plaintiff contends that between August 2008 and October 2010 "Customs established a treatment of classifying Kent's child bicycle seats as seats in HTSUS heading 9401 and disregarding the [2005 Kent Ruling] that had classified the seats as bicycle accessories in HTSUS heading 8714." Pl.'s Br. at 12–13. Specifically, Plaintiff argues that "the heading 9401 treatment is reflected in the Customs approvals of 14 protests covering 35 entries, plus 9 PEAs covering 9 entries." *Id.* at 13.

Defendant disagrees noting that "Plaintiff's claim fails because CBP did not consistently apply the alleged classification determination 'on a national basis as reflected in liquidations of entries or reconciliations or other Customs actions' during *any* two-year period." Def.'s Reply at 3 (citing 19 C.F.R. § 177.12(c)(1)(i)). Specifically, Defendant highlights Kent's 45 entries at the Port of Long Beach that were entered between December 4, 2008 and March 31, 2014 and were liquidated between October 16, 2009 and February 13, 2015 under HTSUS heading 8714. *Id.* at 4 (citing Def.'s Facts Stmt. ¶ 20; Pl.'s Resp. to Facts at 2). Defendant argues that in 2009 and 2010, within the purported 2-year period identified by Plaintiff supporting

its treatment claim, Kent asked that the Port of Long Beach suspend any decision on Kent's pending protests until Customs reached a decision on Kent's second AFR at the Port of New York/Newark. *See id.* (citing Def.'s Facts Stmt. ¶¶ 21–22; Pl.'s Resp. to Facts at 2). Defendant contends that "[a]lthough plaintiff focuses *only* on the entries liquidated and/or reliquidated in heading 9401 from 2008 to 2010 at one port, a treatment claim requires the Court to look to 'all or substantially all of that person's Customs transactions.'" *Id.* at 5 (citing 19 C.F.R. § 177.12(c)(1)(i)) (internal citation omitted). Given the 2005 Kent Ruling, as well as the refusal of Customs' officials at the Port of Long Beach to approve Kent's protests in 2009 and 2010, Defendant maintains that "[t]he consistent application of any classification determination 'on a national basis' over *any* two-year time period does not exist on these facts, which is fatal to plaintiff's claim." *Id.*

In an apparent acknowledgment of this fact, Plaintiff argues that because the protests at the Port of Long Beach remained pending during the time period identified by Plaintiff, the liquidations of the subject entries under heading 8714 are not final and "do not constitute final Customs actions." Pl.'s Resp. at 7. Thus, Plaintiff insists that Customs' actions with respect to Kent's Long Beach entries do not disqualify Kent's claim of treatment under 19 C.F.R. § 177.12(c). *Id.* at 8.

The court agrees with Defendant that Plaintiff cannot demonstrate a "consistent application of any classification determination 'on a national basis' over *any* two-year time period." Plaintiff's attempt to brush away Customs' actions with respect to the entries at the Port of Long Beach directly conflicts with the language of the regulation. The regulation does not limit the considerations of the court to only "final Customs actions." Rather, the court reviews whether "Customs consistently applied [a] determination . . . as reflected in liquidations of entries or reconciliations or other Customs actions with respect to all or substantially all of that person's Customs transactions involving materially identical facts and issues." 19 C.F.R. § 177.12(c)(1)(i). "[L]iquidations" are specifically identified as actions that must be considered. Although the court agrees that it must consider the protest approvals and PEAs at the Port of New York/Newark as "other Customs actions," the court likewise considers the gamut of Customs' actions taken at the Port of Long Beach. Given that the regulation specifically requires consistency in Customs' actions on a "national basis," the court cannot conclude that Plaintiff has established that Customs violated a treatment under § 1625(c)(2) and 19 C.F.R. § 177.12(c).

Alternatively, Plaintiff contends that Customs violated the treatment statute by classifying Kent's merchandise under heading 8714 despite routinely classifying substantially identical merchandise imported by Kent's competitors under heading 9401. *See id.* at 22–28. Plaintiff relies on the three rulings issued to its competitors (Bell Sports in 2007, Todson in 2009, and Britax in 2011), arguing that these rulings demonstrate that "Customs adopted a 'treatment' from 2007 to 2014 of classifying all similar child bicycle safety seats" under heading 9401. *See* Pl.'s Br. at 23–25. While Defendant disputes various aspects of Plaintiff's claim of treatment based on the entries of third parties, *see* Def.'s Br. at 22–29, the court concludes that it need not reach the issue of whether Plaintiff may rely on the third-party entries that it identifies to establish its claim of treatment.[1]

Plaintiff's claim of treatment based on the entries of third parties fails for the same reason its claim of treatment based on its own entries fails. Given the 2005 Kent Ruling and Customs' actions with respect to Kent's entries at the Port of Long Beach, Plaintiff is unable to demonstrate that there was a two-year period in which Customs *consistently* classified entries of the subject merchandise under heading 9401. Plaintiff is thus unable to demonstrate the consistency in Customs' consideration and classification of the subject merchandise on a national basis that is necessary for Plaintiff to prevail on a claim of treatment under § 1625(c)(2) and 19 C.F.R. § 177.12(c).

B. Established and Uniform Practice under 19 U.S.C. § 1315(d)

Plaintiff next argues that Customs' classification of the subject merchandise under HTSUS heading 8714 violated 19 U.S.C. § 1315(d). Section 1315(d) provides in relevant part:

> **(d) Effective date of administrative rulings resulting in higher rates** No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling.

19 U.S.C. § 1315(d). This Court has previously held that a plaintiff could show an established and uniform practice ("EUP") under §

[1] Similarly, the court does not reach Defendant's arguments challenging the time frame for Plaintiff's claim of treatment, see Def.'s Br. at 19–21, as the court agrees that Plaintiff cannot point to *any* two-year time period of consistent treatment as required under the regulation.

1315(d) through actual uniform liquidations, even though the Secretary of the Treasury had made no "finding" that such a practice existed. *See Heraeus-Amersil, Inc. v. United States*, 8 CIT 329, 335, 600 F. Supp. 221, 226 (1984). This so-called *de facto* EUP arises when Customs consistently classified a particular type of merchandise under a specific category of the HTSUS prior to some distinct point in time. *See Atari Caribe, Inc. v. United States*, 16 CIT 588, 595, 799 F. Supp. 99, 106–07 (1992). The requirements for establishing a *de facto* EUP, however, are stringent. *See Jewelpak Corp. v. United States*, 297 F.3d 1326, 1332 (Fed. Cir. 2002) (citing *Heraeus-Amersil, Inc. v. United States*, 795 F.2d 1575 (Fed. Cir. 1986)).

In *Kent II*, the court acknowledged that Plaintiff may have a claim for a *de facto* EUP based on the allegations in its Complaint, but that Plaintiff faces a significant evidentiary burden. Specifically, the court explained that to prevail on its claim that a *de facto* EUP existed, Plaintiff must demonstrate: "(1) a high number of entries resulting in the alleged uniform classifications, (2) a high number of ports at which the merchandise was entered, (3) an extended period of time over which the alleged uniform classifications took place, and (4) a lack of uncertainty regarding the classification over time." *Kent II*, 43 CIT at ___, 264 F. Supp. 3d at 1344 (citing *Heraeus-Amersil, Inc. v. United States*, 9 CIT 412, 415–16, 617 F. Supp. 89, 93 (1985)).

The court notes that Customs previously rejected Kent's claim that the agency violated a *de facto* EUP "for several reasons." *See* 2015 Kent Ruling. First, as it did in denying Kent's treatment claim, Customs relied on the fact that the 2005 Kent Ruling, "which classified Kent's child bike seats under heading 8714," was never revoked. *Id.* Second, Customs emphasized that the "Port of Long Beach liquidated all of Kent's entries of child bike seats under heading 8714." *Id.*

Here, Plaintiff maintains that "based the best information available to Kent reflecting hundreds of entries at 14 ports of entry over a 10-year period, Customs had an EUP of classifying child bicycle seats under HTSUS heading 9401." Pl.'s Br. at 29. Plaintiff further contends that "the Bell Sports, Todson, and Britax Rulings of 2007, 2009, and 2011 support [Kent's claim as to Customs'] established and uniform practice as well." *Id.*[2]

Plaintiff's arguments, however, would have the court completely disregard the 2005 Kent Ruling, as well as all of Kent's entries made between 2008 and 2014 that were classified and liquidated under heading 8714. *See* Pl.'s Reply at 14–15 (arguing that there were "Uniform Liquidations Of Child Bicycle Safety Seats Under Heading

[2] The court notes that Plaintiff's arguments are similar to those rejected by Customs in the 2015 Kent Ruling.

9401 Between 2007 And 2014," but omitting any mention of Kent's entries at the Port of Long Beach classified under heading 8714). Plaintiff is correct that its entries at the Port of Long Beach remained under suspended protest for the relevant time period; however, Plaintiff fails to address the fact that these entries demonstrate that Customs did not engage in an established and *uniform* practice of classifying child safety seats under heading 9401.[3] The court cannot see how it could reasonably conclude that there was "a lack of uncertainty regarding the classification over time" given this record. Accordingly, the court rejects Plaintiff's claim that Customs violated a *de facto* EUP.

V. Conclusion

For the foregoing reasons, the court concludes that Plaintiff has failed to demonstrate that Customs denied Kent the benefit of a treatment under 19 U.S.C. § 1625(c) or an EUP under 19 U.S.C. § 1315(d) when the agency classified the subject merchandise under HTSUS heading 8714. Plaintiff's motion for summary judgment is therefore denied, and Defendant's cross-motion for summary judgment is granted. Judgment will be entered accordingly.

Dated: August 25, 2020
New York, New York

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

Slip Op. 20–124

UNITED STEEL AND FASTENERS, INC., Plaintiff, v. UNITED STATES, Defendant, and SHAKEPROOF ASSEMBLY COMPONENTS DIVISION OF ILLINOIS TOOL WORKS INC., Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 15–00113

[The court denies Plaintiff's motion and affirms Commerce's Final Results.]

Dated: August 26, 2020

[3] A significant portion of Plaintiff's briefing on the EUP issue, as well as Defendant's response, focuses on evidence of Kent's competitors' "substantially identical" entries that were classified under heading 9401. *See* Def.'s Br. at 36–38; Pl.'s Reply at 19–23. Because Customs' classification of Plaintiff's entries at the Port of Long Beach demonstrates that there was not an established and uniform practice of classifying the merchandise under heading 9401, the court does not reach the question of whether Plaintiff may rely on third-party entries in establishing a *de facto* EUP, nor whether Plaintiff's proffered evidence with respect to the third-party entries is admissible.

Dharmendra Choudhary, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of Washington, DC, argued for plaintiff. With him on the brief and supplemental brief were *Francis J. Sailer*, *Mark E. Pardo*, *Brandon M. Petelin, and Ned H. Marshak*.

Eric J. Singley, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, *Renee Gerber* and on the supplemental brief was *Joseph H. Hunt*, Assistant Attorney General. Of Counsel were *W. Mitch Purdy* and *Nanda Srikantaiah*, Attorney-International, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Raymond P. Paretzky and *David J. Levine*, McDermott, Will & Emery, LLC, of Washington, DC, for defendant-intervenor.

OPINION

Katzmann, Judge:

This case involves a challenge to the U.S. Department of Commerce's ("Commerce") selection of surrogate values to determine antidumping ("AD") duties for exports from a non-market economy ("NME"). Plaintiff United Steel and Fasteners, Inc. ("US&F") challenges Commerce's decision to use Thai Harmonized Tariff Schedule ("HTS") 7228.20 as a surrogate value for the primary input—hot-rolled circular silico-manganese steel bar ("Bar")—into the helical spring lock washers ("HSLWs"), which were the subject of Commerce's AD review. *See Helical Spring Lock Washers From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 13,833, 13,833 (Dep't Commerce Mar. 17, 2015), P.R. 126, ECF No. 81 ("*Final Results*"); Mem. from C. Marsh to R. Lorentzen, re: Issues and Decision Mem. for the Final Results of Antidumping Duty Administrative Review: Helical Spring Lock Washers from the People's Republic of China; 2012– 2013 at 4–8 (Dep't Commerce Mar. 9, 2015), P.R. 121, ECF No. 81 ("IDM"); Pl.'s Suppl. Br. Pursuant to the Ct.'s Order of Apr. 20, 2020 at 1, 17, May 18, 2020, ECF No. 79 ("Pl.'s Suppl. Br."). US&F specifically claims Commerce's choice of surrogate value was unsupported by substantial evidence and otherwise not in accordance with the law because the value chosen did not represent the "best available information," as 19 U.S.C. § 1677b(c)(1) (2012)[1] requires. Pl.'s Suppl. Br. at 1, 7. The court sustains Commerce's use of the surrogate value in its *Final Results* and denies US&F's Rule 56.2 motion. *See* Pl.'s Mot. for J. on the Agency R. at 17–35, Nov. 13, 2015, ECF No. 24 ("Pl.'s Br.").

[1] Unless otherwise indicated, all citations to statutes are to the 2012 edition of the United States Code, and all references to regulations are to the 2012 edition of the Code of Federal Regulations.

BACKGROUND

I. Legal and Regulatory Framework for Surrogate Value Selections

The Tariff Act of 1930 empowers Commerce to investigate and impose remedial duties on imported products that are being dumped—sold at less than a "fair value" or a lower price than in the home market. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012). In addition to other statutes and regulations, the Act creates a framework for determining whether a product is being dumped in the United States, determining the extent to which it is being dumped, and calculating the AD duty to offset the dumping. *See id.* at 1047. A domestic producer or other interested party that believes a foreign company is dumping products in the United States may request that Commerce initiate an administrative review. 19 U.S.C. § 1673a(b)(1); 19 C.F.R. § 351.213(b); *see, e.g.*, *N. M. Garlic Growers Coal. v. United States*, 953 F.3d 1358, 1362 (Fed. Cir. 2020).

In an antidumping investigation and any subsequent review of an order, Commerce determines whether the export prices of the subject merchandise are lower than the "normal value" of the same merchandise when it is sold in the exporting country. 19 U.S.C. § 1677b(a)(1)(B)(i). If the exporting country is an NME that provides insufficient information to determine the normal value, Commerce may use surrogate values from market economy countries for "the factors of production utilized in producing the merchandise and . . . for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Section 1677b(c)(3)(A)–(D) lists the factors of production as including, but not limited to: (A) labor hours required; (B) quantities of raw materials used; (C) energy and other utilities consumed in production; and (D) capital costs and depreciation. Commerce thus uses these market economy surrogates for actual production costs to calculate a surrogate value—used in place of a home-market value—for comparison to the export price.

Section 1677b(c)(1) requires that Commerce value the factors of production "based on the best available information regarding the values of such factors in a market economy country." In determining which data are the best available, Commerce has "broad discretion" because "best available information" is not defined by statute. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed.

Cir. 1999)); *see also Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). However, Commerce's discretion to select surrogate values is "curtailed by the purpose of the statute, i.e., to construct the product's normal value as it would have been if the NME country were a market country." *Rhodia, Inc. v. United States*, 25 CIT 1278, 1286, 185 F. Supp. 2d 1343, 1351 (2001) (citing *Nation Ford Chem. Co.*, 166 F.3d at 1375). As with all of its decisions in AD reviews, Commerce must establish AD margins as accurately as possible. *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

In choosing "one or more market economy countries" to provide surrogate factor values, 19 U.S.C. § 1677b(c)(4) requires that Commerce "utilize, to the extent possible" costs of factors of production from market economy countries that are "at a level of economic development comparable to that of the nonmarket economy country, and . . . significant producers of comparable merchandise." Although Commerce "normally will value all factors in a single surrogate country," 19 C.F.R. § 351.408(c)(2), Commerce may also "mix and match" surrogate country values with values available in the exporting NME country if the NME values are more accurate, *Lasko Metal Prods. v. United States*, 16 CIT 1079, 1082, 810 F. Supp. 314, 317 (1992), *aff'd*, 43 F.3d 1442 (Fed. Cir. 1994). If more than one market economy country meets the requirements to provide surrogate values, Commerce may choose a primary surrogate country based on whether the factor of production ("FOP") data are (1) publicly available; (2) contemporaneous with the period of review ("POR"); (3) a broad market average covering a range of prices; (4) from an approved surrogate country; (5) specific to the input in question; and (6) tax exclusive. *See* Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (Mar. 1, 2004), available at: http://enforcement.trade.gov/policy/bull04–1.html (last accessed Aug. 13, 2020) ("Policy Bulletin 04.1"); *see also, e.g.*, *Jiaxing Bro. Fastener Co. v. United States*, 822 F.3d 1289, 1302 (Fed. Cir. 2016) (finding "no error in Commerce's . . . preference to appraise surrogate values from a single surrogate country" with statistics that were "specific, contemporaneous, and represented broad market averages").

Upon review of Commerce's choice of certain surrogate values as the best available information, the court will not determine whether the data used were actually the best available, but "whether a reasonable mind could conclude that Commerce chose the best available information." *Jiaxing Bro. Fastener*, 822 F.3d at 1301 (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed.

Cir. 2011)); *see also Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citation omitted).

II. Factual and Procedural History of the Antidumping Order and Surrogate Value Selection

In 1993, Commerce issued an AD order on HSLW from the People's Republic of China ("PRC"). *Antidumping Duty Order: Certain Helical Spring Lock Washers from the People's Republic of China*, 58 Fed. Reg. 53,914 (Dep't Commerce Oct. 19, 1993); *see also Amended Final Determination and Amended Antidumping Duty Order: Certain Helical Spring Lock Washers from the People's Republic of China*, 58 Fed. Reg. 61,859 (Dep't Commerce Nov. 23, 1993). On December 3, 2013, Commerce initiated the administrative review of this AD order for the period between October 1, 2012, and September 30, 2013, in response to petitions from US&F and Defendant-Intervenor Shakeproof Assembly Components Division of Illinois Tool Works, Inc. ("Shakeproof"). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 Fed. Reg. 72,630 (Dep't Commerce Dec. 3, 2013).

Because the investigated companies' home market is the PRC, an NME, Commerce undertook an analysis of an appropriate surrogate country for calculating normal value. Mem. from S. Balbontin to The File, re: Prelim. Results of the Eighteenth Administrative Review of Helical Spring Lock Washers from the People's Republic of China: Surrogate Value Memorandum at 2 (Dep't Commerce Oct. 31, 2014), P.R. 8, ECF No. 33. US&F and Shakeproof provided comments on the appropriate surrogate. *Id.* US&F claimed that record evidence supported using Indonesia as the surrogate country because it had the most specific data for hot-rolled circular silico-manganese steel bar, the primary input into HSLWs. Letter from US&F to P. Pritzker, re: US&F's Surrogate Country Comments: Administrative Review of the Antidumping Order on Helical Spring Lock Washers from the People's Republic of China at 2 (July 25, 2014), P.R. 2, ECF No. 31 ("US&F Surrogate Country Comments"). Shakeproof argued Thailand was the most appropriate surrogate for the administrative review because of the availability of data. Letter from Shakeproof to Sec'y of Commerce re: Certain HSLWs from China; 20th Administrative Review Rebuttal Comments on Surrogate Country Selection at 2 (Aug. 4, 2014), P.R. 75, ECF No. 81.

Commerce published its *Preliminary Results* on November 7, 2014, in which it preliminarily chose Thailand as the primary surrogate country because of (1) available industry-specific labor data; (2) publicly available freight costs; and (3) available and contemporaneous financial statements for financial ratios required for the normal value

calculation. *See Helical Spring Lock Washers from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012–2013*, 79 Fed. Reg. 66,356, 66,357 (Dep't Commerce Nov. 7, 2014) ("*Preliminary Results*"); Mem. from C. Marsh to R. Lorentzen, re: Decision Mem. for Prelim. Results of Antidumping Duty Administrative Review: Helical Spring Lock Washers from the People's Republic of China; 2012–2013 at 10 (Dep't Commerce Oct. 31, 2014), P.R. 105, ECF No. 81 ("PDM"). At issue here, Commerce valued Bar—the main input of subject merchandise HSLW and thus an important factor in calculating surrogate value—based on the average unit value ("AUV") of imports under Thai HTS 7228.20 ("Other Bars and Rods of Silico-Manganese Steel"). *Id.* at 11. Commerce explained that it chose Thai HTS 7228.20 to value Bar as a FOP because of its practice to use values from a single surrogate country. *Id.* Commerce rejected US&F's proposal of Indonesia as its primary surrogate country and Indonesian HTS 7228.20.1100 because Commerce did not have "useable surrogate financial statements" from Indonesia, while it did from Thailand. *Id.* Therefore, Commerce explained that its practice dictated using values from Thailand. *Id.* Commerce further rejected Thai HTS 7228.20.1100 because there were no imports under that heading contemporaneous with the POR. *Id.*

In its subsequent administrative case brief, US&F argued Commerce did not use the best available data in selecting Thai HTS 7228.20 to value Bar because both Thai HTS 7228.20.1000 and Indonesian HTS 7228.20.1100 were more specific to Bar and thus would be more accurate. *See* IDM at 4–5. It argued that Thai HTS 7228.20.11000 provided data, despite being one month before the POR, that are more specific to the actual inputs of HSLWs. *Id.* It claimed that the Indonesian HTS 7228.20.1100 data are also more specific, in addition to being contemporaneous with the POR. *Id.* Shakeproof also noted that the data for Thai HTS 7228.20 used by Commerce in its *Preliminary Results* did not entirely match the POR, but ultimately agreed that Commerce's selection was "proper and consistent with settled agency and judicial precedent." *Id.* at 4–5.

On March 17, 2015, Commerce published its *Final Results*. Due to ministerial error, Commerce then amended those *Final Results*. *Helical Spring Lock Washers from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 21,208, 21,209 (Apr. 17, 2015). In the accompanying IDM, Commerce stated that Thailand remained the primary surrogate country because (1) Thailand had the same level of economic development as the PRC; (2) it produces significant quantities

of HSLWs; and (3) of the availability of the data noted in the PDM. IDM at 4. Commerce accordingly continued to use Thai HTS 7228.20 import data as a surrogate value for Bar. *Id.* at 8. Commerce revised the data it used to only include data from the POR, *id.*, as Shakeproof recommended in its case brief. In response to US&F's case brief, Commerce stated that the "best available information" standard does not require specificity with respect to HTS codes reflecting the actual inputs of HSLWs to override Commerce's preference for "(1) contemporaneity with the [period of review ("POR")] over specificity or, (2) using a single country in valuing the factors." *Id.* at 6. Commerce further explained that the factors for choosing surrogate values are weighed on a case-by-case basis and that there is no hierarchy among the factors. *Id.*

On May 14, 2015, US&F filed a complaint to challenge Commerce's *Final Results* as not supported by substantial evidence and not in accordance with law with respect to four issues. Compl. at 4–6, ECF No. 8. After initial submission of briefs and oral argument, the case was reassigned to this Chambers. Ct. Order, Feb. 2, 2019, ECF No. 68. The court then granted a motion to stay the case pending final decision in a separate appeal to the Federal Circuit in *United Steel and Fasteners, Inc. v. United States*, Fed. Cir. No. 17–2168. Ct. Order, May 2, 2019, ECF No. 71. After the Federal Circuit ruled on that appeal, US&F decided not to pursue several issues in this case that it had raised initially. Only one issue remains before the court: whether Commerce's decision to use Thai HTS 7228.20 as a surrogate value was supported by substantial evidence and otherwise in accordance with law. Suppl. Joint Status Report, Apr. 17, 2020, ECF No. 76. US&F and the Government each filed a supplemental brief on April 18, 2020. *See* Pl.'s Suppl. Br.; Def.'s Suppl. Br. Filed Pursuant to the Ct.'s Order of Apr. 20, 2020, May 18, 2020, ECF No. 78 ("Def.'s Suppl. Br."). Oral argument was held on July 28, 2020. ECF No. 85. On July 31, 2020, US&F filed a post-argument second supplemental brief. Pl.'s Second Suppl. Br. Pursuant to the Ct.'s Order of July 28, 2020, ECF 86.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). Section 1516a(b)(1)(B)(i) states the standard of review in AD duty proceedings: "[t]he Court shall hold unlawful any determination, finding, or conclusion" by Commerce that is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."

DISCUSSION

US&F asks the court to remand the issue of selection of a surrogate value for Bar to Commerce. Pl.'s Suppl. Br. at 17. The Government responds that Commerce's selection of Thai HTS 7228.20 was supported by substantial evidence. Def.'s Suppl. Br. at 3. The court declines to substitute its judgment for that of Commerce. Because the court holds that Commerce's selection of Thai HTS 7228.20 as a surrogate value was supported by substantial evidence and in accordance with law, the court sustains Commerce's *Final Results*.

Commerce enjoys broad discretion in its interpretation of what is the best information available. *QVD Food*, 658 F.3d at 1323. Nevertheless, US&F argues that Commerce's selection of Thai HTS 7228.20 data as a surrogate value for Bar inputs was not supported by substantial evidence nor in accordance with law because it was not based on the best available information. Pl.'s Suppl. Br. at 1. Its claims before the court are similar to its claims that preceded Commerce's *Final Results*, namely that the "best available information" standard requires: (1) surrogate values that have a rational and reasonable relationship to the FOP; (2) that surrogate data choices should be made, in part, based on whether the data come from an approved surrogate country, and not necessarily the primary surrogate country; (3) that product specificity is the most important criterion; (4) that contemporaneity should be of lesser weight when choosing surrogate values; and (5) that Commerce "should weigh the relative superiority of one [data] set on any given criteria with its relative inferiority on another criteria" and choose "a superior data choice available from a secondary surrogate country over inferior data from the primary surrogate country." Pl.'s Suppl. Br. at 7–9. Hence, US&F maintains the Indonesian HTS 7228.20.1100 data set, or, alternatively, Thai HTS 7228.20.11000 presents the best available information. *Id.* at 9. The court is not persuaded by these arguments because Commerce, within its discretion, made a reasonable selection that was supported by substantial evidence and in accordance with law.

Notably, the parties dispute the applicable standard for the requisite specificity of surrogate values and its relationship to other factors that Commerce evaluates in choosing surrogate values. US&F argues that "[t]he most important criteria" for determining which is the best available data set "is product specificity." Pl.'s Suppl. Br at 8 (citing *Taian Ziyang Food Co. v. United States*, 35 CIT 863, 907, 783 F. Supp. 2d 1292, 1330 (2011)).[2] US&F further claims that "[d]ata which are not product-specific cannot be used as surrogate values, even if the

[2] In its latest brief, US&F argues *Soc Trang Seafood* supports its argument that Commerce should use more specific data. Pl.'s Suppl. Br. at 11 (quoting *Soc Trang Seafood Joint Stock*

remaining criteria arguably favor selection of that data." *Id.* US&F claims that this is true even where the data for the more specific product heading are less reliable than the data for the broader heading. *See* Pl.'s Suppl. Br. at 13. The Government responds that US&F misreads the caselaw. Def.'s Suppl. Br. at 8. The Government contends that the cases instead indicate that Commerce may, within its discretion, choose either a basket header or a more specific subheader—so long as the header chosen is *sufficiently* product-specific and its selection is supported in light of the other factors considered under Policy Bulletin 04.1—because those factors are not hierarchical. Def.'s Suppl. Br. at 11. *See also* PDM at 10 ("There is no hierarchy among these criteria. It is [Commerce's] practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs."). The court agrees with the Government. *See also An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1256, 1269 n.19 (2016) ("The court did not hold that product specificity is the most important consideration in selecting a [surrogate value] data source . . ."); *Xiamen Int'l Trade & Indus. v. United States*, 38 CIT __, __, 36 ITRD 868 (2014) (noting that Commerce does not value specificity above all other considerations, but that it is one, important consideration).

The relevant question is whether substantial evidence on the record supports that Thai HTS 7228.20 is sufficiently product-specific to the FOP at issue to allow a comparison with other criteria, and not whether Thai HTS 7228.20 is the most specific product specific heading available. *See Taian Ziyang Food*, 783 F. Supp. 2d at 1330. Whether the surrogate value has sufficient specificity to the material input to allow comparison with other criteria—including contemporaneity—requires that substantial evidence shows the surrogate data are not so removed from the material input such that they are not comparable (between fishing rods and cardboard packing

Co. v. United States, 43 CIT __, __, 365 F. Supp. 3d 1287, 1290, 1292 (2019)). In *Soc Trang Seafood*, the court affirmed Commerce's decision to use data from a secondary surrogate country because they were more specific and contemporaneous despite its "regulatory preference [] to 'value all factors in a single surrogate country.'" 365 F. Supp. 3d 1287 at 1291–92 (quoting 19 C.F.R. § 351.408(c)(2) (2015)). In that case, the primary surrogate country lacked data that were both contemporaneous and specific, while here, Commerce chose to use primary surrogate data that were contemporaneous with the period of review ("POR") and sufficiently specific. *See id.* at 1292; IDM at 8. This case, like the other cases cited by US&F in its briefs, is inapposite because they each merely affirm Commerce's exercise of discretion in choosing the surrogate country, and do not hold that Commerce may not make a surrogate country selection based on lack of specificity. *See, e.g.*, Pl.'s Suppl. Br. at 12–13 (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 42 CIT __, __, 353 F. Supp. 3d 1323, 1346 (2018); *Vulcan Threaded Prods. v. United States*, 42 CIT __, __, 311 F. Supp. 3d 1357, 1362 (2018); *Elkay Mfg. Co. v. United States*, 40 CIT __, __, 180 F. Supp. 3d 1245, 1253 (2016), *aff'd*, sub nom. *Guangdong Dongyuan Kitchenware Indus. Co. v. Elkay Mfg. Co.*, 702 F. App'x 981 (Fed. Cir. 2017)).

cartons, for example). *See id.* at 1314. In fact, the court in *Fine Furniture* stated that "it is unlikely that Commerce established [] a hierarchy between contemporaneity and specificity" and that Commerce's choice of the primary surrogate country based in part on contemporaneous, rather than specific, data was reasonable. *Fine Furniture (Shanghai) Ltd. v. United States*, 42 CIT __, __, 353 F. Supp. 3d 1323, 1342 (2018).

Because Commerce's selection of Thai HTS 7228.20 was sufficiently specific and supported by other relevant considerations, the court concludes that this selection was supported by substantial evidence.

A. Sufficient Specificity of Thai HTS 7228.20 To Allow Comparison of Other Criteria

In selecting Thai HTS 7228.20, Commerce stated that it provided data that were sufficiently specific, contemporaneous to the POR, publicly available, representative of a broad-market average, tax exclusive, and that allowed it to use a single surrogate country. IDM at 6. US&F first contends that Thai HTS 7228.20 is overbroad because it is not sufficiently specific to the input factor at issue, Bar. Pl.'s Suppl. Br. at 9. The Government responds that US&F failed to meet its burden of showing that data from Thailand were not the best available information because it did not place or point to any evidence on the record to indicate that Thai HTS 7228.20 produced a distorted surrogate value. Def.'s Suppl. Br. at 13. US&F raises that generally cold-pressed steel bar and non-circular characteristics make steel bar more expensive than steel bar that is circular or hot-rolled. Pl.'s Suppl. Br. at 4–5. Because of this, it contends that Thai HTS 7228.20 includes products that increase the surrogate value in a manner that does not reflect the true value of the hot-rolled, circular steel bar. *Id.* US&F claims that the "hot rolled steel bar is less expensive than cold rolled steel bar" and that "[s]ince the most common form of steel bar has a circular profile, its average prices are comparatively lower." Pl.'s Suppl. Br. at 4–5. For this claim, it cites a single case in which Commerce found that "the surrogate value of hot-rolled steel is less than that for cold-rolled steel" in that specific instance. Pl.'s Suppl. Br. at 4 (quoting *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 35 CIT 1398, 1405, 33 ITRD 2123 (2011) (analyzing the ratio of hot-rolled to cold-rolled steel used as material inputs in the manufacture of the respondent's products)). US&F fails to provide a citation or data for its claim regarding the difference in price between circular and non-circular steel bar in the context at issue and only claims the relative prices differ on average. *See* Pl.'s Suppl. Br. at 4–5.

More importantly, US&F failed to place information on the record before Commerce showing that the inclusion of cold-rolled and non-circular steel bar imports in Thai HTS 7228.20 distorted the data Commerce used in this case from an estimate of the value of the actual hot-rolled, circular material input. *See* US&F Surrogate Country Comments; US&F Case Brief; *cf. Taian Ziyang Food*, 783 F. Supp. 2d at 1314. As Commerce noted in its IDM, "there is no record evidence, in this review, that [] the AUVs of Thai HTS 7228.20 are not reasonably comparable nor has US&F argued so." IDM at 8. Furthermore, the crux of US&F's argument is that "[t]he most important criteria is product-specificity" and not that Thai HTS 7228.20 is insufficiently specific to allow any comparison at all with Commerce's other criteria. Pl.'s Suppl. Br. at 8; *see also* Def.'s Suppl. Br. at 11. There is therefore limited evidence on the record, other than the fact that cold-rolling and non-circular shapes generally make steel bar expensive, to detract from Commerce's determination in its IDM that Thai HTS 7228.20 was sufficiently specific to then weigh it against other factors. *See* IDM at 8.

Thus, substantial evidence supports that Thai HTS 7228.20 data are sufficiently specific for Commerce to weigh their specificity against other relevant factors in choosing that subheading. First, there is a rational relationship between Thai HTS 7228.20—which covers "Bars And Rods of Silico-Manganese Steel"—and the material input of Bar because the former includes the latter by definition. *See Xiamen Int'l Trade*, 36 ITRD 868. This is not a situation where Commerce used fishing rods as surrogate for cardboard packing boxes, as was the case in *Taian Ziyang Food*. 783 F. Supp. 2d at 1330. Similarly, Commerce's decision here does not rise to the level of insufficiency of the selection in *Zhejiang DunAn Hetian Metal*, where Commerce used import data that may have related to entirely different metals than the relevant FOP. 652 F.3d at 1341 (summarizing plaintiff's argument that Commerce used data that were not for brass bar when the relevant FOP was for brass bar, but ultimately concluding that the record did not establish that data were products made of other metals). The Government and Defendant-Intervenor refer to several cases in which Commerce's use of broader import categories for surrogate values has been sustained.[3] From these cases, it follows

[3] *See* Def.'s Mem. in Opp'n to Pl.'s Rule 56.2 Mot. for J. upon the Agency R. at 20–21, Apr. 14, 2016, ECF No. 32 (citing *Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 1412, 1419, 460 F. Supp. 2d 1365, 1371 (2006) ("The use of broader product categories is reasonable, despite the availability of product-specific data, if a greater variety of data provides greater reliability."); *Writing Instrument Mfrs. Ass'n, Pencil Section v. Dep't of Commerce*, 21 CIT 1185, 1196, 984 F. Supp. 629, 640 (1997) (upholding the use of a broader tariff category where the other data on the record were unreliable)); *see also* Resp. Br. of Def.-Inter. in Opp'n to Pl.;s Mot. for J. upon the Agency R. at 23, Apr. 14, 2016, ECF No. 30

that there is no principle requiring Commerce to select the most specific HTS category. Rather, Commerce has discretion to select a reasonable surrogate in light of each of the criteria outlined in Policy Bulletin 04.1.

In sum, the court holds that Commerce's finding—that Thai HTS 7228.20 was sufficiently specific—was "reasonable and supported by the record as a whole, even if there is some evidence that detracts from" it. *See Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001). Substantial evidence on the record supports that Thai HTS 7228.20 was sufficiently specific to weigh other factors because (1) the "burden of creating an adequate record lies with [interested parties] and not with Commerce," *QVD Food*, 658 F.3d at 1324 (alteration in original); and (2) the record fails to reflect how inclusion of cold-rolled, non-circular steel bar distorts the surrogate data in this case such that the surrogate data are not sufficiently specific. The court will therefore next consider whether Commerce's weighing of specificity against its other criteria and rejection of Thai HTS 7228.20.11000 and Indonesian HTS 7228.20.1100 were supported by substantial evidence.

B. Commerce's Selection of Thai HTS 7228.20 over Indonesian HTS 7228.20.1100

US&F argues that Commerce should have chosen Indonesian HTS 7228.20.1100, as it is more specific than Thai HTS 7228.20 and includes data contemporaneous with the POR. Pl.'s Suppl. Br. at 14. First, US&F argues that Indonesian HTS 7228.20.1100 provided better data than Thai HTS 7228.20 because (1) Indonesia was an approved surrogate country; (2) the Indonesian data were more specific to the FOP than Thai HTS 7228.20; and (3) the Indonesian data were contemporaneous to the POR. Pl.'s Suppl. Br. at 14. Thus, US&F argues Commerce was required to use Indonesian HTS 7228.20.1100 as the best available information for a surrogate value of hot-rolled, circular bar instead of Thai HTS 7228.20 because, all else being equal, the data are more specific.

US&F provides no additional reasons why Commerce must have chosen the Indonesian header over Thai HTS 7228.20. Commerce

(citing *Goldlink Indus. Co. v. United States*, 30 CIT 616, 630–33, 431 F. Supp. 2d 1323, 1335–38 (2006) (upholding Department's valuation of input carbazole "using a basket category import price rather than a more specific import price" when the more specific price was less reliable on account of other deficiencies)). *Cf. Home Meridian Int'l Inc. v. United States*, 772 F.3d 1289, 1295 (Fed. Cir. 2014) (upholding Commerce's use of a broader category surrogate value than a respondent's market economy purchases because it was, in part, more contemporaneous with the POR and more reflective of actual prices paid for the inputs); *Dorbest Ltd. v. United States*, 30 CIT 1671, 1701–02, 462 F. Supp. 2d 1262, 1289–90 (2006) (sustaining Commerce's use of a data set that included merchandise other than that being valued)).

explained in both its PDM and its IDM that it has a "well established" preference for using values from a single surrogate country and that Thailand had the best available information for all of the FOPs after weighing of all the relevant factors. PDM at 11; IDM at 6. Commerce applied its preference for valuing all surrogate data from one country in tandem with a broader assessment of all relevant factors, and reasonably selected the Thai data as its primary surrogate over Indonesian data. PDM at 11. The court thus concludes that Commerce's selection of Thai HTS 7228.20 over Indonesian HTS 7228.20.1100 for valuing Bar and its explanation for this choice were reasonable and within its discretion and regulatory preference for valuing all the factors from a single country. *See QVD Food*, 658 F.3d at 1323.

US&F claims that caselaw and Commerce's own practice prohibits Commerce from relying on its policy of using a single surrogate country as the sole grounds to prefer one choice of surrogate value over another. *See* Pl.'s Suppl. Br. at 14; Pl.'s Br. at 33–35. The issues in the cases US&F provides are factually distinct, however, and do not indicate that Commerce's determination in this case was unreasonable. For example, US&F argues that *Camau Frozen Seafood* dictates that where data from the primary surrogate country are distorted or inaccurate, Commerce may not rely solely on its preference for valuing all surrogate data in the primary surrogate country, even without an interested party necessarily establishing that the data are aberrational. Pl.'s Br. at 33–34 (quoting *Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, 37 CIT 1116, 1123, 929 F. Supp. 2d 1352, 1358 (2013)). US&F's reliance on *Camau Frozen Seafood* is unpersuasive, however, because the court there determined that data used by Commerce based on a preference for primary surrogate country data were "several orders of magnitude larger" than other available data. 929 F. Supp. 2d at 1355. As discussed above, the record evidence does not support that the data used by Commerce here were similarly distortive. The same reasoning applies to US&F's reliance on *Peer Bearing Co.-Changshan v. United States*, 35 CIT 1626, 804 F. Supp. 2d 1337 (2011), and *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty New Shipper Reviews; 2011–2012*, 78 Fed. Reg. 39,708, 39,708 (Dep't Commerce July 2, 2013). *See* Pl.'s Br. at 34–35.

In sum, because the cases US&F cites are distinct from this case and because "[c]ourts have found that Commerce's single surrogate country preference is strong and must be given significant weight," the court finds Commerce's use of Thai HTS 7228.20 was reasonable. *Jacobi Carbons AB v. United States*, 38 CIT __, __, 992 F. Supp. 2d

1360, 1376 (2014), *aff'd*, 619 F. App'x 992 (Fed. Cir. 2015). Therefore, the court finds Commerce's decision to choose Thai HTS 7228.20 over Indonesian HTS 7228.20.1100 was supported by substantial evidence and in accordance with law.

C. Commerce's Selection of Thai HTS 7228.20 Over Thai HTS 7228.20.1100

Next, US&F argues that Commerce should have chosen the more specific sub-heading of Thai HTS 7228.20.1100 even though the data from that sub-heading were not contemporaneous with the POR. Pl.'s Suppl. Br. at 15. The Government responds that, unlike Thai HTS 7228.20.1100, Thai HTS 7228.20 fulfilled all of the surrogate value criteria and thus Commerce was not required to use Thai HTS 7228.20.1100. Def.'s Suppl. Br. at 9. The court agrees with the Government.

Commerce noted that the import data for Thai HTS 7228.20.11000 occurred one month prior to the POR and explained its preference here for contemporaneous data rather than the most specific data with regards to choosing Thai HTS 7228.20. IDM at 6. Commerce's desire to favor data that were contemporaneous with the POR was reasonable in light of the fact that it "weighed all of the factors [Commerce] normally examines when choosing a" surrogate value and the fact that the Thai HTS 7228.20.11000 data "offer[] a only [sic] single shipment . . . from a single country." IDM at 5–6. Moreover, Commerce's correction after the *Preliminary Results* to use only Thai 7228.20 data that were contemporaneous with the POR further supports Commerce's reasoned preference for contemporaneous data in this case. IDM at 8. The court thus concludes that Commerce's selection of data from Thai HTS 7228.20 over Thai HTS 7228.20.1100 and its explanation for doing so were reasonable and within Commerce's broad discretion in determining which data are the best available. *QVD Food*, 658 F.3d at 1323.

US&F's position fails to acknowledge that Commerce's discretion to determine which data are the best available in its AD reviews includes how to weigh the individual factors when choosing the best available data, provided it offers a reasonable explanation when exercising such discretion. *Hangzhou Spring Washer Co. v. United States*, 29 CIT 657, 672, 387 F. Supp. 2d 1236, 1250 (2005). The court "does not decide . . . whether contemporaneity should be valued over specificity without direct statutory instruction because a reviewing court is prohibited from substituting its judgment for that of the agency." *Id.* at 1250–51. The court in *Fine Furniture* stated that "it is unlikely that Commerce established [] a hierarchy between contemporaneity and specificity" and that Commerce's choice of a primary

surrogate country based in part on contemporaneous, rather than specific, data is reasonable. 353 F. Supp. 3d at 1346. Moreover, even where a heading is not perfectly specific to the material input, in cases where that data's contemporaneity allows it to better reflect actual prices of inputs, it is "not unreasonable for Commerce to find the [data] more reliable." *Home Meridian Int'l, Inc. v. United States*, 772 F.3d 1289, 1296 (Fed. Cir. 2014). This may be especially true where, as here, the more specific data offer limited volume, "bringing into question the reliability of" that data. *See Writing Instrument Mfrs. Ass'n, Pencil Section v. Dep't of Commerce*, 21 CIT 1185, 1195, 984 F. Supp. 629, 639 (1997).

The cases US&F offers as support for its position are distinguishable. For example, US&F cites *Zhejiang DunAn Hetian Metal* for the proposition that use of an HTS heading that "include[s] materials that [are] not representative of the inputs utilized by the manufacturer . . . *might* well conflict with Commerce's obligation to use the best available evidence . . . ." 652 F.3d 1333, 1343 (Fed. Cir. 2011) (emphasis added). In *Zhejiang DunAn Hetian Metal*, however, Commerce included import data that may have related to entirely different metals than the relevant FOP. *Id.* at 1341 (questioning whether Commerce used data that were not from brass bar when the relevant FOP was brass bar). Here, Commerce used a heading that only includes imports for steel bar, even though that heading includes steel bar with different heat treatments and shapes. Pl.'s Suppl. Br. at 4. US&F's reliance on *Vinh Hoan Corp. v. United States* is also distinguishable because there the Federal Circuit upheld Commerce's decision to reject certain data in the in the context of HTS code specificity and FOP value comparisons. 786 F. App'x 258, 265 (Fed. Cir. 2019). Unlike this case, the court did not consider a decision by Commerce that weighed contemporaneity against specificity—or weighed specificity against any factor for that matter—in the process of selecting "the 'best available information' for the factors of production." *Id.* at 261.

Therefore, the court concludes that Commerce properly exercised its discretion in selecting Thai HTS 7228.20 over the non-contemporaneous and less voluminous data of Thai HTS 7228.20.1100.

CONCLUSION

The court holds that Commerce's use of data from Thai HTS 7228.20 for a surrogate value instead of Thai HTS 7228.20.11000 or Indonesian HTS 7228.20.1100 was supported by substantial evidence on the record and in accordance with law. Thus, the court affirms the

Final Results as to this selection.

SO ORDERED.

Dated: August 26, 2020
New York, New York

/*s*/ *Gary S. Katzmann*
GARY S. KATZMANN, JUDGE

Slip Op. 20–125

HUSTEEL CO., LTD., Plaintiff, and NEXTEEL CO., LTD. et al., Consolidated Plaintiffs, v. UNITED STATES Defendant, and MAVERICK TUBE CORPORATION et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 19–00112

[Remanding the U.S. Department of Commerce's final determination in the second administrative review of the antidumping duty order covering welded line pipe from the Republic of Korea.]

Dated: August 26, 2020

Donald B. Cameron and *Brady W. Mills*, Morris, Manning & Martin LLP, of Washington, DC, argued for plaintiff Husteel Co., Ltd. Also on the briefs were *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Sabahat Chaudhary, Edward J. Thomas III*, and *Jordan L. Fleischer*.

Jaehong D. Park, *Henry D. Almond*, *Kang W. Lee*, and *Leslie C. Bailey*, Arnold & Porter Kaye Scholer LLP, of Washington, DC, argued for consolidated plaintiffs Hyundai Steel Company and NEXTEEL Co., Ltd. Also on the briefs was *Daniel R. Wilson*.

Jeffrey M. Winton, Winton & Chapman PLLC, of Washington, DC, argued for consolidated plaintiff SeAH Steel Corporation. Also on the briefs was *Amrietha Nellan*.

Robert R. Kiepura, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. Also on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of Counsel was *Reza Karamloo*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Elizabeth J. Drake, Schagrin Associates, of Washington, DC, argued for defendant-intervenors California Steel Industries and Welspun Tubular LLC USA. Also on the brief were *Roger B. Schagrin*, *Christopher T. Cloutier*, and *Luke A. Meisner*.

Kristina Zissis and *Frank J. Schweitzer*, White & Case, LLP, of Washington, DC, argued for defendant-intervenors Maverick Tube Corporation and IPSCO Tubulars Inc. Also on the brief were *Gregory J. Spak* and *Matthew W. Solomon*.

OPINION AND ORDER

Kelly, Judge:

This consolidated action is before the court on motions for judgment on the agency record filed respectively by Husteel Co., Ltd. ("Hus-

teel"), SeAH Steel Corporation ("SeAH"), NEXTEEL Co., Ltd. ("NEXTEEL"), and Hyundai Steel Company ("Hyundai") (collectively, "Plaintiffs"). *See* Pl. [Husteel]'s Mot. J. Agency R., Dec. 18, 2019, ECF No. 46; [Consol. Pl. SeAH]'s Mot. J. Agency R., Dec. 18, 2019, ECF No. 41; Consol. Pl. [NEXTEEL]'s 56.2 Mot. J. Agency R., Dec. 18, 2019, ECF No. 44; Consol. Pl. [Hyundai]'s 56.2 Mot. J. Agency R., Dec. 18, 2019, ECF No. 45. Plaintiffs challenge various aspects of the final results of the U.S. Department of Commerce's ("Commerce" or "Department") second administrative review of the antidumping duty ("ADD") order covering welded line pipe ("WLP") from the Republic of Korea ("Korea"). *See* Pl. [Husteel]'s Br. Supp. Mot. J. Agency R., Dec. 18, 2019, ECF No. 46–2 ("Husteel's Br."); [SeAH]'s Br. Supp. 56.2 Mot. J. Agency R. Confidential Version, Dec. 18, 2019, ECF No. 41–1 ("SeAH's Br."); Consol. Pl. [NEXTEEL]'s Memo. Supp. 56.2 Mot. J. Agency R., Dec. 18, 2019, ECF No. 44–1 ("NEXTEEL's Br."); Consol. Pl. [Hyundai]'s Memo. Supp. 56.2 Mot. J. Agency R., Dec. 18, 2019, ECF No. 45–1 ("Hyundai's Br."); *see also Welded Line Pipe From the Republic of Korea*, 84 Fed. Reg. 27,762 (Dep't Commerce June 14, 2019) (final results of [ADD] admin. review and final determination of no shipments; 2016–2017) ("*Final Results*") *as amended by* 84 Fed. Reg. 35,371 (Dep't Commerce July 23, 2019) (amended final results of [ADD] admin. review; 2016–2017) ("*Amended Final Results*") and accompanying Issues and Decision Memo. for the [*Final Results*], A-580–876, (June 7, 2019), ECF No. 36–5 ("Final Decision Memo").

SeAH challenges Commerce's decision to reject its third country sales and to use constructed value to determine the normal value of its sales of subject merchandise into the United States. SeAH's Br. at 7–18. Further, Plaintiffs contest various aspects of Commerce's constructed value methodology. *See* SeAH's Br. at 18–36, 43–49; NEXTEEL's Br. at 15–44; Husteel's Br. at 14–31; *see generally* Hyundai's Br.

Namely, Plaintiffs challenge as contrary to law and unsupported by substantial evidence Commerce's determination that a particular market situation ("PMS") in Korea distorts the cost of production for WLP, as well as the resultant PMS adjustments to SeAH's and NEXTEEL's reported costs when determining the constructed value of the subject merchandise. *See* SeAH's Br. at 18–33; NEXTEEL's Br. at 15–38; Husteel's Br. at 14–27; *see generally* Hyundai's Br. SeAH and NEXTEEL object to Commerce's reliance on the constructed value profit ratio ("CV profit ratio") and selling expenses calculated for Hyundai from the first administrative review of the ADD order to calculate profit and selling expenses for SeAH and NEXTEEL. *See* SeAH's Br. at 43–49; NEXTEEL's Br. at 38–41. NEXTEEL challenges

Commerce's decision to reduce the constructed value of its sales of WLP to account for certain losses associated with the production and sale of "non-prime products," *see* NEXTEEL's Br. at 41–43, as well as Commerce's decision to reclassify losses associated with the suspension of certain product lines from cost of goods sold to general and administrative ("G&A") expenses when determining constructed value. *See* NEXTEEL's Br. at 43–44. SeAH challenges Commerce's refusal to apply its quarterly-average methodology to calculate SeAH's costs when determining constructed value. *See* SeAH's Br. at 33–36.

Further, SeAH challenges Commerce's method and justification for allocating the G&A expenses of its U.S. sales affiliate Pusan Pipe America ("PPA") when adjusting the constructed export price of its U.S. sales. *See* SeAH's Br. at 37–42. Husteel challenges Commerce's calculation of the non-examined companies' rate. *See* Husteel's Br. at 28–32.

For the reasons that follow, the court remands Commerce's determination that SeAH's third country sales into the Canadian market are nonrepresentative for further explanation or reconsideration. Moreover, regarding its calculation of constructed value, the court remands for further explanation or reconsideration Commerce's: PMS determination and resultant adjustment to the reported cost of production for WLP; reliance on the CV profit ratio and selling expenses calculated for Hyundai in the first administrative review; reclassification of NEXTEEL's reported losses relating to the suspended production of certain product lines; adjustment to NEXTEEL's constructed value to account for sales of non-prime products; and refusal to employ its quarterly costs methodology to calculate SeAH's constructed value. Additionally, the court remands Commerce's decision to allocate PPA's G&A expenses across all of SeAH's U.S. sales of WLP when calculating SeAH's constructed export price for further explanation or reconsideration. Any modifications to the dumping margins of NEXTEEL and SeAH resulting from this remand shall be reflected in the rate applied to Husteel.

BACKGROUND

On February 23, 2018, in response to timely requests by interested parties, Commerce initiated an administrative review of various ADD and countervailing duty ("CVD") orders and findings, including an ADD order covering WLP from Korea.[1] *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 83 Fed. Reg. 8,058, 8,060

[1] Each year during the anniversary month of the publication of an ADD order, interested parties may request that Commerce conduct an administrative review of that order. *See* 19

(Dep't Commerce Feb. 23, 2018); *see also Welded Line Pipe From the Republic of Korea and the Republic of Turkey*, 80 Fed. Reg. 75,056 (Dep't Commerce Dec. 1, 2015) ([ADD] orders). On March 7, 2017, Commerce selected NEXTEEL and SeAH as mandatory respondents. *See* Resp't Selection Memo. at 1, 3–4, PD 22, bar code 3684544–01 (Mar. 19, 2018).

On August 7, 2018, Defendant-Intervenors Maverick Tube Corporation ("Maverick"), California Steel Industries ("CSI"), IPSCO Tubulars Inc. ("IPSCO Tubulars"),[2] and Welspun Tubular LLC USA ("Welspun") (collectively, "Domestic Interested Parties"), submitted to Commerce a letter alleging that a PMS in Korea distorted the cost of production for WLP. *See generally* PMS Allegation and Factual Info., PD 150–164, CD 171–186, bar codes 3740576–01–15, 3740543–01–16 (Aug. 7, 2018) ("PMS Allegation"). Namely, the Domestic Interested Parties alleged that the PMS in Korea distorted the cost of hot-rolled steel coil ("HRC"), an input used to produce WLP. *See generally id.*

Commerce published its preliminary results on February 14, 2019. *See Welded Line Pipe From the Republic of Korea*, 84 Fed. Reg. 4,046 (Dep't Commerce Feb. 14, 2019) (prelim. results of [ADD] admin. review and prelim. determination of no shipments; 2016–2017) ("*Prelim. Results*") and accompanying Decision Memo. for the [*Prelim. Results*], A-580–876, PD 271, bar code 3791152–01 (Feb. 7, 2019) ("Prelim. Decision Memo").

Finding the aggregate volume of SeAH's and NEXTEEL's WLP sales in the home market insufficient, Commerce considered calculating normal value for both respondents based on third country sales. *See* Prelim. Decision Memo at 18–19 (citing section 773(a)(1)(C)(ii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(a)(1)(C)(ii) (2012);[3] 19 C.F.R. § 351.404 (2018)).[4] After determining that NEXTEEL did not have a sufficient volume of sales in any comparator market, and that SeAH's sales into Canada were not representative within the meaning of 19 U.S.C. § 1677b(a)(1)(B)(ii),[5] Commerce calculated SeAH's and NEXTEEL's margins using con-

C.F.R. § 351.213 (2018); *see also* 19 U.S.C. § 1677(9) (2012)(defining interested parties).

[2] On February 7, 2020, defendant-intervenor IPSCO Tubulars Inc., formerly referred to as "TMK IPSCO", filed on the docket a letter apprising the court of its acquisition by Tenaris, S.A, corporate restructuring, and resultant change in name. *See* Letter Regarding Acquisition & Party Name, Feb. 7, 2020, ECF No. 52.

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition. All further citations to 19 U.S.C. §§ 1677 and 1677b(e) are to the 2015 version, as amended pursuant to the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015) ("TPEA").

[4] Further citations to Title 19 of the Code of Federal Regulations are to the 2018 edition.

[5] Commerce cited its previous reliance on the Canadian International Trade Tribunal's ("CITT") final determination that SeAH's sales of steel line pipe into Canada were dumped.

structed value. *See* Prelim. Decision Memo at 10 n.36, 18–19 (citing 19 U.S.C. § 1677b(a)(1)(B)(ii)).

Commerce made several contested decisions when calculating the constructed value of SeAH's and NEXTEEL's sales of WLP. First, finding that a PMS exists that distorts the cost of production for WLP, Commerce upwardly adjusted SeAH's and NEXTEEL's reported costs of HRC by the CVD rate applied to HRC producers from Commerce's CVD investigation into hot-rolled steel products from Korea.[6] *See* Prelim. Decision Memo at 16; *see also [CVD] Investigation of Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep't Commerce Aug. 12, 2016) (final affirmative determination) *as amended by* 81 Fed. Reg. 67,960 (Dep't Commerce Oct. 3, 2016) ("*Hot-Rolled Steel from Korea CVD*") and accompanying Issues and Decision Memo. for [*Hot-Rolled Steel from Korea CVD*], C580–884, (Aug. 4, 2016) *available at* https://enforcement.trade.gov/frn/summary/korea-south/2016–19377–1.pdf (last visited Aug. 17, 2020) ("Hot-Rolled Steel from Korea CVD IDM"). Second, Commerce used the CV profit and selling expenses for Hyundai from the first administrative review of the ADD order to determine profit and selling expenses for NEXTEEL and SeAH in this review. *See* Prelim. Decision Memo at 20, 22–26. Third, Commerce found that some of NEXTEEL's WLP sales related to "non-prime" products with a lower market value, and accounted for the loss associated with those sales by reducing the constructed value of NEXTEEL's "prime" WLP sales. *See id.* at 22–23; *see also* Final Decision Memo at 42–43. Fourth, Commerce reclassified certain losses incurred by NEXTEEL, associated with suspended production of certain product lines during the period of review ("POR"), from cost of goods sold, allocated to those product lines specifically, to G&A expenses attributable to the operations of the entire company, and adjusted NEXTEEL's G&A expense ratio accordingly. *See* Prelim. Decision Memo at 22–23; *see also* Final Decision Memo at 43–44. Finally, when examining SeAH's cost data for purposes of calculating G&A expenses, interest, profit, selling expenses, and U.S. packing costs, after assessing SeAH's claim that it experienced substantial cost and price changes during the POR, Com-

See Prelim. Decision Memo at 19 (citing *Welded Line Pipe From the Republic of Korea*, 83 Fed. Reg. 33,919 (Dep't Commerce July 18, 2018) (final results of [ADD] admin. review; 2015–2016) ("*WLP from Korea 2015–2016*") *as amended by* 83 Fed. Reg. 39,682 (Dep't Commerce Aug. 10, 2018) (amended final results of [ADD] admin. review; 2015–2016) and accompanying Issues and Decision Memo. for [*WLP from Korea 2015–2016*], A-580–876, (July 11, 2018), available at Cmt. 12 https://enforcement.trade.gov/frn/summary/korea-south/2018–15327–1.pdf (last visited Aug. 30, 2020).

[6] The CVD rate was based on total facts available with an adverse inference. *See* Hot-Rolled Steel from Korea CVD IDM at 7–11.

merce declined to apply its quarterly-average costs methodology. *See* Prelim. Decision Memo at 22. Commerce preliminarily calculated weighted-average dumping margins of 50.09 percent for NEXTEEL, 26.47 percent for SeAH, and 41.53 percent for non-selected respondents. *Prelim. Results*, 84 Fed. Reg. at 4,047.

On August 10, 2018, Commerce published its *Amended Final Results*, and recalculated respondents' weighted-average dumping margins. *See generally*, *Amended Final Results* and Final Decision Memo.[7] For its final determination, Commerce deducted from SeAH's constructed export price G&A expenses incurred by its U.S. sales affiliate PPA by allocating those expenses to all of SeAH's U.S. sales.[8] *See* Final Decision Memo at 58–61. The remaining aspects of Commerce's preliminary determination, discussed above, did not change. *See generally* Final Decision Memo. Commerce assigned rates of 38.87 percent for NEXTEEL, 22.70 percent for SeAH, and 29.89 percent for non-selected respondents. *See Amended Final Results*, 84 Fed. Reg. at 35,372.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an ADD 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).

DISCUSSION

I. Rejection of SeAH's Third Country Sales

SeAH argues that Commerce's decision to calculate the normal value of its sales based on constructed value, instead of third country sales, is unreasonable and contrary to law. *See* SeAH's Br. at 7–18. SeAH expounds, inter alia,[9] that Commerce relies on the CITT's

[7] Commerce amended its *Final Results* to correct for a ministerial error not relevant to this dispute. *Amended Final Results*, 84 Fed. Reg. at 35,371.

[8] Although Commerce discusses its determination with respect to both PPA and State Pipe and Supply Inc., *see* Final Decision Memo at 59, SeAH briefs before this court only dispute the Commerce's treatment of PPA's G&A expenses. *See generally* SeAH's Br.; [SeAH's Amended] Reply Br., Apr. 15, 2020, ECF No. 69.

[9] SeAH argues, as a general matter, that U.S. law does not permit a court to give 'recognition' to a foreign finding of dumping. SeAH's Br. at 9–10 (citations omitted).It does not appear that Commerce seeks recognition of a foreign judgment, but rather, that it views the CITT's dumping finding as substantial evidence that SeAH's sales are not representative. *See* Final Decision Memo at 48–50.

finding that SeAH's sales into Canada were dumped to determine that its sales are not representative without considering detracting evidence that Canadian dumping law is materially inconsistent with U.S. dumping law. *See* SeAH's Br. at 13–16. Defendant submits that it is reasonable for Commerce to rely on the CITT's finding. *See* Def.'s Br. at 44–48. For the reasons that follow, the court remands Commerce's decision to disregard SeAH's third country sales into Canada.

Where Commerce finds that home market sales are an inappropriate basis for determining normal value, it may instead use third country sales. *See* 19 U.S.C. § 1677b(a)(1). Commerce may only rely on third country sales where the "prices [for those sales] are representative," where the aggregate quantity of sales are at a sufficient level, and where Commerce does not determine that a PMS prevents a proper comparison between the export price, or constructed export price, and the third country price. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii). The statute does not define what it means for prices to be representative, but Commerce's regulations and regulatory history reveal that where the aggregate quantity of third country sales are at a sufficient level, those sales are presumptively representative unless proven otherwise. *See* 19 C.F.R. § 351.404(b)–(c) (providing that Commerce shall consider a third country market viable if the aggregate quantity of sales are at a sufficient level, but setting forth an exception where it is established, to the satisfaction of Commerce, that, inter alia, the prices are not representative); *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,357 (Dep't Commerce May 19, 1997);[10] *see also Alloy Piping Prods v. United States*, 26 CIT 360, 339–340, 201 F. Supp. 2d 1267, 1276–77 & n.7 (2002) (citations omitted). Commerce's determination that sales into a third country comparator market are not representative must be supported by substantial evidence. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *CS Wind Vietnam Co. v. United States*, 832

[10] The regulatory history to 19 C.F.R. § 351.404 provides, in pertinent part, that:

> In the Department's view, the criteria of a "particular market situation" and the "representativeness" of prices fall into the category of issues that the Department need not, and should not, routinely consider . . . the [Statement of Administrative Action] at 821 recognizes that the Department must inform exporters at an early stage of a proceeding as to which sales they must report. This objective would be frustrated if the Department routinely analyzed the existence of a "particular market situation" or the "representativeness" of third country sales . . . the party alleging . . . that sales are not "representative" has the burden of demonstrating that there is a reasonable basis for believing that a "particular market situation" exists or that sales are not "representative."

Antidumping Duties; Countervailing Duties, 62 Fed. Reg. at 27,357; *see also* Statement of Administrative Action, H.R. DOC. NO. 103–826, vol. 1, at 821 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4162.

F.3d 1367, 1373 (Fed. Cir. 2016) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997)).

Commerce's reliance on the CITT's finding that SeAH's sales into Canada were dumped to determine that those sales are not representative is unreasonable because Commerce does not address detracting evidence that Canadian antidumping law is materially inconsistent with U.S. antidumping law. *See* Final Decision Memo at 48–50; *see also* 19 U.S.C. § 1677b(a)(1)(B)(ii)(I). For example, SeAH argued before Commerce that the Canada Border Services Agency ("CBSA") applied the equivalent of facts available to SeAH for failing to report home market sales of merchandise produced by another manufacturer. *See* Final Decision Memo at 46; SeAH's Case Brief at 6, PD 307–308, CD 364–365, bar codes 3815200–01–02, 3815197–01–02 (Apr. 4, 2019) ("SeAH's Case Br."); [SeAH]'s Rebuttal CV Cmts. at 2, Attachment 1, PD 166, CD 187, bar code 3741545–01, 3741544–01 (Aug. 9, 2018). SeAH explained that, under U.S. law, the reporting of such sales "would never be relevant" because "normal value can only be based on sales of products that were made by the same producer that made the products exported to the United States." *See* SeAH's Case Br. at 6 & n. 12 (citing 19 U.S.C. § 1677(16)). Commerce notes SeAH's contention that its sales into Canada would not be considered dumped under U.S. law, but responds by stating "[t]he fact that Commerce's methodology may differ from that of the CBSA does not negate Canada's finding of dumping." Final Decision Memo at 49. This response does not explain why the differences between methodologies do not detract from the evidentiary weight of the CITT's finding, but merely concludes that they do not. As such, Commerce's determination that SeAH's sales into Canada are not representative fails to address detracting evidence and cannot be sustained.

II. Commerce's CV Calculation

1. Particular Market Situation

Plaintiffs argue Commerce's determination that distortions present in the Korean market collectively give rise to a PMS that renders the costs of HRC outside the ordinary course of trade is unsupported by substantial evidence, and that the resultant adjustments to SeAH's and NEXTEEL's reported costs are unreasonable. *See* NEXTEEL's Br. at 15–38; SeAH's Br. 18–33; Hyundai's Br. at 7–8; Husteel's Br. at 14–24, 26–27. Defendant and the Domestic Interested Parties maintain that Commerce's PMS determination and adjustments to SeAH's and NEXTEEL's reported costs are reasonable and lawful. *See* Def.'s Br. at 10–41; Def.-Intervenors [CSI, TMK IPSCO, & Welspun's] Resp. Br. at 8–34, Mar. 18, 20[20], ECF No. 60 ("CSI & Welspun's Br.");

Def-Intervenors [Maverick & IPSCO Tubulars'] Resp. Br. at 1, Mar. 18, 2020, ECF No. 61 ("Maverick & IPSCO Tubulars' Br."). For the reasons that follow, Commerce's determination is remanded for further explanation or reconsideration.

When reviewing an ADD order, Commerce determines antidumping duties owed on entries of subject merchandise by calculating the amount by which the normal value of the merchandise exceeds its export price (or constructed export price). *See* 19 U.S.C. §§ 1673, 1675(a)(2)(A), (C); *see also id.* at § 1677(35). Commerce usually relies on sales of the subject merchandise in the home market, or sales in a third country comparator market, to determine normal value. *See id.* at § 1677b(a)(1)(B)(i)–(ii). However, if Commerce determines that it cannot rely on home market or third country market sales, Commerce may determine the normal value of the subject merchandise based on constructed value. *See id.* at § 1677b(a)(4).

The constructed value of the subject merchandise is the sum of the costs of materials and fabrications or other processing of any kind employed to produce the merchandise, plus an amount for selling expenses, G&A expenses, and for profits, plus the cost of packing and shipping to the United States. *See* 19 U.S.C. § 1677b(e). If Commerce finds that a PMS exists such that the "costs of materials and fabrications or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade," Commerce may use any other reasonable calculation methodology. *See id.* To establish the existence of a PMS, Commerce must demonstrate both that there are distortions present in the market and that those distortions prevent a proper comparison of normal value with export price or constructed export price. *See* 19 U.S.C. §§ 1677b(a)(1)(B)(ii)(III), (C)(iii); 1677(15)(C). Those determinations must be supported by substantial evidence, such that a reasonable mind might accept the evidence as adequate to support its conclusion while considering contradictory evidence. *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see also Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994).

Commerce finds that a PMS exists in Korea that distorts the cost of HRC, the main input in WLP production, based on the cumulative effect of Chinese steel overcapacity, the government of Korea's ("GOK") subsidization of hot-rolled steel products,[11] strategic alliances between Korean HRC suppliers and Korean WLP producers, and government control over electricity prices in Korea. *See* Final Decision Memo at 17. Yet, Commerce fails to explain how each factor

[11] HRC is a form of hot-rolled steel product. Commerce states that the GOK's subsidization of hot-rolled steel "includes HRC[.]" Prelim. Decision Memo at 15.

lends credence to its finding that a PMS distorts the costs of HRC during the POR such that Commerce could not properly determine a constructed value of WLP that could properly be compared to export price (or constructed export price).

First, Commerce points to import data that demonstrates Korea receives the largest volume of Chinese steel exports, creating downward pressure on Korean domestic steel prices. *See* Final Decision Memo at 17–18, 20 (citations omitted). However, Commerce does not explain how this global phenomenon prevents a proper comparison between normal value and export price (or constructed export price). *See, e.g.*, Final Decision Memo at 21 ("This global excess steel capacity has the potential to depress steel prices not just in Korea but in various markets. Although the effect may vary, steel prices in various countries are likely lower than they would be but for global excess capacity.").

Second, Commerce cites to dated CVD findings and calculations that resulted in subsidy rates, based on total adverse facts available with an adverse inference ("AFA"),[12] and which Commerce has since reduced significantly,[13] to corroborate its finding that government subsidies distort HRC costs in the Korean market during the POR. *See* Final Decision Memo at 17 (citing PMS Allegation Exs. 15, 17); *Hot-Rolled Steel from Korea CVD*, 81 Fed. Reg. at 67,960–67,961 (assigning ad valorem CVD subsidy rates of 58.68 and 3.89 percent to POSCO and Hyundai, respectively);[14] *but see Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 84 Fed. Reg. 28,461 (Dep't Commerce June 19, 2019) (final results of [CVD] admin. review, 2016) ("*Hot-Rolled Steel from Korea CVD 2016*) and accompanying Issues and Decision Memo. for [*Hot-Rolled Steel from Korea CVD 2016*], C-580–884, (June 11, 2019) *available at* https://enforcement.trade.gov/frn/summary/korea-south/201912991–1.pdf (last visited Aug. 17, 2020) (assigning ad valorem CVD subsidy rates of 0.55 and 0.58 percent to POSCO and Hyundai, respectively). Nowhere does Commerce explain how the GOK's subsidization of hot-

[12] 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.*

[13] Commerce denies Hyundai, NEXTEEL, and SeAH's request to base the PMS adjustments on rates from *Hot-Rolled Steel from Korea CVD 2016* because, at the time that the *Final Results* were issued, it had only concluded on preliminary CVD rates. Final Decision Memo at 27–28 (citations omitted).

[14] Commerce cites Exhibits 15 and 17 of petitioners' PMS Allegation submission, which are the final decision and calculation memoranda for *Hot-Rolled Steel from Korea CVD*.

rolled steel, which are already subject to countervailing duties, distort HRC prices in such a way as to prevent a proper comparison between normal value and export price (or constructed export price). Moreover, given the non-contemporaneity of Commerce's findings in *Hot-Rolled Steel from Korea CVD*, and the fact that the rate was based on AFA, such findings alone do not constitute an approximation of HRC cost distortions during the POR.

Third, regarding the Domestic Interested Parties' allegation that strategic alliances distort HRC costs, Commerce concedes "the record does not contain specific evidence showing that strategic alliances directly created a distortion in HRC pricing in the current POR," yet speculates that "these strategic alliances and price fixing schemes between certain Korean HRC suppliers and Korean WLP producers are relevant as an element of Commerce's analysis in that they may have created distortions in the prices of HRC in the past, and may continue to impact HRC pricing in a distortive manner during the instant POR and in the future." Final Decision Memo at 18–19. Commerce's speculation stems from evidence relating to the Korean Fair Trade Commission's ("KFTC") imposition of penalties on various steel pipe manufacturers for rigging bids offered by the Korea Gas Corporation for orders of steel pipe between 2003 and 2013. *See* Final Decision Memo at 18 (citing Petitioners' Home Market Viability Allegation as to SeAH at Exs. 1–2, PD 69–70, bar codes 3711361–01–02 (May 24, 2018)).[15] These findings are dated and bear no discernible relation to HRC costs during the POR. Although Commerce may not need to demonstrate direct causation when administering the cost-based PMS provision, Commerce's finding that strategic alliances distorted HRC costs must be reasonably and discernibly based on record evidence.

Fourth, Commerce cites evidence of the government's use of the electricity market as a tool of industrial policy and its control of the largest electricity supplier, the Korea Electric Power Corporation. Final Decision Memo at 19, 22 & nn. 94–95 (citing PMS Allegation at Ex. 24, Sub-Exs. 2, 8). Commerce does not explain or support the claim that the purported government control places a downward pressure on electricity prices or otherwise renders HRC costs outside the ordinary course of trade.

Here, Commerce predicates its PMS determination, and adjustment, on the cumulative effect of various market "distortions" without substantiating it findings regarding each factor or explaining how

[15] Commerce also cites a similar KFTC decision regarding allegations of bid rigging dating back to the 1990's. *See* Final Decision Memo at 18 (citing, inter alia, PMS Allegation at Ex. 35).

the factors prevent a proper comparison. As such, Commerce's determination is unreasonable and must be remanded for further explanation or reconsideration.

2. Profit and Selling Expense Information

SeAH submits that Commerce must use its third country sales data to calculate CV profit and selling expenses. SeAH's Br. at 43–46. NEXTEEL similarly requests Commerce use its own profit information when calculating constructed value. NEXTEEL's Br. at 39–40. Alternatively, SeAH and NEXTEEL insist that Commerce use contemporaneous financial statements, instead of using Hyundai's profit and selling expense information from the first administrative review. *See* SeAH's Br. at 46–47; NEXTEEL's Br. at 40. Should Commerce continue to rely on Hyundai's data, SeAH and NEXTEEL request Commerce do so under the statutory "profit cap" provision. *See* SeAH's Br. at 47–48; NEXTEEL's Br. at 40–41. Defendant argues that Commerce reasonably determines that Hyundai's information is the best source of profit and selling expense data, and that Commerce reasonably decided not to apply the statutory profit cap provision. *See* Def.'s Br. at 56–61. Defendant-Intervenors Maverick and IPSCO Tubulars add that Commerce found that Hyundai's profit and selling expense information would serve as the only reasonable profit cap. *See* Maverick & IPSCO Tubulars' Br. at 34–35. For the reasons that follow, Commerce's determination is remanded.

When determining expenses for constructed value, the statue provides that Commerce shall use:

> the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country[.]

19 U.S.C. § 1677b(e)(2)(A). If actual data on amounts for selling expenses, G&A expenses, and for profits, referenced in § 1677b(e)(2)(A), are not available, then § 1677b(e)(2)(B) provides three alternatives:

> (i) the actual amounts incurred and realized by the specific exporter orproducer being examined in the . . . review . . . in connection with the production and sale . . . of merchandise that is in the same general category of products as the subject merchandise,

> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the . . . review . . .
>
> (iii) the amounts incurred and realized . . . based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers[.]

Id. at § 1677b(e)(2)(B).

Here, Commerce rejects record evidence of "actual [profit and selling expenses] incurred and realized" by NEXTEEL and SeAH under 19 U.S.C. § 1677b(e)(2)(A), (B)(i). Commerce observes that NEXTEEL's home market sales are unreliable because they relate to below-cost transactions, and that SeAH's sales into the Canadian market are unreliable because they are not representative. *See* Final Decision Memo at 31–33.

Commerce relies instead on Hyundai's CV profit ratio and selling expense information from the first administrative review under 19 U.S.C. § 1677b(e)(2)(B)(ii) because Hyundai's information specifically relates to the production of WLP in Korea (i.e., the information is product and country specific).[16] Commerce declines to use contemporaneous financial statements of Korean and non-Korean producers pursuant to alternatives (i) or (iii), observing that the statements are incomplete and less specific to the subject merchandise than Hyundai's CV profit ratio and selling expense information, respectively. *See* Final Decision Memo at 34–36. Acknowledging SeAH's and NEXTEEL's contentions that Hyundai's CV profit ratio and selling expense information is not contemporaneous, Commerce nonetheless explains that Hyundai's information is the best and most accurate information available on the record.[17] Final Decision Memo at 34 ("We continue to find that, absent specific evidence of significant

[16] Commerce explains:

> In conducting this analysis, we note that the specific language of both the preferred and alternative methods appear to show a preference that the profit and selling expenses reflect: 1) production and sales in the foreign country; and 2) the foreign like product, i.e., the merchandise under consideration.

Final Decision Memo at 33.

[17] SeAH contests Commerce's decision to reject the proffered financial statements as incomplete, arguing that no statute or regulation requires that surrogate financial statements be complete. *See* SeAH's Br. at 46. Commerce specifically indicated to the respondents that any surrogate financial statement submitted must be complete. Final Decision Memo at 35 (citing Request for CV Profit & Selling Expense Cmts. & Info., PD 128, bar code 3733367–01 (July 19, 2018)). It would not be unreasonable for Commerce to find such sources unreliable because it could not be certain of what the missing information revealed. *See* Final Decision Memo at 36. However, because the court is remanding Commerce's reliance on 19 U.S.C. § 1677b(e)(2)(B)(ii), as well as its refusal to consider SeAH's sales to

differences in market conditions during the two time periods, the specificity of the data outweighs concerns over contemporaneity.").

As a preliminary matter, Commerce's invocation of 19 U.S.C. § 1677b(e)(2)(B)(ii) to use Hyundai's CV profit ratio and selling expense information is contrary to law. Under § 1677b(e)(2)(B)(ii), Commerce must rely on the "weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review[.]" Hyundai's CV profit ratio and selling expense information are from the first administrative review, not this one.

To the extent that Commerce alternatively relies on "[Hyundai's] information from the first review . . . as the only reasonable profit cap" under 19 U.S.C. § 1677b(e)(2)(B)(iii), Commerce's determination is also unsupported by substantial evidence. *See* Final Decision Memo at 36. It is reasonably discernible that Commerce considers Hyundai's CV profit ratio and selling expense information to be the only reasonable source for determining a profit cap under 19 U.S.C. § 1677b(e)(2)(B)(iii). *See id.* ("Hyundai Steel's prior CV profit information for sale of WLP in its home market is the best data to be used as a 'facts available' profit cap, because it is specific to WLP and represents the production experience of a Korean WLP producer in Korea.") However, Commerce's refusal to consider SeAH's sales to Canada as a source for calculating CV profit and selling expense information under section 1677b(e)(2)(A) or 1677b(e)(2)(B) rests on its finding that those sales are not representative. *See id.* at 32. Because the court is remanding Commerce's finding that SeAH's sales into Canada are not representative,[18] Commerce must also further explain or reconsider its reliance on Hyundai's CV profit ratio and selling expense information from the first administrative review as the profit cap under 19 U.S.C. § 1677b(e)(2)(B)(iii).

Canada under § 1677b(e)(2)(A)–(B), the court does not reach the issue of whether Hyundai's information is the only reliable source under 19 U.S.C. § 1677b(e)(2)(B)(iii).

[18] Even if Commerce continues to find that SeAH's sales to Canada are not representative, it must reconcile its refusal to consider SeAH's third country sales with its treatment of SeAH's sales to Canada in *OCTG from Korea*. *Certain Oil Country Tubular Goods from the Republic of Korea*, 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (final results of [ADD] duty admin. review; 2014–2015) ("*OCTG from Korea 2014–2015*") and accompanying Issues and Decision Memo. for [*OCTG from Korea 2014–2015*] at Cmt. 34, A-580–870, (Apr. 10, 2017), *available at*https://enforcement.trade.gov/frn/summary/korea-south/2017–07684–1.pdf (last visited Aug. 7, 2020) ("OCTG from Korea 2014–2015 IDM"). Commerce explains "that basing CV profit on SeAH's sales to Canada [in *OCTG from Korea 2014–2015*] was the appropriate methodology for that review based on the specific facts of that case[,]" but does not state what those facts are, or why the facts of this case are distinguishable. *See* Final Decision Memo at 32–33. In both cases, SeAH's sales into Canada were the subject of dumping proceedings, yet Commerce used SeAH's above-cost sales to calculate CV profit in *OCTG from Korea* while refusing to consider SeAH's sales in this instance. *Compare id. with* OCTG from Korea 2014–2015 IDM at 13–14. Commerce must explain what "specific facts" justify its departure from its previous methodology.

3. NEXTEEL's Non-Prime WLP Products

NEXTEEL argues that Commerce's methodology for classifying and treating certain sales of WLP as non-prime in this proceeding contradicts agency practice. *See* NEXTEEL's Br. at 41–43. Defendant counters that Commerce's methodology is consistent with agency precedent and maintains that Commerce's determination is reasonable. For the reasons that follow, Commerce's deduction to NEXTEEL's constructed value to account for sales of non-prime products is remanded.

When determining the constructed value of the subject merchandise, Commerce shall normally calculate costs based on the records of the respondent under investigation or review. *See* 19 U.S.C. § 1677b(f)(1)(A). However, Commerce sometimes finds that a portion of those costs relate to the production of "non-prime" products. *See, e.g.*, *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1381 (Fed. Cir. 2008) ("*Mittal Steel*"). Commerce classifies a product as "non-prime" when it finds that the product is downgraded so "significantly that it no longer belongs to the same group and cannot be used for the same applications as the prime product." Final Decision Memo at 42; *see also, e.g.*, *Mittal Steel*, 548 F.3d at 1381. According to Commerce, the market value of non-prime products drops to such an extent that the full costs of producing the product cannot be recovered when sold. *See* Final Decision Memo at 42. Because the full costs of such products cannot be recovered when sold (i.e., sold at a loss), Commerce views it unreasonable to account for the full costs of non-prime products when determining constructed value of sales of the subject merchandise (i.e., prime products). *See id.*; *see also* 19 U.S.C. § 1677(16)(A); *Mittal Steel*, 548 F.3d at 1381 (citations omitted). Under such circumstances, Commerce's practice is to lower the reported total value of prime products by the difference between reported costs of the non-prime products and the selling price of the non-prime products. *See* Final Decision Memo at 42–43. Commerce states that its practice is to assess whether a product is "non-prime" on a case-by-case basis, considering factors such as (1) how the products are treated in the respondent's normal books and records, (2) whether they remain in scope, and (3) whether they can still be used in the same applications as the prime subject merchandise. *See id.* at 42.

Commerce fails to fully explain how its determination here accords with its stated practice, given the record evidence and agency precedent, and further, why that practice is reasonable. Commerce determines that some of NEXTEEL's reported WLP sales relate to "non-

prime" products, reasoning that these products are downgraded to such an extent that they cannot be put toward the same applications as their "prime" counterparts. *See* Final Decision Memo at 42–43. Despite NEXTEEL's contention that Commerce has assigned full costs to downgraded line pipe products in the past, Commerce adjusts "NEXTEEL's reported costs to value the downgraded non-prime products at their sales price," and "allocat[es] the difference between the full production cost and market value of the non-prime products to the production costs of prime-quality WLP." Final Decision Memo at 43 (citations omitted). In doing so, Commerce takes into account only one of the three considerations it says it relies on to determine how to classify and account for "nonprime" products. Commerce focuses on its finding that non-prime WLP cannot be put toward the same applications as prime WLP, but does not consider how those products "are treated in [NEXTEEL's] normal books and records" and "whether [the products] remain in scope." *See* Final Decision Memo at 42–43. Commerce's criteria for classifying and valuing non-prime merchandise are conjoined by the word "and", which suggests that Commerce typically considers all three criteria. *See id.* at 42.

Commerce seems to imply that its consideration as to whether the product can be put to the same application as prime product is dispositive, yet the precedent it invokes to evidence its practice suggests otherwise. For example *Steel Concrete Reinforcing Bar from Mexico*, Commerce addresses whether the respondent was justified in "its departure from its normal books and records" and whether the non-prime product was "reportable merchandise." *See, e.g.*, *Steel Concrete Reinforcing Bar From Mexico*, 82 Fed. Reg. 27,233 (Dep't Commerce June 14, 2017) (final results of [ADD] admin. review; 2014–2015) ("*Rebar from Mexico*") and accompanying Issues and Decision Memo. for [*Rebar from Mexico*] at Cmt. 3, A-201–844, (June 7, 2017) *available at* https://enforcement.trade.gov/frn/summary/mexico/2017–12304–1.pdf (last visited Aug. 18, 2020)); *see also* Final Decision Memo at 42 n.195.

Moreover, in *OCTG from Ukraine*, Commerce considered whether a respondent's sales of "reject" merchandise were properly within the scope of the ADD investigation. *See* OCTG from Ukraine IDM at 8–11. After analyzing the scope of the investigation, Commerce concluded that the reject merchandise remained within scope as non-prime products, and included those sales in its calculation of the dumping margin. *See id.* If the products at issue here are not within the scope of the ADD order, then Commerce should explain why the cost associated with their manufacture would be relevant to calculation of NEXTEEL's dumping margin. On remand, Commerce must clarify its

practice, explain why its practice is reasonable and how its determination in this case accords with its practice in light of the record evidence. Accordingly, the court remands Commerce's determination.

4. Reclassification of NEXTEEL's Costs from Suspended Production

NEXTEEL argues that Commerce errs by reallocating costs related to the suspended production of certain product lines from cost of goods sold assigned to those products specifically to G&A expenses, and challenges Commerce's resultant adjustment to NEXTEEL's reported G&A expense ratio for WLP. *See* NEXTEEL's Br. at 43–44. Defendant counters that NEXTEEL merely disagrees with Commerce's finding but does not demonstrate that Commerce's determination is unreasonable. *See* Def.'s Br. at 63–65. Defendant-Intervenors Maverick and IPSCO Tubulars add that Commerce's determination accords with agency practice. *See* Maverick & IPSCO Tubulars' Br. at 37–39. For the following reasons, Commerce's determination is remanded.

When determining constructed value, Commerce "shall normally [calculate selling expenses, G&A expenses, and profit] based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). Here, Commerce explains that it accounts for expenses associated with extended shutdowns of production lines as costs relating to the general operations of the company as a whole, and includes those losses as part of a respondent's G&A expenses.[19] *See* Final Decision Memo at 44–45 & n.210 (citing *Certain Oil Country Tubular Goods from the Republic of Korea*, 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (final results of [ADD] duty admin. review; 2014–2015) ("*OCTG from Korea 2014–2015*") and accompanying Issues and Decision Memo. for [*OCTG from Korea 2014–2015*] at Cmt. 34, A-580–870, (Apr. 10, 2017), *available at* https://enforcement.trade.gov/frn/summary/korea-south/201707684–1.pdf (last visited Aug. 17, 2020) ("OCTG from Korea 2014–2015 IDM"). Specifically, Commerce explains that it reallocates the losses associated with the extended suspension of a respondent's production line because, "once a produc-

[19] Commerce notes that its normal practice is to "to include routine shutdown expenses (i.e., maintenance shutdowns) in a respondent's reported costs and to associate them to the products produced on those lines." Final Decision Memo at 44 (citing *Gray Portland Cement and Clinker From Mexico*, 62 Fed. Reg. 17,148, 17,159–17,160 (Dep't Commerce Apr. 9, 1997) (final results of [ADD] admin. review)).

tion line is suspended, it no longer relates to ongoing production [of the specific product]." Final Decision Memo at 44. According to Commerce, companies suspend product lines for numerous reasons, and whatever the reason for the shutdown, "products are not produced on those production lines to recover the costs associated with those production lines." *Id.* Nonetheless, Commerce does not address NEXTEEL's argument that Commerce's practice of reallocating its losses contravenes the plain requirements of 19 U.S.C. § 1677b(f)(1)(A) in this instance. As such, the court must remand Commerce's determination for further explanation or reconsideration.

5. Use of SeAH's Average Costs for the Review Period

SeAH argues that Commerce's refusal to calculate its costs based on quarterly averages is unreasonable and contrary to agency practice. *See* SeAH's Br. at 33–36. Defendant submits that Commerce's decision use average costs for the review period (i.e., annual weighted averages) is reasonable and consistent with agency practice. *See* Def.'s Br. at 65–67. For the reasons that follow, Commerce's determination is remanded.

When determining constructed value, Commerce usually relies on the weighted average of costs incurred throughout the entire POR (i.e., annual costs). *See Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/[POR] that May Require Using Shorter Cost Averaging Periods*, 73 Fed. Reg. 26,364, 26,365 (Dep't Commerce May 9, 2008) (request for comment). Nonetheless, Commerce deviates from its standard methodology when it determines that there are significant changes in costs during the POR. *See id.*; *see also* Final Decision Memo at 55 (citing *Steel Concrete Reinforcing Bar From Taiwan*, 82 Fed. Reg. 34,925 (Dep't Commerce July 27, 2017) (final determination of sales at less than fair value) ("*Rebar from Taiwan*") and accompanying Issues and Decision Memo. for the [*Rebar from Taiwan*] at Cmt. 2, A583–859, (July 20, 2017), *available at* https://enforcement.trade.gov/frn/summary/taiwan/2017–15840–1.pdf (last visited Aug. 17, 2020) ("Rebar from Taiwan IDM"). In such instances, Commerce instead relies on quarterly average costs, provided that there is a linkage (i.e., reasonable correlation) between costs and sales information during the shorter averaging periods. *See* Rebar from Taiwan IDM at Cmt. 2; *see also* Final Decision Memo at 55.

Commerce explains that although SeAH's reported cost fluctuations during the POR were "significant", the data does not demonstrate that sales prices and costs were linked. *See* Final Decision Memo at 55–57. Specifically, Commerce observes that "the magnitude

of the changes in the quarterly costs and sales prices of WLP were not comparable and the quarterly prices and costs did not trend consistently for all the CONNUMs tested." *Id.* at 56. However, the costs and prices between first and second quarters—i.e., the only period during which SeAH experienced a magnitude of fluctuation in costs that satisfied Commerce's criteria for determining "significance"—do appear to be reasonably correlated. *See* SeAH's Suppl. Questionnaire Resp. at Attachment SD-5, PD 145–146, CD 151–167, bar codes 3738658–01–02, 3738614–01–17 (Aug. 3, 2018) (showing an increase in cost and price from the first to second quarters). Nonetheless, Commerce finds, "that the quarterly prices and costs of WLP do not appear to be reasonably correlated and that linkage does not exist." Final Decision Memo at 56. It is not discernible from Commerce's analysis whether it notes the correlation of prices and costs between the first and second quarters, but finds that the linkage requirement is not satisfied nonetheless (e.g., because Commerce examines whether costs and prices are linked across the entire POR), whether it mistakenly overlooked the correlation, or whether Commerce finds that SeAH's prices and costs are not reasonably correlated for some other reason. Should Commerce continue to rely on constructed value to determine the normal value of SeAH's sales, it must either reconsider its use of the annual weighted averages to calculate SeAH's costs, or explain its continued reliance on annual averages despite the fact that SeAH's prices and costs appear to be correlated during the period of time between the first and second quarters.

III. Allocation of G&A Expenses when Calculating Constructed Export Price

SeAH argues that Commerce erred by deducting from its constructed export price certain G&A expenses incurred by PPA, its affiliate U.S. reseller, as selling expenses. *See* SeAH's Br. at 37–42. Defendant counters that Commerce has discretion to apply PPA's G&A expenses to both further manufactured and non-further manufactured products, and that Commerce reasonably allocated those expenses when adjusting SeAH's constructed export price. *See* Def.'s Br. at 49–55. For the following reasons, Commerce's determination is remanded.

As explained, when reviewing an ADD order, Commerce calculates dumping margins by comparing the normal value of the merchandise to its export price—here, constructed export price. *See* 19 U.S.C. §§ 1673, 1675(a)(2)(A), (C); *see also id.* at §§ 1677(35), 1677a. Commerce uses constructed export price to determine the dumping margin when the producer or exporter of the subject merchandise sells to an affili-

ated buyer. *See* 19 U.S.C. § 1677a(b). The constructed export price is the price at which the subject merchandise is first sold to the affiliated buyer as adjusted under subsections (c) and (d). *See id.* at § 1677a(b). Relevant here, subsection (d)(1) requires Commerce to deduct various selling expenses from the constructed export price, and subsection (d)(2) requires Commerce to deduct costs of further manufacture or assembly from the constructed export price. *See id.* at § 1677a(d). Pursuant to 19 U.S.C. § 1677a(d)(1)(D), Commerce normally calculates, and deducts from the constructed export price, indirect selling expenses.

Commerce describes at length its methodology for determining PPA's G&A expense ratio, but neither clarifies whether it is treating PPA's G&A expenses as indirect selling expenses, nor explains why it is authorized to do so under the statute. *See* Final Decision Memo 58–61. Instead, Commerce frames the issue as "how to properly account for the G&A expenses that have been allocated over the full cost of the products sold[,]" explaining that Commerce's approach accords with agency practice and is a "balanced and reasonable" way to assign PPA's G&A expenses to both resold and further manufactured products. *See id.* at 59–60 (citations omitted). In doing so, Commerce dismisses SeAH's request to apply the G&A expense ratio only to PPA's costs of further manufacturing, explaining that "[a]pplying such a ratio to only the cost of further manufacturing would result in a mismatch between the figures used in the G&A expense ratio calculation[.]" *Id.* at 60. However, bare assertions about what is "proper" or "balanced" as a matter of accounting say nothing of what is authorized and reasonable under the statute. Accordingly, Commerce's determination is remanded for further explanation as to whether it is treating PPA's G&A expenses as indirect selling expenses under the statute, and if so, why it is so authorized, or for reconsideration.

IV. Calculation of Non-Examined Rate

Husteel adopts and incorporates by reference NEXTEEL and SeAH's challenges to Commerce's calculation of the dumping margin, and requests "in addition to the recalculation of the all-others rate to remove the distortive total AFA rate, any other relief granted by the Court and resulting adjustment to the individual weighted average dumping margins for NEXTEEL and SeAH be incorporated into the revised average dumping margin applied to Husteel." Husteel's Br. at 31–32.[20]

[20] Husteel argued that Commerce impermissibly used an AFA CVD rate from a previous proceeding to calculate the non-examined company's rate for cooperative respondents in

Commerce normally calculates the non-examined company's rate, or "all others rate," as the "weighted average of the estimated weighted average dumping margins established for exporters and producers individually examined, excluding, in pertinent part, any margins determined entirely on the basis of facts otherwise available." 19 U.S.C. § 1673d(c)(5)(A).[21] Because the court is remanding Commerce's determination of normal value for the mandatory respondents, Commerce must recalculate the non-examined company's rate as appropriate to reflect any adjustments to its calculation of the dumping margins for NEXTEEL and SeAH.

CONCLUSION

For the foregoing reasons, it is

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

ORDERED that Commerce shall file its 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 remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to comments on the 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 of its remand redetermination.

Dated: August 26, 2020
New York, New York

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

this proceeding. *See* Husteel's Br. at 28–31. Husteel now concedes that Commerce did not base the non-examined rate "entirely" on the AFA CVD rate assigned to POSCO in *Hot-Rolled Steel from Korea CVD*, 19 U.S.C. § 1673d(c)(5)(A),but rather, used the AFA CVD rate as a component of constructed value when calculating NEXTEEL's and SeAH's dumping margins. *See* Oral Arg. at 2:11:20– 2:13:40, June 25, 2020, ECF No. 79.

[21] The Court of Appeals for the Federal Circuit has clarified that the methods under 19 U.S.C. § 1673d apply to administrative reviews as well as investigations. *See Albemarle Corp. v. United States*, 821 F.3d 1345, 1352–53 (Fed. Cir. 2016).

Slip Op. 20–126

RED SUN FARMS, Plaintiff, v. UNITED STATES, Defendant, and THE FLORIDA TOMATO EXCHANGE, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 19–00205

[Granting Defendant's motion to dismiss.]

Dated: August 26, 2020

Valerie Ellis, *Daniel Porter*, and *Kimberly Reynolds*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for Plaintiff Red Sun Farms.

Elizabeth Anne Speck, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. On the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Emma T. Hunter*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

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

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Red Sun Farms (Naturbell SPR DE RL, San Miguel Red Sun Farms SPR DE RL DE CV, Agricola El Rosal SA DE, Jem D International Michigan Inc., and Red Sun Farms Virginia, LLC, collectively d/b/a Red Sun Farms) ("Plaintiff" or "Red Sun Farms") challenges the final determination made by the United States Department of Commerce ("Commerce") in the resumption of the previously suspended antidumping duty investigation on imports of fresh tomatoes from Mexico. Compl. ¶¶ 1–2, ECF No. 8; *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 57,401 (Dep't Commerce Oct. 25, 2019) (final determination of sales at less than fair value) ("*Final Determination*"). Specifically, Red Sun Farms pleads jurisdiction under 28 U.S.C. § 1581(c), Compl. ¶ 2, to contest Commerce's respondent selection decision, *id.* ¶¶ 31–35; use of April 1, 2018 through March 31, 2019 as the period of investigation, *id.* ¶¶ 36– 40; differential pricing analysis, *id.* ¶¶ 41–46; margin calculation methodology, *id.* ¶¶ 47–52; all others rate calculation, *id.* ¶¶ 53–58; continuation of the investigation, *id.* ¶¶ 59–63; and failure to assign Red Sun Farms an exporter-specific cash deposit rate, *id.* ¶¶ 64–69. Red Sun Farms requests in pertinent part that the court find Commerce's final determination unlawful and, on remand, order Commerce to issue revised final results and applicable rates. *Id.*, Prayer for J. and Relief.

Before the court is Defendant United States' ("Defendant") motion to dismiss Red Sun Farms' Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Def.'s Mot. to Dismiss Br., ECF No. 26 ("Def. Br."). Red Sun Farms opposed. Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss Pl.'s Compl., ECF No. 42 ("Opp'n Br.). Defendant replied. Def.'s Reply in Supp. of its Mot. to Dismiss Pl.'s Compl., ECF No. 46 ("Def. Reply").[1] For the reasons that follow, the court grants Defendant's motion to dismiss.

I. BACKGROUND

A. History of the Fresh Tomatoes from Mexico Antidumping Duty Proceeding

Commerce's investigation of fresh tomatoes has a long procedural history. In April 1996, Commerce initiated an antidumping duty investigation to determine whether imports of fresh tomatoes from Mexico were being, or likely to be, sold in the United States at less than fair value. *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 18,377 (Dep't Commerce Apr. 25, 1996) (initiation of antidumping duty investigation). After a preliminary determination from the 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. Compl. ¶ 5; *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,608 (Dep't Commerce Nov. 1, 1996) (preliminary determination). That same day, Commerce published a notice in the Federal Register announcing an agreement to suspend the antidumping duty investigation on fresh tomatoes from Mexico. Compl. ¶ 13; *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,618 (Dep't Commerce Nov. 1, 1996) (suspension of antidumping investigation).

After entering the suspension agreement in 1996, Commerce and the signatories[2] entered into a series of suspension agreements after

[1] Defendant-Intervenor The Florida Tomato Exchange ("Defendant-Intervenor" or "FTE") "support[s] the entirety of the United States' motion and agree[s] with the arguments presented therein." Def.-Intervenor's Resp. 1, ECF No. 41 ("Def.-Intervenor Br.").

[2] The term "signatory" or "signatories" mentioned throughout the various suspension agreements refers to "producers/exporters accounting for substantially all imports of fresh tomatoes from Mexico." *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 49,987, 49,987 (Dep't Commerce Sept. 24, 2019) (suspension of antidumping duty investigation); *Fresh Tomatoes from Mexico*, 78 Fed. Reg. 14,967, 14,968 (Dep't Commerce Mar. 8, 2013) (suspension of antidumping investigation); *Fresh Tomatoes from Mexico*, 73 Fed. Reg. 4831 (Dep't Commerce Jan. 28, 2008) (suspension of antidumping investigation); *Fresh Tomatoes from Mexico*, 67 Fed. Reg. 77,044 (Dep't Commerce Dec. 16, 2002) (suspension of antidumping investigation); *Fresh Tomatoes from Mexico*, 61 Fed. Reg. at 56,619.

the Mexican exporters and producers of fresh tomatoes gave notice of intent to withdraw from the operative suspension agreement in 2002, 2007, and 2013. *See Fresh Tomatoes from Mexico*, 84 Fed. Reg. 20,858, 20,859–61 (Dep't Commerce May 13, 2019) (termination of suspension agreement, rescission of administrative review, and continuation of the antidumping duty investigation) ("*May 2019 Withdrawal Notice*") (explaining the history of the proceedings).[3]

B. Commerce's Withdrawal from the 2013 Suspension Agreement, Continuation of the Underlying Investigation, and Signing of the 2019 Suspension Agreement

Under Section VI.B of the 2013 Suspension Agreement, a signatory can withdraw upon giving 90 days' written notice. Commerce gave the signatory Mexican tomato growers and exporters notice of intent to withdraw from the 2013 Suspension Agreement on February 6, 2019. *May 2019 Withdrawal Notice*, 84 Fed. Reg. at 20,860. Commerce then withdrew from the 2013 Suspension Agreement, effective May 7, 2019, and continued the underlying antidumping investigation. *Id.*; Compl. ¶ 24.

Commerce published a notice in the Federal Register with an effective date of September 19, 2019, announcing that "Commerce and representatives of the signatory producers/exporters accounting for substantially all imports of fresh tomatoes from Mexico signed" an agreement to suspend the antidumping duty investigation. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. at 49,989. No party challenged Commerce's decision to suspend the investigation. The ITC also announced the suspension of its antidumping investigation as of September 24, 2019. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 54,639 (Int'l Trade Comm'n Oct. 10, 2019) (suspension of anti-dumping investigation).

C. Commerce's Final Determination

After signing the 2019 Suspension Agreement, Red Sun Farms and FTE each requested that Commerce continue its antidumping duty investigation under 19 U.S.C. § 1673c(g). *Final Determination*, 84 Fed. Reg. at 57,402. On October 25, 2019, Commerce published its affirmative *Final Determination*. *Id.*; Compl. ¶ 29. The ITC issued an

[3] Each time the signatory Mexican producers/exporters withdrew from the relevant suspension agreement the parties negotiated and entered into a new suspension agreement, and, in 2002, 2008, and 2013, new suspension agreements went into effect. *Fresh Tomatoes from Mexico*, 67 Fed. Reg. 77,044 (Dep't Commerce Dec. 16, 2002) (suspension of antidumping investigation); *Fresh Tomatoes from Mexico*, 73 Fed. Reg. 4831 (Dep't Commerce Jan. 28, 2008) (suspension of antidumping investigation); *Fresh Tomatoes from Mexico*, 78 Fed. Reg. 14,967 (Dep't Commerce Mar. 8, 2013) (suspension of antidumping investigation).

affirmative injury determination on December 12, 2019. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 67,958 (Int'l Trade Comm'n Dec. 12, 2019) (notice of material injury determination).

D. Red Sun Farms' Claims

Red Sun Farms filed the Summons in this action on November 25, 2019, ECF No. 1, and filed a complaint challenging Commerce's final determination in the continued fresh tomatoes investigation on December 26, 2019, ECF No. 8. Specifically, Red Sun Farms avers that "Commerce's *Final Determination* is arbitrary and capricious, an abuse of discretion and or [*sic*] not supported by substantial evidence on the record and is otherwise in accordance with law." Compl. ¶ 30. In particular, Red Sun Farms contests Commerce's respondent selection decision, *id.* ¶¶ 31–35; use of April 1, 2018 through March 31, 2019 as the period of investigation, *id.* ¶¶ 36–40; differential pricing analysis, *id.* ¶¶ 41–46; margin calculation methodology, *id.* ¶¶ 47–52; all others rate calculation, *id.* ¶¶ 53–58; continuation of the investigation, *id.* ¶¶ 59–63; and failure to assign Red Sun Farms an exporter-specific cash deposit rate, *id.* ¶¶ 64–69. Red Sun Farms requests in pertinent part that the court find Commerce's final determination unlawful and order Commerce on remand to issue revised final results and applicable rates. *Id.*, Prayer for J. and Relief. Red Sun Farms does not challenge the 2019 Suspension Agreement. Opp'n Br. at 7 ("What is of concern to [Red Sun Farms] is the final determination changing the margins and the reasoning underlying the calculation of those margins.").

II. LEGAL STANDARDS

Article III of the Constitution limits federal courts to hearing actual, ongoing controversies. *Davis v. FEC*, 554 U.S. 724, 732 (2008). An actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed. *Id.* at 732–33; *see DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (noting that the Court is "presumed to be without jurisdiction unless the contrary appears affirmatively from the record" (internal quotation marks and citations omitted)). "Though justiciability has no precise definition or scope, doctrines of standing, mootness, ripeness, and political question are within its ambit." *Fisher v. United States*, 402 F.3d 1167, 1176 (Fed. Cir. 2005).

The party invoking jurisdiction bears the burden of establishing it. *Hutchinson Quality Furniture Inc. v. United States*, 827 F.3d 1355, 1359 (Fed. Cir. 2016) (internal quotation marks and citation omitted). A plaintiff must allege sufficient facts to state each claim alleged in the complaint. *DaimlerChrysler Corp.*, 442 F.3d at 1318–19 (citing,

inter alia, *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." USCIT R. 12(h)(3).

III. DISCUSSION

Defendant argues that the challenge to the *Final Determination* does not present a live case or controversy because Red Sun Farms pays no antidumping duties, as certain entities comprising Red Sun Farms are signatories to the 2019 Suspension Agreement. Def. Br. at 11–12. Defendant and Defendant-Intervenor point out that Red Sun Farms cannot challenge the *Final Determination* unless and until the 2019 Suspension Agreement ends and Commerce thus issues the antidumping duty order. *See id*.; Def.-Intervenor Br. at 3. Defendant also argues that even if the claims are justiciable, the allegations raised in the Complaint are time-barred because Red Sun Farms did not file the Summons challenging the 2019 Suspension Agreement within 30 days of that agreement's publication in the Federal Register (here, by October 24, 2019), as required under 19 U.S.C. § 1516a. Def. Br. at 12–16; Def.-Intervenor Br. at 3–4.

Red Sun Farms responds that the 2019 Suspension Agreement has no impact on its claims challenging the *Final Determination* "because the controversy here is definite and concrete, and not abstract or hypothetical." Opp'n Br. at 12. Red Sun Farms argues that the filing of the Summons on November 25, 2019 renders its claims timely under 19 U.S.C. § 1516a(a)(2)(A)(i)(I) because the filing occurred within 30 days after publication of the notice of Commerce's *Final Determination* in the Federal Register. Opp'n Br. at 12–13.[4]

"Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (internal quotation marks and

[4] Defendant and Defendant-Intervenor also assert that Red Sun Farms' decision to forgo challenging the 2019 Suspension Agreement precludes the court from adjudicating the claims here because Red Sun Farms did not assert a timely challenge to the 2019 Suspension Agreement. Def. Br. at 14; Def.-Intervenor Br. at 3. Red Sun Farms argues that 19 U.S.C. § 1516a(a)(2)(B)(iv) does not require a tandem challenge for "judicial review of Commerce's determination to suspend an investigation and of Commerce's 'final determination resulting from a continued investigation' that changes the margins from those used at the time the investigation was suspended." Opp'n Br. at 4; *see also id.* at 7 ("What is of concern to [Red Sun Farms] is the final determination changing the margins and the reasoning underlying the calculation of those margins.").

citations omitted); *Martin v. United States*, 894 F.3d 1356, 1362 (Fed. Cir. 2018). Two criteria guide a court in determining ripeness: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* at 808.

In this case, Plaintiff's claims challenging the *Final Determination* are not ripe. As to the fitness of the issues for judicial review, Red Sun Farms' legal challenge rests on the development of an extensive factual record for which the particularity of a concrete harm is absent. Next, Red Sun Farms cannot satisfy the hardship requirement because Red Sun Farms is not currently paying antidumping duties. Specifically, three entities that make up Red Sun Farms—Naturbell SPR DE RL, San Miguel Red Sun Farms SPR DE RL DE CV, and Agricola El Rosal SA DE CV—are signatories to the 2019 Suspension Agreement as members of the Asociación Mexicana de Horticultura Protegida, A.C. ("AMHPAC"), an association of individual Mexican fresh tomato growers that is a signatory to the 2019 Suspension Agreement.[5] *Fresh Tomatoes from Mexico*, 84 Fed. Reg. at 49,994; *see* Compl. n.1, *CAADES*, Court No. 19–00203, ECF No. 14, ECF No. 14–1 (identifying the individual members and associations as signatories to the 2019 Suspension Agreement).[6] AMHPAC and the other associations of individual Mexican fresh tomato growers who signed the 2019 Suspension Agreement "certif[ied] that the members of their organization agree to abide by all terms of the Agreement." *Fresh Tomatoes from Mexico*, 84 Fed. Reg. at 49,994.

Plaintiff does not dispute that three of its entities are members of AMHPAC or that AMHPAC signed the 2019 Suspension Agreement on behalf of its three members. Given that entities comprising Red Sun Farms signed the 2019 Suspension Agreement, that the 2019 Suspension Agreement bars Commerce from levying duties on signatories to that agreement, and that the *Final Determination* has no effect unless and until Commerce issues an antidumping order, the court concludes that Red Sun Farms' claims do not present a live case or controversy. *See, e.g.*, *Usinas Siderúrgicas de Minas Gerais S/A v. United States*, 26 CIT 422, 431 (2002) ("A continued final affirmative determination [made after Commerce resumed an investigation after finalizing a suspension agreement] has no practical effect, unless and

[5] AMHPAC is also a party plaintiff in cases challenging Commerce's withdrawal of the 2013 Suspension Agreement, finalization of the 2019 Suspension Agreement, and the *Final Determination* in the continued fresh tomatoes investigation in *AMHPAC v. United States*, Court No. 20–00036, and *Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C. v. United*, Court Nos. 19–00203 and 19–00206 ("*CAADES*").

[6] Section II.E of the 2019 Suspension Agreement identifies CAADES, AMHPAC, and three other entities as "a Mexican grower association whose members produce and/or export Fresh Tomatoes from Mexico and are also Signatories to this Agreement[.]" *Fresh Tomatoes from Mexico*, 84 Fed. Reg. at 49,990.

until the related suspension agreement is dissolved . . . . Thus, many of the same jurisprudential concerns that militate against piecemeal litigation also weigh against litigation of . . . a challenge which is not yet (and may never be) ripe.") ("*Usinas*").[7]

Plaintiff may seek to challenge the *Final Determination* after its entities withdraw from the 2019 Suspension Agreement and after Commerce issues an antidumping order. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. at 49,994 (Under Section XI.B, "[a]n individual Signatory, or Signatories, collectively, or Commerce may withdraw from this Agreement upon 90 days' written notice to Commerce or the Signatories, respectively."). Absent that type of event occurring, the court cannot review the challenged aspects of the *Final Determination* that have no effect so long as the 2019 Suspension Agreement remains in force. *See Usinas*, 26 CIT at 431. In short, Red Sun Farms cannot have it both ways: it cannot obtain the benefits of paying zero antidumping duties under the 2019 Suspension Agreement while maintaining an after-the-fact challenge to the *Final Determination*, which currently has no impact. Accordingly, the court concludes that Plaintiff's claims are not yet (and may never be) ripe.

IV. CONCLUSION

For these reasons, it is

ORDERED that Defendant's motion to dismiss is granted and Plaintiff's Complaint is dismissed with prejudice. Judgment will enter accordingly.

Dated: August 26, 2020
New York, New York

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

[7] Red Sun Farms argued that the claims were ripe even though certain of its entities signed the 2019 Suspension Agreement since "several members of Defendant-Intervenors, the Florida Tomato Exchange, also have affiliated farms in Mexico who are members of the signatory associations." Opp'n Br. at 15. The court finds no merit in Red Sun Farms' contention. FTE is neither is a signatory to the 2019 Suspension Agreement, nor is FTE a named party challenging the 2019 Suspension Agreement or the *Final Determination*.

Slip Op. 20–127

COALITION FOR FAIR TRADE IN GARLIC, Plaintiff, v. UNITED STATES, Defendant, and HARMONI INTERNATIONAL SPICE, INC., et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 18–00137

[Sustaining the U.S. Department of Commerce's final results of redetermination.]

Dated: August 27, 2020

Anthony L. Lanza and *Brodie H. Smith*, Lanza and Smith PLC, of Irvine, CA, for Plaintiff Coalition for Fair Trade in Garlic.

Meen Geu Oh, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. Of counsel was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Michael J. Coursey, *John M. Herrmann*, and *Joshua R. Morey*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors Fresh Garlic Producers Association and its Individual Members.

Bruce M. Mitchell, *Alan G. Lebowitz*, *Ned H. Marshak*, *Jordan C. Kahn*, and *Andrew T. Schutz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of New York, NY, for Defendant-Intervenors Zhengzhou Harmoni Spice Co., Ltd. and Harmoni International Spice Inc.

OPINION

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") redetermination upon remand in this case. *See* Final Results of Redetermination Pursuant to Remand ("Remand Results"), ECF No. 99–1.[1]

In this action, Plaintiff Coalition for Fair Trade in Garlic ("the CFTG") challenged Commerce's final results and partial rescission of the 22nd administrative review of the antidumping duty order on fresh garlic from the People's Republic of China. *See Fresh Garlic From the People's Republic of China*, 83 Fed. Reg. 27,949 (Dep't Commerce June 15, 2018) (final results and partial rescission of the 22nd antidumping duty admin. review and final result and rescission, in part, of the new shipper reviews; 2015–2016), ECF No. 24–2, and accompanying Issues and Decision Mem., A-570–831 (June 8, 2018), ECF No. 24–3. In particular, the CFTG challenged Commerce's regulation governing the partial rescission of an administrative review upon the withdrawal of request to review a producer or exporter, 19

[1] Commerce filed a public administrative record, ECF No. 100–2, and a confidential administrative record, ECF No. 100–3, in connection with the Remand Results.

C.F.R. § 351.213(d)(1), and Commerce's determination that the CFTG's request for a review of Defendant-Intervenor Zhengzhou Harmoni Spice Co., Ltd. ("Harmoni") was invalid *ab initio* on the basis that none of the CFTG's members had standing to request the review. *See* Mot. of Pls. [CFTG] and its Individual Members for J. on the Agency R. and accompanying Mem. in Supp. at 25–49, ECF No. 38. In a prior opinion, familiarity with which is presumed, the court remanded Commerce's determination based on the CFTG's second challenge and declined to reach the CFTG's first challenge. *Coal. for Fair Trade in Garlic v. United States* ("*CFTG*"), 44 CIT ___, ___, 437 F. Supp. 3d 1347, 1349 (2020).[2]

At the time it submitted its request for an administrative review of Harmoni, the CFTG's membership consisted of four individuals:

> Stanley Crawford, owner and operator of El Bosque Farm of Dixon, New Mexico; Avrum Katz, owner and operator of Boxcar Farm of Peñasco, New Mexico; Alex Pino, owner and operator of Revolution Farm of Santa Fe, New Mexico; and Suzanne Sanford, owner and operator of Sanford Farm of Costilla, New Mexico.

Id. at 1350 n.6. Mr. Katz and Mr. Pino later withdrew from the CFTG and Melinda Bateman joined the CFTG. *Id.* To evaluate the validity of the CFTG's request, Commerce considered the standing and credibility of the CFTG members who had submitted the request—Mr. Katz, Mr. Crawford, Ms. Sanford, and Mr. Pino. *Id.* at 1352 (discussing Commerce's preliminary determination); *id.* at 1353–54 (discussing Commerce's final determination). "Mr. Katz and Mr. Pino did not respond to Commerce's questionnaires"; thus, "Commerce's analysis was limited to the responses of Mr. Crawford and Ms. Sanford." *Id.* at 1352. Commerce concluded that "material misrepresentations and inconsistencies" in Mr. Crawford's and Ms. Sanford's respective statements undermined their alleged status as domestic garlic farmers and, thus, "neither individual had standing to request an administrative review pursuant to 19 U.S.C. § 1677(9)(C)."[3] *Id.* at 1353. "Commerce did not make an explicit finding as to whether the CFTG

[2] Regarding the CFTG's first challenge, the court explained that it was guided by the U.S. Court of Appeals for the Federal Circuit's holding, in connection with analogous facts, that an invalid review request meant that the requestor "'was not a "party to the proceeding"' eligible to challenge Commerce's regulation." *CFTG*, 437 F. Supp. 3d at 1361 (quoting *N.M. Garlic Growers Coal. v. United States*, 953 F.3d 1358, 1372–73 (Fed. Cir. 2020).

[3] Section 1677(9) defines the term "interested party" for purposes of the antidumping and countervailing duty laws. Relevant here, section 1677(9)(C) defines "interested party" as "a manufacturer, producer, or wholesaler in the United States of a domestic like product." 19 U.S.C. § 1677(9)(C). Section 16779(E) defines "interested party" as "a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic

had requested the review on behalf of its individual members or solely as an association," instead, "Commerce found that none of the requesting members had individual standing and, thus, the CFTG did not have standing." *Id.* Commerce rescinded its review of Harmoni and six other companies on the basis that no other review request remained in place. *Id.* at 1354.

The court sustained Commerce's determination respecting Ms. Sanford but remanded Commerce's determination respecting Mr. Crawford. *Id.* at 1354–58. Thus, the court was "unable to affirm the agency's determination that the [CFTG's] review request was invalid *ab initio*." *Id.* at 1360. The court found, however, that "Commerce's determination that at least three of the four members of the CFTG, at the time of the review request, did not credibly establish that they qualified as domestic producers [was] supported by substantial evidence." *Id.* at 1360. Accordingly, the court afforded Commerce the opportunity, on remand, to "make an express finding as to whether the CFTG submitted the review request as an association only or also on behalf of its individual members . . . in addition to, or in lieu of, its reconsideration of Mr. Crawford's credibility and status." *Id.* at 1360–61.

In the Remand Results at issue here, Commerce concluded that the CFTG submitted its review request on behalf of the CFTG as an association only—and not also on behalf of the CFTG's individual members. Remand Results at 4. Commerce therefore concluded that the CFTG's request "was invalid, *ab initio*, because a majority of the members of the CFTG association, at the time of the request, did not credibly establish that they [were] interested parties" pursuant to 19 U.S.C. § 1677(9)(C). *Id.* In light of this conclusion, Commerce declined to reconsider its findings with respect to Mr. Crawford. *Id.* at 21–22.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018), and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (citation omitted).

like product in the United States." *Id.*§ 1677(9)(E). Commerce requires a majority of the members of an association to have standing as individuals pursuant to section 1677(9)(C) for the association to have standing pursuant to section 1677(9)(E). *CFTG*, 437 F. Supp. 3d at 1353.

DISCUSSION

While the CFTG submitted comments during the remand proceeding in opposition to Commerce's draft redetermination, *see* Remand Results at 11–12, the CFTG did not object to the Remand Results before the court.[4] Thus, Commerce's redetermination is uncontested.

Commerce's determination on remand that the CFTG's review request was invalid *ab initio* complies with the court's order in *CFTG*. Commerce provided the agency's reasoning supported by substantial evidence for its findings (1) that the CFTG's review request was filed on behalf of the CFTG as an association only, *see* Remand Results at 5–7, 13–18; and (2) that the CFTG lacked standing as an association because, at the time of the review request, a majority of its members had failed to establish standing as individuals, *see id.* at 7–8.

CONCLUSION

There being no challenges to the Remand Results, and those results being otherwise lawful and supported by substantial evidence, the court will sustain Commerce's Remand Results. Judgment will enter accordingly.

Dated: August 27, 2020
New York, New York

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

Slip Op. 20–128

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

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

[Remanding to the issuing agency a decision placing certain door thresholds within the scope of antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China]

Dated: August 27, 2020

John M. Foote, Gibson, Baker & McKenzie, LLP, of Washington, DC, argued for plaintiff. With him on the brief were *Christine M. Streatfeild* and *Michael E. Murphy*.

Aimee Lee, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of New York, New York, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assis-

[4] Comments in opposition to the Remand Results were due on August 12, 2020. *See* Docket Entry, ECF No. 99. As of the date of this Opinion, the CFTG has not filed any objections.

tant Director. Of counsel on the brief was *Nikki Kalbing*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

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

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiff Worldwide Door Components, Inc. ("Worldwide") contests a final decision by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") that its imported products, which consist of eighteen models of "door thresholds," are within the scope of antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China. Before the court is plaintiff's motion for judgment on the agency record, which is opposed by defendant United States and defendant-intervenors, the Aluminum Extrusions Fair Trade Committee and Endura Products, Inc. The court grants plaintiff's motion and remands the contested decision to the Department for reconsideration.

I. BACKGROUND

A. The Contested Determination

The agency decision ("Scope Ruling") contested in this litigation is *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Rulings on Worldwide Door Components Inc., MJB Wood Group, Inc., and Columbia Aluminum Products Door Thresholds*, P.R. Doc. 36 (Int'l Trade Admin. Dec. 19, 2018) ("*Scope Ruling*").

B. The Antidumping Duty and Countervailing Duty Orders

Commerce issued the antidumping duty and countervailing duty orders pertinent to this litigation (the "Orders") in May 2011. *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*").

C. Worldwide's Scope Ruling Request

Worldwide submitted a request for a scope ruling ("Scope Ruling Request") on August 3, 2017, describing therein eighteen models of door thresholds. *Letter from Baker & McKenzie LLP to Sec'y of Commerce re: Request for a Scope Ruling Finding that Certain Fully*

Assembled Door Handles from the People's Republic of China are not Subject to the Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China, P.R. Doc. 1 (Aug. 3, 2017) ("*Scope Ruling Request*"); *see also Letter from Baker & McKenzie LLP to Sec'y of Commerce re: Response to Supplemental Questionnaire on Scope Ruling Request for Worldwide Door Thresholds*, P.R. Doc. 10 (Nov. 7, 2017); *Letter from Baker & McKenzie LLP to Sec'y of Commerce re: Response to Second Supplemental Questionnaire on Scope Ruling Request for Worldwide Door Thresholds*, P.R. Doc. 18 (Feb. 20, 2018); *Letter from Baker & McKenzie LLP to Sec'y of Commerce re: Response to Third Supplemental Questionnaire on Scope Ruling Request for Worldwide Door Thresholds*, P.R. Doc. 23 (June 18, 2018). The relevant facts pertaining to the door thresholds, as described in Worldwide's submissions to Commerce and in the Scope Ruling, do not appear to be in dispute and are summarized below.

Worldwide's Scope Ruling Request and supplemental responses described eighteen models of door thresholds in seven product "groups." *Scope Ruling* 9. Each door threshold is an assembly consisting of various components, which include a component fabricated from an aluminum extrusion and various components that are not made of aluminum. *Scope Ruling Request* 3. The groups vary as to the non-aluminum components present, with each threshold containing at least one polyvinyl chloride (PVC) component and various other components, including components of plastic polymer, wood, or steel. *Id.* at 3; *see also Scope Ruling* 9–11 (specifying the components included in each group). It is uncontested that the single component in each door threshold that is fabricated from an aluminum extrusion is made of an aluminum alloy identified in the scope language of the Orders. *See Scope Ruling* 33.

D. The Contested Scope Ruling

Commerce issued the Scope Ruling on December 19, 2018, in response to Worldwide's Scope Ruling Request and the requests of Columbia Aluminum Products, LLC and MJB Wood Group, Inc., each of which also sought a scope ruling on assembled door thresholds. *Id.* at 1. The Scope Ruling concluded that the aluminum extrusion component within each of the eighteen models of Worldwide's door thresholds was subject to the antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China, but that the non-aluminum components were not. *Id.* at 37–38.

E. Proceedings in the Court of International Trade

Worldwide commenced this action to contest the Scope Ruling on January 18, 2019. Summons, ECF No. 1; Compl., ECF No. 13 (Feb. 19, 2019). Plaintiff moved for judgment on the agency record pursuant to USCIT Rule 56.2 on August 9, 2019. Pl.'s Mot. for J. on the Agency R. Pursuant to Rule 56.2, ECF No. 38 ("Pl.'s Mot."). Defendant filed its opposition on October 9, 2019. Def.'s Response to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 42 ("Def.'s Response"). Defendant-intervenors filed their opposition on the same day. Def. Intervenors' Response to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 43 ("Def.Intervenors' Response"). Plaintiff replied on November 20, 2019. Pl.'s Reply Br. in Support of its Mot. for J. on the Agency R. Pursuant to Rule 56.2, ECF No. 49 ("Pl.'s Reply").

II. DISCUSSION

A. Jurisdiction and Standard of Review

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

B. The Scope Ruling Misinterprets the Scope Language of the Antidumping Duty and Countervailing Duty Orders

Briefly stated, Worldwide's claim is that Commerce misinterpreted the scope language of the Orders in concluding that Worldwide's door thresholds could not qualify for a specific exclusion from the Orders, the "finished merchandise exclusion." Pl.'s Mot. 8–9.

The scope language is essentially the same in both Orders. The Orders apply generally to "aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series

[1] All citations to the United States Code are to the 2012 edition. All citations to the Code of Federal Regulations are to the 2018 version.

designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents)." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. Such extrusions may be "produced and imported in a wide variety of shapes and forms," and, after extrusion, may be subjected to drawing and to further fabrication and finishing. *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654.

In its decision, Commerce first addressed the following scope language:

> Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods "kit" defined further below.[2] The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.

Scope Ruling 33 (quoting *AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654). Referring to the first sentence quoted above, the Scope Ruling concluded that "...the aluminum extruded components of ...Worldwide's . . . door thresholds may be described as parts for final finished products, *i.e.*, parts for doors, which are assembled after importation (with additional components) to create the final finished product, and otherwise meet the definition of in-scope merchandise." *Scope Ruling* 33. The Scope Ruling erred in relying on that sentence from the scope language, which is inapplicable to the

---

[2] The antidumping and countervailing duty orders at issue in this case (the "Orders") contain a number of exclusions. The "finished goods kit exclusion" reads as follows:

> The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusion product.

Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650, 30,651 (May 26, 2011) ("*AD Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653, 30,654 (May 26, 2011) ("*CVD Order*"). Worldwide does not argue that the finished goods kit exclusion applies to its door thresholds.

issues presented by Worldwide's imported products. Commerce failed to recognize that that the subject of the first sentence quoted above is "[s]ubject *aluminum extrusions*." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added). The sentence refers to the way that goods may be described "at the time of importation," but according to the uncontested facts, Worldwide's door thresholds are not "aluminum extrusions" at the time of importation; rather, they are door thresholds that contain an aluminum extrusion as a component in an assembly. The aluminum extrusion component in each, which is not itself the imported article, becomes part of an assembly before, not after, importation. The effect of the quoted sentence is that an extrusion that has undergone any of various types of processing (but not assembly) after being extruded but prior to importation, to adapt it to a particular use as a part for a final finished product that is assembled after importation, still is an "extrusion" for purposes of the scope and remains within the general scope language, no matter how it is described upon importation.[3] The following sentence in the Orders, "[s]uch parts that otherwise meet the definition of aluminum extrusions are included in the scope," confirms this point. *See id.* Worldwide's door thresholds do not meet that definition: they are not, in the words of the scope language, "aluminum extrusions which are shapes and forms, produced by an extrusion process." *Id*.

The Scope Ruling concluded as follows:

> Additionally, we find that the door thresholds, which constitute aluminum extrusion components attached to non-aluminum extrusion components, may also be described as subassemblies pursuant to the scope of the *Orders.* Thus, the non-aluminum extrusion components (*i.e.*, . . . the synthetic plastic polymers, polyethylene, polyurethane, polypropylene or thermoplastic elastomer, wood, and stainless steel in Worldwide's door thresholds . . .), which are assembled with the in-scope aluminum extrusion components, are not included in the scope of the *Orders.*

Scope Ruling 34.

After concluding that the "subassemblies" provision applied to the aluminum extrusion component of each of Worldwide's door thresh-

[3] The scope language lists as exemplars various types of fabrication and similar processing that an extrusion may undergo prior to importation and still be an aluminum "extrusion" for purposes of the Orders. *See AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. The description of such processing does not include assembly. *See id.*

olds, the Scope Ruling again misinterpreted a provision within the scope language, which reads as follows:

> {S}ubject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language below). Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

Id. (quoting *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654). Commerce concluded from this language that "the plain language of the scope of the *Orders* specifies that 'door thresholds' are included within the scope 'if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.'" *Id.* (footnote omitted). "In light of the above, we find that . . . Worldwide's . . . door thresholds are within the scope of the *Orders*." *Id.* This conclusion is erroneous because, here again, the subject of the first sentence quoted from the Orders, above, is "[s]ubject *extrusions*." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added). As the court noted above, Worldwide's door thresholds are not "extrusions": they are not, in the words of the scope language, "aluminum extrusions which are shapes and forms, produced by an extrusion process," and they do not, therefore, "otherwise meet the scope definition." *See id.* at 30,650–51, 76 Fed. Reg. at 30,653–54. Instead, they are goods assembled from multiple components, only one of which has been fabricated from an aluminum extrusion.

C. Commerce Erred in Refusing to Consider Whether Worldwide's Door Thresholds Satisfied the Requirements of the "Finished Merchandise Exclusion"

Among the specific exclusions provided in the scope language is the "finished merchandise exclusion," which provides as follows:

> The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.

AD Order, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. In the Scope Ruling, Commerce ruled that Worldwide's door thresh-

olds do not qualify for this exclusion. Commerce stated that "[a]s an initial matter, we find that the express inclusion of 'door thresholds' within the scope of the *Orders* (regardless of whether the door thresholds are ready for use at the time of importation) renders the reliance of Worldwide . . . upon the finished merchandise exclusion inapposite." *Scope Ruling* 35–36; *see id.* at 37 ("[W]e find that because of the explicit inclusion of door thresholds as in-scope merchandise, it is unnecessary for Commerce to further consider the finished merchandise or finished goods kit exclusions in these scope proceedings.") Commerce continued, "[f]urthermore, finding door thresholds excluded under the finished merchandise exclusion would render the express inclusion of 'door thresholds' meaningless." *Id.* at 36.

The court rejects the Department's reasoning because it rests on the misinterpretations of the scope language that the court identified previously. The scope language does not expressly include all door thresholds in which there is an extruded aluminum component. Instead, as the court has discussed, the inclusion of "door thresholds" in the scope language as an exemplar is confined to door thresholds that *are* aluminum extrusions. *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 ("Subject *extrusions* may be identified with reference to their end use, such as fence posts, electrical conduits, *door thresholds*.. . .") (emphases added). Simply stated, a good that *contains* an extruded aluminum component as one of a number of components is not the same as a good that *is* an extrusion.

Commerce also erred in reasoning that "finding door thresholds excluded under the finished merchandise exclusion would render the express inclusion of 'door thresholds' meaningless." *Scope Ruling* 36. Door thresholds that are fabricated from aluminum extrusions are "extrusions" for purposes of the scope language and are expressly included in the scope by operation of the reference to "door thresholds"; other door thresholds, which are not themselves "extrusions" for purposes of the Orders, are not. Rather than rendering the express inclusion of door thresholds meaningless, excluding the assembled goods at issue from the Orders according to the finished merchandise exclusion would have no effect at all on the express inclusion of door thresholds, for a straightforward reason: a door threshold that is fabricated from an aluminum extrusion could never qualify under the finished merchandise exclusion in the first place because the finished merchandise exclusion applies only to assembled goods. *See AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (excluding from the Orders "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry").

Because the premise under which Commerce refused to consider the terms of the finished merchandise exclusion was based on a misinterpretation of the general scope language, which in this case does not expressly identify door thresholds that are assembled from extruded aluminum components and non-aluminum components, Commerce erred in refusing to consider whether the requirements of the finished merchandise exclusion were satisfied.

The Scope Ruling relies on the decision of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. v. United States*, 776 F.3d 1351 (Fed. Cir. 2015) ("*Shenyang Yuanda*") for the proposition that the reference to "door thresholds" as an exemplar in the scope language requires it to disregard the finished merchandise exclusion. *Scope Ruling* 36 & n. 313. This reliance is misplaced. *Shenyang Yuanda* does not state a holding that controls the outcome of this case.[4] The rule Commerce advocates would defeat the fundamental principle the Court of Appeals established in *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002) and reaffirmed in numerous subsequent cases, under which Commerce must give effect to unambiguous scope language. In ruling on a scope issue, Commerce must interpret scope language rather than attempt to change it. *Id.* at 1097; *see also Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1301 (Fed. Cir. 2013). Scope language creating a specific exclusion from the general scope language is no exception to this principle. Here, Commerce was not free to disregard the finished merchandise exclusion.

In summary, the Scope Ruling misreads the scope language to conclude that it expressly includes door thresholds that are not extrusions, and it erroneously declined to consider whether Worldwide's imports satisfied a specific exclusion from the scope. Moreover, the Department's misreading of the scope language caused it to misapply the factors that its regulations require it to consider in making any scope ruling. *See* 19 C.F.R. § 351.225(k)(1). The court turns to this issue in the next section.

---

[4] *Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. v. United States*, 776 F.3d 1351 (Fed. Cir. 2015) ("*Shenyang Yuanda*") did not involve a door threshold. In that decision, the Court of Appeals for the Federal Circuit ("Court of Appeals") held that a unit of a curtain wall was within the scope of the orders at issue in this litigation. The opinion considered the curtain wall unit to be a "subassembly" within the meaning of the scope language. *Id.* at 1357. The Court of Appeals also concluded that the finished merchandise exclusion did not apply to an individual curtain wall unit, which the Court of Appeals indicated was not "merchandise." *Id.* at 1358 ("Yuanda itself concedes that 'absolutely no one purchases for consumption a single curtain wall piece or unit.'" (quoting *Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. v. United States*, 38 CIT __, __, 961 F. Supp. 2d 1291, 1298–99 (2014)). In both respects, the decision in *Shenyang Yuanda* is inapposite.

D. The Department's Misinterpretation of the Express Inclusion of "Door Thresholds" Caused It to Apply 19 C.F.R. § 351 225(k)(1) Erroneously

The Department's regulations provide, as is pertinent here, that "in considering whether a particular product is included within the scope of an order . . . , the Secretary will take into account the following: . . . [t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). In applying these factors (the "(k)(1) factors"), the Department repeated its mistake of presuming that the Orders expressly include door thresholds that contain both aluminum extrusions and non-aluminum parts as components. Regarding the first factor, the petition, Commerce erroneously reasoned as follows:

> This determination is further supported by the sources described in 19 CFR 351.225(k)(1). For example, we find that review of the Petition to the underlying investigations demonstrates that the petitioner expressly included "door thresholds" in the original investigations. For instance, the Petition provides that: "The subject extrusions may be identified as other goods, *e.g.*, heat sinks, **door thresholds**, or carpet trim. Again, such goods that otherwise meet the definition of aluminum extrusions are included in the scope.

Scope Ruling 34 (quoting Petition at Vol. 1, p. 5). That the petition sought an investigation of aluminum extrusions identified as door thresholds was irrelevant to the issue presented by Worldwide's Scope Ruling Request, which sought a determination on door thresholds that are *not* aluminum extrusions. The same error affects the Department's analysis of the ITC's report of its affirmative injury determination:

> The ITC Report further confirms statements from the Petition that "aluminum extrusions serve in a wide variety of applications such as window and **door frames and sills**, curtain walls, **thresholds**, gutters, solar panel frames, and vehicle parts{,}" and also states that: "[s]eventeen firms reported that after fabrication, the aluminum extrusions they produce may become known as another product before the point of sale, including . . . **doors and door thresholds** [.]

Id. at 35 (quoting *Certain Aluminum Extrusions from China*, Inv. Nos. 701-TA-475 and 73l-TA-1177, USITC Pub. 4229 at II-5, II-9 (May 2011)). The quoted discussion in the ITC's report pertains to alumi-

num extrusions that are fabricated into door thresholds, not assembled goods of the type Worldwide described in its Scope Ruling Request.

Further, the Department's analysis is unsupported by certain evidence pertaining to the initial investigation. The paragraph directed to subject extrusions referred to by their end use, which includes the reference to door thresholds, was not in the original petition in final form but was revised in response to a supplemental questionnaire from Commerce. *Id.* at 34–35. The petitioner specified that this revised language "clarified that certain covered extrusions may be final, finished goods *in and of themselves*." *Id.* at 35 (emphasis added) (quoting four letters from the petitioner to Commerce during the course of the investigation). The Department's insistence that all "door thresholds" are in-scope merchandise based on this scope language is inconsistent with the explanation that the paragraph intended to capture extrusions that are "final, finished goods in and of themselves." *See id.* According to the uncontested record evidence, Worldwide's door thresholds are not extrusions "in and of themselves."

In addressing prior decisions of the Secretary of Commerce, the Scope Ruling commits the same error, distinguishing those past scope rulings in which the good under consideration was specifically identified in the scope language as in-scope merchandise from those in which it was not. *Id.* at 36–37. Concerning the latter category, the Scope Ruling explains that:

> Because those products [at issue in prior scope rulings] were not specifically identified in the scope language, the determinations involved an analysis as to whether the scope exclusion for finished merchandise applied. Here, based on the specific inclusion of "door thresholds" within the scope of the Orders, we agree with the petitioner that the finished merchandise scope exclusion is inapplicable with respect to the products at issue in these scope requests.

Id. at 37. Again, Worldwide's products are not specifically identified in the scope language. Mistakenly relying on its past scope rulings, Commerce erred in declining to consider whether or not Worldwide's products were "finished merchandise." *See id.* at 14–20 (discussing twelve scope rulings regarding goods containing aluminum extrusions and non-aluminum extrusion components).

E. On Remand, Commerce Must Consider Whether the Door Thresholds Qualify for the Finished Merchandise Exclusion

In opposing Worldwide's motion, defendant argues that "because the finished merchandise exclusion only mentions 'doors with glass or vinyl,' but not door thresholds, the finished merchandise exclusion does not apply to door thresholds." Def.'s Response 17 (citing *Scope Ruling* 36). This argument is based on a misreading of the finished merchandise exclusion that considers the exemplars as exhaustive of the scope of the exclusion. The exclusion applies to "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, *such as* finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added). Under defendant's misguided interpretation, only assembled merchandise specifically identified by the exemplars could qualify for the finished merchandise exclusion.

Defendant argues, further, that "the explicit reference to an exclusion for heat sinks, compared to the absence of a similar exclusion for door thresholds, further supports Commerce's determination that door thresholds are within the scope of the orders." Def.'s Response 19. Defendant-intervenors make essentially the same argument. Def.-Intervenors' Response 16. This argument is also meritless, as it confuses a good fabricated from an aluminum extrusion with an assembled good containing an aluminum extrusion and other non-aluminum parts. The Orders address heat sinks that are fabricated from extrusions; such heat sinks are specifically excluded from the Orders if they are "finished heat sinks" that meet thermal performance requirements. *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. The treatment of heat sinks in the scope language of the Orders has no relevance to the issue of whether the finished merchandise exclusion (which applies only to assembled goods) applies to the door thresholds at issue here.

Defendant-intervenors also argue that the scope language lacks "any distinction between thresholds comprised solely of extruded aluminum and thresholds that contain both extruded aluminum and non-extruded aluminum components." Def.-Intervenors' Response 10. To the contrary, as the court has explained, the scope language expressly includes door thresholds that are "subject extrusions" while not addressing specifically door thresholds that are not themselves aluminum extrusions. Moreover, subject extrusions are *per se* within the scope of the Orders while assembled goods containing non-

aluminum-extrusion components are treated differently, by operation of the subassemblies provision. Under the latter, only the aluminum extrusion component of a subassembly, not the whole assembly, potentially is subject to the Orders, and the Orders specifically make the finished merchandise exclusion available to qualifying assembled merchandise.

In summary, Commerce erred in refusing to determine whether the imported, assembled door thresholds satisfy the requirements of the finished merchandise exclusion. Commerce now must give full and fair consideration to the issue of whether this exclusion applies, upon making findings that are supported by substantial record evidence.

III. CONCLUSION AND ORDER

Therefore, upon consideration of plaintiff's motion for judgment on the agency record and all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's motion for judgment on the agency record (August 9, 2019), ECF No. 38, be, and hereby is, granted; it is further

ORDERED that Commerce, within 90 days from the date of issuance of this Opinion and Order, shall submit a redetermination upon remand ("Remand Redetermination") that complies with this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenors shall have 30 days from the filing of the Remand Redetermination in which to submit comments to the court; and it is further

ORDERED that should plaintiff or defendant-intervenors submit comments, defendant shall have 15 days from the date of filing of the last comment to submit a response.

Dated: August 27, 2020
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, CHIEF JUDGE

Slip Op. 20–129

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

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

[Remanding to the issuing agency a decision placing certain door thresholds within the scope of antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China]

Dated: August 27, 2020

Jeremy W. Dutra and *Peter Koenig*, Squire Patton Boggs (US), LLP, of Washington, DC, for plaintiff.

Aimee Lee, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of New York, New York, for defendant. 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 *Orga Cadet*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Alan H. Price, *Robert E. DeFrancesco, III*, and *Elizabeth S. Lee*, Wiley Rein, LLP, of Washington, D.C., for defendant-intervenors.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiff Columbia Aluminum Products, LLC ("Columbia") contests a decision by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") that its imported products, which consist of ten models of "door thresholds," are within the scope of antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China. Before the court is plaintiff's motion for judgment on the agency record, which is opposed by defendant United States and defendant-intervenors, the Aluminum Extrusions Fair Trade Committee and Endura Products, Inc. The court grants plaintiff's motion and remands the contested decision to the Department for reconsideration.

I. BACKGROUND

A. The Contested Decision

The agency decision contested in this litigation (the "Scope Ruling") is *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Rulings on Worldwide Door Components Inc., MJB Wood Group, Inc., and Columbia Aluminum Products Door Thresholds*, P.R. Doc. 39 (Int'l Trade Admin. Dec. 19, 2018) ("*Scope Ruling*").

B. The Antidumping Duty and Countervailing Duty Orders

Commerce issued the antidumping duty and countervailing duty orders pertinent to this litigation (the "Orders") in May 2011. *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*").

C. Columbia's Scope Ruling Request

Columbia submitted a request for a scope ruling (the "Scope Ruling Request") on March 14, 2018, describing therein, and in supplemental responses to Commerce, ten models of door thresholds. *Letter from Sandler, Travis & Rosenberg, P.A. to Sec'y of Commerce re: Aluminum Extrusions from the People's Republic of China: Scope Ruling Request for Columbia Aluminum Products, LLC*, P.R. Doc. 1 (Mar. 14, 2018) ("*Scope Ruling Request*"); *Letter from Sandler, Travis & Rosenberg, P.A. to Sec'y of Commerce re: Aluminum Extrusions from the People's Republic of China: Supplement to Columbia Aluminum Products, LLC's Scope Ruling Request* 4–6, P.R. Doc. 10 (July 10, 2018) ("*Supplement to Scope Ruling Request*").The relevant facts pertaining to Columbia's door thresholds, as described in Columbia's submissions to Commerce and in the Scope Ruling, do not appear to be in dispute and are set forth below.

Seven of Columbia's models of door thresholds are in three series (the "IM 900 Plus Series," the "IM 900 Plus Home Center Series," and the "990 Series"), along with three proprietary models (the 122, 128, and 129 series) produced for one customer, which have the same characteristics as the 990 Series. *Scope Ruling Request* 13. Each door threshold is an assembly consisting of various components, including a component fabricated from an aluminum extrusion and various components that are not made of aluminum. *Id.* at 14.

Specifically, each of the models in the IM 900 Plus Series and the IM 900 Plus Home Center Series contains an aluminum component fabricated from an extrusion, a polyvinyl chloride ("PVC") extrusion, an insert bar to permit raising and lowering of the threshold, and an injection-molded wood-filled plastic substrate. *Id.* at 14 (citing *Scope Ruling Request* 3). The models of the 990 Series and the three proprietary models contain an aluminum component fabricated from an extrusion, a PVC extrusion, and an extruded PVC substrate. *Id.* (citing *Scope Ruling Request* 3). It is uncontested that the single component in each door threshold that is fabricated from an aluminum extrusion is made of an aluminum alloy identified in the scope language of the Orders. *See id.* at 33.

D. The Contested Scope Ruling

Commerce issued the Scope Ruling on December 19, 2018, in response to Columbia's Scope Ruling Request, and the requests of Worldwide Door Components, Inc. and MJB Wood Group, Inc., each of which also sought a scope ruling on assembled door thresholds. *Id*. at 1. The Scope Ruling concluded that the aluminum extrusion component within each of Columbia's door thresholds was subject to the

antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China, but that the non-aluminum components were not. *Id.* at 37–38.

E. Proceedings in the Court of International Trade

Columbia brought this action to contest the Scope Ruling on January 18, 2019. Summons, ECF No. 1; Compl., ECF No. 3. Plaintiff moved for judgment on the agency record pursuant to USCIT Rule 56.2 on July 31, 2019. Pl. Columbia Aluminum Prods., LLC's Rule 56.2 Mot. for J. on the Agency R., ECF No. 29 (Pl.'s Mot."). Defendant filed its opposition on October 24, 2019. Def.'s Response to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 33 ("Def.'s Response"). Defendant-intervenors filed their opposition on the same day. Def.-Intervenors' Response to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 34 ("Def.-Intervenors' Response"). Plaintiff replied on November 25, 2019. Pl. Columbia Aluminum Prods., LLC's Reply Br. in Further Support of its Rule 56.2 Mot. for J. on the Agency R., ECF No. 37 ("Pl.'s Reply").

II. DISCUSSION

A. Jurisdiction and Standard of Review

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

B. The Scope Ruling Misinterprets the Scope Language of the Antidumping Duty and Countervailing Duty Orders

Columbia's claim is that Commerce misinterpreted the scope language of the Orders in concluding that Columbia's door thresholds could not qualify for a specific exclusion from the Orders, the "finished merchandise exclusion." Pl.'s Mot. 6–15.

[1] All citations to the United States Code are to the 2012 edition. All citations to the Code of Federal Regulations are to the 2018 version.

The scope language is essentially the same in both Orders. The Orders apply generally to "aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents)." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. Such extrusions may be "produced and imported in a wide variety of shapes and forms," and, after extrusion, may be subjected to drawing and to further fabrication and finishing. *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654.

In its decision, Commerce first addressed the following scope language:

> Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods "kit" defined further below.[2] The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.

Scope Ruling 33 (quoting *AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654). Referring to the first sentence quoted above, the Scope Ruling concluded that ". . . the aluminum extruded components of . . . Columbia's door thresholds may be described as

---

[2] The antidumping and countervailing duty orders at issue in this case (the "Orders") contain a number of exclusions. The "finished goods kit exclusion" reads as follows:

> The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusion product.

Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650, 30,651 (May 26, 2011) ("*AD Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653, 30,654 (May 26, 2011) ("*CVD Order*"). Columbia does not argue that the finished goods kit exclusion applies to its door thresholds.

parts for final finished products, *i.e.*, parts for doors, which are assembled after importation (with additional components) to create the final finished product, and otherwise meet the definition of in-scope merchandise." *Scope Ruling* 33. The Scope Ruling erred in relying on that sentence from the scope language, which is inapplicable to the issues presented by Columbia's imported products. Commerce failed to recognize that that the subject of the first sentence quoted above is "[s]ubject *aluminum extrusions*." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added). The sentence refers to the way that goods may be described "at the time of importation," but according to the uncontested facts, Columbia's door thresholds are not "aluminum extrusions" at the time of importation; rather, they are door thresholds that contain an aluminum extrusion as a component in an assembly. The aluminum extrusion component in each, which is not itself the imported article, becomes part of an assembly before, not after, importation. The effect of the quoted sentence is that an extrusion that has undergone any of various types of processing (but not assembly) after being extruded but prior to importation, to adapt it to a particular use as a part for a final finished product that is assembled after importation, still is an "extrusion" for purposes of the scope and remains within the general scope language, no matter how it is described upon importation.[3]

The following sentence in the Orders, "[s]uch parts that otherwise meet the definition of aluminum extrusions are included in the scope," confirms this point. *See id*. Columbia's door thresholds do not meet that definition; they are not, in the words of the scope language, "aluminum extrusions which are shapes and forms, produced by an extrusion process." *Id*.

The Scope Ruling concluded as follows:

> Additionally, we find that the door thresholds, which constitute aluminum extrusion components attached to non-aluminum extrusion components, may also be described as subassemblies pursuant to the scope of the *Orders*. Thus, the non-aluminum extrusion components (*i.e.*,...the PVC extrusions, insert bars, injection molded wood filled plastic substrates, [and] extruded PVC substrates in Columbia's door thresholds), which are assembled with the in-scope aluminum extrusion components, are not included in the scope of the *Orders*.

[3] The scope language lists as exemplars various types of fabrication and similar processing that an extrusion may undergo prior to importation and still be an aluminum "extrusion" for purposes of the Orders. *See AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. The description of such processing does not include assembly. *See id.*

Scope Ruling 34.

After concluding that the "subassemblies" provision applied to the aluminum extrusion component of each of Columbia's door thresholds, the Scope Ruling again misinterpreted a provision within the scope language, which reads as follows:

> {S}ubject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language below). Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

Id. (quoting *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654). Commerce concluded from this language that "the plain language of the scope of the *Orders* specifies that 'door thresholds' are included within the scope 'if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.'" *Id.* (footnote omitted). "In light of the above, we find that.. . Columbia's door thresholds are within the scope of the *Orders*." *Id.* This conclusion is erroneous because, here again, the subject of the first sentence quoted from the Orders, above, is "[s]ubject *extrusions*." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added). As the court noted above, Columbia's door thresholds are not "extrusions": they are not, in the words of the scope language, "aluminum extrusions which are shapes and forms, produced by an extrusion process," and they do not, therefore, "otherwise meet the scope definition." *See id.* at 30,650–51, 76 Fed. Reg. at 30,653–54. Instead, they are goods assembled from multiple components, only one of which has been fabricated from an aluminum extrusion.

C. Commerce Erred in Refusing to Consider Whether Columbia's Door Thresholds Satisfied the Requirements of the "Finished Merchandise Exclusion"

Among the specific exclusions provided in the scope language is the "finished merchandise exclusion," which provides as follows:

> The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.

AD Order, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. In the Scope Ruling, Commerce ruled that Columbia's door thresholds do not qualify for this exclusion. Commerce stated that "[a]s an initial matter, we find that the express inclusion of 'door thresholds' within the scope of the *Orders* (regardless of whether the door thresholds are ready for use at the time of importation) renders the reliance of . . . Columbia upon the finished merchandise exclusion inapposite." *Scope Ruling* 35–36; *see id.* at 37 ("[W]e find that because of the explicit inclusion of door thresholds as in-scope merchandise, it is unnecessary for Commerce to further consider the finished merchandise or finished goods kit exclusions in these scope proceedings.") Commerce continued, "[f]urthermore, finding door thresholds excluded under the finished merchandise exclusion would render the express inclusion of 'door thresholds' meaningless." *Id.* at 36.

The court rejects the Department's reasoning because it rests on the misinterpretations of the scope language that the court identified previously. The scope language does not expressly include all door thresholds in which there is an extruded aluminum component. Instead, as the court has discussed, the inclusion of "door thresholds" in the scope language as an exemplar is confined to door thresholds that *are* aluminum extrusions. *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 ("Subject *extrusions* may be identified with reference to their end use, such as fence posts, electrical conduits, *door thresholds*...") (emphases added). Simply stated, a good that *contains* an extruded aluminum component as one of a number of components is not the same as a good that *is* an extrusion.

Commerce also erred in reasoning that "finding door thresholds excluded under the finished merchandise exclusion would render the express inclusion of 'door thresholds' meaningless." *Scope Ruling* 36. Door thresholds that are fabricated from aluminum extrusions are "extrusions" for purposes of the scope language and are expressly included in the scope by operation of the reference to "door thresholds"; other door thresholds, which are not themselves "extrusions" for purposes of the Orders, are not. Rather than rendering the express inclusion of door thresholds meaningless, excluding the assembled goods at issue from the Orders according to the finished merchandise exclusion would have no effect at all on the express inclusion of door thresholds, for a straightforward reason: a door threshold that is fabricated from an aluminum extrusion could never qualify under the finished merchandise exclusion in the first place because the finished merchandise exclusion applies only to assembled goods. *See AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (excluding from the Orders "finished merchandise contain-

ing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry").

Because the premise under which Commerce refused to consider the terms of the finished merchandise exclusion was based on a misinterpretation of the general scope language, which in this case does not expressly identify door thresholds that are assembled from extruded aluminum components and non-aluminum components, Commerce erred in refusing to consider whether the requirements of the finished merchandise exclusion were satisfied.

The Scope Ruling relies on the decision of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. v. United States*, 776 F.3d 1351 (Fed. Cir. 2015) ("*Shenyang Yuanda*") for the proposition that the reference to "door thresholds" as an exemplar in the scope language requires it to disregard the finished merchandise exclusion. *Scope Ruling* 36 & n. 313. This reliance is misplaced. *Shenyang Yuanda* does not state a holding that controls the outcome of this case.[4] The rule Commerce advocates would defeat the fundamental principle the Court of Appeals established in *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002) and reaffirmed in numerous subsequent cases, under which Commerce must give effect to unambiguous scope language. In ruling on a scope issue, Commerce must interpret scope language rather than attempt to change it. *Id.* at 1097; *see also Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1301 (Fed. Cir. 2013). Scope language creating a specific exclusion from the general scope language is no exception to this principle. Here, Commerce was not free to disregard the finished merchandise exclusion.

In summary, the Scope Ruling misreads the scope language to conclude that it expressly includes door thresholds that are not extrusions, and it erroneously declined to consider whether Columbia's imports satisfied a specific exclusion from the scope. Moreover, the Department's misreading of the scope language caused it to misapply the factors that its regulations require it to consider in making any

[4] *Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. v. United States*, 776 F.3d 1351 (Fed. Cir. 2015) ("*Shenyang Yuanda*") did not involve a door threshold. In that decision, the Court of Appeals for the Federal Circuit ("Court of Appeals") held that a unit of a curtain wall was within the scope of the orders at issue in this litigation. The opinion considered the curtain wall unit to be a "subassembly" within the meaning of the scope language. *Id.* at 1357. The Court of Appeals also concluded that the finished merchandise exclusion did not apply to an individual curtain wall unit, which the Court of Appeals indicated was not "merchandise." *Id.* at 1358 ("Yuanda itself concedes that 'absolutely no one purchases for consumption a single curtain wall piece or unit.'" (quoting *Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. v. United States*, 38 CIT __, __, 961 F. Supp. 2d 1291, 1298–99 (2014)). In both respects, the decision in *Shenyang Yuanda* is inapposite.

scope ruling. *See* 19 C.F.R. § 351.225(k)(1). The court turns to this issue in the next section.

D. The Department's Misinterpretation of the Express Inclusion of "Door Thresholds" Caused It to Apply 19 C.F.R. §351 225(k)(1) Erroneously

The Department's regulations provide, as is pertinent here, that "in considering whether a particular product is included within the scope of an order . . . , the Secretary will take into account the following: . . . [t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). In applying these factors (the "(k)(1) factors"), the Department repeated its mistake of presuming that the Orders expressly include door thresholds that contain both aluminum extrusions and non-aluminum parts as components. Regarding the first factor, the petition, Commerce erroneously reasoned as follows:

> This determination is further supported by the sources described in 19 CFR 351.225(k)(1). For example, we find that review of the Petition to the underlying investigations demonstrates that the petitioner expressly included "door thresholds" in the original investigations. For instance, the Petition provides that: "The subject extrusions may be identified as other goods, *e.g.*, heat sinks, **door thresholds**, or carpet trim. Again, such goods that otherwise meet the definition of aluminum extrusions are included in the scope.

Scope Ruling 34 (quoting Petition at Vol. 1, p. 5). That the petition sought an investigation of aluminum extrusions identified as door thresholds was irrelevant to the issue presented by Columbia's Scope Ruling Request, which sought a determination on door thresholds that are *not* aluminum extrusions. The same error affects the Department's analysis of the ITC's report of its affirmative injury determination:

> The ITC Report further confirms statements from the Petition that "aluminum extrusions serve in a wide variety of applications such as window and **door frames and sills**, curtain walls, **thresholds**, gutters, solar panel frames, and vehicle parts{,}" and also states that: "[s]eventeen firms reported that after fabrication, the aluminum extrusions they produce may become known as another product before the point of sale, including . . . **doors and door thresholds** [.]"

Id. at 35 (quoting *Certain Aluminum Extrusions from China*, Inv. Nos. 701-TA-475 and 73l-TA-1177, USITC Pub. 4229 at II-5, II-9 (May 2011)). The quoted discussion in the ITC's report pertains to aluminum extrusions that are fabricated into door thresholds, not assembled goods of the type Columbia described in its Scope Ruling Request.

Further, the Department's analysis is unsupported by certain evidence pertaining to the initial investigation. The paragraph directed to subject extrusions referred to by their end use, which includes the reference to door thresholds, was not in the original petition in final form but was revised in response to a supplemental questionnaire from Commerce. *Id.* at 34–35. The petitioner specified that this revised language "clarified that certain covered extrusions may be final, finished goods *in and of themselves*." *Id.* at 35 (emphasis added) (quoting four letters from the petitioner to Commerce during the course of the investigation). The Department's insistence that all "door thresholds" are in-scope merchandise based on this scope language is inconsistent with the explanation that the paragraph intended to capture extrusions that are "final, finished goods in and of themselves." *See id.* According to the uncontested record evidence, Columbia's door thresholds are not extrusions "in and of themselves."

In addressing prior decisions of the Secretary of Commerce, the Scope Ruling commits the same error, distinguishing those past scope rulings in which the good under consideration was specifically identified in the scope language as in-scope merchandise from those in which it was not. *Id.* at 36–37. Concerning the latter category, the Scope Ruling explains that:

> Because those products [at issue in prior scope rulings] were not specifically identified in the scope language, the determinations involved an analysis as to whether the scope exclusion for finished merchandise applied. Here, based on the specific inclusion of "door thresholds" within the scope of the Orders, we agree with the petitioner that the finished merchandise scope exclusion is inapplicable with respect to the products at issue in these scope requests.

Id. at 37. Again, Columbia's products are not specifically identified in the scope language. Mistakenly relying on its past scope rulings, Commerce erred in declining to consider whether or not Columbia's products were "finished merchandise." *See id.* at 14–20 (discussing twelve scope rulings regarding goods containing aluminum extrusions and non-aluminum extrusion components).

E. On Remand, Commerce Must Consider Whether the Door Thresholds Qualify for the Finished Merchandise Exclusion

In opposing Columbia's motion, defendant argues that "because the finished merchandise exclusion only mentions 'doors with glass or vinyl,' but not door thresholds, the finished merchandise exclusion does not apply to door thresholds." Def.'s Response 18 (citing *Scope Ruling* 36). This argument is based on a misreading of the finished merchandise exclusion that considers the exemplars as exhaustive of the scope of the exclusion. The exclusion applies to "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, *such as* finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added). Under defendant's misguided interpretation, only assembled merchandise specifically identified by the exemplars could qualify for the finished merchandise exclusion.

Defendant argues, further, that "the explicit reference to an exclusion for heat sinks, compared to the absence of a similar exclusion for door thresholds, further supports Commerce's determination that door thresholds are within the scope of the orders." Def.'s Response 19. Defendant-intervenors make essentially the same argument. Def.-Intervenors' Response 15. This argument is also meritless, as it confuses a good fabricated from an aluminum extrusion with an assembled good containing an aluminum extrusion and other non-aluminum parts. The Orders address heat sinks that are fabricated from extrusions; such heat sinks are specifically excluded from the Orders if they are "finished heat sinks" that meet thermal performance requirements. *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. The treatment of heat sinks in the scope language of the Orders has no relevance to the issue of whether the finished merchandise exclusion (which applies only to assembled goods) applies to the door thresholds at issue here.

Defendant-intervenors also argue that "the scope language contains no distinction between thresholds comprised solely of extruded aluminum and thresholds that contain both extruded aluminum and non-extruded aluminum components." Def.-Intervenors' Response 17. To the contrary, as the court has explained, the scope language expressly includes door thresholds that are "subject extrusions" while not addressing specifically door thresholds that are not themselves aluminum extrusions. Moreover, subject extrusions are *per se* within the scope of the Orders while assembled goods containing non-

aluminum-extrusion components are treated differently, by operation of the subassemblies provision. Under the latter, only the aluminum extrusion component of a subassembly, not the whole assembly, potentially is subject to the Orders, and the Orders specifically make the finished merchandise exclusion available to qualifying assembled merchandise.

In summary, Commerce erred in refusing to determine whether the imported, assembled door thresholds satisfy the requirements of the finished merchandise exclusion. Commerce now must give full and fair consideration to the issue of whether this exclusion applies, upon making findings that are supported by substantial record evidence.

III. CONCLUSION AND ORDER

Therefore, upon consideration of plaintiff's motion for judgment on the agency record and all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's motion for judgment on the agency record (July 31, 2019), ECF No. 29, be, and hereby is, granted; it is further

ORDERED that Commerce, within 90 days from the date of issuance of this Opinion and Order, shall submit a redetermination upon remand ("Remand Redetermination") that complies with this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenors shall have 30 days from the filing of the Remand Redetermination in which to submit comments to the court; and it is further

ORDERED that should plaintiff or defendant-intervenors submit comments, defendant shall have 15 days from the date of filing of the last comment to submit a response.

Dated: August 27, 2020
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, CHIEF JUDGE

U.S. Customs and Border Protection

19 CFR CHAPTER I

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

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

ACTION: Notification of continuation of temporary travel restrictions.

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

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on August 21, 2020, and will remain in effect until 11:59 p.m. EDT on September 21, 2020.

FOR FURTHER INFORMATION CONTACT: Alyce Modesto, Office of Field Operations, U.S. Customs and Border Protection (CBP) at 202–344–3788.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of the Secretary's decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to "essential travel," as further defined in that document.[1] The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with

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

COVID–19 within the United States and globally, the Secretary had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico posed a "specific threat to human life or national interests." The Secretary later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on August 20, 2020.[2]

The Secretary has continued to monitor and respond to the COVID–19 pandemic. As of August 17, there are over 21.2 million confirmed cases globally, with over 761,000 confirmed deaths.[3] There are over 5.3 million confirmed and probable cases within the United States,[4] over 121,000 confirmed cases in Canada,[5] and over 511,000 confirmed cases in Mexico.[6]

Notice of Action

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

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

---

[2] *See* 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020). DHS also published parallel notifications of the Secretary's decisions to continue temporarily limiting the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to "essential travel." *See* 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020).

[3] WHO, Coronavirus disease 2019 (COVID–19) Situation Report—209 (Aug. 16, 2020), available at *https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200816-covid-19-sitrep-209.pdf?sfvrsn=5dde1ca2_2*.

[4] CDC, Cases of COVID–19 in the U.S. (last updated Aug. 17, 2020), available at *https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html*.

[5] WHO, Coronavirus disease 2019 (COVID–19) Situation Report—209 (Aug. 16, 2020).

[6] *Id.*

19 U.S.C. 1318(b)(1)(C) and (b)(2),[7] I have determined that land ports of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in "essential travel," as defined below. Given the definition of "essential travel" below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

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

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.,* to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.,* individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health

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

purposes (*e.g.,* government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID–19 or other emergencies);

- Individuals engaged in lawful cross-border trade (*e.g.,* truck drivers supporting the movement of cargo between the United States and Mexico);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

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

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

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

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

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

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

[Published in the Federal Register, August 21, 2020 (85 FR 51633)]

19 CFR CHAPTER I

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

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

ACTION: Notification of continuation of temporary travel restrictions.

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

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on August 21, 2020, and will remain in effect until 11:59 p.m. EDT on September 21, 2020.

FOR FURTHER INFORMATION CONTACT: Alyce Modesto, Office of Field Operations, U.S. Customs and Border Protection (CBP) at 202–344–3788.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of the Secretary's decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to "essential travel," as further defined in that document.[1] The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, the Secretary had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada posed a "specific threat to human life or national interests."

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

The Secretary later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on August 20, 2020.[2]

The Secretary has continued to monitor and respond to the COVID–19 pandemic. As of August 17, there are over 21.2 million confirmed cases globally, with over 761,000 confirmed deaths.[3] There are over 5.3 million confirmed and probable cases within the United States,[4] over 121,000 confirmed cases in Canada,[5] and over 511,000 confirmed cases in Mexico.[6]

Notice of Action

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

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

---

[2] *See* 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of the Secretary's decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to "essential travel." *See* 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

[3] WHO, Coronavirus disease 2019 (COVID–19) Situation Report—209 (Aug. 16, 2020), available at *https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200816-covid-19-sitrep-209.pdf?sfvrsn=5dde1ca2_2.*

[4] CDC, Cases of COVID–19 in the U.S. (last updated Aug. 17, 2020), available at *https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.*

[5] WHO, Coronavirus disease 2019 (COVID–19) Situation Report—209 (Aug. 16, 2020).

[6] *Id.*

[7] 19 U.S.C. 1318(b)(1)(C) provides that "[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests," is authorized to "[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat." On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland

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

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

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

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

- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

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

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

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

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

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

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

[Published in the Federal Register, August 21, 2020 (85 FR 51634)]

AGENCY INFORMATION COLLECTION ACTIVITIES:

Customs Regulations Pertaining to Customhouse Brokers

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

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than October 26, 2020 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0034 in the subject line and the agency name. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

(1) *Email.* Submit comments to: *CBP_PRA@cbp.dhs.gov.*

(2) *Mail.* Submit written comments to CBP Paperwork Reduction Act Officer, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Economic Impact Analysis Branch, 90 K Street NE, 10th Floor, Washington, DC 20229–1177.

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions

from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Customs Regulations Pertaining to Customhouse Brokers.

OMB Number: 1651–0034.

Form Number: 3124 and 3124E.

Current Actions: CBP proposes to extend the expiration date of this collection of information. There is no change to the burden hours or the information collected.

Type of Review: Extension (without change).

Affected Public: Customhouse Brokers.

Abstract: The information contained in Part 111 of the CBP regulations (19 CFR) governs the licensing and conduct of customs brokers. An individual who wishes to take the broker exam must complete the electronic application CBP Form 3124E, "Application for Customs Broker License Exam," or to apply for a broker license, CBP Form 3124, "Application for Customs Broker License." The procedures to request a local or national broker permit can be found in 19 CFR 111.19, and a triennial report is required under 19 CFR 111.30. This information collected from customs brokers is provided for by 19 U.S.C. 1641. CBP Forms 3124 and 3124E may be found at *http://www.cbp.gov/xp/cgov/toolbox/forms/*. Further information about the customs broker exam and how to apply for it may be found at *https://www.cbp.gov/trade/programs-administration/customs-brokers*.

Application for Broker License Exam (Form 3124E)

Estimated Number of Respondents: 2,300.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 2,300.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 2,300.

Application for Broker License Exam (Form 3124)

Estimated Number of Respondents: 750.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 750.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 750.

Trienniel Report

Estimated Number of Respondents: 4,550.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 4,550.

Estimated Time per Response: 0.5 hours.

Estimated Total Annual Burden Hours: 2,275.

National Broker's Permit Application

Estimated Number of Respondents: 200.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 200.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 200.

Dated: August 28, 2020.

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

[Published in the Federal Register, August 27, 2020 (85 FR 53013)]

AGENCY INFORMATION COLLECTION ACTIVITIES:

Passenger and Crew Manifest

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

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

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than September 28, 2020) to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (85 FR 29469) on May 15, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the

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

Overview of This Information Collection

Title: Passenger and Crew Manifest (Advance Passenger Information System).

OMB Number: 1651–0088.

Form Number: None.

Abstract: The Advance Passenger Information System (APIS) is an automated method in which U.S. Customs and Border Protection (CBP) receives information on passengers and crew onboard inbound and outbound international flights and commercial vessels before their arrival in, or departure from, the United States. APIS data includes biographical information for travelers arriving in or departing from the United States, allowing the data to be checked against CBP databases to target for high-risk travelers and facilitate legitimate travel for the general public.

The information is submitted for both commercial and private aircraft flights, commercial vessels, and voluntarily for some rail carriers and bus carriers. Specific data elements required for each passenger and crew member include: Full name; date of birth; gender; citizenship; travel document type; passport number; country of issuance and expiration date; and alien registration number where applicable. The statutory authority for APIS includes the Aviation and Transportation Security Act, Public Law 107–71, 115 Stat. 597 (49 U.S.C. 44909). The APIS regulatory requirements for air carriers are specified in 19 CFR 122.49a, 122.49b, 122.49c, 122.75a, 122.75b, and 122.22. These provisions list the required APIS data.

Respondents submit their electronic manifest either through a direct interface with CBP, or using eAPIS which is a web-based system that can be accessed at *https://eapis.cbp.dhs.gov/*.

Current Actions: This submission is being made to revise this collection of information to include bus and rail carriers into this OMB control number.

Proposed Changes

CBP is currently running a pilot with nine respondents in which bus carriers are submitting passenger manifest data voluntarily to assist CBP in the development of the Land Pre-Arrival System (LPAS) application. The LPAS application will improve the current method of transmission by allowing carriers to scan the Machine-Readable Zone (MRZ) of travelers' documents which will result in time-savings for the carriers and increased accuracy for CBP. CBP would like to revise this information collection to include bus and rail respondents which would allow CBP to expand the bus pilot beyond the current nine respondents, as well as make the LPAS application available to pilot for rail carriers in the future.

For this pilot, bus carriers submit their APIS information to CBP via Land Pre-Arrival System Application (LPAS), embedded in the CBP ROAM application which is available free of charge for Android and Apple mobile devices.

In the LPAS application, the collection of traveler information is primarily done through electronic submission. The bus carrier designee submits traveler information by scanning the MRZ of each traveler's document which is automatically loaded into the application. Should the MRZ not automatically transfer into the application, the bus carrier will manually input the traveler's document information. This is the only point at which information is collected from travelers for CBP.

The user registers bus as the mode of travel and is prompted to complete information on the company. Information includes:

- Mode of Travel (Bus)
- License Country
- Registration Province
- License Number
- Sender ID
- Carrier Code (APIS code assigned by CBP)
- Bus Company

Each carrier will be required to create a 'Driver Profile' by entering in their documentation using the MRZ or manually. This profile is saved to be associated with each bus that the driver operates and will

have to be selected prior to submitting the trip. The driver is prompted to enter his or her information, including:

- Name
- Date of Birth
- Sex
- Country of Citizenship
- Country of Residence
- Document Type
- Document Number
- Date of Issue
- Date of Expiration
- Country of Issue

This process is duplicated for all additional travelers boarding the bus. Each traveler profile is saved for the trip, but is deleted from the application immediately after the information is submitted to CBP.

Prior to submitting traveler information to CBP, the user must fill in required information about the trip. These fields include items such as:

- Arrival Location in the US
- Estimated Arrival Date
- Estimated Arrival Time
- Arrival Code (Port of Entry)
- Entry State
- Last Country Visited
- Contact Email

Previously, the ROAM application also permitted self-reported submission of information to CBP officers through a face-time feature. This self-reporting feature has been disabled for LPAS and will not be used at any time in conjunction with the Bus APIS pilot or the resulting program that arises from the pilot. The bus carrier, either through the bus driver, another employee, or a designated representative or service provider, will be the only party submitting data to CBP via the LPAS feature within the ROAM application. The basis for this decision arose out of the necessity to collect traveler informa-

tion prior to arrival in the land environment as it is done in the air environment. For pre-arrival or pre-departure vetting and targeting to be conducted, officers must be able to collect information on travelers prior to their arrival at the border to promote officer safety and increase security. In air Ports of Entry, officers have access to traveler information 72 hours prior to arrival. However, this standard does not exist in the land environment, as travelers can board a bus within minutes of arriving at the border. In the air environment, airline carriers or their designated representatives or service providers are the users submitting traveler information. Therefore, in order to closely mirror this successful process, bus carriers will submit traveler data in the land environment. In order to reduce the burden of manual data entry, the LPAS feature includes a technology that reads the MRZ on a passport. As a result, the bus driver can simply scan a passenger's passport in order to populate the required data fields and accurately submit that data to CBP. CBP is considering the development of LPAS for rail carriers in the future.

Type of Review: Revision.

Affected Public: Businesses, Individuals.

Commercial Airlines

Estimated Number of Respondents: 1,130.
Estimated Number of Total Annual Responses: 1,850,878.
Estimated Time per Response: 10 minutes.
Estimated Total Annual Burden Hours: 307,246.

Commercial Airline Passengers (3rd party)

Estimated Number of Respondents: 184,050,663.
Estimated Number of Total Annual Responses: 184,050,663.
Estimated Time per Response: 10 seconds.
Estimated Total Annual Burden Hours: 496,937.

Private Aircraft Pilots

Estimated Number of Respondents: 460,000.
Estimated Number of Total Annual Responses: 460,000.
Estimated Time per Response: 15 minutes.
Estimated Total Annual Burden Hours: 115,000.

Commercial Passenger Rail Carrier

Estimated Number of Respondents: 2.
Estimated Number of Total Annual Responses: 9,540.

Estimated Time per Response: 10 minutes.
Estimated Total Annual Burden Hours: 1,590.

Bus Passenger Carrier

Estimated Number of Respondents: 9.
Estimated Number of Total Annual Responses: 309,294.
Estimated Time per Response: 15 minutes.
Estimated Total Annual Burden Hours: 77,324.

Dated: August 24, 2020.

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

[Published in the Federal Register, August 27, 2020 (85 FR 53015)]

AGENCY INFORMATION COLLECTION ACTIVITIES:

Temporary Scientific or Educational Purposes

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

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

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than September 28, 2020) to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (85 FR 27233) on May 7, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the

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

Overview of This Information Collection

Title: Declaration of the Ultimate Consignee that Articles were Exported for Temporary Scientific or Educational Purposes.

OMB Number: 1651–0036.

Form Number: None.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: The Declaration of the Ultimate Consignee that Articles were Exported for Temporary Scientific or Educational Purposes is used to document duty free entry under conditions when articles are temporarily exported solely for scientific or educational purposes. This declaration, which is completed by the ultimate consignee and submitted to CBP by the importer or the agent of the importer, is used to assist CBP personnel in determining whether the imported articles should be free of duty. It is provided for under 19 U.S.C. 1202, HTSUS Subheading 9801.00.40, and 19 CFR 10.67(a)(3) which requires a declaration to CBP stating that the articles were sent from the United States solely for temporary scientific or educational use and describing the specific use to which they were put while abroad.

Estimated Number of Respondents: 55.

Estimated Number of Annual Responses per Respondent: 3.

Estimated Number of Total Annual Responses: 165.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 27.

Dated: August 24, 2020.

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

[Published in the Federal Register, August 27, 2020 (85 FR 53014)]