

# U.S. Customs and Border Protection



## 19 CFR PART 177

### **REVOCAION OF ONE RULING LETTER AND REVOCAION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF THE ACTIVPANEL VERSION 7**

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

**ACTION:** Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of the ActivPanel Version 7.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of the ActivPanel Version 7 under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 10, on March 17, 2021. One comment was received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 18, 2021.

**FOR FURTHER INFORMATION CONTACT:** Patricia Fogle, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0061.

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 10, on March 17, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of the ActivPanel Version 7. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In Headquarters Ruling Letter ("HQ") H304416, dated August 10, 2020, CBP classified the ActivPanel Version 7 in heading 8471, HTSUS, specifically in subheading 8471.60.10, HTSUS, which provides for "Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: Input or output units, whether or not containing storage units in the same housing: Combined input/output units." CBP has reviewed HQ H304416 and has determined the ruling letter to be in error. It is now CBP's position that the ActivPanel Version 7 is properly classified, in heading 8471, HTSUS, specifically in subheading 8471.41.01, HTSUS, which provides for "Automatic data processing machines and units thereof; magnetic or optical readers,

machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: Other automatic data processing machines: Comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking HQ H304416 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H314277, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

*Attachment*

HQ H314277

April 22, 2021

OT:RR:CTF:EMAIN: H314277 PF

CATEGORY: Classification

TARIFF NO.: 8471.41.01

MICHAEL K. TOMENGA  
NEVILLE PETERSON LLP  
1400 16TH STREET, N.W.  
WASHINGTON, D.C. 20036

Re: Revocation of HQ H304416; Tariff Classification of the ActivPanel Version 7

DEAR MR. TOMENGA:

This is in response to your letter to U.S. Customs and Border Protection (“CBP”), submitted on behalf of Promethean, Inc. (“Promethean”) requesting reconsideration of Headquarters Ruling Letter (“HQ”) H304416, dated, August 10, 2020 (“reconsideration request”). We have reviewed HQ H304416 and found it to be in error based on the revised facts set forth in the request for reconsideration. In reaching our decision, we have also considered a video submitted with the reconsideration request. Accordingly, for the reasons set forth below, CBP is revoking HQ H304416.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 10, on March 17, 2021. CBP received one comment in support of the proposed action.

**FACTS:**

In HQ H304416, the ActivPanel 7 was described as follows:

There are two models of the ActivPanel v7 subject to this request, which are the ActivPanel Nickel and ActivPanel Titanium. Both models contain a 4K ultra high-definition liquid crystal display (“LCD”) video monitor containing a touch overlay, a CPU, speakers and connectors for various signal inputs and outputs, including VGA, USD, and HDMI, and a remote control. The LCD screen size of the ActivPanel Nickel is available from 65 inches to 86 inches and the LCD screen size of the ActivPanel Titanium is available from 70 inches to 86 inches. Both ActivPanel v7 models are configured with a Quad Core processor, 2GB to 4GB of memory, 16GB to 64GB internal storage, a graphics processor, audio, Ethernet, Wi-Fi and Bluetooth connectivity.

The ActivPanel v7 is described as an interactive display and includes a menu bar that allows users access to applications, tools, files, and other attached computing machines. The ActivPanel v7 is sold with Promethean Classroom Essential Applications, which include Whiteboard, Annotate, Screen Share, Spinner and Timer. The Promethean Classroom Essential Apps are educational applications that provide a user with

whiteboard, screen capture, annotating, and mirroring functions.<sup>1</sup> The ActivPanel v7 also has an application or control feature entitled the “Locker” that displays and provides access to the applications that are installed onto the ActivPanel v7 as well as the applications that are stored on a separate computing device. The ActivPanel v7 includes a pre-installed Promethean Store, which includes curated educational applications.<sup>2</sup> In order to install an application from the Promethean Store or from the Google Play Store onto the ActivPanel v7, a separate computing system is required.

Promethean sells different types of computing/Open Pluggable Specification (“OPS”) modules that are externally connected to the ActivPanel v7, including Chromebox, OPS-M, and ActivConnect OPS-G.<sup>3</sup> These OPS modules are considered optional devices and are not imported with the ActivPanel v7. The Chromebox uses a Chrome operating system, contains 4GB of RAM, a 128GB solid-state drive, and has Wi-Fi and Bluetooth connectivity.<sup>4</sup> The Chromebox is connected to the ActivPanel v7 via an HDMI cable, the OPS-M is connected to the ActivPanel v7 via an OPS connection port on the ActivPanel v7’s housing, and the ActiveConnect OPS-G is mounted directly onto the ActivPanel v7 via a mounting bracket. The Chromebox allows a user to download applications from the Google Play Store directly onto the ActivPanel v7, which appear on the ActivPanel v7’s screen.<sup>5</sup> The OPS-M (Windows version) is pre-loaded with Windows 10 and allows a user to install applications and software packages such as Microsoft Office.<sup>6</sup> The ActivConnect G uses an Android operating system and allows the downloading of applications from any Android Application Store to the ActivPanel v7.<sup>7</sup> The ActiveConnect G is described as an external Android Module that gives the ActivPanel v7

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<sup>1</sup> See <https://www.prometheanworld.com/products/interactive-displays/activpanel-elements-series/> (last visited February 7, 2020).

<sup>2</sup> <https://www.prometheanworld.com/products/interactive-displays/activpanel-elements-series/> (last visited February 7, 2020).

<sup>3</sup> See <https://support.prometheanworld.com/article/1015/> and <https://www.prometheanworld.com/products/accessories/computing-modules/> (last visited February 7, 2020).

<sup>4</sup> See <https://www.prometheanworld.com/products/accessories/promethean-chromebox/> and [https://cdn.prometheanworld.com/wp-content/uploads/2019/08/Promethean\\_Chromebox\\_2019\\_SS\\_0619v1.5\\_EN.pdf](https://cdn.prometheanworld.com/wp-content/uploads/2019/08/Promethean_Chromebox_2019_SS_0619v1.5_EN.pdf) (last visited February 7, 2020).

<sup>5</sup> See <https://www.prometheanworld.com/products/accessories/promethean-chromebox/> (last visited February 7, 2020).

<sup>6</sup> See <https://support.prometheanworld.com/product/-ops-m-/> and <https://support.prometheanworld.com/article/1734/> (last visited February 7, 2020). There are two versions of the OPS-M, one with pre-installed Windows 10 operating system and another version with no operating system.

<sup>7</sup> See <https://support.prometheanworld.com/product/-activconnect-g-/> (last visited February 7, 2020).

“tablet-like capabilities, [and] puts the digital world at your fingertips with access to apps, content, mirroring, and more.”<sup>8</sup>

Promethean’s website also provides a description of the OPS modules on its website and describes the objective of these devices:

The objective of the OPS is to provide the ability for a wide range of computing units to be integrated into display units such as the ActivPanel based on standardized dimensions and the use of a common 80-pin JEA socket and other connectors.<sup>9</sup>

The Chromebox is described as follows:

The Promethean Chromebox is the perfect solution for extending an existing Chrome OS ecosystem to the ActivPanel Elements Series, providing certified and seamless access to your preferred apps from the Google Play Store. View and launch downloaded apps directly from the Unified Menu with one-click access and no need for source switching.<sup>10</sup>

The ActivPanel v7 has a CPU on a scaler board. The CPU that runs the Android operating system functions as an image processor that takes a signal from an automatic data processing (“ADP”) machine input and translates it onto the LCD in the form of an image. Aside from the control and interface applications that are installed directly onto the internal scaler CPU, users are limited as to what they can directly install on the scaler board CPU. Applications that provide general purpose computing functions reside on the computing/OPS modules, such as the ActiveConnect OPS-G, Chromebox, and OPS-M and not on the ActivPanel v7. A support video from Promethean describes how a user can “integrate the ActiveConnect OPS-G with the ActivPanel Elements Series so the apps will exist in the Locker alongside the apps from the ActivPanel.”<sup>11</sup> In addition, a separate support video states that the OPS-M and Active Connect G are required to install applications.<sup>12</sup> Moreover, in order to manually install applications, users must download the specific application from their personal computer, save it to a USB drive, and insert it into the mounted OPS/ActiveConnect OPS-G/Chromebox.<sup>13</sup>

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<sup>8</sup> See <https://support.prometheanworld.com/product/activconnect-g/> (last visited February 7, 2020) and <https://blog.prometheanworld.com/tech-insights/educational-apps-to-use-with-the-activpanel/> (discussing how the “ActiveConnect coupled with your Promethean display to leverage educational apps is a great way to keep students engaged, working together, and having fun as they learn!”).

<sup>9</sup> See <https://support.prometheanworld.com/article/1015/> (last visited February 7, 2020).

<sup>10</sup> See <https://www.prometheanworld.com/products/accessories/promethean-chromebox/> (last visited February 7, 2020).

<sup>11</sup> See <https://support.prometheanworld.com/video/activpanel-elements-ops-integration/> (last visited February 7, 2020).

<sup>12</sup> See <https://www.youtube.com/watch?v=r-nbs8KUVsw> (last visited February 7, 2020) and <https://edtechmagazine.com/k12/article/2019/12/review-promethean-activpanel-titanium-has-many-teacher-friendly-features> (noting that an OPS computing module is a must for teachers who wish to run Google apps through their interactive whiteboard) (last visited February 7, 2020).

<sup>13</sup> See <https://www.youtube.com/watch?v=rvakgLzD2sA> (last visited February 7, 2020).

Promethean also creates and supports lesson delivery software, entitled ActivInspire and ClassFlow for use on its ActivPanels v7<sup>14</sup>. These applications are not physically installed on the ActivPanel v7, but instead are installed on a separate ADP machine. The ClassFlow application is installed on the ActiveConnect OPS and is marketed for its ability to “deliver lessons, write, draw, annotate and poll students.”<sup>15</sup> In addition, the ActivInspire specifications require a Windows, Mac or Linux operating<sup>16</sup> system to function and the ActivPanel v7 runs on an Android operating system. Based on the ActivInspire specifications, this software has to be installed on a separate ADP machine and not on the ActivPanel v7. Neither the ActivInspire nor Classflow programs allow users to perform general purpose computing functions.

The request for reconsideration includes a video presentation by a software product manager showing the installation and execution of third-party software on the ActivPanel v7. The video demonstration shows three ways that a user can download and run applications directly to the ActivPanel v7 using the Promethean Store, a web browser, and a DOS Box DOS emulator.

The first method allows a user to download and install applications directly on the ActivPanel v7 via the Promethean Store, which is a software application on the ActivPanel v7, that links to the Promethean Store website. The applications available on the Promethean Store include Microsoft Word, a word processing program that allows users to create and edit documents; Microsoft Excel, a spreadsheet program that allows users to create and edit spreadsheets; Microsoft Outlook, a personal information program that allows users to use webmail, calendars, and tasks services; Microsoft Teams, which allow users to video conference, call, chat, and collaborate on Microsoft 365 applications; and Zoho Books, which is an accounting software. Using an Internet connection, a user can download and run these third-party software applications directly on the ActivePanel v7. The ActivPanel’s v7 USB drive allows programs to be loaded onto the device. As a result, a user can also load, read, and write files on the ActivPanel using a USB device.

The second method allows a user to download web based third-party applications directly from the Internet. A user can download and run applications from the Google Play Store onto the ActivPanel v7. In addition, the ActivPanel v7 can run ClassFlow, the lesson software, directly from the Internet. According to Promethean, ClassFlow is a cloud-based application that runs on external servers and can be accessed via a browser which can be accessed from the ActivPanel v7.

The third method allows a user to install and run applications written in DOS. The ActivPanel v7 includes a DOS emulator, which is a software application that comes with and runs on the ActivPanel v7. The DOS emulator allows users the ability to load custom programs written in DOS to run on the ActivPanel v7.

<sup>14</sup> See <https://www.prometheanworld.com/products/interactive-displays/activpanel-elements-series/> (last visited February 7, 2020).

<sup>15</sup> See <https://support.prometheanworld.com/article/1565>, <https://support.prometheanworld.com/download/45992> and <https://support.prometheanworld.com/download/45776> (last visited February 7, 2020).

<sup>16</sup> See <https://support.prometheanworld.com/activinspire-system-requirements-en/> (last visited February 7, 2020).

As shown in the demonstration video, the third-party applications that were installed and executed on the ActivPanel v7 as described above were installed without the use of the Chromebox, OPS-M and/or ActivConnect computing modules.

**ISSUE:**

Whether the ActivPanel v7 is classified as an automatic data processing (“ADP”) machine of heading 8471, HTSUS or a combined input/output unit of an ADP machine of heading 8471, HTSUS.

**LAW AND ANALYSIS:**

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (“GRIs”) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation (“AUSR”). The GRIs and the AUSR are part of the HTSUS, and are considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

GRI 6 provides as follows:

For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative section and chapter notes also apply, unless the context otherwise requires.

The HTSUS headings under consideration are as follows:

8471	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: * * *
	Other automatic data processing machines:
8471.41.01	Compromising in the same housing at least a central processing unit and an input and output unit, whether or not combined.. * * *
8471.60	Input or output units, whether or not containing storage units in the same housing:
8471.60.10	Combined input/output units...

ADP machines are defined in Legal Note 5(A) to Chapter 84, HTSUS, which provide as follows:

For the purposes of heading 8471, the expression “automatic data processing machines” means machines capable of:



- (i) Storing the processing program or programs and at least the data immediately necessary for the execution of the program;
- (ii) Being freely programmed in accordance with the requirements of the user;
- (iii) Performing arithmetical computations specified by the user; and
- (iv) Executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.

To be classified as an ADP unit under heading 8471, HTSUS, an article must meet the terms of Legal Note 5(C) to Chapter 84, HTSUS, which provides that:

Subject to paragraphs (D) and (E) below, a unit is to be regarded as being a part of an automatic data processing system if it meets all the following conditions:

- (i) It is of a kind solely or principally used in an automatic data processing system;
- (ii) It is connectable to the central processing unit [CPU] either directly or through one or more other units; and
- (iii) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

Separately presented units of an automatic data processing machine are to be classified in heading 8471....

In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System, which constitute the official interpretation of the HTSUS at the international level, may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

The ENs to heading 8471 provide, in pertinent part:

**(I) AUTOMATIC DATA PROCESSING MACHINES  
AND UNITS THEREOF**

Data processing is the handling of information of all kinds, in pre-established logical sequences and for a specific purpose or purposes.

Automatic data processing machines are machines which, by logically interrelated operations performed in accordance with pre-established instructions (program), furnish data which can be used as such, or, in some cases, serve in turn as data for other data processing operations.

This heading covers data processing machines in which the logical sequences of the operations can be changed from one job to another, and in which the operation can be automatic, that is to say with no manual intervention for the duration of the task....

However, the heading **excludes** machines, instruments or apparatus incorporating or working in conjunction with an automatic data processing machine and performing a specific function. Such machines, instru-

ments or apparatus are classified in the headings appropriate to their respective functions or, failing that, in residual headings (See Part (E) of the General Explanatory Note to this Chapter).

### (A) AUTOMATIC DATA PROCESSING MACHINES

The automatic data processing machines of this heading must be capable of fulfilling **simultaneously** the conditions laid down in Note 5(A) to this Chapter. [...]

Thus, machines which operate only on fixed programs, i.e., programs which cannot be modified by the user, are **excluded** even though the user may be able to choose from a number of such fixed programs.

These machines have storage capability and also stored programs which can be changed from job to job...

Prior to issuing HQ H304416, CBP had considered and rejected classification under subheading 8471.41.01, HTSUS. In HQ H304416, CBP explained that the ActivPanel v7 was not freely programmable. CBP noted that the ActivPanel v7 ran on fixed programs and that a user could not install, modify, or remove program applications on the ActivPanel v7 itself. As a result, we concluded that the ActivPanel v7 did not meet all of the requirements of Note 5(A) to Chapter 84, HTSUS. This conclusion would be correct if the ActivPanel v7 required the OPS modules, such as the Chromebox, OPS-M and ActivConnect, to download, install, and execute third-party applications. However, the information provided in your reconsideration request confirms that the ActivPanel v7 can download, install, and execute third-party applications without these OPS modules.

The applications described above must also comport with the second requirement set forth in Note 5(A) to Chapter 84, which is that an automatic data processing machine of heading 8471 must be capable of “[b]eing freely programmed in accordance with the requirements of the user.” Note 5(A)(ii) to Chapter 84, HTSUS. In HQ H075336, dated May 16, 2011, CBP analyzed the meaning of “freely programmable” in this context and explained as follows:

In *Optrex America Inc. v. United States*, 4[27] F. Supp. 2d. 1177 (Ct. Int'l Trade 2006), *aff'd*, [47]5 F.3d 1367 (Fed. Cir. 2007) (“Optrex”), the U.S. Court of Appeals for the Federal Circuit (“CAFC”) upheld CBP’s long-standing interpretation that a “freely programmable” ADP machine is one that: (i) applications can be written for, (ii) does not impose artificial limitations upon such applications, and (iii) will accept new applications that allow the user to manipulate the data as deemed necessary by the user. [47]5 F.3d at 1368. *See also* Headquarters Ruling Letter (“HQ”) 964880, dated December 21, 2001. The *Optrex* court noted that “[CBP’s] interpretation is supported by the World Customs Organization’s Explanatory Notes [...] which provide that ‘machines which operate only on fixed programs, that is, programs which cannot be modified by the user, are excluded [from heading 8471] even though the user may be able to choose from a number of such fixed programs.’ Explanatory Note 84.71(I)(A).” *Id.* The court added that “[a]pplication programs are not ‘fixed’ because they can be installed or deleted from a machine.” 427 F. Supp. 2d at 1197.

Moreover, in HQ 952862, dated November 1, 1994, CBP determined that Teklogix data collection devices were not freely programmable, in part, because they were not “general purpose” machines and were designed for certain specific applications and could not by themselves perform the typical applications of computers or personal computers. HQ 952862 discussed the concept of freely programmable by examining the definitions of computer and personal computer and stated as follows:

In determining whether a particular machine is “freely programmable,” it is helpful to examine the definitions of the terms “computer” and “personal computer.” A computer, which is freely programmable, is a “[g]eneral-purpose machine that processes data according to a set of instructions that are stored internally either temporarily or permanently.” A. Freedman, *The Computer Glossary*, Sixth Edition, pg. 95 (1993). A personal computer “is functionally similar to larger computers, but serves only one user. It is used at home and in the office for almost all applications traditionally performed on larger computers.” *Computer Glossary* (1993), pg. 400. Personal Computers “are typically used for applications, such as word processing, spreadsheets, database management and various graphics-based programs, such as computer-aided design (CAD) and desktop publishing. They are also used to handle traditional business applications, such as invoicing, payroll and general ledger. At home, personal computers are primarily used for games, education and word processing.” A. Freedman, *The Computer Glossary*, Fourth Edition, pg. 524 (1989). Because they can perform any of the above-listed applications, personal computers are considered to be “freely programmable.”

The ActivPanel v7 is freely programmable under the criteria set forth above because it is not limited to fixed programs and there are no hardware or software blocks preventing the end user from downloading off-the-shelf, third party applications. Moreover, the Promethean Store is not the exclusive source of applications that can be downloaded for use by the end user for installation on the ActivPanel v7; other sources are available online and programs can be manually created by the end users. As such, the user of the ActivPanel v7 can perform the functions of word processing, web surfing, email, spreadsheet manipulation, etc., which provide general purpose computing while the devices also serve as a display and interactive medium for specific classroom programs.

Except for what is discussed above, none of the other requirements for automatic data processing machines of heading 8471, HTSUS, is in controversy in this case; and, in light of the discussion, the ActivPanel v7 is properly classified under subheading 8471.41.01, HTSUS. Our decision is consistent with New York Ruling (“NY”) N296923, dated June 7, 2018, where CBP determined that a tablet that was installed onto a treadmill, having the capability of downloading and running various applications via the Android OS, satisfied Note 5(A) to Chapter 84 even though the performing of such functions on the machine was very limited. The Android tablet in NY N296923 was also responsible for the power (on/off), the speed control, and the elevation control of the treadmill. CBP classified the Life Cycle Android Tablet under 8471.41.01, HTSUS.

**HOLDING**

By application of GRIs 1 and 6, the ActivPanel Version 7 is classified under heading 8471, HTSUS, and specifically under subheading 8471.41.01, HTSUS, which provides for “Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: Other automatic data processing machines: Comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined.” The column one, general rate of duty is free.

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

**EFFECT ON OTHER RULINGS:**

HQ H304416, dated August 10, 2020, is hereby REVOKED.

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

*Sincerely,*

GREGORY CONNOR

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

**PROPOSED REVOCATION OF THREE RULING LETTERS,  
PROPOSED MODIFICATION OF ONE RULING LETTER  
AND PROPOSED REVOCATION OF TREATMENT  
RELATING TO THE TARIFF CLASSIFICATION OF FIRE  
PITS**

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

**ACTION:** Notice of proposed revocation of three ruling letters, proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification of fire pits.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke three ruling letters and modify one ruling letter concerning the tariff classification of fire pits under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

**DATE:** Comments must be received on or before June 18, 2021.

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

**FOR FURTHER INFORMATION CONTACT:** Karen S. Greene, Chemicals, Petroleum, Metals & Miscellaneous Branch, Regulations and Rulings, Office of Trade, at [Karen.S.Greene@cbp.dhs.gov](mailto:Karen.S.Greene@cbp.dhs.gov).

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter and modify three ruling letters pertaining to the tariff classification of fire pits. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N053402, dated March 16, 2009 (Attachment A), NY N301170, dated November 1, 2018 (Attachment B), NY N264651, dated June 3, 2015, (Attachment C), and NY N301060, dated October 13, 2018 (Attachment D), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

CBP classified certain fire pits in heading 9403, HTSUS, based on their constituent material. Accordingly, the fire pits in NY N301060 and in NY N053402 were classified in subheading 9403.20, HTSUS,

as metal furniture and the fire pits in NY N301170 and in NY N264651 were classified in subheading 9403.89, HTSUS, as other furniture.

CBP has reviewed NY N053402, NY N301170, NY N264651 and NY N301060 and has determined the ruling letters are in error.

It is now CBP's position that these fire pits are properly classified according to their constituent material of their outer body. The fire pits that are the subject of NY N053402 and NY N301060 are classified in subheading 7321.81.50, HTSUS. The fire pits that are the subject of NY N264651 is classified in subheading 6810.99.00, HTSUS. The fire pit that is the subject of NY N301170 is classified based on its constituent material.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N053402, NY N301170 and NY N301060, and to modify, NY N264651 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H306789, set forth as Attachment E to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: April 13, 2021

ALLYSON MATTANAH  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

Attachments

N053402

March 16, 2009

CLA-2-94:OT:RR:E:NC:N2:233

CATEGORY: Classification

TARIFF NO.: 9403.20.0015

Ms. JOY SEMENUK  
LG SOURCING, INC.  
P.O. BOX 1000  
MAIL CODE 4EIM  
MOORESVILLE, NC 28115

RE: The tariff classification of an outdoor fire pit from China.

DEAR Ms. SEMENUK:

In your letter dated March 2, 2009, you requested a tariff classification ruling.

Photographs and description have been provided for an outdoor fire pit, style number 61664. The fire pit will include several components making up a set that will be packaged and shipped together. The fire pit table is made of steel and measures 44 inches in diameter and 25.98 inches in height. The rim is about 6 inches deep allowing placement of cup, plate or other dining item. The set also includes a steel mesh cover for the pit; four steel mesh stools each measuring 28.15 inches wide and 15.75 inches high; one steel poker tool and one cover composed of plastic sheeting. The fire pit is designed to stand on the ground in an outdoor setting.

The Explanatory Notes, which constitute the official interpretation of the Harmonized Tariff Schedule of the United States (HTSUS) at the international level, state in Note X to Rule 3(b) that the term “goods put up in sets for retail sale” means goods which: consist of at least two different articles which are, *prima facie*, classifiable in different headings; (b) consist of products or articles put up together to meet a particular need and carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking.

Because the subject fire pit is a set for tariff purposes, and the headings or subheadings under which the various components could be classified refer to only part of the components in the set, we turn to GRI 3(b) to classify the merchandise. GRI 3(b) states, in part, that goods put up in sets for retail sale shall be classified as if consisting of the component that gives them their essential character. In other words, when presented put up together for retail sale, each component of a set will be dutiable at the rate accorded to the component of the set that imparts the essential character.

“Essential character” is the attribute which strongly marks or serves to distinguish what an article, or set, is. In considering all the factors that help determine a finding of essential character, we have concluded that in the case of the fire pit, it is the fire pit table which provides the set with its essential character.

The applicable subheading for the outdoor fire pit will be 9403.20.0015, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Other furniture and parts thereof: Other metal furniture, Household: Other.” The rate of duty will be free.



Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at (646) 733-3036.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director*

*National Commodity Specialist Division*

N301170

November 1, 2018

CLA-2-94:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 9403.89.6015; 9903.88.03

LAUREL T. SCAPICCHIO  
BJ'S WHOLESALE CLUB, INC.  
25 RESEARCH DRIVE  
P.O. BOX 5230  
WESTBOROUGH, MA 01581

RE: The tariff classification of a fire pit from China.

DEAR MS. SCAPICCHIO:

In your letter dated October 16, 2018, you requested a tariff classification ruling. Illustrative literature and a product description were provided.

BJ's Wholesale Club, Inc. item 190533, the "20lb Gas Fire Pit" is composed of a 100% glass fiber reinforced concrete (GRC) frame and a fire burner center insert that contains lava rocks. The fire pit dimensions are 34.65" in length, 34.65" in width and 24.21" in height. The fire pit frame will store and conceal a 20lb propane tank (propane tank is not included). A polyvinyl chloride (PVC) cover is included for storage and protection from the outdoor elements when not in use.

The Explanatory Notes (ENs) to the Harmonized Tariff Schedule of the United States (HTSUS) constitute the official interpretation of the tariff at the international level. EN VIII to General Rule of Interpretation (GRI) 3(b) provides: "the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." When the essential character of a composite good can be determined, the whole product is classified as if it consisted only of the material or component that imparts the essential character to the composite good.

The structure and frame of the "20lb Gas Fire Pit" is provided by the 100% glass fiber reinforced concrete. The fire burner insert with accompanying lava rocks provide a focused safe outdoor heating source. The 11" tabletop surface on each of the four sides of the fire pit is capable of holding and placing cups, glasses, plates, and other dining items and therefore is an article of furniture. The components meet a particular need, that of providing a focused safe outdoor heating source, along with carrying out a specific activity, that of dining. This office finds that the essential character of the fire pit is imparted by the tabletop.

The applicable subheading for the "20lb Gas Fire Pit" will be 9403.89.6015, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other furniture and parts thereof: Furniture of other materials, including cane, osier, bamboo or similar materials: Other: Other Household." The rate of duty will be free.

Effective July 6, 2018, the Office of the United States Trade Representative (USTR) imposed an additional tariff on certain products of China classified in the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(b), HTSUS. The USTR imposed additional tariffs, effective August 23, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(d), HTSUS. Subse-

quently, the USTR imposed further tariffs, effective September 24, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(f) and U.S. Note 20(g), HTSUS. For additional information, please see the relevant Federal Register notices dated June 20, 2018 (83 F.R. 28710), August 16, 2018 (83 F.R. 40823), and September 21, 2018 (83 F.R. 47974). Products of China that are provided for in subheading 9903.88.01, 9903.88.02, 9903.88.03, or 9903.88.04 and classified in one of the subheadings enumerated in U.S. Note 20(b), U.S. Note 20(d), U.S. Note 20(f) or U.S. Note 20(g) to subchapter III shall continue to be subject to antidumping, countervailing, or other duties, fees and charges that apply to such products, as well as to those imposed by the aforementioned Chapter 99 subheadings.

Products of China classified under subheading 9403.89.6015, HTSUS, unless specifically excluded, are subject to the additional 10 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 9403.89.6015, HTSUS, listed above.

The tariff is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Notice cited above and the applicable Chapter 99 subheading.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at <https://hts.usitc.gov/current>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Dharmendra Lilia at [dharmendra.lilia@cbp.dhs.gov](mailto:dharmendra.lilia@cbp.dhs.gov).

*Sincerely,*

STEVEN A. MACK

*Director*

*National Commodity Specialist Division*

N264651

June 3, 2015

CLA-2-94:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 9403.89.6015; 6810.99.0080

THURMON BONE  
TRADE PRODUCT COMPLIANCE SPECIALIST  
PIER 1 IMPORTS (U.S.), INC.  
100 PIER 1 PLACE, LEVEL 11  
FORT WORTH, TEXAS 76102

RE: The tariff classification of fire pits from China.

DEAR MR. BONE:

In your letter dated May 12, 2015, you requested a tariff classification ruling. Photographs and descriptive literature were provided for three styles of fire pits.

The "Faux Stone Fire Pit" (VIN: DC-MG01421) is a moveable fire pit designed to stand on the ground in an outdoor setting. The dimensions of the fire pit are 29 inches in length by 29 inches in width by 23 inches in height. The fire pit weighs 68 pounds. The base is composed of a natural stone powder mixture of marble, quartz and silica with a cement binder containing fiberglass, and the rim has a depth of approximately 5-inches, which allows for placement of cups/glasses, small plates and other small dining items. The rim of the fire pit acts as a tabletop forming a fire pit table. Company provided information indicates that the material breakdown by weight is 50% stone powder and 50% iron. This item includes an iron mesh cover for the fire pit table and one steel poker tool.

The "Faux Stump Fire Pit" (VIN: DC-MG01425) is a moveable fire pit designed to stand on the ground in an outdoor setting. The dimensions of the fire pit are 28 inches on length by 28 inches in width by 21 inches in height. The fire pit weighs 48 pounds. The base is composed of a natural stone powder mixture of marble, quartz and silica with a cement binder containing fiberglass, and the rim has a depth of approximately 2-inches, leaving inadequate room for the placement of cups, plates or other dining items. Company provided information indicates that the material breakdown by weight is 50% stone powder mixture and 50% iron. This item includes an iron mesh cover for the fire pit and one steel poker tool.

The "Square Fire Pit" (VIN DC-FG6412SQ) is a moveable fire pit designed to stand on the ground in an outdoor setting. The dimensions of the fire pit are 32 inches in length by 32 inches in width by 22 inches in height. The fire pit weighs 44 pounds. The base consists of 4 iron legs. The rim has a depth of approximately 6-inches, which allows cups/glasses, plates and other dining items. The rim of the fire pit acts as a tabletop forming a fire pit table. Company provided information indicates that the material breakdown by weight is 40% stone powder and 60% iron. This item includes an iron mesh cover for the fire pit table and one steel poker tool.

You suggest that the three fire pits identified above are classifiable as furniture in Chapter 94 of the Harmonized Tariff Schedule of the United States (HTSUS). We agree that the Faux Stone Fire Pit and the Square Fire Pit, each having a rim that acts as a tabletop, are classified as articles of furniture, in that they are capable of holding and placing cups/glasses, plates and other dining items upon their surface area. However, the Faux Stump

Fire Pit has no room for the placement and holding of cups/glasses, plates and other dining items upon its rim, and therefore is not considered to be an article of furniture.

The Explanatory Notes (ENs), which constitute the official interpretation of the HTSUS at the international level, state in Note X to Rule 3 (b) of the General Rules of Interpretation (GRIs), that the term “goods put up in sets for retail sale” means goods which: (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings; (b) consist of products or articles put up together to meet a particular need and carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking. Because the components of the fire pits: are classified in two or more different headings of the HTSUS (fire pit tables heading 9403; fire pit heading 6810; iron mesh / spark guards heading 7323; and steel pokers heading 8205), work together in maintaining the safety and control of the heating source of the fire pit tables and fire pit; and are packaged together for retail sale, we find that the merchandise concerned falls within the term goods put up in sets for retail sale.

For the purposes of sets, the classification is made according to the component, or components taken together, which can be regarded as conferring on the set as a whole its essential character. The iron mesh covers and steel pokers do not confer the essential character to the fire pit table sets or the fire pit set. As such, the fire pit tables and fire pit are composed of different components (agglomerated stone and iron), and therefore are considered composite goods for tariff purposes.

The Explanatory Notes (ENs) to the Harmonized Tariff Schedule of the United States (HTSUS), GRI 3 (b) (VIII), state that “the factor which determines essential character will vary between different kinds of goods. It may for example, be determined by the nature of the materials or components, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.” When the essential character of a composite good can be determined, the whole product is classified as if it consisted only of the material or component that imparts the essential character to the composite good.

Review of the photographs and descriptive literature indicate that the iron frames of the fire pit tables and fire pit provide the functionality of focused heat to those sitting or gathered around each of the units. Yet, it is the natural stone powder mixture of marble, quartz and silica with a cement binder containing fiberglass (agglomerated stone), which provides the beauty, charm and overall aesthetics of the fire pit tables and fire pit to blend almost effortlessly into one’s environment. Additionally, the agglomerated stone draws those around the fire pit tables and fire pit for social gathering, while the tabletops of the two fire pit tables allow for social eating and drinking too. Accordingly, the agglomerated stone imparts the essential character to all three items of the merchandise concerned.

The applicable subheading for the Faux Stone Fire Pit and Square Fire Pit, each having a tabletop, will be 9403.89.6015, HTSUS, which provides for “Other furniture and parts thereof: Furniture of other materials, including cane, osier, bamboo or similar materials: Other: Other; Household.” The rate of duty will be free.

The applicable subheading for the Faux Stump Fire Pit will be 6810.99.0080, HTSUS, which provides for “Articles of cement, of concrete or of artificial stone, whether or not reinforced: Other articles: Other; Other.” The rate of duty will be free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at E-Mail address: [neil.h.levy@cpb.dhs.gov](mailto:neil.h.levy@cpb.dhs.gov).

*Sincerely,*

GWENN KLEIN KIRSCHNER

*Director*

*National Commodity Specialist Division*

N301060

October 31, 2018

CLA-2-94:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 9403.20.0050; 9903.88.03

LAUREL T. SCAPICCHIO  
BJ'S WHOLESALE CLUB, INC.  
25 RESEARCH DRIVE  
P.O. BOX 5230  
WESTBOROUGH, MA 01581

RE: The tariff classification of a fire pit table from China.

DEAR MS. SCAPICCHIO:

In your letter dated October 9, 2018, you requested a tariff classification ruling. Illustrative literature and a product description were provided.

BJ's Wholesale Club, Inc. item 188109, the "36" Tile Top Firepit Table" consists of an aluminum and steel frame with black and brown ceramic tiles serving as the tabletop. Accessories included with the fire pit table are a steel mesh cover, a steel grate, and a steel poker tool. The fire pit table is wood burning and does not incorporate a propane tank. The fire pit table and accessories will be packaged and shipped as one item.

The Explanatory Notes (ENs) to the Harmonized Tariff Schedule of the United States (HTSUS) constitute the official interpretation of the tariff at the international level. EN X to General Rule of Interpretation (GRI) 3(b) provides: "for the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which: (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings; (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to end users without repacking (e.g., in boxes or cases or on boards)." Sets are classified according to the component, or components taken together, which can be regarded as conferring on the set as a whole its essential character.

The "36" Tile Top Firepit Table" consists of multiple items classifiable under separate headings and the components meet a particular need, that of providing a focused safe outdoor heating source, along with carrying out a specific activity, that of dining. They are imported and packaged together for retail sale. Therefore, the "36" Tile Top Firepit Table" meet the definition of the term "goods put up in sets for retail sale." The fire pit's 6" ceramic tile tabletop surface that surrounds the wood burning fire pit is capable of holding and placing cups, glasses, plates, and other dining items upon the surface and is therefore an article of furniture. This office finds that the essential character of the fire pit is imparted by the tabletop.

The applicable subheading for the "36" Tile Top Firepit Table" will be 9403.20.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other furniture and parts thereof: Other metal furniture: Household: Other." The rate of duty will be free.

Effective July 6, 2018, the Office of the United States Trade Representative (USTR) imposed an additional tariff on certain products of China classified in the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(b), HTSUS. The USTR imposed additional tariffs, effective August 23, 2018, on products classified under the subheadings enumerated in

Section XXII, Chapter 99, Subchapter III U.S. Note 20(d), HTSUS. Subsequently, the USTR imposed further tariffs, effective September 24, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(f) and U.S. Note 20(g), HTSUS. For additional information, please see the relevant Federal Register notices dated June 20, 2018 (83 F.R. 28710), August 16, 2018 (83 F.R. 40823), and September 21, 2018 (83 F.R. 47974). Products of China that are provided for in subheading 9903.88.01, 9903.88.02, 9903.88.03, or 9903.88.04 and classified in one of the subheadings enumerated in U.S. Note 20(b), U.S. Note 20(d), U.S. Note 20(f) or U.S. Note 20(g) to subchapter III shall continue to be subject to antidumping, countervailing, or other duties, fees and charges that apply to such products, as well as to those imposed by the aforementioned Chapter 99 subheadings.

Products of China classified under subheading 9403.20.0050, HTSUS, unless specifically excluded, are subject to the additional 10 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 9403.20.0050, HTSUS, listed above.

The tariff is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Notice cited above and the applicable Chapter 99 subheading.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at <https://hts.usitc.gov/current>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Dharmendra Lilia at [dharmendra.lilia@cbp.dhs.gov](mailto:dharmendra.lilia@cbp.dhs.gov).

*Sincerely,*

STEVEN A. MACK

*Director*

*National Commodity Specialist Division*



HQ H306789  
OT:RR:CTF:CPMM H306789 KSG  
CATEGORY: Classification  
TARIFF NO.: 7321.81.50; 6810.99.00

LAUREL T. SCAPICCHIO  
BJ'S WHOLESALE CLUB, INC.  
25 RESEARCH DRIVE  
P.O. BOX 5230  
WESTBOROUGH, MA 01581

THURMON BONE  
TRADE PRODUCT COMPLIANCE SPECIALIST  
PIER 1 IMPORTS (U.S.), INC.  
100 PIER 1 PLACE, LEVEL 11  
FORT WORTH, TEXAS 76102

JOY SEMENUK  
LG SOURCING, INC.  
P.O. BOX 1000  
MAIL CODE 4E1M  
MOORESVILLE, NC 28115

RE: Proposed revocation of NY N053402, NY N301170, and NY N301060; proposed modification of NY N264651, tariff classification of fire pits

DEAR MS. SCAPICCHIO, MS. SEMENUK AND MR. BONE:

This letter is in reference to New York Ruling Letters (NY) N053402, dated March 16, 2009, NY N301170, dated November 1, 2018, NY N264651, dated June 3, 2015, and NY N301060, dated October 13, 2018, regarding the tariff classification of certain fire pits under the Harmonized Tariff Schedule of the United States (HTSUS).

In NY N053402 and NY N301060, the fire pits were classified in subheading 9403.20.0050, HTSUS, as metal furniture. In NY N301170 and in NY N264651, the fire pits were classified in subheading 9403.89.6015 as furniture of other materials.

We have reviewed NY N053402, NY N301170, NY N264651, and NY N301060; and determined that the reasoning is in error. Accordingly, for the reasons set forth below, CBP is revoking NY N053402, NY N301170, and NY N301060, and modifying NY N264651.

**FACTS:**

The 44 inch in diameter round fire pit the subject of NYN053402 is primarily constructed of steel. It includes 4 steel benches. It has a six inch rim and includes a cover for the fire pit and a poker tool.

The 34.65 inch by 34.65 inch gas-powered fire pit the subject of NY N301170 is made of glass fiber reinforced concrete and has an 11 inch rim. It has a fire burner center insert that contains lava rocks and a space to conceal a 20 lb. propane tank.

There are three fire pits that are the subject of NY N264651: a faux stone fire pit, a square fire pit and a faux stump fire pit. We are not addressing the

classification of the faux stump fire pit.<sup>1</sup> The faux stone fire pit is 29 inches by 29 inches and has a five inch rim. The base is made of natural stone powder mixture of marble, quartz, and silica with a cement binder containing fiberglass. Lastly, the square fire pit measures 32 inches by 32 inches and has a six inch rim composed of a natural stone powder mixture.

The 36 inch in diameter wood-burning fire pit the subject of NY N301060 is composed of aluminum and steel. The surface has a six inch ceramic tiled surface rim surrounding the wood-burning fire pit. It also includes a cover for the fire pit, a steel grate and a poker tool.

#### **ISSUE:**

Whether the fire pits described above are properly classified according to their constituent material or as furniture in heading 9403, HTSUS. Whether the fire pits described above are properly classified according to their constituent material or as furniture in heading 9403, HTSUS.

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

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

GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

The HTSUS headings under consideration are the following:

7321 Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbecues, braziers, gas rings, plate warmers and similar nonelectric domestic appliances, and parts thereof, of iron or steel: Other appliances

9403 Other furniture and parts thereof:

NY N053402, NY N301060, NY N264651 and NY 301170 all involve the classification of fire pits that are a source of heat and have a rim of between 5 inches and 11 inches around the outer area. The presence of the rim of at least 5 inches was the basis of the determination that these fire pits were furniture. While the rim could be used to place a drinking glass and possibly small dinnerware, the utilitarian and primary purpose of these articles is to provide a heat source, not to be used as a table. We note that all the fire pits are made of heat resistant materials. A table is not typically made of heat resistant material. One would not purchase and use these fire pits as a place

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<sup>1</sup> We note that the faux stump fire pit was described as having a two inch rim which CBP determined was not usable to place glassware and therefore, it was classified in heading 6810, HTSUS, based on the component materials which are identical to the faux stone fire pit.

to put a glass or plate if there was no desire for the heat source. These fire pits, as described above, are not primarily designed to function as a place to place dinner plates and comfortably dine. Therefore, they are distinguishable from outdoor dining furniture.

In contrast to the above cases, in NY N301062, dated October 30, 2018, CBP classified an outdoor 8-piece dining set (includes 6 aluminum chairs) with a lava rock insert in heading 9403, HTSUS, as furniture. The tabletop surface provided between 14.8" and 16.57" area in which to place dinnerware and had a lava rock insert in the center. The lava rock insert provided visual appeal to outdoor dining. The primary function of the article was to provide a dining surface and a place to sit while dining. This article was properly classified in heading 9403, HTSUS, because it was a dining set with an accessory feature of the lava rock insert. It would be functional as an outdoor dining table without the lava rock heat source, which was a secondary feature of the article.

The outdoor dining set the subject of NY N301062 is distinguishable from the four cases that are the subject of this ruling letter (NY N053402, NY N301170, NY N264651 and NY N301060), because these four cases involve fire pits whose primary function is as a heat source; they merely have a rim of between five and 11 inches which can be used to place small items. The mere presence of a rim does not transform the fire pits in those four NY rulings into tables. Accordingly, the fire pits described in NY N053402, NY N301170, NY N264651 and NY N301060 are not properly classified in heading 9403, HTSUS, as furniture.

The fire pits are classified according to the constituent material of their outer body. Accordingly, the fire pits in NY N053402 and NY N301060 are classified in subheading 7321.81.50, HTSUS as a heat source of iron or steel. The faux stone fire pit, and square fire pit in NY N264651 and the concrete fiberglass reinforced fire pit in NY N301170 are classified with the faux stump fire pit in subheading 6810.99.00, HTSUS.

#### **HOLDING:**

By application of GRI's 1 and 6, the fire pits in NY N053402 and NY N301060 are classified in subheading 7321.81.50, HTSUS as a heat source of iron or steel. The column one, general rate of duty for the fire pits in NY N053402 and NY N301060 is Free.

The faux stone fire pit and square fire pits described in NY N264651 and in NY N301170 are classified in heading 6810 and specifically subheading 6810.99.00, HTSUS. The column one, general rate of duty is Free.

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

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

NY N053402, NY N301170, and NY N301060 are revoked, and NY N264651 is modified.

*Sincerely,*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

cc: NIS Sandra Carlson, NCSD  
NIS Christopher Burton, NCSD  
NIS Dharmendra Lilia, NCSD  
NIS Michael W. Chen, NCSD

## 19 CFR PART 177

### **MODIFICATION OF TWO RULING LETTERS, REVOCATION OF FIVE RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF TABLET AND E-READER COVERS**

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

**ACTION:** Notice of modification of two ruling letters, revocation of five ruling letters, and revocation of treatment relating to the tariff classification of tablet and e-reader covers.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying two ruling letters and revoking five ruling letters concerning tariff classification of tablet and e-reader covers under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 7, on February 24, 2021. One comment was received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 18, 2021.

**FOR FURTHER INFORMATION CONTACT:** Ms. Arim J. Kim, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch Branch, Regulations and Rulings, Office of Trade, at (202) 325–0266.

#### **SUPPLEMENTARY INFORMATION:**

##### **BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter,

classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 7, on February 24, 2021, proposing to modify two ruling letters and revoke five ruling letters pertaining to the tariff classification of tablet and e-reader covers. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N150305, NY N208195, NY N209825, NY N223955, NY N225563, NY N225565, and NY N227736, CBP classified tablet and e-reader covers in heading 3926, HTSUS, specifically in subheading 3926.10.0000, HTSUS, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Office or school supplies." CBP has reviewed the aforementioned rulings and determined the ruling letters to be in error. It is now CBP's position that tablet and e-reader covers are properly classified, in heading 3926, HTSUS, specifically in subheading 3926.90.9990, HTSUS, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N150305 and NY N208195, revoking NY N209825, NY N223955, NY N225563, NY N225565, and NY N227736, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (HQ) H295585, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: April 30, 2021

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

Attachment

H295585

April 30, 2021

OT:RR:CTF:CPMMA H295585 AJK

CATEGORY: Classification

TARIFF NO: 3926.90.99

MS. JENNIFER R. DIAZ  
BECKER & POLIAKOFF  
121 ALHAMBRA PLAZA, 10TH FLOOR  
CORAL GABLES, FL 33134

RE: Modification of NY N150305 and NY N208195; Revocation of NY N209825, NY N223955, NY N225563, NY N225565, and NY N227736; Tariff Classification of Plastic Tablet and E-reader Covers

DEAR Ms. DIAZ,

This letter is in reference to New York Ruling Letters (NY) N150305, dated March 25, 2011; NY N208195, dated April 6, 2012; NY N209825, dated April 10, 2012; NY N223955, dated July 25, 2012; NY N225563, dated August 1, 2012; NY N225565, dated August 1, 2012; and N227736, dated August 24, 2012, concerning the tariff classification of plastic tablet and e-reader covers. In the aforementioned rulings, U.S. Customs and Broder Protection (CBP) classified tablet and e-cover readers in subheading 3926.10, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed the aforementioned rulings, and have determined that the classification was incorrect.<sup>1</sup>

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 55, No. 7, on February 24, 2021. One comment was received in response to this notice.

**FACTS:**

NY N227736 states the following, in relevant part:

[T]he C.E.O. Hybrid, product AHHB1P[] is a folding cover/stand for the iPad 2nd and 3rd generation. The C.E.O. Hybrid serves as a protective cover or jacket for the iPad. It measures approximately 7–1/4 inches by 9–1/2 inches in its closed condition and can be secured by means of a thin elastic strap sewn to the inside front cover. The rigid back is essentially flat with tabs that curve slightly inward so that the iPad can be secured into the tabs. The back section incorporates a small cut-out for the camera lens. The front and sides of the iPad, other than the side portions that fit within the curved tabs, are completely exposed when the cover is open. The front cover protects the face of the iPad when the cover is closed. A wide hand strap sewn onto the inside of the front cover allows for secure one handed viewing when the front lid is folded back and the reader's hand is slid inside the hand strap.

<sup>1</sup> NY N150944, dated March 28, 2011, and NY N102216, dated May 6, 2010, concern substantially similar products that were classified under heading 4202. Those rulings have been revoked as a matter of law by the decision in *Otter Prods., LLC v. United States*. 70 F. Supp. 3d 1281 (Ct. Int'l Trade 2015), *aff'd*, 834 F.3d 1369 (Fed. Cir. 2016).



The cover converts to a stand to hold the iPad at an angle for either typing or viewing. There are two separate grooves located one inch apart from each other on the inside front cover. To transform the cover into a stand, the bottom of the iPad is released from the two tabs securing it to the back cover and the back cover is folded at the scored center. The top of the iPad remains secured in the tabs on the back cover while the base of the iPad is nestled into one of the two grooves on the front cover. The grooves serve as a support for the iPad and allow the user to choose between two different viewing angles, a low angle for typing or a high angle for display.

The cover/stand is constructed of molded polycarbonate plastic that is covered on the exterior with cellular polyurethane plastic sheeting backed with plain woven textile fabric for mere reinforcement. The lining, which you describe as “micro suede,” is cellular sponge plastic sheeting backed with nonwoven textile fabric for mere reinforcement. Both the cellular polyurethane laminate on the exterior and the cellular sponge plastic lining material are considered to be of chapter 39 plastics for tariff purposes. There are also some cushioning layers of cellular foam plastic in between the shell and the lining in the front cover.

The products described in NY N150305, NY N208195, NY N209825, NY N223955, NY N225563, and NY N225565 are substantially similar to the product described above.

**ISSUE:**

Whether the tablet and e-reader covers are classified as in subheading 3926.10, HTSUS, as plastic office or school supplies, or subheading 3926.90, HTSUS, as other articles of plastic.

**LAW AND ANALYSIS:**

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

\* \* \* \* \*

The HTSUS provisions at issue are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.10.00	Office or school supplies
3926.90	Other:
3926.90.99	Other

\* \* \* \* \*

Pursuant to GRI 1, the plastic tablets and e-reader covers are classified under heading 3926, HTSUS, because they constitute “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914” and they are not more specifically provided for under other headings. On the subheading level, however, we find that the tablet and e-reader covers are not classifiable in subheading 3926.10, HTSUS, which provides for plastic office or school

supplies. Subheading 3926.10, HTSUS, is a principle use provision and therefore subject to the Additional U.S. Rule of Interpretation 1(a), which states:

1. In the absence of special language or context which otherwise requires
  - a. a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use....

Generally, tablets and e-readers can be used in myriad locations for various purposes beyond “office or school”. The fact that buyers purchase covers and cases for these devices further support the fact that the tablets and e-readers are portable items which are not confined to a specific location or use, such as “office or school”. Tablets can be used for social media, games, online shopping, and many other non-work or school related activities. Similarly, e-readers can be used for personal reading pleasure beyond work or school settings. Moreover, retail stores typically advertise tablets and e-readers as electronic devices for entertainment or personal use. For example, Best Buy advertises iPad as “[p]ortable, powerful and easy-to-use tablets ... [to] enjoy your favorite entertainment nearly anywhere ....” and further states that iPad can “download content from the huge selection of apps, games, music, books and movies ....”<sup>2</sup> Similarly, Amazon advertises that Amazon Fire 7—an e-reader—can be utilized to “[e]njoy millions of movies, TV shows, songs, Kindle eBooks, apps and games” and showcases its portability by stating that it is “now thinner, lighter, and with longer battery life”.<sup>3</sup> Amazon does not explicitly identify any office or school uses for Amazon Fire 7. As evidenced by the actual use and advertisement of tablets and e-readers, the instant tablet and e-reader covers do not constitute office or school supplies.

This analysis is in accordance with the recent court decisions in *Otter Prods., LLC v. United States*<sup>4</sup> and *Apple Inc. v. United States*.<sup>5</sup> In *Otter Prods.*, the U.S. Court of Appeals for the Federal Circuit classified two styles of durable and protective cases designed for certain types of cell phones in subheading 3926.90.99, HTSUS. The Federal Circuit held that “at the subheading level, subheadings 3926.10 to 3926.40 ... do not apply *prima facie* to the subject merchandise.”<sup>6</sup> In *Apple Inc. v. United States*, the Court of International Trade held that a “smart cover” for iPad 2, which consisted of a plastic outer layer, a microfiber lining, aluminum hinge and magnets, was a composite good with an essential character of plastic because the plastic portion “protects the screen” and thus, classified the product in subheading 3926.90, HTSUS.<sup>7</sup> Pursuant to GRI 1 and 6, therefore, subheading 3926.90,

<sup>2</sup> See *iPad*, Best Buy, <https://www.bestbuy.com/site/ipad-tablets-ereaders/ipad/pcmcat209000050007.c?id=pcmcat209000050007> (last visited Mar. 30, 2018).

<sup>3</sup> See *Fire 7*, Amazon, [https://www.amazon.com/All-New-Amazon-Fire-7-Tablet/dp/B01GEW27DA/ref=zg\\_bs\\_1232597011\\_1/141-6390163-2474802?.encoding=UTF8&psc=1&refRID=TM3HC6YMX57RV4ZYER5Q](https://www.amazon.com/All-New-Amazon-Fire-7-Tablet/dp/B01GEW27DA/ref=zg_bs_1232597011_1/141-6390163-2474802?.encoding=UTF8&psc=1&refRID=TM3HC6YMX57RV4ZYER5Q) (last visited Mar. 30, 2018).

<sup>4</sup> 70 F. Supp. 3d 1281 (Ct. Int’l Trade 2015), *aff’d*, 834 F.3d 1369 (Fed. Cir. 2016).

<sup>5</sup> 375 F. Supp. 3d 1288 (Ct. Int’l Trade 2019), *aff’d*, 964 F.3d 1087 (Fed. Cir. 2020).

<sup>6</sup> *Otter Prods., LLC v. United States*, 70 F. Supp. 3d 1281, 1295 (Ct. Int’l Trade 2015), *aff’d*, 834 F.3d 1369 (Fed. Cir. 2016).

<sup>7</sup> See *Apple Inc.*, 375 F. Supp. 3d at 1304.

HTSUS, which provides for other articles of plastic, is the only subheading that wholly covers the instant tablet and e-reader covers.

As noted above, we received one comment in response to the notice of the proposed revocation. The commenter, who submitted on behalf of its client, argues that the tablet and e-reader covers are principally used in the workplace and school because the use in those settings exceeds other uses of tablets and e-readers. The commenter further asserts that the principal use of the product in office and schools is supported by the fact that its client, who produces substantially similar products as those described herein, designs and sells its merchandise for use in companies and schools. As stated above, however, tablets and e-readers are generally used for various purposes beyond “office or school” and thus, does not constitute office or school supplies under HTSUS. Moreover, the evidence of a single importer’s design or sale for the use of office and school does not evidence the actual principal use of the merchandise. *See United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102 (1976) (“Susceptibility, capability, adequacy, or adaptability of the import to the common use of the class is not controlling.”). Therefore, the tablet and e-reader covers are classified in subheading 3926.90, HTSUS.

**HOLDING:**

By application of GRI 1, the subject tablet and e-reader covers are classified in heading 3926, HTSUS, specifically subheading 3926.90.99, HTSUS, which provides for “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: [o]ther: [o]ther: [o]ther”. The 2021 column one general rate of duty is 5.3% *ad valorem*. Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at *www.usitc.gov*.

**EFFECT ON OTHER RULINGS:**

NY N150305, dated March 25, 2011 and NY N208195, dated April 6, 2012 are modified. NY N209825, dated April 10, 2012; NY N223955, dated July 25, 2012; NY N225563, dated August 1, 2012; NY N225565, dated August 1, 2012; and N227736, dated August 24, 2012, are hereby revoked.

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

*Sincerely,*

ALLYSON MATTANAH

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

Cc:

Ms. Denise Young-Sang  
Office Depot  
6600 North Military Trail  
Boca Raton, FL 33496

Mr. Marc D. Torrence  
V. Alexander & Company, Inc.  
P.O. Box 291929  
Nashville, TN 37229

Ms. Haley Barshis  
James J. Boyle & Co.  
7505 NE Ambassador Place, Suite B  
Portland, OR 97220

## 19 CFR CHAPTER I

### **TERMINATION OF ARRIVAL RESTRICTIONS APPLICABLE TO FLIGHTS CARRYING PERSONS WHO HAVE RECENTLY TRAVELED FROM OR WERE OTHERWISE PRESENT WITHIN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**ACTION:** Announcement of termination of arrival restrictions.

**SUMMARY:** This document announces the decision of the Secretary of Homeland Security to terminate arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, the Democratic Republic of the Congo (DRC). These arrival restrictions were initiated due to outbreaks of Ebola Virus Disease (EVD) in the DRC and in the Republic of Guinea. These restrictions directed such flights to only land at a limited set of United States airports where the United States Government had focused public health resources to implement enhanced public health measures. Arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, the Republic of Guinea remain in effect.

**DATES:** The arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, the DRC are terminated as of 11:59 p.m. Eastern Daylight Time on April 29, 2021.

**FOR FURTHER INFORMATION CONTACT:** Alyce Modesto, Office of Field Operations, U.S. Customs and Border Protection at 202-286-8995.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On March 4, 2021, the Secretary of Homeland Security (Secretary) announced arrival restrictions applicable to flights carrying persons who have recently traveled from, or were otherwise present within, the Democratic Republic of the Congo (DRC) or the Republic of Guinea, consistent with 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19 CFR 122.32, in a **Federal Register** document titled “Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently

Traveled From or Were Otherwise Present Within the Democratic Republic of the Congo or the Republic of Guinea” (“Arrival Restrictions Notice”) (86 FR 12534).

For the reasons set forth below, the Secretary has decided to terminate the arrival restrictions applicable to flights carrying persons who have recently traveled from, or were otherwise present within, the DRC. These restrictions funnel relevant arriving air passengers to one of six designated airports of entry where the U.S. is implementing enhanced public health measures. Since March 1, 2021, there have been no new confirmed EVD cases reported in the DRC and all contacts of cases that were being monitored for EVD have passed the 21-day incubation period. With no new cases reported in the past 42 days (2 incubation periods), no remaining hospitalized patients with EVD, and no contacts of confirmed EVD cases still requiring monitoring, the potential risk for Ebola virus exposure in the DRC has greatly diminished. Therefore, flight restrictions are no longer required for flights carrying persons who have recently traveled from, or were otherwise present within, the DRC. Because the most recent case of EVD in the Republic of Guinea was confirmed on April 3, 2021, the arrival restrictions applicable to flights carrying persons who have recently traveled from, or were otherwise present within, the Republic of Guinea remain in effect.

**Notice of Termination of Arrival Restrictions Applicable to All Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the Democratic Republic of the Congo**

Pursuant to 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19 CFR 122.32, and effective as of 11:59 p.m. Eastern Daylight Time on April 29, 2021, for all affected flights arriving at a United States airport, I hereby terminate the arrival restrictions applicable to flights carrying persons who have recently traveled from, or were otherwise present within, the Democratic Republic of the Congo announced in the Arrival Restrictions document published at 86 FR 12534 (March 4, 2021).

ALEJANDRO MAYORKAS

*Secretary,*

*U.S. Department of Homeland Security.*

[Published in the Federal Register, May 3, 2021 (85 FR 23277)]

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

DEACERO S.A.P.I. DE C.V., DEACERO USA, INC., Plaintiffs-Appellants v.  
UNITED STATES, NUCOR CORPORATION, Defendants-Appellees

Appeal No. 2020–1918

Appeal from the United States Court of International Trade in No. 1:17-cv-00183-CRK, Judge Claire R. Kelly.

SEALED OPINION ISSUED: April 13, 2021

PUBLIC OPINION ISSUED: April 30, 2021\*

SONALI DOHALE, Greenberg Traurig, LLP, Washington, DC, argued for plaintiffs-appellants. Also represented by ROSA JEONG, FRANCHINY MANUEL OVALLE.

KELLY A. KRYSZYNIAK, Commercial Litigation Branch, Civil Division, United States Department of Justice, argued for defendant-appellee United States. Also represented by BRIAN M. BOYNTON, JEANNE DAVIDSON, TARA K. HOGAN, KARA WESTERCAMP; LESLIE MAE LEWIS, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, Capitol Heights, MD.

DERICK HOLT, Wiley Rein, LLP, argued for defendant-appellee Nucor Corporation. Also represented by TESSA V. CAPELOTO, DANIEL B. PICKARD, ALAN H. PRICE, MAUREEN E. THORSON.

Before WALLACH, CHEN, and HUGHES, *Circuit Judges*

WALLACH, *Circuit Judge*

Appellants, Deacero S.A.P.I. de C.V. and Deacero USA, Inc. (together, “Deacero”), filed suit against Appellee, the United States (“Government”), in the U.S. Court of International Trade (“CIT”), challenging the U.S. Department of Commerce’s (“Commerce”) final results in the 2014–2015 administrative review of the antidumping (“antidumping” or “AD”) duty order covering carbon and certain alloy steel wire rod from Mexico. *See* Carbon and Certain Alloy Steel Wire Rod from Mexico: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014–2015 (“Final Results”), 82 Fed. Reg. 23,190 (May 22, 2017).<sup>1</sup> Appellee, Nucor Corporation (“Nucor”), participated as a defendant-intervenor. The CIT “sustain[ed] [Commerce’s] determination to apply total facts available with an adverse inference (‘AFA’),” *Deacero I*, 353 F. Supp. 3d at 1306, but remanded to Commerce twice for “further explanation or reconsideration” of “Commerce’s selection of 40.52 [percent] as the

\* This opinion was originally filed under seal and has been unsealed in full.

<sup>1</sup> Deacero S.A.P.I. de C.V. is a Mexican producer and exporter to the United States of the subject merchandise, carbon and certain alloy steel wire rod; Deacero USA, Inc. is its affiliated importer in the United States. J.A. 698; *see Deacero S.A.P.I. de C.V. v. United States (Deacero I)*, 353 F. Supp. 3d 1303, 1305 (Ct. Int’l Trade 2018).

AFA rate,” *id.*; see *Deacero S.A.P.I. de C.V. v. United States (Deacero II)*, 393 F. Supp. 3d 1280, 1281 (Ct. Int’l Trade 2019) (concluding that “Commerce’s [first] [r]emand [r]esults d[id] not comply with the [CIT’s] remand order in *Deacero I* and its decision to apply the 40.52 [percent] AFA-rate to Deacero continues to be unsupported by substantial evidence”); J.A. 1644–60 (First Remand Results). After Commerce placed additional information on the record corroborating the 40.52 percent rate, the CIT sustained Commerce’s second remand results. See *Deacero S.A.P.I. de C.V. v. United States (Deacero III)*, 456 F. Supp. 3d 1263, 1265 (Ct. Int’l Trade 2020); J.A. 68–69 (Judgment), 4960–80 (Second Remand Results).

Deacero appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5). We affirm.

## BACKGROUND

### I. Legal Framework

Antidumping duties may be imposed on “foreign merchandise [that] is being, or is likely to be, sold in the United States at less than its fair value.” 19 U.S.C. § 1673(1).<sup>2</sup> Domestic industries may seek “relief from [such] imports,” *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1368 (Fed. Cir. 2002), by filing a petition with Commerce and the U.S. International Trade Commission (“ITC”) to initiate an antidumping duty investigation, see 19 U.S.C. §§ 1673a(b), 1677(9)(C). Following investigation, if Commerce determines that imported merchandise “is being, or is likely to be, sold in the United States at less than its fair value,” *id.* § 1673(1), and the ITC determines that the importation or sale of that merchandise has “materially injured” or “threaten[s]” to “materially injur[e]” “an industry in the United States,” *id.* § 1673(2), then Commerce will “publish an antidumping duty order . . . direct[ing] [U.S. Customs and Border Protection] to assess . . . antidumping dut[ies]” on subject merchandise, *id.* § 1673e(a)(1). Each year after the order is published, “if [Commerce receives] a request for . . . review” of that order from an interested party, Commerce will “review[] and determine . . . the amount of any antidumping duty” under the order. *Id.* §

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<sup>2</sup> In June 2015, Congress amended the statutes containing the antidumping provisions. See Trade Preferences Extension Act of 2015 (“TPEA”), Pub. L. No. 114–27, §§ 501–07, 129 Stat. 362, 383–87. We review the Final Results in accordance with the TPEA because they issued after the TPEA became effective. See *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1348–52 (Fed. Cir. 2015).



1675(a)(1)(B); see 19 C.F.R. § 351.213(b) (providing for the “[a]dministrative review of orders” on the request of “an interested party”).<sup>3</sup>

In the course of an investigation or review, Commerce “determine[s] the estimated weighted average dumping margin for each exporter and producer individually investigated” and “the estimated all-others rate for all exporters and producers not individually investigated” or reviewed. 19 U.S.C. § 1673d(c)(1)(B)(i); see *id.* § 1677f-1(c) (providing for the “[d]etermination of dumping margin[s]” in investigations and reviews for “a reasonable number of exporters or producers”). A dumping margin reflects the amount by which the “normal value” (the price a producer charges in its home market) exceeds the “export price” (the price of the product in the United States) or “constructed export price.” *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1353 (Fed. Cir. 2010) (footnote omitted) (citing 19 U.S.C. § 1677(35)(A)); see 19 U.S.C. §§ 1677b(a)(1) (defining “normal value” as “the price at which the [merchandise] is first sold . . . for consumption” in the home country or a third country), 1677a(b) (defining “constructed export price” as “the price at which the subject merchandise is first sold . . . in the United States” to “a purchaser not affiliated with the producer or exporter”).

In the course of an investigation or review, if Commerce determines that “necessary information is not available on the record,” 19 U.S.C. § 1677e(a)(1), or “an interested party or any other person . . . withholds information that has been requested by [Commerce],” “fails to provide such information by the deadlines . . . or in the form and manner requested,” “significantly impede[d] a proceeding,” or “provides such information but the information cannot be verified,” *id.* § 1677e(a)(2)(A)–(D), then Commerce “shall, subject to [19 U.S.C. § 1677m(d)], use facts otherwise available” in making its determination, *id.* § 1677e(a); see 19 C.F.R. § 351.308(a) (similar); see also 19 U.S.C. § 1677m(d) (providing that if Commerce “determines that a response to a request for information . . . does not comply with the request,” Commerce “shall promptly inform” the respondent “of the deficiency and shall, to the extent practicable, provide that [respondent] with an opportunity to remedy or explain the deficiency”).

Further, if Commerce “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information,” then Commerce “may use an inference that is adverse to the interests of that party in selecting from among the

<sup>3</sup> An “interested party” includes: “a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise”; “the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported”; and “a manufacturer, producer, or wholesaler in the United States of a domestic like product.” 19 U.S.C. § 1677(9)(A)–(C).

facts otherwise available.” 19 U.S.C. § 1677e(b)(1)(A). In making this determination, Commerce may consider “information derived from”: “the petition,” the “final determination in the investigation,” “any previous [administrative] review,” or “any other information placed on the record.” 19 U.S.C. § 1677e(b)(2). When Commerce “relies on secondary information rather than on information obtained in the course of an investigation or review,” it “shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal.” 19 U.S.C. § 1677e(c)(1); *see Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1338 (Fed. Cir. 2016) (“Secondary information does not include information obtained from the subject [review], which is known as ‘primary information.’”).

## II. Procedural History

### A. The Investigation and AD Duty Order

In August 2001, three domestic producers (“Petitioners”) petitioned Commerce, “alleg[ing] that imports of carbon and certain alloy steel wire rod” from Mexico, were being, or were likely to be “sold in the United States at less than fair value” and “that such imports [were] materially injuring, or [were] threatening to materially injure, an industry in the United States.” Notice of Initiation of Antidumping Duty Investigations: Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Ukraine, and Venezuela (“Investigation Initiation Notice”), 66 Fed. Reg. 50,164, 50,164 (Oct. 2, 2001); *see* J.A. 1695–1759 (Petition). Petitioners alleged that “[p]ricing and cost information available to [P]etitioners confirm[ed] that carbon and certain steel wire rod . . . from Mexico [wa]s being sold, or offered for sale, in the United States at less than fair value.” J.A. 1698. Following the Petition, the Petitioners submitted various supporting documents and research (“the Petition Supplements”) to support their dumping allegations. J.A. 1695–1759 (Supplement 1.A), 1760–67 (Supplement 1.B), 1768–1855 (Supplement 1.C), 1856–1919 (Supplement 1.D), 1920–21 (Supplement 1.E), 1922–23 (Supplement 1.F). “Where the [P]etitioners obtained data from foreign market research, [Commerce] contacted the researchers to establish their credentials and to confirm the validity of the information being provided.” Investigation Initiation Notice, 66 Fed. Reg. at 50,165.

Based on the Petition, Commerce calculated a potential dumping margin of 29.63 to 40.52 percent for Mexican producers. *Id.*; *see id.* (“The sources of data for the deductions and adjustments relating to home market price, U.S. price, constructed value . . . and factors of production . . . are detailed in the Initiation Checklist.”). Commerce

concluded that the “country-wide import statistics for the anticipated period of investigation . . . and price quotes based on market research used to calculate the estimated margin[] for [Mexico] [were] sufficient for purposes of initiation,” and, in October 2001, initiated an anti-dumping duty investigation. *Id.* at 50,164–65.

In October 2002, following affirmative determinations of less-than-fair-value imports from Mexico and resulting material injury to domestic industries, Commerce issued an antidumping duty order on carbon and certain alloy steel wire rod from Mexico. Notice of Anti-dumping Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine (“AD Order”), 67 Fed. Reg. 65,945, 65,946 (Oct. 29, 2002). The AD Order covers “certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.” *Id.* Deacero was not individually investigated. *See generally id.* at 65,945–47.

In 2011, Commerce determined that Deacero had circumvented the AD Order by importing into the United States “steel wire rod within a diameter of 4.75 mm, 0.25 mm smaller than the steel wire rod subject to the duty order.” *Deacero S.A. de C.V. v. United States*, 817 F.3d 1332, 1335 (Fed. Cir. 2016); *see id.* at 1339 (sustaining Commerce’s “minor alteration anti-circumvention affirmative determination” against Deacero as “in accordance with law and supported by substantial evidence”); *see also* Carbon and Certain Alloy Steel Wire Rod from Mexico: Affirmative Final Determination of Circumvention of the [AD] Order (“Circumvention Determination”), 77 Fed. Reg. 59,892, 59,892 (Oct. 1, 2012) (concluding that Deacero made “shipments of wire rod with an actual diameter of 4.75 mm to 5.00 mm . . . constitut[ing] merchandise altered in form or appearance in such minor respects that it should be included within the scope of the [AD] [O]rder”). Deacero’s imports were then subject to the all others rate under the AD Order, 20.11 percent. *See Deacero*, 817 F.3d at 1335; Circumvention Determination, 77 Fed. Reg. at 59,893. Thereafter, Deacero was a mandatory respondent in the 2010–2011, 2012–2013, and 2013–2014 administrative reviews. *See* Carbon and Certain Alloy Steel Wire Rod From Mexico: Final Results of Antidumping Duty Administrative Review; 2010–2011, 78 Fed. Reg. 28,190, 28,191 (May 14, 2013) (calculating a margin of 12.08 percent for Deacero, as the sole mandatory respondent, for the period October 1, 2010, through September 30, 2011); Carbon and Certain Alloy Steel Wire Rod From Mexico: Final Results of Antidumping Duty Administrative Review; 2012–2013, 80 Fed. Reg. 27,147, 27,148 (May 12, 2015) (calculating a

margin of 2.13 percent for Deacero, as the sole mandatory respondent, for the period October 1, 2012, through September 30, 2013); Carbon and Certain Alloy Steel Wire Rod From Mexico: Final Results of Antidumping Duty Administrative Review; 2013–2014, 81 Fed. Reg. 31,592, 31,593 (May 19, 2016) (calculating a margin of 1.54 percent for Deacero, as one of two mandatory respondents, for the period October 1, 2013, through September 30, 2014).

#### B. The 2014–2015 Administrative Review

In November 2015, both Nucor and Deacero requested administrative review of Deacero's AD duty rate. J.A. 695–96; *see* J.A. 695–708 (Preliminary I&D Mem.); *see also* 19 U.S.C. § 1675(a)(1); 19 C.F.R. § 351.213. Commerce then initiated an administrative review, covering the period of review (“POR”) of October 1, 2014, through September 30, 2015. Initiation of Antidumping and Countervailing Duty Administrative Reviews, 80 Fed. Reg. 75,657, 75,658 (Dec. 3, 2015). Commerce selected Deacero S.A.P.I. de C.V. and one other company as mandatory respondents. *Id.*; *see* J.A. 695.<sup>4</sup> Having petitioned for the review, Nucor participated as an interested party. J.A. 1029; *see* J.A. 1029–42 (Final I&D Mem.).

In December 2015, Commerce issued Deacero its initial questionnaire, instructing Deacero to report its cost of production and constructed value figures based on the “actual costs incurred by [Deacero] during the [POR], as recorded under [Deacero's] normal accounting system.” J.A. 89; *see* J.A. 85–90 (AD Duty Questionnaire). Commerce explained that if Deacero's cost accounting system was based upon “standard or budgeted costs” or planned production, Deacero should provide cost variance information. J.A. 90.

In January and February 2016, Deacero submitted responses to all five sections. J.A. 91 (Excerpt from Deacero's Section A Response), 93–114 (Excerpts from Deacero's Section B and C Responses), 115–56 (Excerpts from Deacero's Section D and E Responses). In its Section D response, Deacero stated that it had “reported [its] cost of manufacture . . . based on the actual costs incurred during the POR as recorded in its accounting system, with certain revisions . . . described fully” in its response, “to meet [Commerce's] cost reporting requirements.” J.A. 117. Deacero indicated that it had not submitted any cost variance information because “Deacero's cost accounting system [was] based on actual costs, not standard or budgeted costs.” J.A. 148.

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<sup>4</sup> Commerce subsequently determined that this second respondent did not have any shipments into the United States of subject merchandise during the relevant POR and, therefore, did not calculate its separate rate. J.A. 695–96.

Deacero confirmed that its “reported costs reflect the actual costs incurred and recorded by Deacero in its normal cost accounting system.” J.A. 149; *see* J.A. 150–51 (explaining that Deacero’s calculated cost for steel scrap input was “calculated based on Deacero’s actual processing yield on a diameter-specific basis during the POR”).<sup>5</sup>

In June 2016, Commerce issued Deacero a supplemental questionnaire, requesting additional information about Deacero’s production process, accounting system, and reporting of its home market and U.S. sales. J.A. 157; J.A. 157–63 (Supplemental Questionnaire). Deacero responded to the supplemental questionnaire. J.A. 164; *see* J.A. 164–665 (Deacero’s First Supplemental Response). However, in addition to responding to Commerce’s questions, Deacero also submitted, unsolicited, a revised Section D cost of production database, J.A. 164–68. Deacero summarily explained that it had made “minor corrections to [its] sales and cost databases,” including “correct[ing] the assignment of steel scrap costs to each grade of billet produced during the POR.” J.A. 167.

On September 29, 2016, Nucor submitted to Commerce deficiency comments concerning Deacero’s revised cost of production database. J.A. 671; *see* J.A. 671–78 (Deficiency Comments). Nucor asserted that the changes Deacero made to its revised cost of production database resulted in “significant changes” to Deacero’s reported costs “without any explanation.” J.A. 672. Nucor argued that, because the changes concerned the product identification and control number (“CONNUM”) that “represented [the vast majority] of Deacero’s U.S. sales during the POR,” and because those changes indicated that billet costs for that CONNUM substantially decreased Deacero’s original cost of production database, these changes would result in a significant reduction in Deacero’s total cost of manufacturing and, therefore, “Deacero’s overall dumping margin.” J.A. 672–73. Nucor requested that, “given the proximity of [Commerce’s] preliminary results,” Commerce “immediately issue another supplemental questionnaire to clarify [the] issues [presented]” by Deacero’s revised cost of production database. J.A. 672.

On November 7, 2016, Commerce issued Deacero a post-preliminary supplemental questionnaire. J.A. 718; *see* J.A. 718–20 (Post-Preliminary Supplemental Questionnaire). Commerce requested that Deacero “provide a detailed explanation of billet cost

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<sup>5</sup> Deacero reported its cost for production of billet (the alloyed, but unshaped steel from which wire rod is subsequently produced), based on its “consumption costs” for “steel scrap,” J.A. 127, and “[a]dditions, such as ferroalloys and carbon, . . . used to produce the desired grade of steel,” J.A. 128; *see* J.A. 128 (explaining that “Deacero converts billet into wire rod in its rolling mills” and that “[a]dditional direct materials are not consumed at [the rolling] stage [of production]”).

changes during the POR and how such changes [were] reflected in [Deacero's revised] questionnaire response," and, more specifically, that Deacero "[e]xplain fully" the "decrease[] in cost in [its] cost database" for its main U.S. sales CONNUM and "provide a revised . . . cost buildup" for that CONNUM. J.A. 720. On November 16, 2016, Commerce published its preliminary results, calculating a 17.02 percent AD margin for Deacero, based on Deacero's revised Section D database. *Deacero I*, 353 F. Supp. 3d at 1306; J.A. 707, 709–17; see *Carbon and Certain Alloy Steel Wire Rod From Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2014–2015*, 81 Fed. Reg. 80,638, 80,639 (Nov. 16, 2016); J.A. 709 (Preliminary I&D Mem., dated Nov. 3, 2016). *Certain Alloy Steel Wire Rod From Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2014–2015*, 81 Fed. Reg. 80,638, 80,639 (Nov. 16, 2016); J.A. 709 (Preliminary I&D Mem., dated Nov. 3, 2016). *Certain Alloy Steel Wire Rod From Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2014–2015*, 81 Fed. Reg. 80,638, 80,639 (Nov. 16, 2016); J.A. 709 (Preliminary I&D Mem., dated Nov. 3, 2016).<sup>6</sup>

On November 25, 2016, Deacero proffered its response to Commerce. J.A. 912; see J.A. 912–26 (Deacero's Second Supplemental Response). Deacero alleged that "[t]he main reason for the decrease in the cost of production [for Deacero's primary U.S. export CONNUM] [wa]s that Deacero [had] corrected the allocation of costs for billet production." J.A. 914. Deacero explained that, "[i]n [its] original Section D response, Deacero [had] allocated billet costs based on planned production" and had "failed to take billet reclassifications into account." J.A. 914; see J.A. 914 (explaining that where Deacero "finds that the output of a particular production run fails to meet the specifications of the billet product Deacero planned to produce, [Deacero] reclassifies the billet to a product code for which the specifications are met"). In its revised cost of production database, Deacero had "allocated billet costs to the billet products actually produced." J.A. 914. Deacero further alleged that, "[u]nder [its] original allocation . . . steel scrap costs assigned to some billet product codes were overstated, while" others were "understated," and that Deacero's revised cost of production database corrected these errors because its "steel scrap costs are now based on actual—not planned—production." J.A. 915; see J.A. 915 (explaining that "Deacero corrected the allocation of steel scrap costs to take billet reclassifications into account").

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<sup>6</sup> Deacero asserts that this rate should have been 3.65 percent, "based on Deacero's calculations," with the correction of "several minor clerical errors" made by Commerce in the Preliminary Results. Appellant's Br. 9, 9 n.2.



In May 2017, Commerce issued its Final Results. 82 Fed. Reg. at 23,190; *see* J.A. 1029–42 (Final I&D Mem.). Commerce applied AFA to Deacero “and assigned . . . the highest margin alleged in the [P]etition, i.e., 40.52 percent, as Deacero’s AFA rate.” Final Results, 82 Fed. Reg. at 23,190. Commerce found that Deacero had “stated in its initial questionnaire response that it [had] based its [S]ection D database on actual costs,” and that “in its supplemental questionnaire response, Deacero [had] submitted an unsolicited and revised [S]ection D database stating that it [had] made ‘minor corrections’ to account for revisions to the allocation of billet costs.” J.A. 1032; *see* J.A. 1031 (noting that “[o]ther than stating that [Deacero] had ‘corrected the assignment of steel scrap costs to each grade of billet produced during the POR,’ Deacero did not explain these significant changes in the first supplemental questionnaire response” (quoting J.A. 167)). Commerce further found that Deacero did not, until its “post-preliminary questionnaire response,” state that “its reporting of the costs in [its] initial [S]ection D database reflected ‘planned production’ while the reporting of steel scrap costs in the revised [S]ection D database reflected ‘actual production.’” J.A. 1032 (quoting J.A. 915). Commerce determined that, contrary to Deacero’s statements, the revised Section D database “significantly and disproportionately changed the billet costs associated with the CONNUM comprising the vast majority of Deacero’s U.S. sales of subject merchandise during the POR.” J.A. 1032.

Commerce concluded that recourse to facts otherwise available “w[as] appropriate under [19 U.S.C. §§ 1677e(a)(2)(A), (B), (C)].” J.A. 1033. Commerce explained that this was appropriate because Deacero had “mischaracterized the nature of its [revised Section D database],” “withheld critical information from [Commerce]” when it submitted the revised database by representing that the changes were “minor,” and, despite further “opportunity to explain the revisions,” “Deacero’s response” remained “not satisfactory.” J.A. 1033; *see* J.A. 1033 (noting that “in [its] post-preliminary attempt to explain the significant and unsolicited changes made to its first [Section D] database,” Deacero had “provided an explanation of its allocation methodology that” was both new and contrary to its prior statements). Commerce concluded that it was “unable to use the [revised] cost information . . . because [it was] unable to determine whether the reallocation of the billet cost information [wa]s reliable,” and further, that it “h[ad] no confidence in either the originally submitted cost information or the reallocation of the costs” and, therefore, could not

“rely on Deacero’s reported cost information, and without reliable cost information, [was] unable to calculate a margin for Deacero.” J.A. 1034.

Commerce further concluded that use of an adverse inference in selecting from facts otherwise available was appropriate under 19 U.S.C. § 1677e(b)(1). J.A. 1034. Commerce explained that this was appropriate because Deacero’s “significant failings” during the review established that “Deacero ha[d] failed to act to the best of its ability to comply with [Commerce’s] request for information.” J.A. 1034. Specifically, while Deacero was an experienced company that had “participated as a mandatory respondent in prior administrative reviews,” and therefore “is knowledgeable of the process and understands what is required to be prepared to participate and provide complete and reliable responses in an antidumping duty administrative review,” J.A. 1032, it had failed to do so, J.A. 1034 (finding that Deacero’s submission of “an unsolicited second [Section D] database in a supplemental response prior to the Preliminary Results in which it made significant and unexplained revisions to reported billet costs,” “amount[ed] to withholding of information, failure to submit information by the deadline for submission, and significantly impeding the proceeding,” and that, despite opportunity to correct the situation, “Deacero [had] not provide[d] an adequate explanation of its [cost of production] revisions, supported by record evidence”).

Commerce selected the highest margin alleged in the Petition, 40.52 percent, as Deacero’s AFA rate. J.A. 1034; *see* J.A. 1034 (explaining that Commerce’s practice is to select the higher of “(a) [the] highest margin alleged in the petition, or (b) the highest weighted-average calculated rate for any respondent in the investigation”). Commerce relied on its prior “pre-initiation [of investigation] analysis of the adequacy and accuracy of the information in the [P]etition” to corroborate the selected rate. J.A. 1035; *see* 19 U.S.C. § 1677e(c) (providing that, when Commerce “relies on secondary information rather than on information obtained in the course of an investigation or review,” it “shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal”); J.A. 1035 (explaining that, when deciding whether to initiate its investigation, Commerce had “examined information from various independent sources provided either in the petition” or in Petitioners’ responses to Commerce’s requests, “which corroborated key elements” of the relevant calculations).



### C. Proceedings Before the CIT

Deacero filed suit against the Government in the CIT, challenging the Final Results as unsupported by substantial evidence and contrary to law. *Deacero I*, 353 F. Supp. 3d at 1307, 1310. The CIT sustained “Commerce’s determination to apply total facts available with an adverse inference” against Deacero as “supported by substantial evidence,” *id.* at 1306–07, while remanding for further explanation or reconsideration on the issue of Commerce’s selection of 40.52 percent, from the 2001 petition, as Deacero’s AFA rate, *id.* at 1314. The CIT explained that, while Commerce was required to corroborate its selected AFA rate, it had “not place[d] any corroborating information on the record.” *Id.*; *see id.* (“Here, although Commerce purports to rely upon information it obtained during the initiation of the investigation, namely a pre-initiation analysis memorandum and documentation supporting the calculations in the petition, that information has not been placed on the record of this proceeding.”). The CIT explained that “[t]o the extent practicable, at a bare minimum,” Commerce must “produce the documents it relied upon to analyze why the chosen rate is probative.” *Id.*; *see* 19 U.S.C. § 1677e(c)(1) (requiring that Commerce corroborate “to the extent practicable”).

“In accordance with [*Deacero I*], Commerce . . . provided additional information and explanation to corroborate the total [AFA] margin applied to Deacero.” J.A. 1644. Specifically, Commerce supplemented the administrative record with a copy of the Initiation Notice and “the public version of the accompanying . . . Initiation Checklist[.]” J.A. 1649. Commerce explained that the Initiation Notice and checklist “evince our pre-initiation examination of the independent information provided in the Petition, including the information used to calculate [normal value] and [export price] in the [P]etition” and its “determination that such information had probative value and was a reasonable basis for initiating an investigation,” such that the documents “corroborate[d] the 40.52 percent AFA rate applied to Deacero[.]” J.A. 1657.

The CIT remanded again, concluding that Commerce’s First Remand Results “d[id] not comply with the [CIT’s] remand order in *Deacero I* and [Commerce’s] decision to apply the 40.52 [percent] AFA-rate to Deacero continue[d] to be unsupported by substantial evidence.” *Deacero II*, 393 F. Supp. 3d at 1281. The CIT noted that, while Commerce had supplemented the record, it “[ha]d not rel[ie]d upon” the documents presented “to corroborate Deacero’s rate,” as the documents only summarized Commerce’s previous conclusions. *Id.* at 1285; *see id.* at 1286 (explaining that “[Commerce’s] pre-initiation analysis itself is not an independent source”). The CIT explained that

“[i]f the obligation to demonstrate the probative value of a rate is to have any meaning, Commerce must do more than refer to conclusions of calculations it carried out previously.” *Id.* at 1286.<sup>7</sup>

“Based on the CIT’s holding in *Deacero II*,” Commerce “placed on the record . . . the information . . . that was used to corroborate the petition margin that” served as the basis for Deacero’s AFA rate. J.A. 4964; *see* J.A. 1692–94 (Mem. re Placement of Factual Information on Record of Remand) (adding the Petition, various supporting documents, and Deacero’s records from the 2013–2014 review, with opportunity for “interested parties to place rebuttal factual information” on the record). Specifically, Commerce placed on the record “the business proprietary and public versions of the Petition and Petition Supplements, and various memoranda on which Commerce relied to corroborate [Deacero’s] 40.52 [percent] margin.” J.A. 4961; *see* J.A. 1695–1759 (Supplement 1.A), 1760–67 (Supplement 1.B) 1768–1855 (Supplement 1.C), 1856–1919 (Supplement 1.D), 1920–21 (Supplement 1.E), 1922–23 (Supplement 1.F). Commerce explained that these documents “constitute the independent sources of information . . . that Commerce relied upon to derive the [AFA] margin” assigned to Deacero. J.A. 4965. Commerce also placed on the record “the margin calculations for Deacero” in connection with the prior, 2013–2014 review and “a summary spreadsheet that identifies individual transactions from that review with margins” for individual transactions “in the range of or exceed[ing] the 40.52 [percent] petition margin” assigned to Deacero in the Final Results, “to further demonstrate that the petition margin has probative value [for] Deacero in the 2014–2015 review.” J.A. 4965–66. The CIT sustained Commerce’s selection of a 40.52 percent margin, based on this additional corroboration, as “reasonable on th[e] record” and “comport[ing] with the [CIT’s] order.” *Deacero III*, 456 F. Supp. 3d at 1272.

## DISCUSSION

Deacero argues, first, that “Commerce’s decision to apply AFA to Deacero is unsupported by substantial evidence,” Appellants’ Br. 30 (capitalization normalized); and, second, that “Commerce’s selection of a 40.52 [percent] AFA rate is unsupported by substantial evidence,” *id.* at 41 (capitalization normalized). We address each argument in turn.

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<sup>7</sup> The CIT also denied Deacero’s request to provide express “instructions to Commerce to abandon its chosen 40.52 [percent] AFA-rate.” *Id.* at 1287.

## I. Standard of Review

We “apply . . . the same standard” of review as the CIT, *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1373 (Fed. Cir. 2015) (internal quotation marks and citation omitted), upholding Commerce’s determinations if they are supported “by substantial evidence on the record” and otherwise “in accordance with law,” 19 U.S.C. § 1516a(b)(1)(B)(i). “Although we review the decisions of the CIT de novo, we give great weight to the informed opinion of the CIT and it is nearly always the starting point of our analysis.” *Nan Ya Plastics*, 810 F.3d at 1341 (internal quotation marks, alterations, and citation omitted).

We review Commerce’s “statutory interpretations as to the appropriate methodology” under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379 (Fed. Cir. 2001). If “Congress has directly spoken to the precise question at issue,” then “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842–43. “In order to determine whether a statute clearly shows the intent of Congress[,] . . . we employ traditional tools of statutory construction and examine the statute’s text, structure, and legislative history, and apply the relevant canons of interpretation.” *Kyocera Solar, Inc. v. U.S. Int’l Trade Comm’n*, 844 F.3d 1334, 1338 (Fed. Cir. 2016) (internal quotation marks and citations omitted). If, however, “the statute is silent or ambiguous with respect to the specific issue,” we evaluate whether Commerce’s interpretation is reasonable. *Chevron*, 467 U.S. at 843. The agency’s construction need not be the only reasonable interpretation or even the most reasonable interpretation. See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

We review Commerce’s findings of fact for substantial evidence. See *SolarWorld Ams., Inc. v. United States*, 910 F.3d 1216, 1222 (Fed. Cir. 2018). Substantial evidence is “more than a mere scintilla”; it is such “evidence that a reasonable mind might accept as adequate to support a conclusion.” *Downhole Pipe*, 776 F.3d at 1374 (internal quotation marks and citations omitted). “We look to the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.” *SolarWorld*, 910 F.3d at 1222 (internal quotation marks and citation omitted).

## II. Adverse Facts Available

### A. Legal Standard

In the course of an investigation or review, “the burden of creating an adequate record lies with interested parties.” *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (internal quotation marks, alterations, and citation omitted). If Commerce determines that “necessary information is not available on the record” or “an interested party or any other person . . . withholds information that has been requested by [Commerce],” “fails to provide such information by the deadlines . . . or in the form and manner requested,” “significantly impedes a proceeding,” or “provides such information but the information cannot be verified,” then Commerce is permitted to use “facts otherwise available” in making its determinations. 19 U.S.C. § 1677e(a); see 19 C.F.R. § 351.308 (providing for “[d]eterminations on the basis of facts available”). Commerce uses “facts otherwise available” to “fill in . . . gaps” in the administrative record. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003).

Further, if an interested party “fail[s] to cooperate by not acting to the best of its ability to comply with a request for information,” then Commerce “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available,” commonly referred to as AFA. 19 U.S.C. § 1677e(b); see 19 C.F.R. § 351.308 (similar). Because Commerce “has no subpoena power,” *Nan Ya Plastics*, 810 F.3d at 1338, AFA is “an essential investigative tool” in AD proceedings, Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (“SAA”), H.R. REP. NO. 103–316, at 868 (1994).<sup>8</sup> To avoid AFA, “interested parties” must “cooperate . . . to the best of [their] ability,” 19 U.S.C. § 1677e(b), meaning they must “do the maximum [they are] able to do,” *Nippon Steel*, 337 F.3d at 1382. This standard “does not require perfection and recognizes that mistakes sometimes occur[.]” *Id.* However, “it does not condone inattentiveness, carelessness, or inadequate record keeping.” *Id.*; see *id.* at 1383 (explaining that, “[w]hile intentional conduct, such as deliberate concealment or inaccurate reporting,” may show “a failure to cooperate, the statute does not contain an intent element”).

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<sup>8</sup> The SAA is “an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [enacting legislation] in any judicial proceeding in which a question arises concerning such interpretation or application.” 19 U.S.C. § 3512(d).

## B. Commerce's Decision to Apply AFA is Supported by Substantial Evidence and Otherwise in Accordance with Law

In its Final Results, Commerce concluded that, in setting Deacero's antidumping duty margin, recourse to facts otherwise available "w[as] appropriate under [19 U.S.C. §§ 1677e(a)(2)(A), (B), (C)]," and further, that use of an adverse inference in selecting from facts otherwise available was appropriate under 19 U.S.C. § 1677e(b)(1), given Deacero's "significant failings" in responding to Commerce's requests for information during the administrative review. J.A. 1033–34. The CIT sustained "Commerce's determination to apply total facts available with an adverse inference" against Deacero as "supported by substantial evidence." *Deacero I*, 353 F. Supp. 3d at 1306–07. On appeal, Deacero argues that "Commerce's decision to apply AFA to Deacero is unsupported by substantial evidence[.]" Appellants' Br. 30. Deacero asserts that recourse to AFA was unwarranted because "Deacero provided complete, accurate, and timely information." *Id.* (capitalization normalized). We disagree with Deacero.

First, Commerce's recourse to facts otherwise available under 19 U.S.C. § 1677e(a) is supported by substantial evidence. Specifically, Commerce found that Deacero had "mischaracterized the nature of its [revised Section D database]," and, further, that Deacero "withheld critical information from [Commerce]," when it submitted the revised database by representing that the changes were "minor." J.A. 1033; *see* J.A. 166. Commerce explained that the changes were not "minor," but rather "significant." J.A. 1032; *see* J.A. 1032 (explaining that the revised Section D database "significantly and disproportionately changed the billet costs associated with the CONNUM comprising the vast majority of Deacero's U.S. sales of subject merchandise during the POR"). Commerce further found that, despite "opportunity to explain the revisions," "Deacero's response" remained "[un]satisfactory." J.A. 1033; *see* J.A. 117 (Deacero representing that it had "reported [its] cost of manufacture . . . based on the actual costs"), 166 (Deacero representing that it had made "minor corrections to [its] sales and cost databases"), 914 (Deacero representing that "[i]n [its] original Section D response, Deacero [had] allocated billet costs based on planned production" not "actual costs"). Commerce concluded that it could not "rely on Deacero's reported cost information," because it "h[ad] no confidence in either the originally submitted cost information or the reallocation of the costs." J.A. 1034; *see* J.A. 1033 (noting that Deacero had never otherwise raised the "planned" versus "actual cost" accounting system in any of its prior submissions in this or any other segment under the AD Order), 1033–34 (noting that Deacero had yet to produce any records to support or clarify its "planned"

versus “actual cost” explanation). Deacero, therefore, “with[held] [requested] information,” “fail[ed] to provide [necessary] information by the deadlines for submission of the information,” and, thereby, “significantly impede[d]” the administrative review, such that Commerce properly “use[d] facts otherwise available.” 19 U.S.C. §§ 1677e(a)(2)(A), (B), (C); see *Ad Hoc Shrimp*, 802 F.3d at 1355 (concluding that Commerce’s use of facts otherwise available was supported by substantial evidence where the respondent’s “withholding of information and its repeated misrepresentations rendered the company’s submissions unreliable”). Accordingly, Commerce’s recourse to facts otherwise available is supported by substantial evidence.

Second, Commerce’s determination to use an adverse inference under 19 U.S.C. § 1677e(b) in selecting from facts otherwise available is supported by substantial evidence. Specifically, Commerce used an adverse inference because Deacero’s “significant failings” during the review established that “Deacero ha[d] failed to act to the best of its ability to comply with [Commerce’s] request for information[.]” J.A. 1034. Commerce explained that, while Deacero had “participated as a mandatory respondent in prior administrative reviews,” and therefore “is knowledgeable of the process and understands what is required . . . in an [AD] administrative review,” J.A. 1032, it had failed to do so, J.A. 1033–34. Rather, Deacero had “mischaracterized the nature” of its revised Section D database, “misrepresented the magnitude of the changes made to [that] database,” and “withheld critical information from Commerce,” by representing that its revised Section D database presented only “minor corrections” to its original Section D database. J.A. 1032–33. Compare J.A. 167 (Deacero representing that its revised Section D database made “minor corrections to [its] sales and cost databases”), with J.A. 1032 (Commerce finding that Deacero’s revised Section D database “significantly and disproportionately changed the billet costs associated with the CONNUM comprising the vast majority of Deacero’s U.S. sales of subject merchandise during the POR”). Further, despite being given an opportunity to explain and correct the situation, J.A. 718–20, “Deacero [did] not provide an adequate explanation of its [cost of production] revisions, supported by record evidence,” J.A. 1034; see J.A. 1033–34 (noting that Deacero had failed to produce any records to support or clarify its “planned” versus “actual cost” explanation). Whether through active misrepresentation or “inadequate record keeping,” Deacero failed to “act to ‘the best of its ability’”—it did not “do the maximum it [wa]s able to do”—in responding to Commerce’s request for information, and was therefore uncooperative. *Nippon Steel*, 337 F.3d at 1382–83



(quoting 19 U.S.C. § 1677e(b)(1)); see SAA, H.R. REP. NO. 103–316, at 870 (“A party is uncooperative if it has not acted to the best of its ability to comply with requests for necessary information.”). Accordingly, Commerce’s decision to apply AFA to Deacero, based on Deacero’s, at best, inconsistent representations, and failure to timely explain and meaningfully support those representations, is supported by substantial evidence.

Deacero’s counterarguments are unpersuasive. First, Deacero asserts that “Commerce’s determination to apply AFA” relies on “a mischaracterization of Deacero’s submissions and responses.” Appellants’ Br. 22. Deacero argues that “[t]he record demonstrates [it] acted exactly as a cooperative respondent should” and, therefore, Commerce’s determination that Deacero failed to cooperate to the best of its ability “is unsupported by substantial evidence on the record.” *Id.*; see *id.* at 34 (arguing that “[t]he fact that Deacero did not provide information [to explain its revised Section D database] prior to being asked by Commerce does not evince a flaw in the data or lack of cooperation”). This argument is without merit. Even if Deacero’s alternative interpretation of the record was within the scope of our review, see *SolarWorld*, 910 F.3d at 1222 (“Commerce’s finding may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence.” (internal quotation marks and citation omitted)), the record belies Deacero’s argument, J.A. 1032–34. Indeed, Deacero’s conduct “points to why the use of an adverse inference is a useful tool in antidumping determinations.” *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1307 (Fed. Cir. 2014). An adverse inference is appropriate not only when an interested party fails to respond, but also where “it is reasonable for Commerce to expect that more forthcoming responses should have been made.” *Nippon Steel*, 337 F.3d at 1383. Cost of production data “is a fundamental element in the [anti]dumping analysis, and it is standard procedure for Commerce to request” such data. *Mukand*, 767 F.3d at 1307; see 19 U.S.C. § 1677b(b)(2)(A)(i) (providing that, in an AD investigation or review, Commerce “shall request information necessary to calculate the constructed value and cost of production” to determine whether “sales of the foreign like product have been made at prices that represent less than the cost of production of the product”). “It was thus reasonable for Commerce to expect . . . more accurate,” transparent, “and responsive answers” from Deacero, and to conclude that Deacero was an uncooperative respondent when it failed to provide such answers. *Mukand*, 767 F.3d at 1307.

Second, Deacero asserts that “Commerce abused its discretion and acted contrary to law when it refused to consider Deacero’s corrected

cost database.” Appellants’ Br. 32. Deacero argues that “when a respondent seeks to correct an error prior to the final results,” Commerce must “analyze the new information,” *id.* at 31 (citing *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006)), and that, “if there were any deficiencies with [Deacero’s] submission, Commerce failed to follow its statutory obligation to promptly notify Deacero of the ‘nature of the deficiency,’” *id.* at 33 (quoting 19 U.S.C. § 1677m(d)). This argument is without merit. It is premised on a misreading of Commerce’s determination. Commerce did not refuse to consider Deacero’s revised Section D database; it declined to rely on that database because it found it unreliable. J.A. 1033–34. While “Commerce is free to correct any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an anti-dumping duty determination,” it is incumbent on the importer to “seek[] correction before Commerce issues its final results and adequately prove[] the need for the requested corrections.” *Timken*, 434 F.3d at 1353. Deacero did not adequately explain the need for its requested corrections. J.A. 1033.

Contrary to its arguments here, Deacero’s “significant failing” was not that it submitted corrected information; rather, it was that Deacero failed to timely notify Commerce of the nature and import of those corrections, and failed to adequately explain the corrections when given the opportunity to do so. J.A. 1033–34. After receiving Deacero’s unsolicited, revised Section D database, Commerce “promptly inform[ed]” Deacero “of the nature of [its] deficienc[ies]” and provided Deacero “with an opportunity to remedy or explain th[ose] deficienc[ies],” through its post-preliminary supplemental questionnaire. 19 U.S.C. § 1677m(d); *see* J.A. 718–20. Commerce found that “Deacero’s response to [that] questionnaire” was “not satisfactory,” J.A. 1033; *see* J.A. 912–26, and that Deacero had not acted to the best of its ability in providing its response, J.A. 1033–34. Commerce, therefore, acted within its discretion when it declined to use Deacero’s revised Section D database. *See* 19 U.S.C. § 1677m(d)(1), (e)(4) (providing that, where Commerce “finds that [a] response [to a deficiency notice] is not satisfactory,” Commerce may “disregard all or part of the original and subsequent responses” unless, *inter alia*, “the interested party has demonstrated that it acted to the best of its ability in providing the information”). Accordingly, Commerce’s decision to apply AFA in the selection of Deacero’s AD duty rate is supported by substantial evidence and otherwise in accordance with law.



### III. Corroboration

#### A. Legal Standard

In selecting from adverse facts available, Commerce may use “information derived from” the following: “the petition,” the “final determination in the investigation,” “any previous [administrative] review,” or “any other information placed on the record.” 19 U.S.C. § 1677e(b)(2); *accord* SAA, H.R. REP. NO. 103–316, at 870; *see Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (providing that, “in the case of uncooperative respondents,” Commerce has discretion to “select from a list of secondary sources as a basis for its adverse inferences”). When Commerce “relies on secondary information rather than on information obtained in the course of an investigation or review,” it “shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal.” 19 U.S.C. § 1677e(c); *see Nan Ya Plastics*, 810 F.3d at 1338 (“Secondary information does not include information obtained from the subject [review], which is known as ‘primary information.’”). “Corroborate means that [Commerce] will examine whether the secondary information to be used has probative value.” 19 C.F.R. § 351.308(d); *see* SAA, H.R. REP. NO. 103–316, at 870 (providing that, before Commerce may use “secondary information” in calculating a duty rate, it must establish that the information “has probative value”). “Independent sources may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review.” 19 C.F.R. § 351.308(d). A source’s “independence” is a question of “the nature of the information, not . . . whether the source of the information was referenced in or included with the petition” or an interested party’s submission. *KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010).

#### B. Commerce’s Selection and Corroboration of Deacero’s AFA Rate Is Supported by Substantial Evidence and Otherwise in Accordance with Law

In its Final Results, Commerce “selected the highest margin alleged in the [P]etition,” 40.52 percent, “as Deacero’s AFA rate[.]” J.A. 1034. Commerce explained that it “relied on [its] pre-initiation analysis of the adequacy and accuracy of the information in the petition” to corroborate the rate. J.A. 1035. Following two remands, *see Deacero I*, 353 F. Supp. 3d at 1314; *Deacero II*, 393 F. Supp. 3d at 1281, Commerce placed on the record the Petition Supplements as “the independent sources of information . . . Commerce [had] relied upon to

derive the margin” assigned to Deacero, J.A. 4965; *see* J.A. 4961. Commerce also placed on the record transaction-specific “margin calculations for Deacero” from the 2013–2014 review, that were in “the range of or exceed[ed] . . . 40.52 [percent].” J.A. 4965–66. The CIT sustained Commerce’s selection of a 40.52 percent margin as “reasonable on th[e] record[.]” *Deacero III*, 456 F. Supp. 3d at 1272. Deacero asserts that “Commerce’s selection of a 40.52 [percent] AFA rate is unsupported by substantial evidence[.]” Appellants’ Br. 41 (capitalization normalized). Deacero argues that “Commerce failed to properly corroborate [its selected] AFA rate,” *id.* (capitalization normalized), because “[t]he petition-related evidence” it placed on the record is not “reliable and relevant in the context of [the] 2014–2015 administrative review,” *id.* at 43. We disagree with Deacero.

Substantial evidence supports Commerce’s corroboration of Deacero’s selected AFA rate. Commerce relied on secondary information—the highest Petition rate—in setting Deacero’s AFA rate. J.A. 1034; *see* 19 U.S.C. § 1677e(b)(2)(A) (listing “the petition” as a “[p]otential source[] of information for adverse inferences”). Commerce found that the highest Petition rate “ha[d] probative value,” because it was “both reliable and relevant” to Deacero. *Ad Hoc Shrimp*, 802 F.3d at 1354 (internal quotation marks and citation omitted); *see* J.A. 4963–67. Commerce demonstrated that its selected AFA rate was reliable because it was derived from independent sources of information submitted with the Petition and Petition Supplements, including “market research information on the terms of sale and price of wire rod sold by Mexican producers in Mexico and the United States.” J.A. 4965; *see* J.A. 1695–1759 (Supplement 1.A), 1760–67 (Supplement 1.B) 1768–1855 (Supplement 1.C), 1856–1919 (Supplement 1.D), 1920–21 (Supplement 1.E), 1922–23 (Supplement 1.F); *see also* 19 C.F.R. § 351.308(d) (“Independent sources may include, but are not limited to . . . information obtained from interested parties”); *KYD*, 607 F.3d at 765 (explaining that a source’s independence is a question of “the nature of the information, not . . . whether [it] was referenced in or included with the petition”). Commerce further demonstrated that its selected AFA rate was relevant because it aligned with transaction-specific “margin calculations for Deacero” from the 2013–2014 review, which were in “the range of or exceed[ed] . . . 40.52 [percent].” J.A. 4965–66; *see Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002) (explaining that where “Commerce select[s] a dumping margin within the range of [a respondent’s] actual sales data, we cannot conclude that Commerce overreached reality” (internal quotation marks omitted)). Commerce thus corroborated the highest Petition rate using “independent

sources . . . reasonably at [its] disposal. 19 U.S.C. § 1677e(c)(1). Accordingly, Commerce's corroboration of Deacero's AFA rate is supported by substantial evidence.

Deacero's counterarguments are unpersuasive. First, Deacero asserts that "Commerce's chosen rate is impermissibly punitive." Appellants' Br. 45 (capitalization normalized). This argument is without merit. "[A]s long as a rate is properly corroborated according to the statute, Commerce has acted within its discretion and the rate is not punitive." *Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373, 1382 (Fed. Cir. 2016) (citing *KYD*, 607 F.3d at 768); see *Ad Hoc Shrimp*, 802 F.3d at 1354 (explaining that "corroborat[ing]" an AFA rate means "demonstrating the rate is both reliable and relevant" (internal quotation marks and citations omitted)). As Commerce has properly corroborated Deacero's AFA rate, Commerce acted within its discretion in its selection of that AFA rate.

Second, Deacero argues that Commerce failed to "consider the overall facts and circumstances of each case, including the level of culpability of the non-cooperating party in an AFA analysis." Appellants' Br. 46 (quoting *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1301 (Fed. Cir. 2019)); see *id.* at 47–48 (arguing that Commerce's "refusal to consider the totality of the circumstances, as well as the punitive nature of its proposed AFA rate," render Commerce's selected rate unreasonable). This misreads Commerce's determination. "We agree, and common sense dictates, that Commerce should consider the overall facts and circumstances of each case, including the level of culpability of the non-cooperating party in an AFA analysis." *BMW*, 926 F.3d at 1301. It is well established both that "the purpose of" AFA is to incentivize cooperation, "not to impose punitive, aberrational, or uncorroborated margins," *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000), and that Commerce's AFA determinations must be reasonable on the record, see *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) (providing that we "review whether substantial evidence supports Commerce's [AFA] determination"). It did so here. Commerce found that Deacero had "mischaracterized," "misrepresented," and "withheld critical information from Commerce," J.A. 1032–33, and, further, that Deacero failed to produce any records to support or clarify its representations when given the opportunity to do so, J.A. 1034. That is, Commerce considered the "unique factual circumstances" of Deacero's situation and its "level of culpability," *BMW*, 926 F.3d at 1302, and concluded that the highest Petition rate was appropriate, J.A. 1043.

Third, Deacero argues that “Commerce acted unreasonably when it ignored evidence on the record of the actual weighted-average calculations from prior administrative reviews.” Appellants’ Br. 48; *see id.* (arguing that, “[d]espite the fact that Commerce had more recent, relevant information on the record that it did not have to corroborate . . . Commerce erroneously insisted on relying on the [P]etition rate”). This argument is without legal basis. “Commerce has wide discretion to assign the ‘highest calculated rate’ to uncooperative parties.” *BMW*, 926 F.3d at 1300 (quoting *KYD*, 607 F.3d at 766). Further, in applying AFA, Commerce is “not required” “to estimate what the . . . dumping margin would have been if the interested party . . . had cooperated,” *id.* § 1677e(d)(3)(A), or “to demonstrate that the . . . dumping margin used by the administering authority reflects an alleged commercial reality of the interested party,” *id.* § 1677e(d)(3)(B). In short, Commerce was not required to select Deacero’s AFA rate to reflect Deacero’s alleged commercial reality and, therefore, did not err in failing to do so. *See Nan Ya Plastics*, 810 F.3d at 1347 (“The statute simply does not require Commerce to select facts that reflect a certain amount of sales, yield a particular margin, fall within a continuum according to the application of particular statistical methods, or align with standards articulated in other statutes and regulations.”). We decline to “impose conditions not present in or suggested by the statute’s text.” *Id.*

Deacero also asserts that “the TPEA established a presumption of validity for AFA rates that [are] based on weighted average margins from prior reviews,” because 19 U.S.C. § 1677e(c)(2) “remov[es] the corroboration requirement” for use of such rates. Appellants’ Br. 48; *see* 19 U.S.C. § 1677e(c)(2) (providing that Commerce is not “required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding”). However, as the CIT noted “[s]imply because Congress established a presumptive validity for AFA rates based on margins from previous reviews does not preclude the use of other corroborated rates. Had Congress intended to limit Commerce’s consideration to margins from previous reviews it could have done so.” *Deacero III*, 456 F. Supp. 3d at 1272. In effect, Deacero “invite[s] [us] to reweigh” the evidence it presented to Commerce concerning what it considered a more appropriate AFA rate. *Downhole Pipe*, 776 F.3d at 1376. We decline to do so. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984) (“That [an appellant] can point to evidence of record which detracts from the evidence which supports the [agency’s] decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive.”). Accordingly, Commerce’s selection

and corroboration of Deacero's AFA rate is supported by substantial evidence and otherwise in accordance with law.

**CONCLUSION**

We have considered Deacero's remaining arguments and find them unpersuasive. For the foregoing reasons, the Judgment of the U.S. Court of International Trade is

**AFFIRMED**



# U.S. Court of International Trade

Slip Op.21-48

UTTAM GALVA STEELS LIMITED, Plaintiff, v. UNITED STATES, Defendant,  
and CALIFORNIA STEEL INDUSTRIES, INC., AND STEEL DYNAMICS, INC.,  
Defendant-Intervenors.

Before: Leo M. Gordon, Judge  
Court No. 19-00044

[Commerce's *Second Remand Results* sustained.]

Dated: April 29, 2021

*John M. Gurley* and *Aman Kakar*, Arent Fox LLP, of Washington, DC, for Plaintiff Uttam Galva Steels Limited.

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

## OPINION

### Gordon, Judge:

This action involves the final results of the 2016 administrative review conducted by the U.S. Department of Commerce (“Commerce”) of the countervailing duty (“CVD”) order of certain corrosion-resistant steel products from India. *See Certain Corrosion-Resistant Steel Products from India*, 84 Fed. Reg. 11,053 (Dep’t of Commerce Mar. 25, 2019) (final results admin. review) (“*Final Results*”); *see also* accompanying Issues and Decision Memorandum, C-533-864, PD<sup>1</sup> 193 (Dep’t of Commerce Mar. 18, 2019), *available at* <https://enforcement.trade.gov/frn/summary/india/2019-05647-1.pdf> (last visited this date) (“*Decision Memorandum*”).

Before the court are Commerce’s Final Results of Redetermination Pursuant to Court Remand, ECF No. 45<sup>2</sup> (“*Second Remand Results*”), filed pursuant to the court’s remand order in *Uttam Galva Steels Ltd. v. United States*, 44 CIT \_\_\_, 476 F. Supp. 3d 1387 (2020) (“*Uttam Galva II*”). *See* Plaintiff’s Comments on Remand Redetermination,

<sup>1</sup> “PD” refers to a document in the public administrative record, which is found in ECF No. 20-3, unless otherwise noted. “CD” refers to a document in the confidential administrative record, which is found in ECF No. 20-2, unless otherwise noted.

<sup>2</sup> All citations to the *Second Remand Results*, the agency record, and the parties’ briefs are to their confidential versions unless otherwise noted.

ECF No. 51 (“Pl.’s Br.”); *see also* Defendant’s Response to Comments on Remand Redetermination, ECF No. 56 (“Def.’s Resp.”). 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)<sup>3</sup>, and 28 U.S.C. § 1581(c) (2018). For the reasons follow, the court sustains the *Second Remand Results*.

## I. Background

Although the court assumes familiarity with the procedural history and its prior decision in this matter, some additional background will aid the reader. Commerce assigned adverse facts available (“AFA”) rates totaling 588.42% to Uttam Galva Steels Limited (“Uttam Galva” or “Plaintiff”) due to Uttam Galva’s failure to provide information about its affiliation with Lloyds Steel Industry Limited (“LSIL”). *See Final Results*, 84 Fed. Reg. at 11,054.

Uttam Galva subsequently challenged several aspects of the *Final Results*, and Commerce sought a voluntary remand to correct certain errors identified by Uttam Galva. *See Uttam Galva Steels Ltd. v. United States*, 44 CIT \_\_\_, 425 F. Supp. 3d 1366 (2020) (“*Uttam Galva I*”); *Final Results of Redetermination Pursuant to Court Remand*, ECF No. 35 (“*First Remand Results*”). In the initial remand, Commerce corrected the errors in the calculation and application of AFA rates for the subsidy programs identified in *Uttam Galva I*, but determined that it would continue to apply the same AFA rates to all of the other remaining programs identified in the *Final Results* based on the adverse inference that Uttam Galva benefitted from all initiated programs. *See First Remand Results* at 6–7.

Uttam Galva challenged the *First Remand Results*, contending that Commerce failed to reasonably explain the differences in its application of AFA to Uttam Galva in the review as compared to JSW, a mandatory respondent during the underlying investigation. *See Uttam Galva II*, 44 CIT at \_\_\_, 476 F. Supp. 3d at 1391–92. The court agreed and remanded the matter again for Commerce to explain why it chose to apply AFA differently to Uttam Galva as compared to JSW. *See Uttam Galva II*, 44 CIT at \_\_\_, 476 F. Supp. 3d at 1392 (“While there may have been factual distinctions between the application of AFA to JSW in the investigation and the application of AFA to Uttam Galva in this review, Commerce failed to identify them and explain what distinguished Uttam Galva’s situation from that of JSW.... The court therefore remands this issue so Commerce may provide a rea-

<sup>3</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.



soned explanation for the differences in its application of AFA to JSW and Uttam Galva, and, if appropriate, reconsider its application of AFA to Uttam Galva.”).

On remand, Commerce provided the requested explanation, noting that it “continue[d] to find that the facts of this review warrant application of total AFA to Uttam Galva.” *Second Remand Results* at 7. Commerce reiterated that its standard practice is to apply total AFA due to a respondent’s failure to properly report affiliates/cross-owned companies. *Id.* at 7–8, 16 (citing *First Remand Results* at 5–6 and 18–21). Commerce went on to explain that “the only remaining issue is whether a departure from this practice is appropriate with respect to Uttam Galva given application of partial AFA to JSW for its failure [to] timely report a cross-owned affiliate in the investigation.” *Id.* at 8. Like Uttam Galva, JSW initially failed to properly report the existence of an affiliate. *Id.* at 10. However, JSW voluntarily raised and corrected its failure at the start of the verification. *Id.* Additionally, the late-disclosed entity was only an operational affiliate of JSW for a short period of time, *i.e.* the last two months of the investigation. *Id.* at 11.

In contrast to JSW, Commerce explained that there were not “any factors that would warrant a departure from our practice regarding application of total AFA” for Uttam Galva. *Id.* at 11. “[T]he circumstances surrounding [Commerce’s] AFA determination for each company were different.” *Id.* at 8, 20. First, despite multiple opportunities to report its affiliation, Uttam Galva only addressed its relationship with LSIL after Commerce directly prompted Uttam Galva for an explanation in a supplemental questionnaire. *See id.* at 11. And, when Uttam Galva finally addressed its relationship with LSIL, Commerce determined that “Uttam Galva mischaracterized its acquisition of Lloyds Steel by ‘provid[ing] false information that it acquired control of a single division of Lloyds Steel... without providing any detail regarding how Lloyds Steel was in fact acquired as a whole....” *Id.* Second, LSIL was affiliated with Uttam Galva for the entire period of review. *Id.* at 10–11 (contrasting the facts in the underlying review with the fact that in the investigation, “the affiliate JSW initially failed to report to Commerce was operational only during the last two months of the period investigation.”).

Uttam Galva now challenges as unreasonable Commerce’s explanation and continued determination to apply total AFA in the *Second Remand Results*. *See* Pl.’s Br. at 5–12.

## II. Standard of Review

The court sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966).

Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. *Administrative Law and Practice* § 9.24[1] (3d ed. 2021). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the whole record.” 8A *West’s Fed. Forms*, National Courts § 3.6 (5th ed. 2020).

## III. Discussion

In the investigation segment of the underlying proceeding, Commerce selected two mandatory respondents: Uttam Galva and JSW. *See Certain Corrosion-Resistant Steel Products from India*, 81 Fed. Reg. 35,323 (Dep’t of Commerce June 2, 2016) (final affirm. determ.), and accompanying Issues and Decision Memorandum at 1, *available at* <https://enforcement.trade.gov/frn/summary/india/2016-12967-1.pdf> (last visited on this date). Commerce found that JSW failed to submit a response for a cross-owned input supplier (“Affiliate X”) and determined that the application of AFA was appropriate. *See id.* at 8–9. In applying AFA in calculating JSW’s subsidy rate, Commerce did not apply adverse inferences to all programs initiated upon during the investigation. *See id.* at 9. (“[W]e made an adverse inference that Affiliate X benefitted from all of the programs used by the other entities within the JSW group of companies that did properly submit questionnaire responses.”); *see also First Remand Results* at 18 (“we acknowledge that we did not countervail all programs initiated upon

when determining the subsidy rate for JSW”); *Second Remand Results* at 9 (“We acknowledge that, in select instances, such as in the case of JSW in the investigation in this proceeding, Commerce has deviated from [the application of total AFA] due to mitigating factors.”). In the administrative review here, Commerce similarly found that Uttam Galva had failed to report the existence of an affiliate, LSIL, providing the basis for the application of AFA. *See Decision Memorandum* at 24. In calculating Uttam Galva’s subsidy rate, however, Commerce applied adverse inferences for *all* programs initiated upon with respect to LSIL. *Remand Results* at 18 (“while we acknowledge that we did not countervail all programs initiated upon when determining the subsidy rate for JSW in the investigation, as we explain below, this does not require us to deviate from our standard practice where companies fail to report all of their cross-owned entities in this segment of the proceeding...”).

In the *Second Remand Results*, Commerce reiterated that it “has a practice of applying total AFA where a company does not timely report its affiliations.” *Second Remand Results* at 16. Commerce explained that the difference in its application of adverse inferences to Uttam Galva and JSW was reasonable “because the circumstances surrounding [the] AFA determinations for each company were different.” *Id.* at 8. Commerce noted that there were several factual distinctions between its application of AFA to Uttam Galva and JSW, including significant “mitigating factors,” which Commerce found to justify its more lenient application of AFA to JSW as compared to Uttam Galva. *See id.* at 9.

Specifically, Commerce emphasized the differing levels of cooperation on the part of JSW and Uttam Galva, noting that “a full explanation of Uttam Galva’s affiliation/cross-ownership with LSIL was only obtained because of Commerce’s inquiry into the issue.” *Id.* at 10–11. Commerce also points to Uttam Galva’s failure to comment in response to Commerce’s placing of LSIL’s financial statement on the record, and highlights the prodding required to elicit any information from Uttam Galva regarding its relationship with LSIL. *See id.* at 8–9 (“Only after Commerce issued a third supplemental questionnaire to Uttam Galva specifically, seeking additional clarification regarding the relationship between itself and FIPL, MEEL, and LSIL, did Uttam Galva provide the information.”). In contrast, Commerce states that JSW “voluntarily reported” Affiliate X following the conclusion of the period of review. *See id.* at 10, 11 (“JSW raised this issue at the start of verification as a ‘minor correction’ to its affiliation questionnaire response.”). Commerce also emphasized that Uttam Galva, unlike JSW, misrepresented the facts surrounding its acqui-

sition of an affiliate. *See id.* at 10 (quoting finding in Post-Preliminary Analysis that Uttam Galva “provided false information that it acquired control of a single division of Lloyds Steel as a corporate entity, without providing any detail regarding how Lloyds Steel was in fact acquired as {a} whole, and only during the POR effectively divided into two affiliated companies, UVSL and LSIL.”).

### **A. Comparison of Application of AFA to Uttam Galva and JSW**

Uttam Galva contends that “Commerce’s explanations in the Second Remand Redetermination are not satisfactory and do not offer sufficient reasons for treating similar situations differently.” *See* Pl.’s Br. at 6; *see also id.* at 12 (“There is no factual distinction of significance that would support differing treatment for JSW and Uttam Galva.”). Uttam Galva argues that Commerce improperly distinguished Uttam Galva from JSW based on an unreasonable view of the differing “confluence of facts.” *See id.* at 2 (“[E]ach proceeding before Commerce will present a unique set of facts, Commerce should not treat similarly situated respondents different because the same confluence of facts does not exist in different proceedings.”). Uttam Galva maintains that the underlying facts surrounding the application of AFA to Uttam Galva were largely the same as those for JSW, and therefore, it should be treated the same as JSW. *Id.* at 11–12. In particular, Uttam Galva contends that Commerce’s reliance on “mitigating factors” as the distinguishing consideration as to the application of AFA to JSW as compared to Uttam Galva is unreasonable. *Id.* at 9. Uttam Galva argues that Commerce was in fact “better positioned” to investigate Uttam Galva’s unreported affiliate, LSIL, because the record remained open at the time of Commerce’s discovery of the affiliate, whereas the record was closed when Commerce discovered the undisclosed affiliate of JSW in the investigation segment of the proceeding. *See id.*

Commerce rejected Uttam Galva’s arguments that JSW and Uttam Galva were similarly situated meriting the same application of AFA. *See Second Remand Results* at 18–20. As Commerce explained:

Uttam Galva contends that Commerce’s analysis indicates that the factual distinctions between JSW’s and Uttam Galva’s reporting are not meaningful. Uttam Galva misstates Commerce’s position, as laid out in the draft remand. In the draft remand, we explicitly noted that it was the confluence of mitigating factors that led to partial application of AFA for JSW. We emphasized that the particular facts of that case – *e.g.*, where an unreported affiliate was operational for only a portion of the period of investigation/review, or where the respondent attempted to self-

correct its response unprompted by Commerce – may not, when viewed alone, render total AFA inappropriate. Rather, we emphasized that those facts, taken together, guided our approach to selecting a (partial) AFA rate for JSW.

*Id.* at 18. Commerce also dismissed Uttam Galva’s argument as to the timing of its reporting of its affiliation with LSIL, noting that:

[w]hether Uttam Galva reported LSIL in response to Commerce’s placement of information on the record or in response to Commerce’s subsequent questionnaire, the end result is the same: It was approximately a year after issuance of the initial CVD questionnaire that Uttam Galva reported its relationship with LSIL, and, unlike in the investigation where JSW voluntarily informed Commerce of its affiliate, Uttam Galva did not volunteer information regarding LSIL until after Commerce placed the LSIL financial statement on the record and issued supplemental questions regarding LSIL to Uttam Galva.

*Id.* Commerce further explained that:

[the agency] only discovered Uttam Galva’s and LSIL’s affiliation after placing affiliation/cross-ownership information on the record upon discovering an unreported relationship between Uttam Galva and LSIL and soliciting additional information from Uttam Galva on this issue. We find this fact relevant to our decision to apply total AFA to Uttam Galva in the administrative review as compared with our application of partial AFA to JSW in the investigation. Also relevant is the fact that JSW’s affiliate was only operational during the final two months of the POR, while LSIL was operational during the entirety of the POR.

*Id.* at 19 (footnotes omitted).

Plaintiff also argues that Commerce was better positioned to investigate and collect information as to Uttam Galva’s affiliation with LSIL. Commerce rejected this argument highlighting that it was previously addressed by the court and that Uttam Galva “ignore[d] the importance that Commerce places on receiving affiliated company information early in the proceeding.” *Id.* at 19 (citing *Uttam Galva I*). Commerce further emphasized that the affiliation only became apparent after placing affiliation/cross-ownership information on the record upon discovering an unreported relationship between Uttam Galva and LSIL and soliciting additional information from Uttam Galva on this issue. *Id.* This combined with the fact that LSIL was operational during the entirety of the POR as compared to JSW’s

affiliate that was operational for only the last two months of the investigation provides a reasonable basis for Commerce's determination. *See id.* In sum, given this analysis and explanation, the court is not persuaded by Plaintiff's contentions that Commerce's determination to apply total AFA was unreasonable.

## **B. Comparison of Application of AFA in other Proceedings**

Alternatively, Uttam Galva maintains that even if Commerce has reasonably distinguished its treatment of Uttam Galva as compared to JSW, Commerce has still failed to address its application of partial AFA in other proceedings with similar circumstances. *See* Pl.'s Br. at 6–10 (citing *Carbon and Alloy Steel Threaded Rod from the People's Republic of China*, 85 Fed. Reg. 8833 (Dep't of Commerce Feb. 18, 2020) (final. determ. CVD investigation) ("*CASTR from China*"), and *Certain Plastic Ribbon from the People's Republic of China*, 84 Fed. Reg. 1064 (Dep't of Commerce Feb. 1, 2019) (final determ. CVD investigation) ("*Plastic Ribbon from China*"). Uttam Galva contends that Commerce's decision to apply partial AFA to similarly situated respondents in other proceedings demonstrates that Commerce's application of total AFA to Uttam Galva here is unreasonable. *See* Pl.'s Br. at 6.

Uttam Galva maintains that "Commerce's recounting of the *CASTR from China* case and the facts surrounding the partial AFA application seek to minimize the similarity between the underlying administrative review" and the proceeding in *CASTR from China*. Pl.'s Br. at 7. Commerce addressed Uttam Galva's proposed comparison of its situation to that in *CASTR from China*, explaining that:

Commerce's approach in *CASTR from China* is inapposite, however, because the facts are dissimilar to the facts surrounding Uttam Galva's reporting failure in this case. There, the respondent, Junyue, timely identified two companies as affiliated parties, but did not accurately describe the companies' operations. Subsequently, at verification, Commerce learned that the two affiliates provided processing and manufacturing services; these facts were relevant to Commerce's attribution analysis and, in turn, relevant to Commerce's decision as to whether to solicit a questionnaire response from the affiliates. Thus, there, the question was not whether affiliates were identified as such in the first instance. Rather, the reporting deficiency related to whether Junyue provided complete information regarding the affiliates. Similar to identifying a confluence of mitigating factors that distinguished application of partial AFA to JSW in the



investigation, under the circumstances in *CASTR from China*, Commerce determined that total AFA was not warranted. Here, in contrast, Uttam Galva's relationship with LSIL went unreported until Commerce placed information on the record and solicited a response on the matter. Additionally, as noted below, we determined that Uttam Galva provided certain information that did not accurately reflect its relationship to LSIL. Thus, we find that the facts of this review are distinct from those surrounding Junyue's reporting in *CASTR from China*.

*Second Remand Results at 16–17.*

Uttam Galva further challenges Commerce's determination that the affiliate information belatedly provided in *CASTR from China* was "voluntary." *See id.* Uttam Galva's conclusory assertions that Commerce is arbitrarily distinguishing the circumstances in *CASTR from China* do not persuade the court that Commerce acted unreasonably in applying total AFA to Uttam Galva. Uttam Galva fails to cite any evidence to support its premise that, in *CASTR from China*, the respondent Junyue did not disclose the affiliate information voluntarily. *See id.* (arguing that "[g]iven that the information regarding the two affiliates was only disclosed at verification, it is unlikely that the disclosure was voluntary."). Commerce also explained that Junyue's reporting violation was categorically less severe than that of Uttam Galva, as Junyue had at least acknowledged the existence of the affiliate whereas Uttam Galva did not. *See id.* at 17. Given the totality of the circumstances, the court cannot conclude that Commerce acted unreasonably by refusing to find its application of AFA in *CASTR from China* to be comparable to the application of AFA to Uttam Galva in this matter.

As for *Plastic Ribbon from China*, Uttam Galva explains that "Commerce applied partial AFA to the mandatory respondent because it failed to report a predecessor company that operated during the average useful life period in its questionnaire responses and was disclosed at verification. Commerce determined that the mandatory respondent impeded the investigation regarding whether the mandatory respondent could have used nonrecurring programs." Pl.'s Br. at 8 (internal citations omitted). Plaintiff's reliance on *Plastic Ribbon from China* is also misplaced as Uttam Galva did not fail to report a predecessor company. *See generally Plastic Ribbon from China*, and accompanying Issues and Decision Memorandum at cmt. 12; *see also* Def.'s Resp. to Comments On [First] Remand Redetermination at 14, ECF No. 41 (citing Commerce's analysis in *Plastic Ribbon from China* and explaining why the circumstances are not comparable). Accord-

ingly, the court is not persuaded by Plaintiff's argument that Commerce acted unreasonably by not treating Uttam Galva the same as the mandatory respondent in *Plastic Ribbon from China*.

#### IV. Conclusion

In sum, Commerce has provided a reasoned explanation for the differences in its application of AFA to JSW and Uttam Galva. Uttam Galva's alternative arguments about Commerce's determinations in *CASTR from China* and *Plastic Ribbon from China* implicitly concede that Commerce reasonably explained its application of partial AFA to JSW and total AFA to Uttam Galva (searching for alternative grounds of unreasonableness). Commerce, though, reasonably explained why *CASTR from China* and *Plastic Ribbon from China* are distinguishable here given the underlying facts in each of those proceedings compared to the underlying facts justifying total AFA for Uttam Galva.

For the foregoing reasons, the court sustains the *Second Remand Results*. Judgment will enter accordingly.

Dated: April 29, 2021

New York, New York

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



## Slip Op.21–49

JILIN FOREST INDUSTRY JINQIAO FLOORING GROUP CO., LTD., Plaintiff, v.  
UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge  
Court No. 18–00191

[Remanding U.S. Department of Commerce’s final results of fifth administrative review of multilayered wood flooring from the People’s Republic of China.]

Dated: April 29, 2021

*Ronald M. Wisla*, Fox Rothschild LLP, of Washington, DC, argued for Plaintiff. With him on the brief were *Lizbeth R. Levinson* and *Brittney R. Powell*.

*Sonia M. Orfield*, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued 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 *Rachel A. Bogdan*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

**OPINION and ORDER**

**Eaton, Judge:**

Plaintiff, Jilin Forest Industry Jinqiao Flooring Group Co., Ltd. (“Jilin”), is a mandatory respondent supplier of multilayered wood flooring, located in the People’s Republic of China (“China”). Jilin challenges the final results of the fifth administrative review of the antidumping duty order on that flooring. *See Multilayered Wood Flooring From the People’s Republic of China*, 83 Fed. Reg. 35,461 (Dep’t Commerce July 26, 2018), P.R. 351 (“Final Results”), and accompanying Issues and Decision Mem. (July 18, 2018), P.R. 340 (“Final IDM”). The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018) and 28 U.S.C. § 1581(c) (2018).

By its motion for judgment on the agency record, Jilin disputes the Final Results in two respects: (1) that the United States Department of Commerce (“Commerce” or the “Department”) unlawfully determined that Jilin was not separate from the control of the government of China; and (2) that Commerce’s failure to calculate an individual rate for it as a fully cooperative mandatory respondent was contrary to law. *See* Pl.’s Mem. Supp. Mot. J. Agency R., ECF No. 20–1 (“Pl.’s Br.”); Pl.’s Reply, ECF No. 27; *see also* Compl. ¶¶ 14–21, ECF No. 9.

Defendant the United States, on behalf of Commerce, urges the court to sustain the Final Results as supported by substantial evidence and otherwise in accordance with law. *See* Def.’s Opp’n Pl.’s Mot. J. Agency R., ECF No. 23 (“Def.’s Br.”).

For the reasons set forth below, Jilin’s motion for judgment on the agency record is granted, and this case is remanded to the Department for further proceedings consistent with this opinion.

## BACKGROUND

The antidumping duty order on multilayered wood flooring from China dates from December 8, 2011. *See Multilayered Wood Flooring From the People’s Republic of China*, 76 Fed. Reg. 76,690 (Dep’t Commerce Dec. 8, 2011), as amended by *Multilayered Wood Flooring From the People’s Republic of China*, 77 Fed. Reg. 5,484 (Dep’t Commerce Feb. 3, 2012) (“Order”). On the 2016 anniversary month of the Order, the domestic industry petitioners Coalition for American Hardwood Parity requested review of the 2015–2016 period. *See Pet’rs’ Req. for Admin. Rev.* (Dec. 30, 2017), P.R. 14; *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Admin. Rev.*, 81 Fed. Reg. 86,694 (Dep’t Commerce Dec. 1, 2016); *see also* 19 U.S.C. § 1675(a)(1). Commerce subsequently identified 115 exporters, producers, or importers of the flooring as subjects of the review in its *Initiation of Antidumping & Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 10,457 (Dep’t Commerce Feb. 13, 2017), as corrected by *Initiation of Antidumping & Countervailing Duty Administrative Reviews.*, 82 Fed. Reg. 13,795 (Dep’t Commerce Mar. 15, 2017). *See* Respondent Selection Mem. (Apr. 7, 2017), P.R. 161 (“RSM”).

In the initiation notices, Commerce stated that China was a non-market economy country<sup>1</sup> and therefore that it would employ its nonmarket economy policy of applying the rebuttable presumption that all respondents were subject to state control (the “NME Policy”). *See* 82 Fed. Reg. at 13,796. Respondents that could rebut this presumption—by providing evidence of *de jure* decentralized control from the state, including “an absence of restrictive stipulations associated with an individual exporter’s business and export licenses” and also evidence that their “export activities”<sup>2</sup> (or rather “export func-

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<sup>1</sup> A “nonmarket economy country” is “any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” 19 U.S.C. § 1677(18)(A). The implication for entities operating subject to a nonmarket economy structure is that their financial and sales information is unreliable for the purpose of determining the “normal value” of subject merchandise. *See* 19 U.S.C. § 1677b(a); *see also Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004).

<sup>2</sup> *See, e.g., Guizhou Tyre Co. v. United States*, 44 CIT \_\_\_, \_\_\_, 469 F. Supp. 3d 1338, 1345 (2020) (quoting the Department’s reference to “export activities” in its final determination); *Gerber Food (Yunnan) Co. v. United States*, 31 CIT 921, 945, 491 F. Supp. 2d 1326, 1350 (2007) (quoting the Department’s reference to “export activities” in its final determination).

tions”<sup>3</sup>) are not subject *de facto* to Chinese governmental control—would be entitled to receive a rate that is separate from the country-wide rate assigned to all companies or entities that are presumptively considered state-controlled as part of an amalgamated “NME entity.” See U.S. Dep’t Commerce, *Import Administration Policy Bulletin 05.1* (Apr. 5, 2005), <https://enforcement.trade.gov/policy/bull05-1.pdf> (“Policy Bulletin 05.1”).

Jilin was among seventy-two firms that submitted a request for separate rate status. See Decision Mem. for the Preliminary Results of Antidumping Duty Admin. Rev.: Multilayered Wood Flooring from the People’s Republic of China; 2015–2016 (Jan. 2, 2018), P.R. 308 (“PDM”) at 10. Jilin’s separate rate certification stated that it had been granted separate rate status in the previous administrative review. See Jilin Separate Rate Certification (Mar. 14, 2017), P.R. 97. Jilin had also received a separate rate (*i.e.*, the “all-others” rate) in the initial investigation and in each of the four preceding administrative reviews. The company reported, as required, that it was not under the control of the Chinese government *de jure* nor were its export functions subject to governmental control *de facto*, and it provided documentation to support its claim. See Jilin Separate Rate Certification.

Thereafter, relying on 19 U.S.C. § 1677f-1(c)(2), the Department selected Jilin and Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. (“Jiangsu”)<sup>4</sup> as “mandatory respondents,” as they accounted for the “largest” volume of subject merchandise. See RSM at 7. The Department then sent its usual antidumping questionnaires to Jilin and Jiangsu.

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This opinion relies on the Department’s original articulation of “export functions” in the Import Administration Policy Bulletin 05.1. See U.S. Dep’t Commerce, *Import Administration Policy Bulletin 05.1* (Apr. 5, 2005), <https://enforcement.trade.gov/policy/bull051.pdf>.

<sup>3</sup> Import Administration Policy Bulletin 05.1 states:

Typically, the Department considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions: 1) whether the export prices are set by, or subject to the approval of, a governmental authority; 2) whether the respondent has authority to negotiate and sign contracts and other agreements; 3) whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management; and 4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

U.S. Dep’t Commerce, *Import Administration Policy Bulletin 05.1* (Apr. 5, 2005), <https://enforcement.trade.gov/policy/bull05-1.pdf> (emphasis added). In developing these factors, Commerce relied upon neither statute nor regulation. Rather it has cited two of its own prior decisions, including *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People’s Republic of China*, 59 Fed. Reg. 22,585, 22,587 (Dep’t Commerce May 2, 1994) and *Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People’s Republic of China*, 60 Fed. Reg. 22,544, 22,545 (Dep’t Commerce May 8, 1995).

<sup>4</sup> Jiangsu is not a party to this action.

Between May and September 2017, Jilin timely responded to Commerce's requests for information in sections A, C, and D of the original questionnaire, which included detailed factor-of-production calculations. Jilin also provided timely responses to four lengthy supplemental questionnaires detailing its operations and ownership structure, asserting that it operated independently of the Chinese government, providing all of the other information requested regarding its operations, and submitting surrogate value information to enable Commerce to calculate an individual margin based on its factors of production. *See* Pl.'s Br. 28–29; *see also* Jilin Section A Resp. (May 16, 2017), P.R. 202–207. There is no indication on the record that Commerce ever called into question the accuracy and adequacy of Jilin's responses to the questionnaires, or that Jilin ever failed to cooperate or provided untimely responses to Commerce's requests for information. *See* Pl.'s Reply 10.

Commerce issued its Preliminary Decision Memorandum and accompanying Preliminary Separate Rate Analysis for Jilin on January 2, 2018. The Department preliminarily determined that Jilin was not entitled to a separate rate because it had not demonstrated an absence of *de facto* governmental control as to its export functions. *See* PDM at 12; Preliminary Separate Rate Analysis for Jilin (Jan. 2, 2018), C.R. 208, P.R. 309 (“SRM”) at 1, 6. Commerce's specific finding on state control concerned ownership of Jilin's shares, and the Chinese government's ability to appoint members of Jilin's board of directors and key operational positions. *See* SRM at 5–6.

In its Final Results, Commerce continued to find that Jilin had not qualified for a separate rate but that sixty-nine of the seventy-two companies requesting a separate rate had qualified for one. Jiangsu, the only other mandatory respondent, was one of those that qualified for a separate rate. Commerce calculated Jiangsu's rate as *de minimis* (0.00 percent) and ultimately used this rate as the all-others rate for the other separate rate respondents. *See* Final Results, 83 Fed. Reg. at 35,462–63. Finding that Jilin was not entitled to a separate rate, Commerce apparently halted any further examination of Jilin's individual data and selected the pre-existing 25.62 percent China-wide rate<sup>5</sup> for Jilin. *See* Final IDM at 8; Final Results, 83 Fed. Reg. at 35,464. Jilin brought its objections here.

<sup>5</sup> The 25.62 percent China-wide rate is based on application of “adverse facts available,” and results from litigation that altered the original adverse facts available China-wide rate of 58.84 percent. *See Baroque Timber Indus. (Zhongshan) Co. v. United States*, 38 CIT \_\_\_, \_\_\_, 971 F. Supp. 2d 1333, 1338–39 (2014) (“The changes . . . resulted in a new calculated highest transaction-specific rate of 25.62 percent. Commerce selected this rate as the revised [adverse facts available] rate for the [China]-wide entity.”); *see also* Final Results of Redetermination Pursuant to Court Order at 27, *Baroque Timber Indus. (Zhongshan) Co. v. United States*, No. 12–0007 (CIT Nov. 14, 2013), ECF No. 132 (“Based on the updated

## STANDARD OF REVIEW

The court will sustain a determination by Commerce 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. Commerce’s Determination of *De Facto* Government Control of Jilin Lacks the Support of Substantial Evidence and Is Not in Accordance with Law

On the issue of whether Jilin is entitled to a separate rate, the question concerns governmental control over Jilin’s export functions. *See* Policy Bulletin 05.1. Jilin contends Commerce (1) ignored the evidence it placed on the record of the absence of government involvement, (2) made certain assertions unsupported by substantial evidence, and (3) misapplied the presumption of state control. *See* Pl.’s Br. 13–27. In particular, Jilin argues that Commerce’s reliance late in the administrative review (not until the Final IDM), on the *Aluminum Foil* investigation (“*Aluminum Foil*”),<sup>6</sup> which was a separate proceeding that concerned, among other issues, the status of labor unions in China, deprived the parties of the opportunity to rebut, clarify, or correct new factual material placed on the administrative record by the Department as directed by 19 C.F.R. § 351.301(c)(4). *See* Pl.’s Reply 8 (citing Final IDM at 8).

In the Final Results, Commerce found that Jilin was not entitled to a dumping rate separate from the China-wide entity because it had not demonstrated that its export “activities” were *de facto* free from government control:

In recent proceedings, we have concluded that where a government entity holds a majority equity ownership, either directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company’s operations. This may include control over, for example, the selection of

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[surrogate values], the highest calculated transaction-specific rate on the record is 25.62 percent and, as a result, 25.62 percent is now the rate assigned to the [China]-wide entity.”)

<sup>6</sup> As used in this opinion, “*Aluminum Foil*” refers collectively to the following documents cited in the Final IDM at 8, notes 29 and 30: *Certain Aluminum Foil From the People’s Republic of China: Notice of Initiation of Inquiry Into the Status of the People’s Republic of China as a Nonmarket Econ. Country Under the Antidumping & Countervailing Duty Laws*, 82 Fed. Reg. 16,162 (Dep’t Commerce Apr. 3, 2017); *Certain Aluminum Foil From the People’s Republic of China: Notice of Extension of Time for Public Comment Regarding Status of the People’s Republic of China as a Nonmarket Econ. Country Under the Antidumping & Countervailing Duty Laws*, 82 Fed. Reg. 20,559 (Dep’t Commerce May 3, 2017); and Memorandum, “*Aluminum Foil from the People’s Republic of China: China’s Status as a Non-Market Economy*” (Oct. 26, 2017).

management, which is a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate. Consistent with normal practice, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company. Therefore, in assessing the degree of government control over [Jilin], we analyzed the level of government ownership of [Jilin].

In the *Preliminary Results*, we found, after a review of each owner's capital verification report, that the majority of [Jilin]'s shares are held by a state-owned enterprise (SOE). [Jilin] does not dispute this key fact. Rather, [Jilin] simply reiterates arguments it made before the *Preliminary Results* as to why it is not controlled by the government. For example, [Jilin] restates that its Articles of Association establish that three of five members of the Board of Directors are elected by [its] Labor Union, a non-governmental organization. This example, according to [Jilin], demonstrates that it is free from the control, supervision, or interference of any government entity. [Jilin]'s reiterated arguments are not responsive to Commerce's separate rate analysis. The crux of Commerce's separate rate analysis centers on the implications of majority government ownership, *i.e.*, a potential, ability, interest, *etc.*, to control the company. [Jilin]'s arguments fail to resolve these notable implications of the SOE's ownership.

Final IDM at 7–8. The fuller determination was based on an analysis of the chain of company ownership back to the Chinese government, the percentage of government ownership, the relevant Company Law of China, Articles of Association provisions establishing shareholder rights, and relevant legal precedent. *See id.* at 6–8; *see also* SRM at 3–6. Commerce insists that, where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter, it may conclude that the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company's operations generally. The Department further claims that this finding is consistent with this Court's *Advanced Technology* decisions. *See* Def.'s Br. 7–8; *see also* *Advanced Tech. & Materials Co. v. United States*, 36 CIT 1576, 885 F. Supp. 2d 1343 (2012); *Advanced Tech. & Materials Co. v. United*



*States*, 37 CIT 1487, 938 F. Supp. 2d 1342 (2013), *aff'd*, 581 F. App'x 900 (Fed. Cir. 2014) (collectively, “*Advanced Technology*”).<sup>7</sup>

Jilin opposes Commerce’s position. It argues that its questionnaire responses made clear that corporate control of the company was in the hands of its workers (the “Labor Union”) and not those of “the majority government shareholder.” Pl.’s Br. 8–12. Acknowledging that a majority of its shares are indirectly controlled by the government, Jilin argues substantial evidence shows that the Labor Union controlled a majority of the board of directors and supervisors pursuant to the company’s Articles of Association, which conferred upon the Labor Union the ability to select three of the five members of the board of directors and two of the three operational supervisors:

[S]pecific terms contained in [Jilin]’s Articles of Association effectively restrain the ability of the majority shareholder to exert control over the appointment of [Jilin]’s board of directors and the selection of [its] senior management. Article 24 of the Articles of Association designates [Jilin]’s board of directors, and not the shareholders or the shareholders’ meeting, as the management decision-making body of the company. . . . Thus, in accordance with Article 24.9 of the Articles of Association, it is the board of directors, and not the Chinese government majority shareholder, that appoints the company’s general manager and senior management.

Pl.’s Reply 1–2 (citing Jilin’s 4th Suppl. Resp. (Sept. 29, 2017), C.R. 178, P.R. 282, Ex. S4–2 at 3). Jilin thus contends that Commerce’s interpretation of *Advanced Technology* unlawfully imposed an “irrebuttable” presumption of *de facto* government control in the Final Results. *See* Pl.’s Br. 14.

Commerce, however, faults Jilin’s implicit assumption regarding the “independence” of its Labor Union. In response to Jilin’s “selection of management” argument, the Department, albeit late in the game, placed on the record “factual information” from the *Aluminum Foil* nonmarket economy inquiry. *See* Final IDM at 8 (citing *Aluminum Foil*); *see also* 19 C.F.R. § 351.301 (2018). In the course of the *Aluminum Foil* inquiry, Commerce evaluated the extent to which wage rates in China are determined by free bargaining between labor and management and concluded that “[l]abor unions are under the control and direction of the All-China Federation of Trade Unions (ACFTU), a government-affiliated [Chinese Communist Party] organ.” Final

<sup>7</sup> In *Advanced Technology*, Commerce ultimately reversed its original finding that the respondent company was entitled to a separate rate, based on its reconsideration of the facts on that record.



IDM at 8. Commerce applied its *Aluminum Foil* findings to Jilin's facts when considering the "autonomy" of Jilin's Labor Union and found that "[t]his [*Aluminum Foil*] determination is not undermined by [Jilin]'s excerpts from the Trade Union Law and assertion that the labor union is not under government ownership. Therefore, [Jilin]'s reliance on the labor union's control over the selection of management does not rebut the finding of government control." Final IDM at 8.

Jilin complains of the eleventh-hour placement, by Commerce, of factual information from the *Aluminum Foil* proceeding, and disputes its relevance to this case. Jilin states in its briefs that its "Labor Union does not operate under Chinese Government control," arguing that *Aluminum Foil* relates to a different proceeding, different labor union, and different issue (specifically, whether wage rates in China were determined by free bargaining between labor and management) from the issue before Commerce in this proceeding, which is whether Jilin's selection of its management was made in the absence of Chinese government control. See Pl.'s Br. 26. After restating relevant provisions of its Articles of Association that vest in the Labor Union the ability to appoint members to the boards of directors and supervisors, Jilin concludes "[t]here is no evidence [in its] Articles of Association that indicate[s] that any of the activities or the elections of the Labor Union are influenced or controlled by any level of the Chinese government." Pl.'s Br. 26–27.

By regulation, Commerce permits itself, at any time, to place factual information on the record. See 19 C.F.R. § 351.301(c)(4). If Commerce does so, however, it is generally required by that regulation to permit an opportunity for a party to respond to such information. Here, Commerce contends that Jilin did, in fact, have an opportunity to comment on the *Aluminum Foil* proceeding, as the proceeding's notice published in the Federal Register solicited comments from the public at large. See Def.'s Br. 15. The notice-and-comment of *that* proceeding, however, does not satisfy the requirement that Jilin be afforded the opportunity to respond to the new information placed on the record in *this* proceeding. See 19 C.F.R. § 351.301(c)(4).

Commerce placed *Aluminum Foil* on the record late in the proceeding, alerting the parties to it only in its Final IDM. This information had the effect of placing Jilin under the Chinese government's control despite the company having been able to demonstrate the absence of government control in previous reviews. As mentioned above, Commerce's argument that Jilin had an opportunity to address the labor union issue in another proceeding to which Jilin was not a party is without merit.

Jilin must be given “a meaningful opportunity to be heard.” See *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761–62 (Fed. Cir. 2012) (quoting *LaChance v. Erickson*, 522 U.S. 262, 266 (1998)). On remand, Commerce shall permit Jilin, in advance of draft remand results and in accordance with 19 C.F.R. § 351.301(c)(4), to submit written argument with respect to the Department’s inclusion of the *Aluminum Foil* proceeding on the record of this review, and shall consider such argument in its draft remand results.

In addition, it is worth emphasizing that the fundamental question here concerns state control over *export functions*. See Policy Bulletin 05.1 (“Typically, the Department considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions.”). There is little discussion of this in the Final Results, in particular how “majority equity ownership” translates into control of export functions. On remand, the Department shall explain its use of the phrase, and state whether “export functions” are synonymous with “export activities” or “company’s operations.” Further, Commerce shall state whether analysis of “export functions” is required as part of its *de facto* control analysis, and if so, how that consideration affects its remand results, and how the phrase figures in this case. The Department shall also consider any relevant arguments presented by Jilin to Commerce on the issue of state control.

## **II. Commerce Has Failed to Explain How the Application of Its NME Policy to Jilin Is in Accordance with Law and Supported by Substantial Evidence**

### **A. Jilin’s Legal Status as a Mandatory Respondent**

#### **1. Individually-Examined Respondents**

Commerce is required to “determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.” 19 U.S.C. § 1677f-1(c)(1). That determination normally requires calculating the dumping margin for “each entry” of subject merchandise. See *id.* § 1675(a)(2)(A)(i), (ii). The “dumping margin” is “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” *Id.* § 1677(35)(A). Normal value is “the price at which the foreign like product is first sold . . . for consumption in the exporting country.” *Id.* § 1677b(a)(1)(B)(i). If the exporting country is a market economy country, Commerce determines normal value using sales prices or constructed normal value in the home market—or if there are no sales prices in the home market, Commerce may use sales prices in a

third country. *See id.* § 1677b(a); *see also* 19 C.F.R. §§ 351.403-407. If the exporting country is a nonmarket economy country, Commerce determines normal value based on a nonmarket economy producer's factors of production using values obtained from a surrogate market economy country or countries. *See* 19 U.S.C. § 1677b(c); *see also* 19 C.F.R. § 351.408.

The congressional goal of directing this exercise (and the goal found in treaties and agreements to which the United States is a signatory) is for Commerce to determine an *accurate* margin for each respondent. *See Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1356 (Fed. Cir. 2016) (“[T]here is a clear congressional intent’ that administrative reviews ‘be as accurate *and current* as possible.’”) (quoting *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1373 (Fed. Cir. 2003)); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) (emphasis added) (“An overriding purpose of Commerce’s administration of antidumping laws is to calculate dumping margins *as accurately as possible.*”) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).

In the usual case, where Commerce calculates the rates for individual respondents, the calculation of each dumping margin is determined by using a respondent’s own data. *See* 19 U.S.C. § 1677f-1(c)(1) (“In determining weighted average dumping margins under section 1673b(d), 1673d(c), or 1675(a) of this title, the administering authority shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.”); *id.* § 1677a (defining export price and constructed export price); *id.* § 1677(16), (25) (defining foreign like product and subject merchandise, respectively). The statute provides for an exception, however, under circumstances that are described in 19 U.S.C. § 1677f-1(c)(2) (the “Mandatory Respondent Exception”).

## 2. The Statute’s Mandatory Respondent Exception

The Mandatory Respondent Exception is used when the number of respondents in a proceeding is so “large” that it is “not practicable to make individual weighted average dumping margin determinations.” 19 U.S.C. § 1677f-1(c)(2). When that occurs, Commerce may determine the weighted-average dumping margins for a “reasonable” number of exporters or producers by limiting its examination to (1) “a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection,” or (2) “exporters and producers accounting for the largest volume of the subject merchandise from the

exporting country that can be reasonably examined.” *Id.* § 1677f-1(c)(2)(A), (B). The weighted average of the rates for each mandatory respondent forms the basis of the all-others rate for respondents not individually examined. *See id.* § 1673d(c)(1)(B)(i). Here, noting the “large” number of respondents in the underlying proceeding, Commerce chose to employ this Mandatory Respondent Exception and base the determination of the all-others rate<sup>8</sup> on the rate determined for two mandatory respondents, which were the two largest exporters of subject merchandise by volume during the period of review. *See* RSM at 1. Jilin was one of these. The other was Jiangsu.

The aim of the Mandatory Respondent Exception is to determine an *accurate* all-others rate, based on a weighted average of rates determined for mandatory respondents by statistical sampling or the use of a statistically sufficient volume of exports. The statute directs Commerce to (1) “determine the estimated weighted average dumping margin for each exporter and producer individually investigated” and (2) “determine” in accordance with the statute’s method “the estimated all-others rate for all exporters and producers not individually investigated.” 19 U.S.C. § 1673d(c)(1)(B)(i), (c)(5)(B). Use of the Mandatory Respondent Exception is intended to fulfill the prime purpose of the antidumping duty statute to calculate accurate rates. *Compare* 19 U.S.C. § 1677f-1(c)(2), *with* 19 U.S.C. § 1673d(c)(1)(B)(i). The role of the mandatory respondents is therefore broader than that of the usual individually-examined respondent, because the mandatory respondents serve as surrogates for what can be (and is, in this case) a much larger group.

Commerce now employs the Mandatory Respondent Exception often, and reviews only a limited number of selected respondents. *See, e.g., Certain Fresh Cut Flowers From Colombia: Preliminary Results & Partial Rescission of Antidumping Duty Admin. Rev.*, 62 Fed. Reg. 16,772 (Dep’t Commerce Apr. 8, 1997). Indeed, Commerce’s practice has devolved to the point where it regularly chooses only two (and sometimes one<sup>9</sup>) mandatory respondents to be “representative” of unexamined respondents for the purpose of calculating the all-others rate in a review, a devolution that this Court has regarded with some

<sup>8</sup> Although, as shall be seen, just what the “all-others” rate is, has some mystery connected to it. *See, e.g., Thuan An Prod. Trading & Serv. Co. v. United States*, 42 CIT \_\_\_, \_\_\_, 348 F. Supp. 3d 1340, 1347 (2018).

<sup>9</sup> *See, e.g., Certain Carbon & Alloy Steel Cut-To-Length Plate From the People’s Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 79,450, 79,451 (Dep’t Commerce Nov. 14, 2016) (Commerce selected one entity as “the sole mandatory respondent in this investigation”). In Jilin’s case, Commerce chose the two respondents that together accounted for a “large” share of the export volume of subject merchandise, although not the majority of such export volume, and it subsequently relied only on Jiangsu’s data.

skepticism. See, e.g., *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 33 CIT 1125, 637 F. Supp. 2d 1260 (2009); *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 662 F. Supp. 2d 1337 (2009).

Even when Commerce does choose two mandatory respondents (and despite having replaced or substituted mandatory respondents in the past<sup>10</sup>), it has more recently declined to name a mandatory respondent replacement when it became clear that a chosen mandatory entity would not participate or is otherwise excluded from examination. See, e.g., *Bestpak*, 716 F.3d at 1374. When one of two chosen mandatory respondents does not participate or is excluded from participation, a failure to name a replacement can result (as it did here) in an all-others rate being determined based on the margin of a sole respondent whose percentage of export volume is quite small in relation to the total volume of exports. See, e.g., *Stainless Steel Sheet & Strip From the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value & Preliminary Affirmative Determination of Critical Circumstances*, 81 Fed. Reg. 64,135 (Dep't Commerce Sept. 19, 2016), and accompanying decision memorandum.

In November 2013, Commerce announced changes in its method of selecting mandatory respondents. See *Antidumping Procs.: Announcement of Change in Dep't Practice for Respondent Selection in Antidumping Duty Procs. & Conditional Review of the Nonmarket Econ. Entity in NME Antidumping Duty Procs.*, 78 Fed. Reg. 65,963 (Dep't Commerce Nov. 4, 2013) ("Practice Change").

As originally enacted, a 1984 change in the statute permitted Commerce to use "statistical sampling" of products "whenever a significant volume of sales is involved or a significant number of adjustments to prices is required."<sup>11</sup> See Pub. L. No. 98-573, § 620(a), 98 Stat. 2948, 3039 (1984). With passage of the Uruguay Round Agree-

<sup>10</sup> See, e.g., *Certain Kitchen Appliance Shelving & Racks from the People's Republic of China: Postponement of the Preliminary Determination of the Antidumping Duty Investigation*, 73 Fed. Reg. 78,721 (Dep't Commerce Dec. 23, 2008).

<sup>11</sup> The authority to sample "types of products" in 19 U.S.C. § 1677f-1(c)(2)(A) is a carryover from the original statute, 19 U.S.C. § 1677f-1(a), that was added to the Tariff Act ten years prior to passage of the Uruguay Round Agreements Act ("URAA"). See Pub. L. No. 98573, § 620(a), 98 Stat. 2948, 3039 (1984). As originally enacted, § 1677f-1(a) permitted Commerce to use "generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustments to prices is required," provided "such samples and averages shall be representative of the transactions under investigation." 19 U.S.C. § 1677f-1(a) (Supp. II 1984). Section 229 of the URAA slightly altered this congressional delegation in subsection (a):

For purposes of determining the export price (or constructed export price) under section 1677a of this title or the normal value under section 1677b of this title, and in carrying out reviews under section 1675 of this title, the administering authority may . . . use

ments Act in 1994, Commerce’s mandatory respondent selection practice came to rely generally upon the then-new provision of 19 U.S.C. § 1677f-1(c)(2) for “exporters and producers accounting for the *largest volume* of the subject merchandise from the exporting country *that can be reasonably examined*” (“subsection (B)”), and it resorted to using the “statistically valid” sampling provision (“subsection (A)”) only rarely. See *Proposed Methodology for Respondent Selection in Antidumping Procs.; Req. for Cmt.*, 75 Fed. Reg. 78,678, 78,678 (Dep’t Commerce Dec. 16, 2010) (“*Proposed Methodology*”) (emphasis added) (the Department has used subsection (B) in “*virtually every one of its proceedings*”). The 2013 *Practice Change* announced that Commerce would

consider sampling when it can select a *minimum of three respondents* to examine individually and when the three largest respondents (or more if the Department intends to select more than three respondents) by import volume of the subject merchandise under review account for normally no more than 50 percent of total volume. *The Department considers 50 percent [of import volume] to be a reasonable threshold* because in these circumstances the agency would be able to calculate specific dumping margins *for the majority* of imports during a period of review.

*Practice Change*, 78 Fed. Reg. at 65,968 (emphasis added).

Thus, the *Practice Change* announced that Commerce would use the statistical sampling found in subsection (A) only if certain conditions were met. Otherwise, subsection (B) (volume) would be used. Specifically, Commerce would use the sampling of subsection (A) “where possible” on a case-by-case basis for the selection of mandatory respondents,<sup>12</sup> if interested parties made a specific request to use

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averaging and statistically valid samples, if there is a significant volume of sales of the subject merchandise or a significant number or types of products, and . . . decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.

Pub. L. No. 103–465, § 229, 108 Stat. 4809, 4889 (1994). In conjunction with the authority of subsection (a) of 19 U.S.C. § 1677f-1 to sample *products*, Congress in subsection (c)(2) of 19 U.S.C. § 1677f-1 also permitted Commerce to sample respondent *exporters* and *producers*, as an exception to the general rule of subsection (c)(1) requiring Commerce to determine the individual weighted-average dumping margin for each known exporter and producer of the subject merchandise. See *id.*

<sup>12</sup> See, e.g., *Certain Steel Nails From the People’s Republic of China: Preliminary Results of the Antidumping Duty Admin. Rev. & Preliminary Determination of No Shipments; 2017–2018*, 84 Fed. Reg. 55,906 (Dep’t Commerce Oct. 18, 2019); *Certain Steel Nails From the People’s Republic of China: Preliminary Results of the Antidumping Duty Admin. Rev. & Preliminary Determination of No Shipments; 2016–2017*, 83 Fed. Reg. 45,883 (Dep’t



that method. *See Proposed Methodology*, 75 Fed. Reg. at 78,678. Commerce, however, would forgo the subsection (A) option (and rely on the (B) option): (1) if it is unable to examine at least three companies “due to resource constraints”; or (2) *when the largest companies by import volume account for at least 50 percent of total imports*; or (3) when the “characteristics” of the underlying population make it highly likely that results obtained from the largest possible sample would be unreasonable to represent the population (*i.e.*, when “information obtained by or provided to the Department provides a reasonable basis to believe or suspect that the average export prices and/or dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters”). *Practice Change*, 78 Fed. Reg. at 65,964–65.

There can be little doubt that relying almost exclusively on subsection (B) made Commerce’s work easier, while still, at least arguably, using a sufficiently large sample of imports to calculate an accurate rate for the unexamined respondents receiving the all-others rate. *Cf. Practice Change*, 78 Fed. Reg. at 65,968. The Department, however, does not appear to always follow the guidance of the *Practice Change*. *See, e.g., id.* (“The Department considers 50 percent [of import volume] to be a reasonable threshold because in these circumstances the agency would be able to calculate specific dumping margins for the majority of imports during a period of review.”).

Although authorizing a different method for determining the rate for unexamined respondents, there is nothing in the language of the Mandatory Respondent Exception exempting Commerce from its statutory duty to determine a dumping margin for Jilin as a “*known*” exporter or producer that is selected for examination using its own information. *Compare* 19 U.S.C. § 1677f-1(c)(2), *with* 19 U.S.C. § 1673d(c)(1)(B)(i) (the Department must (I) “determine the estimated weighted average dumping margin for each exporter and producer individually investigated” and (II) “determine” in accordance with the statute’s methodology “the estimated all-others rate for all exporters and producers not individually investigated”); *see also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103316, Vol. 1 at 872 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4200 (“Commerce will calculate individual dumping margins for those firms selected for examination and an ‘all others’ rate to be applied to those firms not selected for examination.”).

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Commerce Sept. 11, 2018); *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Admin. Rev.: 2013–2014*, 80 Fed. Reg. 12,441 (Dep’t Commerce Mar. 9, 2015).



Nor does the Mandatory Respondent Exception free Commerce from its duty to determine an accurate rate for both the unexamined and examined respondents. *See Albemarle*, 821 F.3d at 1356. Considering that Commerce now routinely identifies only two mandatory respondents to act as stand-ins for numerous unexamined respondents, the statutory requirement of calculating a rate for each respondent selected for individual examination using its own data becomes all the more important in satisfying the accuracy requirement.<sup>13</sup> *Cf. id.*

### 3. Commerce's "Nonmarket Economy" Policy

Over the years, Commerce has developed an administrative practice of applying a rebuttable presumption that all companies within a nonmarket economy country are controlled by the government of that country, *i.e.*, the "NME Policy." The NME Policy has not been formalized by regulation but is found in the *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 Fed. Reg. 22,585 (Dep't Commerce May 2, 1994) ("*Silicon Carbide*") as well as the *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*, 56 Fed. Reg. 20,588 (Dep't Commerce May 6, 1991) ("*Sparklers*").

The problem the NME Policy was meant to address was that the Chinese government, in particular, had been less than forthcoming with information about its involvement in Chinese companies, after changes in the laws of China were introduced in the period prior to 1991. *Cf. Iron Construction Castings From the People's Republic of China; Final Results of Antidumping Duty Admin. Rev.*, 56 Fed. Reg. 2,742, 2,743–44 (Dep't Commerce Jan. 24, 1991). Until that time, Commerce, consistent with the statute, had calculated separate individual rates for all respondents within a nonmarket economy coun-

<sup>13</sup> Although no party has challenged the selection of the mandatory respondents or the impact of ignoring the data for Jilin and using only Jiangsu's data to calculate the all-others rate, it is unlikely that substantial evidence supports a finding that that rate was determined, in this instance, in accordance with the statute's injunction that it be determined by "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." 19 U.S.C. § 1677f-1(e)(2)(B); compare RSM at 1 (Commerce, opting for the Mandatory Respondent Exception, anticipated that the determination of the all-others rate would be based on the weighted-average rates determined for both Jilin and Jiangsu, the two largest exporters of subject merchandise by volume), with *Practice Change*, 78 Fed. Reg. at 65,968:

*The Department considers 50 percent to be a reasonable threshold [for sampling] because in these circumstances the agency would be able to calculate specific dumping margins for the majority of imports during a period of review. However, when [the act of] selecting the largest respondents does not allow the Department to calculate dumping margins for the majority of imports, and the Department has the resources to review at least three respondents, the Department may choose to sample in view of the enforcement concerns discussed herein.*

try. *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002). Changes in Chinese law, or its administration, led to difficulties for Commerce in trying to determine whether certain respondents were truly independent of state control. *See, e.g., Iron Construction Castings From the People's Republic of China*, 56 Fed. Reg. at 2,744.

To address these difficulties, Commerce adopted a policy that imposed an additional burden of proof on each respondent from a non-market economy country seeking an individual separate rate, requiring it to demonstrate independence from state control. The presumption that every respondent is subject to state control implies that every respondent is part of a single “entity,” an amalgam of all firms in the industry within the nonmarket economy country, and that these respondents should receive a single country-wide rate. Thus, the nonmarket economy entity (“NME Entity”) is not “*the State*” itself but consists of producers or exporters *controlled by* “the State.” The NME Policy placed all respondent-exporters within such a single NME Entity—a country-wide legal fiction employed for convenience—until such time as Commerce is persuaded otherwise with respect to any individual respondent.<sup>14</sup>

Apparently, one idea behind the NME Policy was that a respondent facing the prospect of an AFA-determined rate would “encourage” a reluctant Chinese government to comply with Commerce’s requests for information or that the Chinese government would itself be motivated to seek to avoid having its domestic businesses receive a rate based on AFA. *See Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 932–37, 806 F. Supp. 1008, 1011–12 (1992). The NME Policy was thus designed as an inducement for cooperation and participation. That is, through AFA, the NME Policy is intended to encourage respondents and their governments to be forthcoming with respect to Commerce’s requests for information in administrative proceedings.

Some support for the general idea of inducement has been found in such cases as *Fine Furniture (Shanghai) Ltd. v. United States* and *KYD, Inc. v. United States*. *See Fine Furniture*, 748 F.3d at 1373 (remedy that collaterally reaches respondent-plaintiff has the potential to encourage China to cooperate so as not to hurt its overall industry); *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010) (the AFA rate calculated for a non-cooperating exporter could be applied to a cooperating importer of that exporter’s goods). The rea-

<sup>14</sup> In Jilin’s case, for example, under “Exporters” the Order lists a “PRC-wide Entity” with its own rate that is distinct from the separate all-others rate (discussed further *infra*) that Commerce applied to respondents who had not been individually investigated or reviewed. *See Order*, 76 Fed. Reg. at 76,692–93.

soning in these cases is, however, inapplicable to cases where the collaterally injured respondent could not possibly influence the behavior of a third party or, as is the case here, where the cooperation of, or information concerning, the third party (China) is not sought.

The NME Policy has not been codified by regulation and remains policy. The closest Commerce came to formalization was in 1997 when it published its regulation to calculate a “single rate” for producers and exporters from a nonmarket economy country. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296 (Dep’t Commerce May 19, 1997); *see also* 19 C.F.R. § 351.107(d) (“In an antidumping proceeding involving imports from a nonmarket economy country, ‘rates’ may consist of a single dumping margin applicable to all exporters and producers.”). Participants had urged Commerce to codify the NME Policy, but it has declined to do so, concluding that the nature of nonmarket economies is not static. *See* 62 Fed. Reg. at 27,304 (“[B]ecause of the changing conditions in those [nonmarket economy] countries most frequently subject to [antidumping duty] proceedings, we do not believe it is appropriate to promulgate the presumption [that all exporters and producers of such countries are subject to state control] or the separate rates test in these regulations. Instead, we intend to continue developing our policy in this area, and the comments that were submitted will help us in that process.”).

Development of the policy has had its critics. *See, e.g., China Mfrs. All., LLC v. United States*, 41 CIT \_\_\_, \_\_\_, 205 F. Supp. 3d 1325, 1340 (2017) (“Commerce may not exercise the discretion inherent in [19 C.F.R. § 351.107(d)], which states that rates ‘may’ consist of a single margin, to apply a single antidumping duty margin to all exporters and producers in a nonmarket economy country in a way that fails to heed the statutory requirement to assign an individual weighted average dumping margin to a fully cooperative exporter or producer it designated for individual examination pursuant to 19 U.S.C. § 1677f-1(c) [*i.e.*, the sampling and averaging statute, including the Mandatory Respondent Exception].”).

Nevertheless, the use of the NME Policy has been applied to various factual situations. After the announcement of *Antidumping Duties; Countervailing Duties*, the Federal Circuit in *Sigma Corp. v. United States*, held that the employment of a presumption of state control for exporters in a nonmarket economy

was within Commerce’s authority . . . . Moreover, because exporters have the best access to information pertinent to the “state control” issue, Commerce is justified in placing on them the burden of showing a lack of state control.

*Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997) (first citing 19 U.S.C. § 1677(18)(B)(iv), (v); and then citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) (“The burden of production should belong to the party in possession of the necessary information.”)).

Following *Sigma*, the Federal Circuit was presented with a number of specific factual situations demonstrating how Commerce administers its NME Policy when considering the cases of individual plaintiffs. In an unpublished decision, the Federal Circuit agreed that “substantial evidence supported Commerce’s conclusion that the specified brake rotor exporters satisfied their burden of establishing their *de jure* and *de facto* independence from the central government and were therefore not required to be assigned a country-wide anti-dumping rate.” *Coal. for Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 232 F.3d 913 tbl., 2000 WL 380087, at \*3 (Fed. Cir. Apr. 13, 2000). In *AMS Associates, Inc. v. United States*, the Federal Circuit considered the case of the plaintiff’s affiliate, a Chinese exporter that withdrew from the administrative review and removed its confidential information from the record after initially showing independence from the Chinese government. See *AMS Assocs., Inc. v. United States*, 719 F.3d 1376 (Fed. Cir. 2013). There, the Federal Circuit upheld this Court’s decision that the circumstances necessarily indicated that the affiliate was unable to carry its burden of affirmatively showing lack of *de jure* and *de facto* control by the Chinese government, because the remaining public information on the record did not include verifiable evidence that would be necessary to establish the affiliate’s eligibility for a separate rate, and it was thus not entitled to a separate company-specific antidumping duty rate. *Id.* at 1380–81. To give another example, *Dongtai Peak Honey Indus. Co. v. United States*, the Federal Circuit likewise reviewed the record and concluded “substantial evidence supports Commerce’s determination that [the appellant] failed to demonstrate the absence of *de facto* and *de jure* government control, as required for separate-rate status,” because the record lacked information as to shareholders, management, accounting practices, corporate structure, and affiliations, as well as information addressing whether several organizations to which the plaintiff belonged were state-sponsored, controlled the plaintiff’s business operations, or coordinated its “export activities.” *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1353–54 (Fed. Cir. 2015). These and other cases indicate that the Federal Circuit has addressed the NME Policy on a case-by-case

basis,<sup>15</sup> and because it is policy, rather than a regulation, the Court has sustained the Policy's use only for the facts before it.

As the NME Policy currently stands, an exporter may overcome the presumption of state control only by persuading Commerce that its export functions are subject to neither *de jure* nor *de facto* control by the state. If Commerce is not persuaded that an exporter is independent from state control, then the exporter is assigned the NME Entity rate—which, to the court's knowledge, is always based on AFA. Commerce has extended what amounts to an AFA “policy” rate even to *cooperative* “mandatory” respondents based on their inability to rebut the presumption of state control. See *Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Admin. Rev. & Final Determination of No Shipments; 2016–2017*, 84 Fed. Reg. 38,002 (Dep't Commerce Aug. 5, 2019).

The NME Policy thus accomplishes a result that cannot be achieved through application of the AFA statute: under particular circumstances, for *cooperative* respondents that fail to rebut the presumption of state control, Commerce may apply a rate based on AFA<sup>16</sup> (the China-wide rate) *without* (1) finding a “gap” in the *individual* factual record of the respondent that would justify the use of facts available, *and without* (2) finding a *failure* in the *behavior* of the respondent justifying the use of an adverse inference.<sup>17</sup> See *Fine Furniture*, 748 F.3d at 1371. In other words, Commerce believes it does not have to make the requisite findings under 19 U.S.C. § 1677e(a)-(b) in order to

<sup>15</sup> See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”) (citing *CBS v. United States*, 316 U.S. 407, 421 (1942)).

<sup>16</sup> See, e.g., *Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of the First Admin. Rev. of the Antidumping Duty Order & Final Rescission of the Admin. Rev., in Part*, 76 Fed. Reg. 56,397, 56,399 (Dep't Commerce Sept. 13, 2011) (adverse facts available applied to adjust certain of cooperating mandatory respondent's reported factors of production resulting in final margin of 56.63 percent); *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Admin. & New Shipper Revs. & Partial Rescission of Rev.*, 74 Fed. Reg. 6,372, 6,379 (Dep't Commerce Feb. 9, 2009) (adverse facts available applied to adjust certain of cooperating mandatory respondent's reported factors of production resulting in a preliminary margin of 124.31 percent).

<sup>17</sup> Commerce must make two separate findings before resorting to AFA. *First*, Commerce must find that it has to resort to “facts available” “[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . fails to provide . . . information [that has been requested by Commerce] . . . in the form and manner requested” or “significantly impedes” a proceeding. 19 U.S.C. § 1677e(a)(1)-(2)(B), (C). *Second*, 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.” Only at that point may Commerce use an adverse inference “in selecting from among the facts otherwise available.” *Id.* § 1677e(b)(1).

impose an AFA-inclusive margin on a respondent. It believes the AFA rate may be imposed because the respondent is presumed to be under state control.

Still, the essential purpose of the NME Policy seems to be to encourage compliance, not to punish respondents for failing to prove their independence from the state. Were the administrative application of the NME Policy employed to justify punishment, it would be in violation of the statute. See *SKF USA Inc. v. United States*, 29 CIT 969, 979, 391 F. Supp. 2d 1327, 1336 (2005) (“Section 1677e(b) is geared to promote cooperation by respondents, but not impose ‘punitive, aberrational, or uncorroborated’ margins; this is evidenced in the 19 U.S.C. § 1677e(c) corroboration requirement which intends the AFA rate ‘to be a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.’”) (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)); *Am. Silicon Techs. v. United States*, 26 CIT 1216, 1223, 240 F. Supp. 2d 1306, 1312–13 (2002) (“Although an adverse facts available margin is to have ‘some built-in increase intended as a deterrent to non-compliance’ in this instance it is so far removed from being ‘a reasonably accurate estimate of the respondent’s actual rate’ that it is disproportionately punitive in nature.”) (quoting *De Cecco*, 216 F.3d at 1032). The long history of U.S. unfair trade law has repeatedly emphasized its remedial intent. See *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1321 (Fed. Cir. 2020) (citations omitted) (describing repeated congressional iteration of the “curative purpose” and “remedial intent” of the statutory scheme). Thus, punitive application of the statute has routinely been rejected.

Although Commerce argues otherwise, under the facts of this case, Commerce’s NME Policy is entitled to no deference. While courts have authorized the Policy’s use in specific situations, it has never been reduced to a regulation, and the only writings purporting to explain the Policy are found in *Sparklers*, *Silicon Carbide*, and other individual administrative determinations. And, while the Policy’s use has been confirmed by the courts in specific factual situations, no court may provide the explanation for its lawful use in any case where the Department has not supplied one itself. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (no deference “to an agency counsel’s interpretation of a statute where the agency itself has articulated no position on the question”); see also *Prime Time Commerce LLC v. United States*, 43 CIT \_\_\_, \_\_\_ n.14, 396 F. Supp. 3d 1319, 1331 n.14 (2019) (“[I]t is not for this court to provide a rationale supporting Commerce’s determination.”).



Judicial review of an agency’s construction of the statute begins with whether Congress “has directly spoken to the precise question at issue,” because if it has, and Congress’ intent is clear, then “that is the end of the matter,” and effect is given to the unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). When deciding if Congress has clearly expressed its intent, courts use the usual tools including the canons of statutory construction and legislative history to find the meaning of the words they have before them. If the statute is silent or ambiguous with respect to the specific issue, then the question is whether the agency’s interpretation is based on a permissible construction of the statute. *See id.* at 843. The agency’s construction need not be the only—or even the most reasonable—interpretation, *see Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978), but no deference is given “where the agency itself has articulated no position on the question . . . .” *Bowen*, 488 U.S. at 212. Also, in contrast to regulations, agency “interpretations contained in policy statements, agency manuals, and enforcement guidelines . . . lack the force of law [and] do not warrant *Chevron*-style deference.” *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *cf. United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (an agency’s statutory interpretations are due *Chevron* deference when articulated in “a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement” having the force of law). Importantly, courts may not provide a reasoned interpretation when an agency, such as Commerce, has not.

Unlike a reasoned statutory interpretation, a policy lacking any clear expression of why an agency has chosen to implement a statute in a particular manner is entitled to no deference, because no court can determine if the policy represents a reasonable interpretation of the statute or not. In addition, policies, like the NME Policy, do not merit “*Skidmore*” deference, because an unexplained policy does not have the “power to persuade.” *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). It is worth repeating that courts cannot provide the reasons to justify an agency’s particular interpretation of a statute. The agency must supply the interpretation, and the courts then determine if it is reasonable.

As far as the court’s knowledge extends, Commerce has never performed a *Chevron* analysis<sup>18</sup> with respect to the specific statute Commerce claims to be construing when applying the NME Policy—nor,

<sup>18</sup> *See, e.g., Jinko Solar Co. v. United States*, 961 F.3d 1177, 1183 (Fed. Cir. 2020) (“[I]f ‘the intent of Congress is clear, that is the end of the matter,’ . . . but if the statute is ambiguous or does not include the aspect at issue, then the agency’s interpretation must be accepted unless it is ‘procedurally defective, arbitrary or capricious in substance, or manifestly



for that matter, has Commerce clearly identified the statute whose silence or ambiguity requires interpretation. In particular, Commerce has never explained why the NME Policy should apply to rates being determined pursuant to the Mandatory Respondent Exception or identified the statute or statutes that it has construed to reach that result.

### **B. Commerce Must Explain Adequately the Application of Its NME Policy to Jilin After Selecting Jilin for Examination Pursuant to the Mandatory Respondent Exception**

Pursuant to statute, Commerce is directed to determine an individual rate for each known exporter or producer of subject merchandise. *See* 19 U.S.C. § 1677f-1(c). This is the “general rule” of § 1677f-1(c)(1), and it is subject only to the Mandatory Respondent Exception in subsection (c)(2), which implicitly provides for a calculation of the all-others rate based upon the weighted-average rates of mandatory respondents. The statute clearly directs that Commerce must determine an individual rate for respondents chosen for individual examination as mandatory respondents, because they are “known” exporters or producers. *See id.*

Here, Commerce did not first determine which entities were eligible for a separate rate and which were not, prior to deciding which entities would be designated as mandatory respondents. Instead, having designated Jilin a mandatory respondent and thus a “known exporter,” Commerce placed itself under the general obligation to determine for Jilin an “individual weighted average dumping margin.” *See id.* The Department states that it need not comply with the statute, because of Jilin’s failure to demonstrate independence from state control. Beyond concluding that the NME Policy should be applied, Commerce does little to explain why it did not determine Jilin’s individual rate.<sup>19</sup> It bears repeating that it appears Commerce

contrary to the statute.”) (first quoting *Chevron*, 467 U.S. at 842; and then citing *Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1253 (Fed. Cir. 2009)) (applying *Chevron* to antidumping determinations).

<sup>19</sup> The China-wide rate that Commerce applied to Jilin was based on an adverse inference. *See, e.g., Baroque Timber*, 38 CIT at \_\_\_, 971 F. Supp. 2d at 1338–39 (“Commerce selected . . . the revised AFA rate for the [China]-wide entity.”). The application of an AFA rate to a fully cooperative respondent is unanticipated by the statute. The statute only provides for the use of AFA when there is (1) a gap in the record, and (2) uncooperative behavior by respondent. That is, if information necessary to the record is “missing,” then Commerce is permitted to base an individual weighted-average dumping margin on the use of “facts otherwise available” (19 U.S.C. § 1677e(a)(1)), and indeed, if circumstances permit, with resort to AFA (19 U.S.C. § 1677e(b)). No such circumstances are apparent on the record before the court. Commerce did not make a finding, supported by record evidence, that “necessary information,” within the meaning of 19 U.S.C. § 1677e(a), was unavailable on the record with respect to Jilin’s information. *Cf. China Mfrs. All.*, 41 CIT at \_\_\_, 205 F. Supp. 3d at 1338 (“The authority Congress provided in 19 U.S.C. § 1677e does not extend

had all of the information it needed to determine an individual weighted-average dumping margin for Jilin. Moreover, because of the importance of the Mandatory Respondent Exception’s goal of determining an *accurate* all-others rate by means of a weighted-average calculation of the rates of the *two* mandatory respondents *selected* for this review, compliance with the statute assumes even greater importance.

It also bears repeating that the purpose of the NME Policy is to encourage compliant participation in a proceeding, not only on the part of an individually-examined respondent, but also by the nonmarket economy country government. The Policy does this by shifting the burden to respondents to demonstrate their independence from the government. Here, there is nowhere on the record any indication that Jilin, in its efforts to demonstrate its independence from state control and provide the factual information necessary to determine its individual rate, was not entirely cooperative with Commerce’s requests for information. Thus, Jilin was compliant. Also absent from the record is any evidence that China was sent a questionnaire, or that Commerce sought information from Chinese officials in any other way.<sup>20</sup> When asked to cooperate, Jilin did. The government of China

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to the use of an adverse inference against Double Coin, a fully cooperative int[er]ested party that Commerce examined individually in the review and for which Commerce calculated (but declined to apply) an individual weighted average dumping margin based on information it found to be sufficient for that purpose.”); *but see Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1313 n.6 (Fed. Cir. 2017) (noting, in dicta, that *China Manufacturers Alliance* “does not properly apply our precedent upholding Commerce’s use of the [China]-wide entity rate for companies that fail to rebut the presumption of government control and is incompatible with the underlying NME presumption,” although *China Manufacturers Alliance* had yet to be finally decided by this Court).

<sup>20</sup> The Department does say that it “matters” that no request to review the China-wide entity was submitted here. Commerce apparently believes that circumstance absolves it of any duty to inquire further as to the status of the NME Entity. It is unclear, however, why Jilin should be charged with shouldering the burden of asking that the China-wide entity be reviewed. The evidence indicates that Jilin did not expect to be included in the entity. It never was before. And it presented evidence, once again, that it was not. Commerce itself proceeded along that same assumption when it selected Jilin as a mandatory respondent. Therefore, Jilin had no reason to request review of the China-wide entity.

Moreover, this Court has found that a mandatory respondent cannot ask for a review of the “NME-wide entity.” The relevant regulation on the subject confers no such right. *See Guizhou Tyre*, 44 CIT at \_\_\_, 469 F. Supp. 3d at 1355–57. The regulation indicates that only Commerce, or possibly the foreign government impacted, could request a review of the NME Entity. *See* 19 C.F.R. § 351.221(b) (“on the Secretary’s own initiative”); *see also id.* § 351.213(b)(1) (“or an interested party described in section 771(9)(B) of the Act (foreign government)”). Respondents or importers may only request administrative review with respect to their own products, exports, or imports. *See id.* § 351.213(b)(2), (b)(3). Furthermore, the evidence of record indicates that the composition of—or even the actual existence of—the so-called “China-wide entity” was a complete “unknown” at the beginning of the review. It is, after all, a legal fiction constructed for convenience. It is, therefore, difficult to see how Jilin could be required to “request” a review of an indefinite entity that has yet to be “clarified” at the start of an administrative proceeding. *Cf. id.* § 351.213(b)(1) (emphasis added) (“*specified individual* exporters or producers covered by an order”).

was never asked to “cooperate,” so it could not have failed to do so. In other words, “compliance” is not an issue in this case.

Both Commerce and the Federal Circuit have been mindful that the need to encourage compliance can be combined with the primary goal of determining an accurate rate and thus avoid rates that serve to punish a respondent. *See Albemarle*, 821 F.3d at 1356 (citation omitted) (administrative reviews should “be as accurate *and current as possible*”).

An examination of the record further reveals that it is difficult to figure out just what entities were under review (being examined) as well as the statutory authority to apply to Jilin the China-wide rate. *See* Final IDM at 10 (“Because [Jilin] has failed to rebut the presumption of government control, it is subject to the same rate applicable to all members of the China-wide entity that have not proven their independence from the state.”). The question of what entities are actually under review is not one that is presenting itself here for the first time. This Court has questioned what type of rate Jilin’s NME Entity rate actually is, given that the rates specified in the antidumping statute for an “individually investigated” respondent and for the *all-others rate* for those respondents “not individually investigated” are the only two rates explicitly authorized by the statute. *See, e.g., Thuan An*, 42 CIT at \_\_\_, 348 F. Supp. 3d at 1351 (“That courts have permitted Commerce to presume state control in an NME country does not address the problem of Commerce lacking statutory authority for a country-wide rate that is neither an individually investigated rate nor an all-others rate. Although Defendant-Intervenors argued initially that the country-wide rate in this case was indeed an individual rate, [Commerce] expressly denied that the Vietnam-wide rate in this case is an individual rate.”); *UCF Am. Inc. v. United States*, 20 CIT 320, 325–26, 919 F. Supp. 435, 440 (1996) (“Other than pointing to its current rationale for its NME policy, including an example of application of a single country-wide ‘all others’ rate where no company proved autonomy from the central government, Commerce has pointed to no authority for establishing a ‘PRC rate’ in lieu of an ‘all others’ rate.”). Commerce has not stated the statutory authority for assigning Jilin the China-wide rate of 25.62 percent.<sup>21</sup>

<sup>21</sup> *Diamond Sawblades* and *Thuan An* do not direct a different result. *See Diamond Sawblades*, 866 F.3d at 1304; *Thuan An Production Trading & Service Co. v. United States*, 43 CIT \_\_\_, 396 F. Supp. 3d 1310 (2019). In *Diamond Sawblades*, the parties did not raise, and the Court did not decide, whether the statute authorizes Commerce to apply a China-wide rate. *See Diamond Sawblades*, 866 F.3d at 1310 n.4 (“During oral argument, ATM clarified that it does not challenge Commerce’s ability to apply a PRC-wide entity rate under the statutory framework.”). In *Thuan An*, this Court rejected, as contrary to the statute, Commerce’s determination that it had the authority to establish “a third type of rate, i.e., an NME-entity rate or country-wide rate,” pursuant to 19 C.F.R. § 351.107(d),

Commerce has provided no reasoned explanation for its application of the NME Policy to mandatory respondent Jilin, nor has it provided a reasoned explanation for failing to calculate Jilin's rate as directed by statute and in light of its particular role in the Mandatory Respondent Exception. Therefore, on remand the Department shall calculate an antidumping duty rate for Jilin and use it in its construction of the all-others rate or provide a reasonable explanation for why it need not. Should the Department adopt the latter course, Commerce's explanation shall ensure that it has permitted Jilin, in advance of draft remand results and in accordance with 19 C.F.R. § 351.301(c)(4), to submit written argument with respect to the Department's inclusion of the *Aluminum Foil* proceeding on the record of this review, and shall take into consideration all relevant arguments presented by Jilin to Commerce on the issue of state control.

In addition, should it endeavor to explain why it need not calculate an individual rate for Jilin, Commerce's explanation shall cover: (1) the role played by the Mandatory Respondent Exception and how the Mandatory Respondent Exception's purpose of establishing an accurate rate for Jilin and an accurate all-others rate is advanced by not calculating an individual rate for Jilin; (2) the purpose of the NME Policy and how the Policy's purpose is achieved by the application of the NME Policy to Jilin; (3) the statutory and/or regulatory basis for a request for review of the China-wide entity by Jilin; (4) the interplay of the NME Policy, the Mandatory Respondent Exception, and the purpose of the statute to determine accurate rates not only for Jilin but for all unexamined respondents subjected to the all-others rate; (5) because of its importance to determining whether the law directs Commerce to calculate an individual rate for Jilin, a specific statement as to whether and how Jilin was under review individually or as part of the China-wide entity; (6) an explanation as to why 19 C.F.R. § 351.212(c)(1) does not operate to continue Jilin's cash deposit rate, as the record seems to indicate that Commerce did not, apparently and/or completely, "review" Jilin; (7) the specific statutes the Department is construing with respect to both the NME Policy and the Mandatory Respondent Exception and any legal theories upon which it relies if it seeks deference for the construction of the statute; (8) an explanation of the Department's use of the various phrases "export functions," "export activities," and "company's operations," in

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which Commerce viewed as neither "an individual rate [nor] an all-others rate." *Thuan An*, 43 CIT at \_\_\_, 396 F. Supp. 3d at 1314 (citing 19 C.F.R. § 351.107(d)). After remand, the Court found sufficient, for purposes of compliance with its remand order, Commerce's "acknowledgement" in its redetermination, based on the facts of that case, that "the NME-entity rate in the underlying investigation was an individually investigated rate." *Id.* Neither case resolved the questions presented here, *i.e.*, just what entities were under review (being examined) as well as the statutory authority to apply to Jilin the China-wide rate.

particular a statement of the extent to which they differ or are synonymous, and a statement of the extent to which analysis of “export functions” is required as part of its *de facto* control analysis regarding Jilin, how that consideration affects its remand results, and how the phrase figures in this case; and (9) if Commerce should assign the AFA-inclusive China-wide rate to Jilin, then explain, with specificity, why it is reasonable to apply such an AFA-inclusive rate when Jilin has, apparently, been fully compliant in responding to Commerce’s requests for information and has not otherwise hindered or impeded the proceeding. While Commerce may, on remand, cite to any cases it wishes, these cases cannot take the place of reasoned explanations.

### CONCLUSION and ORDER

In view of and in addition to the foregoing, Jilin’s motion for judgment on the agency record is hereby granted, and this case is remanded to Commerce. On remand, it is hereby:

**ORDERED** that Commerce shall reconsider the Final Results as directed by this Opinion and Order and submit a new determination upon remand (“Remand Redetermination”) that complies with this Opinion and Order, is supported by substantial evidence, and is otherwise in accordance with law; and it is further

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

Dated: April 20, 2021

New York, New York

*/s/ Richard K. Eaton*

RICHARD K. EATON, JUDGE

Slip Op. 21–50

YAMA RIBBONS AND BOWS CO., LTD. Plaintiff, v. UNITED STATES,  
Defendant, and BERWICK OFFRAY LLC, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge  
Court No. 19–00047

[Ordering remand of an agency determination in a countervailing duty proceeding on narrow woven ribbons with woven selvedge from the People’s Republic of China.]

Dated: April 30, 2021

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*Kara M. Westercamp*, Trial Counsel, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Rachel A. Bogdan*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

*Gregory C. Dorris*, Pepper Hamilton LLP, of Washington D.C., for defendant-intervenor Berwick Offray LLC.

## OPINION AND ORDER

### Stanceu, Judge:

Plaintiff Yama Ribbons and Bows Co., Ltd. (“Yama”) contests an administrative determination the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) issued to conclude the sixth periodic administrative review of a countervailing duty (“CVD”) order on narrow woven ribbons with woven selvedge from the People’s Republic of China (“China” or the “PRC”). Ruling in favor of plaintiff, the court remands the determination to Commerce for appropriate corrective action.

## I. BACKGROUND

### A. The Contested Determination

The contested determination (the “Final Results”) is *Narrow Woven Ribbons With Woven Selvedge From the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2016*, 84 Fed. Reg. 11,052 (Int’l Trade Admin. Mar. 25, 2019) (“Final Results”).

### B. The Administrative Review, Preliminary Results, and Final Results

Commerce issued the countervailing duty order (the “Order”) on narrow woven ribbons with woven selvedge from China (the “subject



merchandise”) in 2010. *Narrow Woven Ribbons With Woven Selvedge From the People’s Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 53,642 (Int’l Trade Admin. Sept. 1, 2010) (the “Order”).<sup>1</sup> Commerce initiated the sixth review on November 13, 2017 upon the request of Berwick Offray LLC (“Berwick Offray”), the petitioner in the countervailing duty investigation and the defendant-intervenor in the present action. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 52,268 (Int’l Trade Admin. Nov. 13, 2017). The review pertained to entries of subject merchandise made during the period of review (“POR”) of January 1, 2016 through December 31, 2016. *Id.* at 52,273. Commerce identified Yama as the sole exporter or producer of the subject merchandise to be reviewed. *Id.*

Commerce published the preliminary results of the review (“Preliminary Results”) on October 10, 2018. *Narrow Woven Ribbons With Woven Selvedge From the People’s Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2016*, 83 Fed. Reg. 50,891 (Int’l Trade Admin. Oct. 10, 2018), P.R. Doc. 108, J.App. at 51 (“Preliminary Results”).<sup>2</sup> Commerce preliminarily assigned Yama a total net countervailable duty subsidy rate of 23.70%. *Id.* Commerce incorporated an explanatory document into the Preliminary Results by reference. *Decision Memorandum for Preliminary Results of 2016 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People’s Republic of China* (Int’l Trade Admin. Oct. 3, 2018), P.R. Doc. 95, J.App. at 44 (“Preliminary Results Mem.”).

The Final Results also incorporated by reference an explanatory memorandum, the “Final Decision Memorandum.” *Decision Memorandum for the Final Results of 2016 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People’s Republic of China* (Int’l Trade Admin. Mar. 19, 2019), P.R. Doc. 117, J.App. at 14 (“Final Decision Mem.”). In the Final Results, Commerce determined that Yama benefited from 16 subsidy programs and calculated the subsidy rate for each, as follows: (1) Policy

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<sup>1</sup> The countervailing duty order applies generally to woven ribbons 12 centimeters or less in width, and of any length, that are composed in whole or in part of man-made fibers and that have woven selvedge. Some exclusions apply. *Narrow Woven Ribbons With Woven Selvedge From the People’s Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 53,642, 53,642–43 (Int’l Trade Admin. Sept. 1, 2010). The term “selvedge” refers to “the edge on either side of a woven or flat-knitted fabric so fashioned as to prevent raveling.” *Selva* or *selvedge*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (2002).

<sup>2</sup> The information disclosed in this Opinion and Order is included in public versions of record documents, public versions of the parties’ submissions, and other information subsequently made public in issuances by Commerce. All citations to record documents are to the public versions of those documents. All citations to the “J.App.” are to the Joint Appendix, Public Version (Dec. 10, 2019), ECF No. 35.



Loans to Narrow Woven Ribbon Producers from State-owned Commercial Banks, 0.03%; (2) Income Tax Reduction for High and New Technology Enterprises, 0.41%; (3) Preferential Tax Policy for Wages of Disabled Employees, 0.01%; (4) Provision of Synthetic Yarn for Less-than-Adequate Remuneration (“LTAR”), 10.45%; (5) Provision of Caustic Soda for LTAR, 0.26%; (6) Provision of Electricity for LTAR, 1.07%; (7) Export Buyer’s Credit Program, 10.54%; (8) Xiamen Municipal Science and Technology Grant Program, 0.34%; (9) International Market Development Fund Grants for Small and Medium-sized Enterprises, 0.21%; (10) Assistance for Recruiting Rural Labor, 0.04%; (11) Assistance for Recruiting Vocational Institution and/or College Graduates, 0.03%; (12) Insurance Expense Assistance, 0.09%; (13) Interest Assistance for Loans Obtained for Technology Projects, 0.18%; (14) Assistance for Textile Exhibition, 0.01%; (15) Training Fee Rebate, 0.01%; and (16) Payments from Xiamen Commerce Bureau, 0.02%. Final Decision Mem. 3–5.

Aggregating the various subsidy rates for the Final Results, Commerce assigned Yama a total net countervailable duty subsidy rate of 23.70%, which was unchanged from the rate Commerce calculated in the Preliminary Results. *Final Results*, 84 Fed. Reg. at 11,052.

In the instant action, Yama contests the Department’s including in the 23.70% total subsidy rate the 10.54% subsidy rate for the Export Buyer’s Credit Program and the subsidy rates for the provision of synthetic yarn (10.45%) and caustic soda (0.26%) for less-than-adequate remuneration.

### **C. Proceedings in the Court of International Trade**

Yama brought this action in April 2019. Compl. (Apr. 9, 2019), ECF No. 6. Before the court is Yama’s motion for judgment on the agency record under USCIT Rule 56.2. Pl. Yama Ribbons and Bows Co., Ltd.’s Rule 56.2 Mot. for J. upon the Agency R. (Aug. 9, 2019), ECF No. 25 (“Pl.’s Mot.”); Mem. of Law in Supp. of Pl. Yama Ribbons and Bows Co., Ltd.’s 56.2 Mot. for J. upon the Agency R. (Aug. 9, 2019), ECF No. 26 (“Pl.’s Br.”).

Yama’s motion is opposed by defendant United States, Def.’s Resp. in Opp’n to Pl.’s Mot. for J. upon the Agency R. (Oct. 23, 2019), ECF No. 30 (“Def.’s Br.”), and by defendant-intervenor Berwick Offray, Resp. Br. of Def.-Int. Berwick Offray LLC in Opp’n to Pl.’s Rule 56.2 Mot. for J. on the Agency R. (Oct. 23, 2019), ECF No. 29 (“Def.-Int.’s Br.”). Defendant and defendant-intervenor urge the court to sustain the Final Results.

The court held oral argument on Yama’s motion on February 13, 2020. Oral Argument (Feb. 13, 2020), ECF No. 39. At oral argument,

the court requested supplemental briefing on a specific issue the court considered unresolved by the parties' presentations, which was whether Commerce included a 17% value-added tax in the comparison price when assessing the adequacy of remuneration for two production inputs, synthetic yarn and caustic soda. Defendant answered the court's inquiry affirmatively. Def.'s Resp. to the Ct.'s Req. for Suppl. Briefing (Mar. 16, 2020), ECF No. 41. Yama concurred with defendant's answer. Pl.'s Reply to Def.'s Resp. to the Ct.'s Req. for Suppl. Briefing (Mar. 23, 2020), ECF No. 42.

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an administrative review of a countervailing duty order. *See id.* § 1516a(a)(2)(B)(iii).<sup>3</sup>

In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

### B. Countervailing Duties under the Tariff Act

Where certain conditions are met, the Tariff Act provides for the imposition of a "countervailing duty" on imported merchandise to redress a subsidy provided by the government of the exporting country. Section 701(a) of the Tariff Act, 19 U.S.C. § 1671(a), directs generally that Commerce is to impose a countervailing duty if: (1) Commerce determines that an "authority," defined as either the government of a country or any public entity within the territory of the country, *id.* § 1677(5)(B), "is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States"; and (2) the U.S. International Trade Commission determines that an industry in the

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<sup>3</sup> All citations to the United States Code are to the 2012 edition.

United States is materially injured or threatened with material injury by reason of the subsidized imports.

A “countervailable subsidy” exists, generally, where an authority provides a financial contribution to a person and a benefit is thereby conferred, and the subsidy meets the requirement of “specificity,” which is determined according to various rules set forth in the statute. *Id.* § 1677(5), (5A). When subsidies consist of the provision of goods or services rather than the provision of monies directly, a benefit is conferred if those goods or services are provided for less than adequate remuneration. *Id.* § 1677(5)(E)(iv).

### **C. The Export Buyer’s Credit Program**

Yama claims that Commerce unlawfully included in Yama’s overall subsidy rate of 23.70% a subsidy rate of 10.54% that Commerce assigned to China’s “Export Buyer’s Credit Program” (“EBCP”), an export-promoting loan program administered by the Export-Import Bank of China (“Ex-Im Bank”). Pl.’s Br. 15–32. In the alternative, Yama claims that the 10.54% subsidy rate Commerce imposed on Yama and attributed to the program was derived from information pertaining to an industry dissimilar to the woven ribbon industry and was punitive. *Id.* at 33–35.

In the sixth review, Commerce included a rate for the EBCP in Yama’s overall subsidy rate without reaching a factual finding that Yama actually received a benefit from the EBCP. Instead, Commerce stated its primary finding in the negative: “In these final results, we continue to find that the information on the record does *not* support finding that Yama did *not* use the Export Buyer’s Credit program during the POR.” Final Decision Mem. 21 (emphasis added). At issue is the statutory requirement that Commerce, in order to impose a countervailing duty, find that an authority provided a financial contribution “to a person and a benefit is thereby conferred.” 19 U.S.C. § 1677(5)(B). Rather than make the affirmative finding that a financial contribution was provided to Yama and a benefit was thereby conferred, Commerce inferred a contribution and benefit to Yama by invoking its “facts otherwise available” authority under 19 U.S.C. § 1677e(a) and its “adverse inference” authority under 19 U.S.C. § 1677e(b).<sup>4</sup> As explained below, Commerce found, with respect to § 1677e(a), that the government of China (“GOC”) withheld requested information and significantly impeded the proceeding and found, with respect to § 1677e(b), that the Chinese government failed to cooperate by not acting to the best of its ability to comply with the Department’s requests for information.

<sup>4</sup> When using both provisions, Commerce refers to “adverse facts available” or “AFA.”

Based on its review of the administrative record for the Final Results, the court holds that the Department's use of facts otherwise available and an adverse inference did not suffice to support a subsidy rate related to the EBCP. Most significantly, Commerce disregarded record evidence that Yama did not benefit from the EBCP and overlooked the lack of record evidence from which Commerce could conclude that it had. Commerce deemed Yama to have benefitted from the EBCP by resorting to facts otherwise available, and an adverse inference, reasoning that the government of the PRC failed to provide certain requested information. As the court explains below, the record evidence does not support a finding that the information Commerce lacked as a result of non-cooperation by the Chinese government prevented Commerce from relying upon or verifying the information Yama provided to show the absence of a benefit from the EBCP. Because the court concludes that Commerce acted unlawfully in its use of facts otherwise available, and an adverse inference, to include a rate for the EBCP in the overall subsidy rate, the court does not reach Yama's alternative claim that the subsidy rate of 10.54% was improperly derived.

Commerce is directed to use "facts otherwise available" in various circumstances, as set forth in 19 U.S.C. § 1677e(a). Commerce is directed, generally, to use facts otherwise available when: "(1) necessary information is not available on the record, or (2) an interested party or any other person—(A) withholds information that has been requested by [Commerce]; (B) fails to provide such information by the deadlines for submission of the information . . . ; (C) significantly impedes a proceeding under this subtitle, or (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this subtitle." 19 U.S.C. § 1677e(a).

In the sixth review, Commerce based its resort to facts otherwise available on the "withholds information" and "significantly impedes a proceeding" criteria of 19 U.S.C. § 1677e(a)(2)(A) and (2)(C), respectively. Commerce stated as follows: ". . . [W]e continue to find that the GOC withheld necessary information that was requested of it, and thus, Commerce must continue to rely on facts otherwise available in these final results, pursuant to section 776(a)(2)(A) and (2)(C) [19 U.S.C. § 1677e(a)(2)(A) and (2)(C)] of the Act." Final Decision Mem. 23. "By refusing to provide this information, the GOC impeded Commerce's ability to conduct its investigation of this program." *Id.* at 22. Commerce also invoked the "adverse inference" provision of 19 U.S.C. § 1677e(b), under which Commerce, in selecting from the facts otherwise available, may use an inference adverse to the interests of a party that fails to cooperate by not acting to the best of its ability to

comply with its request for information. *Id.* at 23 (“Moreover, we determine that the GOC failed to cooperate by not acting to the best of its ability to comply with our requests for required information.”).

Commerce used an inference adverse to Yama even though Yama was not a party Commerce found to have failed to cooperate. The Tariff Act, in 19 U.S.C. § 1677e(b), authorizes Commerce, in choosing from among facts otherwise available, to use an inference that is adverse to a party that failed to cooperate in the proceeding by not acting to the best of its ability to comply with an agency’s request for information. Regardless, the Court of Appeals for the Federal Circuit (“Court of Appeals”) has recognized circumstances in which Commerce may use an adverse inference in a countervailing duty proceeding, in response to non-cooperation by a national government with information bearing on the subsidy in question, even if the result is a collateral adverse effect upon a cooperating party. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014) (“*Fine Furniture*”) (“[A] remedy that collaterally reaches *Fine Furniture* has the potential to encourage the government of China to cooperate so as not to hurt its overall industry.”).

Commerce relied upon *Fine Furniture* to support its use of facts otherwise available with an adverse inference. Final Decision Mem. 23–24. But the facts of *Fine Furniture* are not analogous to those presented here. In *Fine Furniture*, the cooperative respondent provided the price at which it purchased electricity, but the PRC government failed to provide requested information on how electricity prices were calculated, which was necessary to the Department’s determining whether electricity was provided according to market principles or on non-market terms that amounted to a countervailable subsidy. *See Fine Furniture*, 748 F.3d at 1368. Due to the resulting gap in the record, Commerce used AFA to determine that electricity was provided as a specific financial contribution and to construct a benchmark price for electricity for comparison with the rate paid by the cooperating respondent. *Id.* The Court of Appeals recognized that “[b]ecause the government of China did not provide the requested information, Commerce was forced to substitute for the missing information and did so in accordance with 19 U.S.C. § 1677e(b).” *Id.* at 1372. The Court of Appeals noted this important qualification: “Commerce did not apply adverse inferences to substitute for any information that was actually submitted by the cooperating respondents, such as the actual rate *Fine Furniture* reported paying for electricity. Commerce used this rate to determine the amount of benefit that *Fine Furniture* received under the Electricity Program.” *Id.* As this Court has stated in the context of governmental non-cooperation in a

countervailing duty proceeding, “Commerce may apply AFA even if the collateral effect is to ‘adversely impact a cooperating party.’ . . . Commerce, however, should ‘seek to avoid such impact if relevant information exists elsewhere on the record.’” *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT \_\_, \_\_, 352 F. Supp. 3d 1316, 1325 (2018) (quoting *Archer Daniels Midland Co. v. United States*, 37 CIT 760, 768–69, 917 F. Supp. 2d 1331, 1342 (2013)). “Under 19 U.S.C. § 1677e(b) Commerce may use AFA to choose among facts of record, but the choice must fill in the information that is actually missing.” *Id.* at \_\_, 352 F. Supp. at 1327.

In the sixth review, Commerce used facts otherwise available and adverse inferences in place of probative record evidence that bore directly on the issue the statute called upon Commerce to decide, which was whether an authority provided a financial contribution “to a person and a benefit is thereby conferred.” 19 U.S.C. § 1677(5)(B). The record contained evidence supporting a finding that Yama did not benefit from the EBCP. This included Yama’s statement that its customers did not use the program, Yama First Supplemental Questionnaire Response 10 (Apr. 9, 2018), P.R. Doc. 34; declarations from Yama’s U.S. customers stating that they did not use the program, Final Decision Mem. 22 (referencing these declarations); and the PRC government’s cross-referencing Yama’s customer list against EX-IM Bank records and reporting its having found none of Yama’s customers in the records of the EBCP, GOC First Supplemental Questionnaire Response 65–67 (Apr. 23, 2018), P.R. Doc. 35–37 (“GOC First Supplemental Questionnaire Response”). Commerce disregarded this evidence, explaining as follows:

Our complete understanding of the operation of this program is a prerequisite to our reliance on the information provided by the company respondents regarding non-use. Therefore, without the necessary information that we requested from the GOC, the information provided by the company respondents is incomplete for reaching a determination of non-use. Accordingly, information regarding the operation of this program and the respondents’ usage would come from the GOC. Commerce considered all the information on the record of this proceeding, including the incomplete statements of non-use provided by Yama. As explained above and in the *Preliminary Results*, we are unable to rely on the information provided by Yama because Commerce lacks a complete and reliable understanding of the program.

Final Decision Mem. 23. Commerce also concluded that the information it lacked rendered the information Yama provided “unverifiable



because, without a complete understanding of the operation of the program, which could only be achieved through a complete response by the GOC to our questions on this program, verification of these customer's certifications of non-use would be meaningless." *Id.* at 22. Commerce described what it considered to be the necessary information in this way: "information pertaining to the 2013 revisions to the program, a list of all third-party banks involved in the disbursement/settlement of export buyer's credits, and a list of all partner/correspondent banks involved in disbursement of funds under this program[]." *Id.*

During the review, the first questions to the Chinese government relating to the EBCP were in the Department's March 23, 2018 first supplemental questionnaire. *See* GOC First Supplemental Questionnaire (Mar. 23, 2018), P.R. Doc. 29 (the Department's questionnaire); GOC First Supplemental Questionnaire Response 64–67 (the PRC's answers). The instructions stated: "You must answer the below listed questions regarding Export Buyer's Credits provided to *all* U.S. customers of the mandatory respondents . . . during the POR." GOC First Supplemental Questionnaire Response 64 (emphasis in original). Question 6 in this questionnaire asked the government to "[p]rovide a list of all partner/correspondent banks involved in the disbursement of funds" under the EBCP, to which the GOC replied "[n]ot applicable," as ". . . none of [Yama]'s US customers used the Export Buyer's Credits during the POR." *Id.* at 65–66. Based on the Chinese government's stated position that Yama's customers were not provided credits under the EBCP, this response does not constitute a failure to cooperate.

In a second supplemental questionnaire dated June 21, 2018, Commerce asked the Chinese government in question 16 to "[p]rovide the original and English translation of the 2013 revisions to the Administrative Measures of Export Buyer's Credits of the Ex-Im Bank of China." GOC Second Supplemental Questionnaire 5 (June 21, 2018), P.R. Doc. 40 ("GOC Second Supplemental Questionnaire"). The PRC government did not provide the 2013 revisions in response to question 16. Instead, it responded that "[t]he document requested is not available and can not be submitted. We provide a copy of the Annual Report of 2016 of Ex-Im Bank of China at Exhibit Sup2.Exhibit III.16." GOC Second Supplemental Questionnaire Response 49 (July 12, 2018), P.R. Doc. 44–47 ("GOC Second Supplemental Questionnaire Response"). Because the response did not provide any explanation as to why the document was not available, the response is evidence of a failure by the Chinese government to cooperate.

In question 17, the supplemental questionnaire also directed: "In addition, although you maintain on pages 65 - 67 that Yama's U.S.



customers did not use the Export Buyer's Credits from China Ex-Im Bank, as requested in the questionnaire, please provide the following information: . . . Provide a list of all partner/correspondent banks involved in disbursement of funds under the Export Buyer's Credit Program." GOC Second Supplemental Questionnaire 5. The Chinese government replied that it confirmed that none of Yama's U.S. customers appear on the records of the Ex-Im Bank and thus, "there were no relevant disbursements of funds in the [P]OR from *any* bank." GOC Second Supplemental Questionnaire Response 49–50 (emphasis added). The PRC government appears to have misinterpreted the question, which is reasonably interpreted to seek the identification of banks that were involved in any disbursements of EBCP funds in partnership or correspondence with the Export Import Bank. Nevertheless, a review of the entire record reveals that Commerce was not lacking information on the issue presented by question 17. To the contrary, the record of the review included the PRC government's response to a supplemental questionnaire in another proceeding. See GOC First Supplemental Questionnaire Response 65. This submission clarifies that only the Ex-Im Bank makes disbursements under the EBCP and that the role of private banks is limited to the "settlement" of funds, a process described as involving the crediting and debiting of funds disbursed by the Ex-Im Bank.<sup>5</sup>

Thus, according to record evidence, Commerce erred, in two respects, in concluding that it lacked requested information comprised of "a list of all third-party banks involved in the disbursement/

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<sup>5</sup> The response states as follows:

The Ex-Im Bank has confirmed to the GOC that, when the conditions or milestones are met, the Ex-Im Bank will disburse the funds . . . [I]n order to make a disbursement, the Ex-Im bank lending contract requires the buyer (importer) and seller (exporter) to open accounts with either the Ex-Im Bank or one of its partner banks. While these accounts are typically opened at the Ex-Im Bank, sometimes a customer prefers another bank (e.g., the Bank of China) which is more accessible than an account with the Ex-Im Bank. The loan agreement also stipulates that the borrower (generally the importer/customer) must grant the Ex-Im Bank authorization to conduct transactions in the account opened specifically for this financing. After all conditions for disbursement are met, the Ex-Im Bank will disburse the funds according to the lending agreement. The funds are first sent from the Ex-Im Bank to the borrower's (importer) account at the Ex-Im Bank (or other approved partner bank). The Ex-Im Bank then sends the funds from the borrower's (importer) account to the seller's (exporter) bank account.

GOC First Supplemental Questionnaire Response Sup1 Ex. D-1 (*GOC 7th Supplemental Response in the Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China* 4–5 (Sept. 6, 2016)) (Apr. 23, 2018), P.R. Docs. 35–37 ("GOC First Supplemental Questionnaire Response"); see also *id.* at Sup1 Ex. D-3 (Detailed Implementation Rules Governing Export Buyers' Credit of the Export-Import Bank of China 2 (Sept. 11, 1995)) (distinguishing between the "disbursing bank," i.e., the Ex-Im Bank, and the "settlement bank," as follows: "After the Export-Import Bank of China receives the notice, the business department shall verify and debit the borrower's loan account, notify the borrower on the account entry date, disburse the funds to the settlement bank, and notify the settlement bank . . .").

settlement of export buyer's credits, and a list of all partner/correspondent banks involved in disbursement of funds under this program," Final Decision Mem. 22. First, Commerce was on notice from record evidence that only the Ex-Im Bank disbursed EBCP funds and that private banks did not. Second, the questions Commerce placed before the Chinese government pertained only to the disbursement of funds. Commerce did not ask for a list of banks involved in the settlement of funds. See GOC First Supplemental Questionnaire Response 65 ("6. Provide a list of all partner/correspondent banks involved in *disbursement* of funds under the Export Buyer's Credit Program") (emphasis added). Commerce may not resort to its authority under 19 U.S.C. § 1677e based on an alleged failure to provide information it never requested. Commerce, therefore, was unjustified, and unsupported by record evidence, in concluding that the information it requested, and did not receive, from the PRC government regarding "disbursement" and "settlement" of EBCP funds prevented it from relying upon or verifying the information Yama provided.

In sum, Commerce had a basis in record evidence on which to conclude that the Chinese government failed to cooperate by not providing information, but only regarding information on the 2013 revisions to the EBCP. But record evidence does not establish a relationship between this missing information and the question of whether Commerce could rely upon or verify Yama's and the Chinese government's submitted information constituting record evidence that Yama did not benefit from this program. The only explanation Commerce provided as to why it sought the 2013 revisions was its desire to ascertain whether a two-million-dollar threshold applies to loans under the program. See Preliminary Results Mem. 11 ("Information obtained in a prior CVD proceeding indicates that the GOC revised the Export Buyer's Credit program in 2013 to eliminate the requirement that loans under the program be a minimum of two million U.S. dollars."); Final Decision Mem. 22 ("[T]he 2013 revisions may have eliminated the two million U.S. dollar contract minimum associated with this lending program."). The record shows no relationship between the existence of, or lack of, that loan threshold and the issue of whether Yama's customers used the EBCP to Yama's benefit.

The Final Decision Memorandum states that when a government, rather than a respondent, fails to cooperate in a countervailing duty proceeding, "[t]he respondent company has the opportunity to demonstrate that it did not use, or benefit from, the program at issue." Final Decision Mem. 27. Here, the Department's unsupported conclu-

sions that “Commerce can no longer rely on declarations of non-use without a complete response by the GOC to Commerce’s questionnaires,” *id.* at 22, and “[o]ur complete understanding of the operation of this program is a prerequisite to our reliance on the information provided by the company respondents regarding non-use,” *id.* at 23, rendered that opportunity a nullity for Yama. According to the Final Decision Memorandum, “Commerce considered all the information on the record of this proceeding, including the incomplete statements of non-use provided by Yama.” *Id.* The record refutes any contention that Commerce considered the record evidence Yama and the Chinese government presented relating to the question of a benefit to Yama from the EBCP. The only reason Commerce offered as to why Yama’s evidence was incomplete was a non-sequitur: “we are unable to rely on the information provided by Yama because Commerce lacks a complete and reliable understanding of the program.”<sup>6</sup> *Id.* There was no evidence on the record of the review to support a finding that any U.S. customer of Yama used the EBCP, and the record contained evidence refuting any such finding. On remand, Commerce must consider the record evidence fairly and impartially and reach a new determination on whether Yama benefitted from the EBCP.

#### **D. Provision of Synthetic Yarn and Caustic Soda for Less-than-Adequate Remuneration**

Commerce attributed to Yama participation in what it termed “programs” that it identified as “Provision of Synthetic Yarn for LTAR” and “Provision of Caustic Soda for LTAR.” Commerce reached this result by using facts otherwise available and adverse inferences under 19 U.S.C. § 1677e(a) and (b), respectively, concluding that the government of the PRC did not provide requested information and was uncooperative in not acting to the best of its ability in responding to certain of the Department’s information requests.

As discussed further below, Yama challenges the Department’s use of facts otherwise available with adverse inferences with respect to the synthetic yarn and caustic soda inputs, including the Department’s drawing an adverse inference that the “specificity” requirement in the statute was satisfied. Pl.’s Br. 36–42. In the alternative, Yama claims that Commerce erred in adding ocean freight and value-added tax in determining the adequacy of remuneration. *Id.* at 42–47. Because it concludes that Commerce erred in its application of facts

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<sup>6</sup> This is the latest in a series of cases involving the EBCP in which Commerce claimed that its lack of understanding of the EBCP program prevented it from considering or verifying record evidence tending to establish non-use of the program. See *Clearon Corp. v. United States*, 44 CIT \_\_, \_\_, 474 F. Supp. 3d 1339, 1350–51 nn. 10–12 (2020) (listing cases).

otherwise available and adverse inferences with respect to these two inputs, the court does not reach Yama's alternative claim.

According to the Final Decision Memorandum, Commerce requested that the government of the PRC provide the following items of information for each of the two production inputs:

- a. The total number of producers.
- b. The total volume and value of Chinese domestic *consumption* of {input} and the total volume and value of Chinese domestic *production* of {input}.
- c. The percentage of domestic consumption accounted for by domestic production.
- d. The total volume and value of imports of {input}.
- e. The percentage of total volume and (separately) value of domestic production that is accounted for by companies in which the Government maintains an ownership or management interest, either directly or through other Government entities, including a list of the companies that meet these criteria.
- f. A discussion of what laws, plans or policies address the pricing of the input, the levels of production of the input, the importation or exportation of the input, or the development of the input capacity. Please state which, if any, central and subcentral level industrial policies pertain to the input industry.

Final Decision Mem. 10 (citing GOC First Supplemental Questionnaire 3). In responding to this request for both synthetic yarn and caustic soda, the PRC began by stating that “[i]n the GOC’s view, there is no program such that synthetic yarn [or caustic soda] is provided for LTAR to the respondent” and continued, “[n]evertheless to fully cooperate in this investigation, the GOC provides responses to the Input Producer Appendix below.” GOC First Supplemental Questionnaire Response 16, 38.

The Chinese government provided answers in response to questions concerning production inputs including: (1) the total number of enterprises producing and the total value of production of each of these input supplies; (2) the total volume and value of domestic consumption and production; and (3) the percentages of domestic consumption satisfied by domestic production of these input supplies, by both

volume and value. *Id.* at 32–33, 53–54. The government of China also noted that no supplier of synthetic yarn or caustic soda was a state-owned enterprise or otherwise majority-owned by the government. *Id.* at 17, 38. In several responses to the questionnaire, the Chinese government reiterated its initial statement indicating that no program provided Yama with synthetic yarn or caustic soda for LTAR. These reiterations included: “[t]he GOC notes that synthetic yarn was not subject to any price control during the POR,” *id.* at 28, “[t]he GOC does not regulate the pricing of synthetic yarn. Rather, the provision of synthetic yarn is dictated by market forces and not by any plan that sets the levels of production of synthetic yarn or the development of synthetic yarn,” *id.* at 34, and “[t]he GOC does not impose any limitations on the use of synthetic yarn and producers of synthetic yarn are free to sell their product to any purchaser and at any price,” *id.* at 35. The government provided identical responses for caustic soda. *Id.* at 49, 55–56.

Regarding the request for information on “individual owners, members of the board of directors, or senior managers who were Government or CCP officials during the POI” the GOC responded by stating that there was no central database with this information and that they could not disclose personal information under the Regulation on Disclosure of Government Information. *Id.* at 30 (synthetic yarn), *id.* at 51 (caustic soda). The government then stated that Commerce “should collect this information through the respondents, via their suppliers directly.” *Id.*

Commerce issued a second supplemental questionnaire “requesting further information regarding the two inputs, including that the GOC provide a list with the number of producers in which it maintains an ownership or management interest.” Final Decision Mem. 10; *see also* GOC Second Supplemental Questionnaire. In that questionnaire, Commerce requested that the PRC government provide full ownership information and documentation for each of Yama’s private suppliers of these two inputs, “identify any individual owners, members of the board of directors, or senior managers” of these suppliers or any entity in their ownership structure who, during the POR, “were government or Chinese Communist Party (CCP) officials,” and “explain if [each] company had a CCP organization during the POR.” GOC Second Supplemental Questionnaire 2.

Regarding the request for full ownership information, the GOC’s second supplemental response stated that “these raw material providers concerned are not state-owned or state controlled enterprises,” GOC Second Supplemental Questionnaire Response 41, and that

Commerce should reach out to Yama for “information about these shareholders including their ultimate owners,” should there be additional inquiries. *Id.* The government of China also stated, further, that the National Bureau of Statistics of China does not collect certain of the information requested and that Article 25 of the Statistics Law of China prohibited dissemination of other information regarding suppliers, including those in which the GOC had a less-than-controlling interest. *Id.* at 42–43. Much like it did in response to the first supplemental questionnaire, on the identification of government or CCP officials involved with Yama’s private suppliers, the government replied, “the requested information and documents are confidential and commercial information in China, which is not available to the public. Therefore, the GOC is unable to obtain the information requested.” *Id.* at 41.

Commerce rejected the PRC government’s explanations for not providing the requested information on levels of government ownership and CCP membership in the input suppliers. Regarding the ownership information, Commerce stated that:

Information on the record indicates that in prior CVD proceedings, Commerce was able to confirm at verification that the GOC maintains two databases at the State Administration of Industry and Commerce: one is the business registration database, showing the most up-to-date company information; a second system, ‘ARCHIVE,’ houses electronic copies of documents such as business licenses, annual reports, capital verification reports, etc.

Final Decision Mem. 11. Commerce added that “[t]herefore, we find that the GOC has an electronic system available to it to gather the industry-specific information Commerce requested, but elected not to assist Commerce in obtaining necessary information for this proceeding.” *Id.* Regarding possible CCP presence in the input suppliers, Commerce noted that the PRC government replied by providing “a long narrative explanation of the role of the CCP” but “explained that there is ‘no central informational database to search for the requested information’ and directed Commerce to obtain this information directly from Yama’s privately-owned input suppliers.” *Id.* at 12 (citation omitted). Rejecting this explanation, Commerce stated that “[a]s AFA, we find that CCP officials are present in each of Yama’s privately-owned input suppliers as individual owners, managers and members of the boards of directors, and that this gives the CCP, as the government, meaningful control over the companies and their resources.” *Id.*

Concluding that the Chinese government failed to cooperate in answering its inquiries, Commerce drew the adverse inference “that Chinese prices from transactions involving Chinese buyers and sellers are significantly distorted by the involvement of the GOC.” *Id.* at 11 (citing *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,377 (Int’l Trade Admin. Nov. 25, 1998)). It also adopted adverse inferences that Yama’s private suppliers of both inputs were “authorities” within the meaning of 19 U.S.C. § 1677(5)(B). *Id.* Commerce then drew the further adverse inferences that Yama received from these authorities financial contributions from a program or programs that provided financial contributions in the form of receiving these two inputs for less-than-adequate remuneration. *Id.* at 13. Commerce used other adverse inferences in deeming each of these “programs” to have met the specificity requirement set forth in the statute, 19 U.S.C. § 1677(5) and (5A). *Id.* Commerce proceeded to determine what it considered to be adequate remuneration and calculated subsidy rates for these two inputs, 10.45% for synthetic yarn and 0.26% for caustic soda, for inclusion in the total net countervailable duty subsidy rate of 23.70%. *Final Results*, 84 Fed. Reg at 11,052; see Final Decision Mem. 4.

Yama brings three specific claims in challenging the Department’s inclusion of the subsidy rates for synthetic yarn and caustic soda. It claims, first, that Commerce unlawfully resorted to facts otherwise available and an adverse inference in determining that all eight of the private producers of synthetic yarn, and the sole producer of caustic soda, that supplied it these inputs during the POR were “authorities” within the meaning of 19 U.S.C. § 1677(5). Pl.’s Br. 36. Second, Yama claims that any subsidy that may have been provided to Yama with respect to these two production inputs was not “specific” within the meaning of 19 U.S.C. § 1677(5) and (5A) and, therefore, was not countervailable. *Id.* at 42. Third, in the alternative, Yama challenges the Department’s calculation of the individual subsidy rates, i.e., 10.45% for synthetic yarn and 0.26% for caustic soda, arguing that Commerce erred when it included ocean freight and value-added tax in the calculation of the adequacy of remuneration. *Id.* at 42–47.

As discussed below, the court does not sustain the Department’s decision to use adverse inferences to deem Yama to have received a financial benefit from a program or programs that met the specificity requirement of the Tariff Act, 19 U.S.C. § 1677(5A) in providing synthetic yarn and caustic soda for less-than-adequate remuneration. Commerce reached these adverse inferences despite uncontradicted record evidence, consisting of the aforementioned questionnaire responses of the Chinese government, that no such program or pro-



grams existed. Moreover, Commerce did not present a convincing reason for concluding that the specificity requirement in the Tariff Act, 19 U.S.C. § 1677(5) and (5A), was met. The court, therefore, does not address Yama's claim that the Department's adverse inference deeming the suppliers to be authorities was unlawful or its claim that the subsidy rates relating to the two inputs improperly included value-added taxes and ocean freight.

Under the Tariff Act, a countervailable subsidy potentially exists where an "authority," i.e., a "government of a country or any public entity within the territory of the country," 19 U.S.C. § 1677(5)(B), confers a benefit upon a person by providing goods "for less than adequate remuneration," *id.* § 1677(5)(E)(iv). Here, the court may presume, *arguendo*, that the Department's adopting as an adverse inference that Yama's synthetic yarn and caustic soda suppliers were "authorities" within the meaning of 19 U.S.C. § 1677(5)(B) was supported by the Chinese government's failure to cooperate by not acting to the best of its ability to provide full information on the ownership of input suppliers and the possible presence of CCP members in positions of leadership on those suppliers. Commerce drew the adverse inference that "CCP officials are present in each of Yama's privately-owned input suppliers as individual owners, managers and members of the boards of directors, and that this gives the CCP, as the government, meaningful control over the companies and their resources." Final Decision Mem. 12. But even if the suppliers are presumed, *arguendo*, to be authorities as a result of government control, it does not follow that government programs necessarily existed to provide these inputs at less-than-adequate remuneration. And even if it were presumed that a benefit is conferred, a subsidy will not be countervailable unless it is "specific" as described in the statute. *See* 19 U.S.C. § 1677(5A). Here, the Department's adverse inferences that a governmental program or programs existed during the POR that provided Yama with synthetic yarn and caustic soda for less-than-adequate remuneration, and that any such programs met the specificity requirement of the statute, are not supported on this record or on the Department's reasoning.

Commerce grounded its specificity determination solely in its prior practices rather than the record of this review. The Department's analysis of this issue in the Final Decision Memorandum is as follows: "When the government fails to provide requested information concerning alleged subsidy programs, as AFA, we typically find that a financial contribution exists under the alleged program and the program is specific." Final Decision Mem. 13. The Preliminary Decision

Memorandum contains no further analysis on this issue. *See* Preliminary Results Mem. 7–10, 26–30.

Neither the Preliminary nor Final Decision Memorandum fully addresses the responses the Chinese government provided to the first supplemental questionnaire regarding synthetic yarn and caustic soda, for “a discussion of what laws, plans or policies address the pricing of [the input], the levels of production of [the input], the importation or exportation of [the input], or the development of [the input] capacity.” Final Decision Mem. 10 (quoting GOC First Supplemental Questionnaire 4, 7). Commerce asked, further, that the PRC government “please state which, if any, central and subcentral level industrial policies pertain to the input industry.” *Id.* As noted previously, the PRC government provided responses to these inquiries indicating that no program existed that provided either synthetic yarn or caustic soda for less-than adequate remuneration in China. GOC First Supplemental Questionnaire Response 16, 38. The government responded, further, that “[t]he GOC does not regulate the pricing of synthetic yarn [or caustic soda].” *Id.* at 34 (synthetic yarn), *id.* at 55 (caustic soda).<sup>7</sup> It added that “[r]ather, the provision of synthetic yarn is dictated by market forces and not by any plan that sets the levels of production of synthetic yarn or the development of synthetic yarn [or caustic soda],” *id.* at 34 (synthetic yarn); *id.* at 55 (caustic soda). These responses constitute uncontradicted record evidence that the program or programs providing the two inputs at LTAR that Commerce posited, as an adverse inference, to have been in effect during the POR, to have benefitted Yama, and to have met the specificity requirement, did not exist.

Commerce acted unlawfully in directing some of its adverse inferences to gaps in the record where none were shown. Here, Commerce did not question the responses the government of China gave to the Department’s first supplemental questionnaire on the non-existence of a program to subsidize particular users of synthetic yarn or caustic soda. Commerce placed no evidence on the record indicating that the PRC government’s assertions were incorrect. Commerce did not pose additional questions regarding the existence of programs to supply Yama synthetic yarn or caustic soda at LTAR in its second supplemental questionnaire, which was concerned instead with potential CCP control and the level of government ownership of synthetic yarn and caustic soda suppliers.

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<sup>7</sup> The GOC attached a “Pricing Law” as an exhibit to this questionnaire response specifying that market-set prices are the default and allowing for government-controlled prices in situations not relevant here. GOC First Supplemental Questionnaire Response 34 Ex. II.E.7.

The Department's failure to mention in the Final Decision Memorandum the record evidence that no programs to provide synthetic yarn or caustic soda at LTAR existed in China during the POR is a critical, and misleading, omission from the analysis Commerce offered to support its decision to impose upon Yama a countervailing duty for the two inputs. The Department's unsatisfactory treatment of the issue of specificity ignores a fundamental component of the countervailing duty law that is designed to ensure that countervailing duties are not imposed where widespread availability and use of a subsidy spreads a benefit throughout an economy. *See Changzhou Trina Solar Energy Co.*, 42 CIT at \_\_, 352 F. Supp. 3d at 1330 (citing Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103-316, vol. 1, at 930-31 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4242). Thus, the Department's use of facts otherwise available and adverse inferences to determine that programs providing synthetic yarn and caustic soda for LTAR existed during the POR, and were specific as required under 19 U.S.C. § 1677(5) and (5A), is unsupported by the evidence on the record.

The court does not suggest that Commerce would lack authority, in an appropriate circumstance, to use facts otherwise available or an adverse inference in fulfilling the statutory prerequisites stemming from the specificity requirement of 19 U.S.C. § 1677(5) and (5A). But here, Commerce drew its adverse inferences relating to a supposed program or programs involving the two inputs, and the supposed specificity of those programs, based on its finding that the PRC government failed to cooperate in responding to inquiries directed to another issue, which was government control of the suppliers of the inputs, i.e., the issue of whether those suppliers were "authorities." In doing so, Commerce ignored relevant and uncontradicted evidence. Particularly where, as here, the injurious effect of the adverse inference is borne by a cooperative party, not the non-cooperating government, "Commerce must tread carefully." *Yama Ribbons and Bows Co. v. United States*, 43 CIT \_\_, \_\_, 419 F. Supp. 3d 1341, 1347 (2019). Commerce conducted no analysis to support its adverse inferences of a government program or programs benefitting a limited or preferred group of purchasers of yarn or caustic soda. As a result, Commerce failed to justify its use of its authority under 19 U.S.C. § 1677e(b) to reach an adverse inference, prejudicial to Yama, of the existence of a subsidy program or programs that would meet the specificity limitations of the Tariff Act.

Defendant argues that Commerce was justified in inferring specificity as "adverse facts available" on the basis of the PRC government's failure to respond to the Department's request that the gov-

ernment provide “a list of industries in China that purchase synthetic yarn and caustic soda, identify the classification scheme the government normally relies on to define industries, and classify companies within an industry.” Def.’s Br. 34. Defendant-intervenor argues that “[p]recisely because Commerce had to use AFA, it was reasonable for Commerce to determine as AFA that the provision of synthetic yarn and caustic soda was specific.” Def.-Int.’s Br. 22. The court disagrees with these arguments, as they do not withstand analysis of the nature of the Department’s inquiry and the evidence consisting of the responses of the PRC government, considered on the whole.

The Chinese government’s first response to the request defendant identifies was that “[t]he GOC does not impose any limitations on the use of synthetic yarn and producers of synthetic yarn are free to sell their product to any purchaser and at any price. Similarly, purchasers of synthetic yarn are free to source their product from any producer, domestic or foreign” and that “[a]s a general matter, synthetic yarn has a wide range of uses, including but not limited to use in the narrow ribbon industry.” GOC First Supplemental Questionnaire Response 35. The same response was provided with respect to caustic soda. *Id.* at 55–56. When Commerce repeated its inquiry in its supplemental questionnaire, the Chinese government responded, as to both inputs, that “[t]he GOC does not maintain such information, as the industry classification in question is not used or maintained as required.” GOC Second Supplemental Questionnaire Response 44.

The court agrees with defendant’s argument that the government of the PRC did not provide certain information Commerce sought. But the conclusion of a failure on the part of the government to cooperate as to this specific inquiry is not supported on this record. Commerce did not place evidence on this record that the information it sought on customers of the synthetic yarn and caustic soda industries and the related industrial classifications was maintained and available to be provided, contrary to the claim of unavailability made by the PRC government. Moreover, even if it were assumed, *arguendo*, that some failure to cooperate occurred as to this inquiry, defendant’s argument still would be unconvincing. Other responses by the PRC government introduced uncontradicted evidence that no programs existed upon which a relevant specificity analysis could have been conducted, such that there was no “gap” to be filled by facts otherwise available and adverse inferences.

Defendant argues, further, that Yama’s claim that the specificity element of the statute was not met “is directly contrary to the rule that ‘(w)here the foreign government fails to act to the best of its

ability, Commerce will usually find that the government has provided a financial contribution to a specific industry.” Def.’s Br. 35 (quoting *Essar Steel Ltd. v. United States*, 34 CIT 1057, 1070, 721 F. Supp. 2d 1285, 1297 (2010)). Defendant also relies on *RZBC Grp. Shareholding Co., Ltd. v. United States*, 39 CIT \_\_, \_\_, 100 F. Supp. 3d 1288, 1299–1301 (2015) for the principle that Commerce may infer specificity to an industry when the government of the exporting country fails to cooperate. Neither case speaks to the problem this case poses, which is the Department’s ignoring, as well as failing to mention in its Final Decision Memorandum, uncontradicted record evidence that the government programs Commerce inferred to exist to the benefit of Yama, and to have had specificity, did not exist.

In summary, Commerce acted unlawfully in deciding to include subsidy rates related to Yama’s synthetic yarn and caustic soda inputs without considering all relevant record evidence, in particular the uncontradicted record evidence that no programs existed during the POR that provided these inputs at LTAR. Commerce, in addition, did not conduct an analysis sufficient to support an adverse inference that any such programs would have met the specificity requirement of the Tariff Act so as to result in countervailable subsidies.

### III. CONCLUSION AND ORDER

The court remands the Final Results to Commerce for reconsideration of the Department’s decision to include a subsidy rate for the EBCP in the total subsidy rate applied to Yama. On remand, Commerce must make the determination the statute requires it to make, i.e., whether Yama was conferred a benefit from the EBCP. Commerce must make this determination based upon a full and fair consideration of the record evidence.

Commerce also must reconsider its decision to include in Yama’s overall subsidy rate individual subsidy rates related to Yama’s synthetic yarn and caustic soda inputs and take the corrective action that is necessary to fulfill the requirements of the statute. Therefore, upon consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

**ORDERED** that the Motion for Judgment on the Agency Record of Plaintiff Yama Ribbons and Bows Co. (Aug. 9, 2019), ECF No. 25, be, and hereby is, granted; and it is further

**ORDERED** that Commerce shall correct the errors identified herein and submit a new determination upon remand (“Remand Redetermination”) that complies fully with this Opinion and Order; it is further

**ORDERED** that Commerce will submit its Remand Redetermination within 90 days of the date of this Opinion and Order; it is further

**ORDERED** that any comments by plaintiff Yama Ribbons and Bows Co. and defendant-intervenor Berwick Offray LLC on the Remand Redetermination must be filed with the court no later than 30 days after the filing of the Remand Redetermination; and it is further

**ORDERED** that any response of defendant to any comments received must be filed no later than 15 days from the date on which the last comment is filed.

Dated: April 30, 2021

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU, JUDGE

## Slip Op. 21–51

HUSTEEL CO., LTD., Plaintiff, and SEAH STEEL CORPORATION, HYUNDAI STEEL COMPANY, AND NEXTEEL Co., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge  
Consol. Ct. No. 19–00107

[Granting Defendant’s motion for partial voluntary remand and sustaining in part and remanding in part the U.S. Department of Commerce’s remand results in the 2016–2017 administrative review of the antidumping duty order on circular welded non-alloy steel pipe from the Republic of Korea.]

Dated: May 3, 2021

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

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### OPINION AND ORDER

#### Choe-Groves, Judge:

Plaintiff Husteel Co., Ltd. (“Husteel”) and Consolidated Plaintiffs SeAH Steel Corporation (“SeAH”), Hyundai Steel Company (“Hyundai Steel”), and NEXTEEL Co., Ltd. (“NEXTEEL”), (collectively, “Plaintiffs”), filed this consolidated action challenging the final results published by the U.S. Department of Commerce (“Commerce”) in the 2016–2017 administrative review of the antidumping duty order on circular welded non-alloy steel pipe (“CWP”) from the Republic of Korea (“Korea”). See *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea (“Final Results”)*, 84 Fed. Reg. 26,401 (Dep’t Commerce June 6, 2019) (final results of admin. review;



2016–2017);<sup>1</sup> *see also* Issues and Decision Mem. for the Final Results of the 2016–2017 Admin. Review of the Antidumping Duty Order on Circular Welded Non-Alloy Steel Pipe from the Republic of Korea, PD 173 (May 30, 2019) (“Final IDM”). Before the court are the Final Results of Redetermination Pursuant to Court Order, ECF Nos. 47–1, 48–1 (“*Remand Results*”), which the court ordered in *Husteel Co. v. United States* (“*Husteel I*”), 44 CIT \_\_\_, 476 F. Supp. 3d 1363 (2020), and Defendant’s Motion for Partial Voluntary Remand, ECF No. 56 (“Defendant’s Motion” or “Def. Mot.”).

Plaintiffs assert that the facts and Commerce’s analysis and explanations on remand with respect to its particular market situation determinations and adjustments are essentially identical to those in its remand results in the 2016–2017 administrative review of the antidumping duty order covering circular welded carbon steel pipes and tubes from Thailand, and urge the court to follow its decision in *Saha Thai Steel Pipe Public Co. v. United States* (“*Saha Thai II*”), 44 CIT \_\_\_, 487 F. Supp. 3d 1323 (2020) (remanding the remand results in the 2016–2017 administrative review of the antidumping duty order covering circular welded carbon steel pipes and tubes from Thailand). *See* Pl. Husteel Co., Ltd.’s Comments Redetermination Pursuant Ct. Remand Order at 2–6, ECF No. 51 (“*Husteel Cmts.*”); Comments Consol. Pl., Hyundai Steel Company, Commerce’s Remand Redetermination at 4–7, ECF No. 52 (“*Hyundai Cmts.*”); Comments SeAH Steel Corporation Commerce’s Dec. 17, 2020, Redetermination at 4–6, ECF No. 53 (“*SeAH Cmts.*”); Remand Comments Consol. Pl. NEXTEEL Co., Ltd. at 1–2, ECF No. 54 (“*NEXTEEL Cmts.*”).<sup>2</sup> Hyundai Steel contends that Commerce’s decision to base normal value on constructed value is contrary to the law because Commerce did not explain under 19 U.S.C. § 1677(15)(C) how a “particular market situation prevents a proper comparison [of] the export price or constructed export price” with normal value based on home market sales, or determine under 19 U.S.C. § 1677b(a)(4) that “the normal value of the subject merchandise cannot be determined.” Hyundai Cmts. at 9–12; *see also* Husteel Cmts. at 5–6. Hyundai Steel argues that on remand Commerce made a “sales-based” particular market situation determination (rather than a “cost-based” particular market situation determination as Commerce had made in the *Final Results*), despite the fact that no party made a market viability allegation and interested parties were not given the opportunity to respond pursu-

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

<sup>2</sup> NEXTEEL concurs with, refers to, and incorporates by reference Hyundai Steel’s and Husteel’s arguments, and does not make any independent arguments. NEXTEEL Cmts. at 1–2.

ant to 19 C.F.R. § 351.301(c)(2). Hyundai Cmts. at 8–9. Defendant-Intervenor Wheatland Tube Company (“Wheatland”) did not file comments.

On March 12, 2021, Defendant United States (“Defendant”) filed Defendant’s Motion, requesting that the court remand partially the *Remand Results* for Commerce “to reconsider its approach of basing normal value on constructed value and making certain particular market situation adjustments to the respondents’ costs when calculating constructed value” “in light of *Saha Thai II*.” Def. Mot. at 6, 5. Defendant asks the court to sustain Commerce’s determination on remand that Hyundai Steel and Hyundai Steel (Pipe Division) are the same legal entity. Def.’s Resp. Comments Remand Redetermination at 2, 4, ECF No. 57.

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

### ISSUES PRESENTED

The court reviews the following issues:

1. Whether remand is warranted on the particular market situation issue; and
2. Whether Commerce’s treatment of Hyundai Steel and Hyundai Steel (Pipe Division) as a single entity is supported by substantial evidence.

### BACKGROUND

The court presumes familiarity with the facts and procedural history as set forth in its prior opinion and recounts the facts relevant to the court’s review of the *Remand Results*. See *Husteel I*, 44 CIT at \_\_\_, 476 F. Supp. 3d at 1367–68.

In its request for review, Wheatland included Hyundai Steel (Pipe Division) in its list of proposed respondents and did not separately include Hyundai Steel. Wheatland’s Req. for Admin. Review at 3, PD 4 (Nov. 30, 2017) (“Wheatland’s Request for Administrative Review” or “Wheatland Req.”). Hyundai Steel and Hyundai Steel (Pipe Division) were identified separately in the *Initiation of Antidumping and Countervailing Duty Administrative Reviews* (“*Initiation Notice*”), 83 Fed. Reg. 1329, 1331 (Dep’t Commerce Jan. 11, 2018).

In the *Final Results*, Commerce assigned weighted-average dumping rates of 10.91% for *Husteel*, 8.14% for Hyundai Steel, and the all-others rate of 9.53% for NEXTEEL and Hyundai Steel (Pipe Division). *Final Results*, 84 Fed. Reg. at 26,402. Commerce determined that a particular market situation existed in Korea that distorted the cost of production of CWP based on the cumulative impact of four

factors, namely: (1) Korean subsidies of hot-rolled steel coil; (2) Korean imports of hot-rolled steel coil from China; (3) strategic alliances between Korean hot-rolled steel coil producers and Korean CWP producers; and (4) distortions in the Korean electricity market. Final IDM at 6, 12–14. Commerce applied an upward adjustment to the cost of production for purposes of the sales-below-cost test based on subsidy rates of hot-rolled steel coil from *POSCO v. United States*, 43 CIT \_\_\_, 378 F. Supp. 3d 1348 (2019). See Final IDM at 5, 18 (citing *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep’t Commerce Aug. 12, 2016) (countervailing duty investigation final affirmative determination), *amended by* 81 Fed. Reg. 67,960 (Dep’t Commerce Oct. 3, 2016)). Commerce conducted a sales-below-cost test and disregarded certain below-cost home market sales. See Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: 2016–2017 at 21, PD 135 (Dec. 3, 2018) (“Prelim. DM”); Final IDM at 3 (noting that Commerce used the same calculation methodology for the *Final Results* as explained in the Prelim. DM). Commerce calculated normal value from the remaining above-cost home market sales for mandatory respondents Hyundai Steel and Husteel. Prelim. DM at 21.

The court remanded the *Final Results* in *Husteel I*, concluding that Commerce’s adjustment to the cost of production for purposes of the sales-below-cost test pursuant to 19 U.S.C. § 1677b(b)(1) and Commerce’s cost-based particular market situation determination under 19 U.S.C. § 1677b(e) were not in accordance with the law because 19 U.S.C. § 1677b(e) applies only when Commerce bases normal value on constructed value. *Husteel I*, 44 CIT at \_\_\_, 476 F. Supp. 3d at 1373–74, 1377.

Commerce filed the *Remand Results* on December 17, 2020 under protest. *Remand Results* at 1, 6. Commerce maintained its determination that a particular market situation distorted the cost of production. *Id.* at 7–8. Commerce did not conduct the sales-below-cost test because, it explained, the sales-below-cost test would not be “meaningful” without an adjustment to the cost of production to account for the particular market situation. *Id.* at 7. Instead, Commerce made a particular market situation determination under 19 U.S.C. § 1677(15)(C), stating that the distorted cost of production prevented a proper comparison between home market sales and export prices. *Id.* “[A]bsent the ability to determine whether the comparison market sales were made within the ordinary course of trade,” on remand Commerce based normal value on constructed value under

19 U.S.C. § 1677b(a)(4) for each respondent. *Id.* at 7, 9. In calculating constructed value, Commerce made a cost-based particular market situation determination under 19 U.S.C. § 1677b(e) and adjusted the cost of production as an alternative calculation methodology. *Id.* at 8–9.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final results of an administrative review of an anti-dumping duty order. The court will uphold Commerce’s determinations unless they are unsupported by substantial record evidence or are otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The court reviews also determinations made on remand for compliance with the court’s remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT \_\_, \_\_, 992 F. Supp. 2d 1285, 1290 (2014), *aff’d*, 802 F.3d 1339 (Fed. Cir. 2015).

## DISCUSSION

### I. Partial Remand

Defendant asks the court to remand partially the *Remand Results* for Commerce to reconsider its decisions to base normal value on constructed value and make certain particular market situation adjustments to the cost of production when calculating constructed value in light of the subsequent issuance of this court’s December 21, 2020 *Saha Thai II* decision. Def. Mot. at 1–2, 6. Defendant notes that Plaintiffs cited *Saha Thai II* in their respective comments to the *Remand Results*. *Id.* at 4 (citing *Husteel Cmts.* at 2–6; *Hyundai Cmts.* at 4–7; *SeAH Cmts.* at 4–6; *NEXTEEL Cmts.* at 1 (incorporating by reference *Husteel’s* and *Hyundai Steel’s* arguments)). Defendant represents that the request is made in good faith and out of a substantial and legitimate concern. *Id.* at 5. *Hyundai Steel* does not oppose Defendant’s Motion. Resp. Consol. Pl., *Hyundai Steel Company*, Def.’s Mot. Voluntary Remand at 1, ECF No. 60. No other party filed a response to Defendant’s Motion.

The U.S. Court of Appeals for the Federal Circuit has recognized that an agency may seek a remand if an intervening event outside of the agency’s control, such as the issuance of a new legal decision or the passage of new legislation, may affect the validity of the agency action. *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028–29 (Fed. Cir. 2001) (citing *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)) (“We commonly grant such motions, preferring to allow agen-

cies to cure their own [determinations] rather than [consuming] the courts' and the parties' resources . . . .") (other citations omitted).

Plaintiffs and Defendant agree that the facts and Commerce's actions and explanations on remand in the instant case are analogous to the facts and Commerce's actions and explanations in *Saha Thai II*. See *Husteel Cmts.* at 2–6; *Hyundai Cmts.* at 4; *SeAH Cmts.* at 4–5; *Def. Mot.* at 4. In *Saha Thai II*, which the court issued after Commerce filed the *Remand Results* in this case, the court discussed Commerce's decision to base normal value on constructed value after disregarding all of the respondents' home market sales as outside the ordinary course of trade under 19 U.S.C. § 1677(15)(C) without conducting the sales-below-cost test because Commerce determined that the sales-below-cost test would not be "meaningful" without an adjustment to the cost of production to account for the alleged particular market situation. *Saha Thai II*, 44 CIT at \_\_, 487 F. Supp. 3d at 1330–35; see generally *Saha Thai Steel Pipe Pub. Co. v. United States*, 43 CIT \_\_, \_\_, 422 F. Supp. 3d 1363, 1368–70 (2019) (concluding that an adjustment to the cost of production for purposes of the sales-below-cost test is not in accordance with the law). The court concluded that Commerce's exclusion of home market sales without conducting the sales-below-cost test to affirmatively confirm that sales were made below the cost of production as required by 19 U.S.C. § 1677b(b)(1) was not in accordance with the law. *Saha Thai II*, 44 CIT at \_\_, 487 F. Supp. 3d at 1331–32. The court concluded further that the statute did not authorize Commerce to exclude home market sales under 19 U.S.C. § 1677(15)(C) when Commerce had conceded that "it had not considered whether a particular market situation existed in the home market for the sale of the foreign like product such that home market sales cannot be used as the basis for normal value." *Id.* at \_\_, 487 F. Supp. 3d at 1332 (brackets and internal quotation marks omitted).

It is undisputed that *Saha Thai II* was issued after Commerce published the *Remand Results* and that Commerce's determinations that were discussed in *Saha Thai II* are analogous to Commerce's determinations in the *Remand Results*. The court concludes that the issuance of *Saha Thai II* is an intervening event that may affect the validity of Commerce's *Remand Results* and remands Commerce's particular market situation determinations and adjustments for reconsideration.

## II. Treatment of Hyundai Steel (Pipe Division)

In *Husteel I*, the court remanded Commerce's treatment of Hyundai Steel and Hyundai Steel (Pipe Division) as separate entities for re-

consideration in light of record documents appearing to support a determination that Hyundai Steel (Pipe Division) is a component of Hyundai Steel's Ulsan factory, not a separate entity. *Husteel I*, 44 CIT at \_\_, 476 F. Supp. 3d at 1376–77. Commerce determined on remand that the record did not support a distinction between Hyundai Steel and Hyundai Steel (Pipe Division) and that they “should be treated as a single entity for cash deposit and suspension of liquidation purposes upon the conclusion of litigation.” *Remand Results* at 2, 12–13, 26. No party opposed.

On remand, Commerce determined that the record did not support separate entity treatment of Hyundai Steel and Hyundai Steel (Pipe Division). *Id.* at 12. Commerce observed that the headquarters address provided by Hyundai Steel and the headquarters address for Hyundai Steel (Pipe Division) provided in Wheatland's Request for Administrative Review were the same address. *Id.* at 12 & n.46 (citing Wheatland Req. at 3, Hyundai's Section A Questionnaire Resp.Ex. A-3, PD 30–42 (Mar. 20, 2018)). Commerce noted also that Hyundai Steel referred in its questionnaire responses to its “pipe division” in Ulsan. *Id.* at 12 & n.48;<sup>3</sup> see Hyundai's Section B–D Questionnaire Resps. at D-28, PD 62 (Apr. 17, 2018)). Commerce determined from review of the record that Hyundai Steel and Hyundai Steel (Pipe Division) were the same legal entity. *Id.* at 2, 12, 26.

Commerce's determination that Hyundai Steel (Pipe Division) is a component of Hyundai Steel is reasonable based on record evidence reflecting Hyundai Steel's references to its pipe division in Ulsan and the same address provided for the headquarters of Hyundai Steel and Hyundai Steel (Pipe Division). The court concludes that Commerce's decision to recognize Hyundai Steel and Hyundai Steel (Pipe Division) as a single entity and assign a single dumping margin is reasonable and complies with the court's order in *Husteel I*.

### CONCLUSION

The court remands Commerce's particular market situation determinations and adjustments. The court sustains Commerce's treatment of Hyundai Steel and Hyundai Steel (Pipe Division) as a single entity.

Accordingly, it is hereby

**ORDERED** that Defendant's Motion for Partial Voluntary Remand, ECF No. 56, is granted; and it is further

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<sup>3</sup> Commerce cited Exhibit A-2 of Hyundai Steel's Section A Questionnaire Response and pages B-7 and D-25 of Hyundai Steel's Section B, C, and D Questionnaire Responses, which were not included in the Joint Appendix filed with the court. See *Remand Results* at 12 nn.47–48. The court reviewed the documents cited by Commerce that were included in the Joint Appendix.

**ORDERED** that the *Remand Results* are remanded for Commerce to reconsider its particular market situation determinations and adjustments in light of caselaw from this Court; and it is further

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

1. Commerce shall file the second remand results on or before June 30, 2021;
2. Commerce shall file the administrative record on or before July 14, 2021;
3. Comments in opposition to the second remand results shall be filed on or before August 13, 2021;
4. Comments in support of the second remand results shall be filed on or before September 13, 2021; and
5. The joint appendix shall be filed on or before September 27, 2021.

Dated: May 3, 2021  
New York, New York

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



## Slip Op. 21–53

COMMUNICATIONS WORKERS OF AMERICA LOCAL 4123, on behalf of FORMER EMPLOYEES OF AT&T SERVICES, INC., Plaintiff v. U.S. SECRETARY OF LABOR, Defendant.

Before: M. Miller Baker, Judge  
Court No. 20–00075

[Plaintiffs’ motion for judgment on the agency record is granted and this matter is remanded to the Department of Labor for further consideration.]

Dated: May 4, 2021

*Devin S. Sikes*, Akin Gump Strauss Hauer & Feld LLP of Washington, DC, argued for Plaintiffs. With him on the brief were *Bernd G. Janzen* and *Tebsy Paul*.

*Ashley Akers*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, argued for Defendant. With her on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Tecla A. Murphy*, Attorney Advisor, Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor of Washington, DC.

## OPINION

### **Baker, Judge:**

Several decades ago, Congress established a remedial program to provide benefits to American workers displaced by the offshoring of manufacturing or service jobs. *See Former Emps. of BMC Software, Inc. v. U.S. Sec’y of Labor*, 454 F. Supp. 2d 1306, 1307 (CIT 2006) (“Trade adjustment assistance . . . programs historically have been—and today continue to be—touted as the *quid pro quo* for U.S. national policies of free trade.”). In this case, a union challenges the Labor Department’s denial of benefits to former AT&T call center employees under that program. The Court agrees with the union that Labor’s summary denial of benefits is not supported by substantial evidence, and remands for further proceedings consistent with this opinion.

### **Statutory and Regulatory Background**

In the Trade Act of 1974, Congress updated a preexisting mechanism for providing benefits—referred to as “trade adjustment assistance”—to Americans who lose their jobs, or whose work hours and pay are reduced, due to foreign trade. *See* 19 U.S.C. § 2271 *et seq.*; *see also* U.S. Dep’t of Labor, *Getting Back to Work After a Trade Related Layoff*, at 2, [https://www.dol.gov/sites/dolgov/files/ETA/tradeact/pdfs/program\\_brochure2014.pdf](https://www.dol.gov/sites/dolgov/files/ETA/tradeact/pdfs/program_brochure2014.pdf) (accessed May 3, 2021).

Under that statute, a group of workers in the same firm, their union, or their authorized representative may petition the Department of Labor to certify them as eligible to apply for trade adjustment assistance benefits and services. *See* 19 U.S.C. § 2271(a)(1); *see also Getting Back to Work, above*. Once Labor receives a petition, it investigates whether the circumstances of the workers' layoff satisfy certain statutory criteria. *See Getting Back to Work, above*.

As relevant here, those criteria are as follows:

**(a) In general**

A group of workers shall be certified by the Secretary as eligible to apply for adjustment assistance under this part . . . if the Secretary determines that—

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated; and

**(2) ... (B)**

**(i)**

**(I)** there has been a shift by such workers' firm to a foreign country in the production of articles or the supply of services like or directly competitive with articles which are produced or services which are supplied by such firm; or

**(II)** such workers' firm has acquired from a foreign country articles or services that are like or directly competitive with articles which are produced or services which are supplied by such firm; and

**(ii)** the shift described in clause (i)(I) or the acquisition of articles or services described in clause (i)(II) contributed importantly to such workers' separation or threat of separation.

19 U.S.C. § 2272(a).

Thus, as relevant here, for a group of workers to receive certification of eligibility for trade adjustment assistance, they must satisfy §§ 2272(a)(1) (show that they were separated), (a)(2)(B)(i) (show that the services they formerly provided are now provided abroad), and (a)(2)(B)(ii) (show that the foreign provision of such services "contributed importantly" to their separation). The dispute here involves Labor's determination regarding the second of these requirements.

In determining whether to certify a group of workers as eligible under these criteria, Labor must "obtain from the workers' firm . . . information the Secretary determines to be necessary to make the certification, through questionnaires and in such other manner as the

Secretary determines appropriate.” 19 U.S.C. § 2272(d)(1). The statute directs the Secretary to require a firm to “certify” all information submitted in response to questionnaires. *Id.* § 2272(d)(3)(A)(i). The Secretary must also require certification of all other information obtained from a firm or a customer “on which the Secretary relies in making a[n eligibility] determination . . . , unless the Secretary has a reasonable basis for determining that such information is accurate and complete without being certified.” *Id.* § 2272(d)(3)(A)(ii).<sup>1</sup>

Labor’s regulations require the Department to issue either a certification of eligibility or a notice of negative determination specifying the reasons for the negative decision, and in either case to publish in the Federal Register a summary of the determination and the reasons for making it. 29 C.F.R. § 90.16(c), (f). If Labor returns an affirmative determination, the Department also issues a “certification of eligibility” allowing the workers to apply individually for benefits and services. *Id.* § 90.16(c); *see also Getting Back to Work, above* (“Workers in a certified group . . . may apply for individual eligibility for benefits and services.”). If Labor returns a negative determination, the workers may ask the Department to reconsider. *See generally* 29 C.F.R. § 90.18.<sup>2</sup>

Following a final negative determination, a worker, a group of workers, a certified or recognized union, or the group’s authorized representative may commence a civil action in this Court for review of the determination. *See* 19 U.S.C. § 2395(a).

## **Factual and Procedural Background**

### **A. The union’s petition for benefits**

In March 2019, Communications Workers of America Local 4123 filed a petition for trade adjustment benefits on behalf of AT&T “Consumers Group” employees at the Kalamazoo (Michigan) Lovell Call Center. AR3. The petition alleged that AT&T established call

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<sup>1</sup> The statute grants the Secretary broad authority to seek “additional information” by contacting, *inter alia*, officials or employees of the workers’ firm (apparently in their individual capacity rather than as representatives of the firm), officials of the workers’ firm’s customers, or union officials or other “duly authorized representatives of the group of workers.” *Id.* § 2272(d)(2)(A)(i)–(iii). The Secretary may also “us[e] other available sources of information.” *Id.* § 2272(d)(2)(B). Unlike information obtained directly from the workers’ firm, Labor need not require certification of such additional information or find a reasonable basis for relying upon such noncertified information.

<sup>2</sup> Reconsideration may be granted in three circumstances: “(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous; (2) If it appears that the determination complained of was based on mistake in the determination of facts previously considered; or (3) If, in the opinion of the certifying officer, a misinterpretation of facts or of the law justifies reconsideration of the determination.” 29 C.F.R. § 90.18(c).

centers in multiple foreign locations, including Mexico, the Philippines, and the Caribbean, and that during 2019 AT&T planned to close the Kalamazoo call center and four other call centers operated by the company. AR3–4.<sup>3</sup> Thereafter, Labor agreed to deem the petition as also encompassing the four other call centers (in Appleton, Wisconsin; Indianapolis, Indiana; Syracuse, New York; and Meriden, Connecticut). AR14–15.

In support of its petition, the union submitted its own “AT&T Jobs Report” asserting that the company closed multiple call centers and laid off several thousand workers while shifting work to lower-wage contract workers, many of them located abroad. AR20. The report identified the Indianapolis, Kalamazoo, and Appleton call centers as locations facing imminent closure. AR20. The union further contended that AT&T opened a call center in Mexico and planned to expand it by moving jobs away from U.S.-based locations. AR22.

## **B. Labor’s initial investigation and report**

Following receipt of the petition, Labor contacted AT&T officials and asked that they complete questionnaires relating to the five call centers identified by the union. AR26–35, AR38–42, AR43–45.<sup>4</sup>

Among other things, the questionnaire responses specifically addressed the reasons for the call center closures and the potential loss of jobs. AT&T stated that three of the call centers closed because they were being consolidated into other domestic call centers. AR53 (Appleton), AR63 (Indianapolis), AR73 (Kalamazoo). AT&T stated that the other two call centers closed because their operations were being moved to other domestic locations. AR92 (Meriden), AR106 (Syracuse). For all five call centers, AT&T emphasized that displaced employees were offered the opportunity to move to the new call center locations or to train for alternative positions and further emphasized that all work was remaining in the United States. AR53, AR63, AR73, AR92, AR106.

Following AT&T’s submission of the questionnaire responses, Labor’s investigator e-mailed AT&T’s in-house counsel a series of informal follow-up questions. The transmittal e-mail stated that the union

<sup>3</sup> Citations to “AR” refer to the public version of the administrative record, ECF 15.

<sup>4</sup> The questionnaires requested certifications under penalty of law for false statements and warned:

Knowingly falsifying any information on this form is a Federal offense (18 U.S.C. § 1001) and a violation of the Trade Act (19 U.S.C. § 2316). By signing below, you agree to the following statement: “Under penalty of law, I declare that to the best of my knowledge and belief the information I have provided on this form is true, correct, and complete.”

AR57 (Appleton), AR67 (Indianapolis), AR76 (Kalamazoo), AR98 (Meriden), and AR112 (Syracuse).

had identified (1) an individual who worked in Jamaica but reported to a manager in the Appleton call center and (2) an individual who worked in the Philippines but reported to a manager in Brecksville, Ohio, “which is another location that has laid off hundreds of Union workers.” AR114 (quoting the union’s allegations). Based on that information and on AT&T’s questionnaire responses, Labor asked AT&T whether the allegations that foreign workers were supervised by U.S. managers were true; if so, AT&T was to answer a series of further questions. AR114.

AT&T’s in-house counsel responded—in the same informal e-mail format as Labor’s inquiries—that the allegations were not true and that the foreign workers were employed by vendors, supervised by vendor managers, and handled calls that were never serviced by employees in the Kalamazoo, Appleton, or Indianapolis call centers. AR122; *see also* AR126 (response for Syracuse and Meriden that referred to the response for the other three centers).

Following the receipt of AT&T’s e-mail responses to the investigator’s inquiries, someone at Labor—presumably the investigator—prepared an unsigned “investigative report” that determined that the loss of jobs at the five call center locations was not attributable to the company’s offshoring of the work. AR141 *et seq.* The report summarized the factual record discussed above and stated that AT&T “reported that they have not shifted the supply of services like or directly competitive to those of the workers to a foreign country nor acquired any services like or directly competitive to those of the workers from a foreign country.” AR149. The report also quoted AT&T’s statement about the two workers in Jamaica and the Philippines and did not address the point further. AR150.

### **C. Labor’s initial negative determination**

Following the investigative report, Labor issued a “Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance”—essentially, an administrative opinion. AR154 *et seq.* As to the relevant statutory tests, Labor found that AT&T

did not shift the supply of call center, billing, or network operations services or like or directly competitive services to a foreign country or acquire call center, billing, or network operations services or like or directly competitive services from a foreign country. AT&T officials have confirmed the work remained in the United States.

AR160. Accordingly, the certifying officer concluded that “the requirements of Section 222 of the Act, 19 U.S.C. § 2272, have not been met and, therefore, den[ied] the petition for group eligibility . . . .” AR160–61.

#### **D. The union’s request for reconsideration**

After Labor issued its negative determination, the union submitted a one-page letter “requesting an appeal to the determination made to deny the original petition,” AR173, which Labor construed as an application for reconsideration under 29 C.F.R. § 90.18. The letter gave two reasons for the request: (1) “The majority of the workers at that location were separated from the company” and (2) “The work that was being done has shifted to offshore locations as documented in the evidence presented with the original petition.” AR174. The letter contained no attachments with new evidence.

Labor—through a new certifying officer not previously involved in the matter—granted the reconsideration request with boilerplate language stating that “[t]he request for reconsideration includes new information and allegations regarding a shift in services to a foreign country”<sup>5</sup> such that “the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor’s prior decision.” AR177–78.

#### **E. Labor’s reconsideration investigation and report**

After granting reconsideration, a new investigator at Labor and AT&T’s in-house counsel exchanged e-mails probing deeper into the issues raised by the union’s petition. Following these exchanges, Labor is sued an unsigned “Reconsideration Investigative Report”—presumably authored by the new investigator—affirming the initial negative determination’s conclusion that there was “no shift in services/no company or customer imports.” AR362–63 (cleaned up). The reconsideration report found that AT&T “confirmed” that the Kalamazoo, Appleton, and Indianapolis locations “did not shift services like or directly competitive with the services supplied by the workers of the subject firm to foreign country [sic] or contract to have services like or directly competitive with those supplied by the workers of the subject firm in a foreign country.” AR373–74.

As to the other two locations (Syracuse and Meriden), Labor repeated the same findings set forth above—AT&T confirmed the com-

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<sup>5</sup> The record contained no basis for this statement given that the union’s reconsideration letter referred to “the evidence presented with the original petition” rather than any new information. AR174. At oral argument, the government’s counsel explained that Labor routinely grants reconsideration notwithstanding the Department’s nominally stringent standard governing such requests. *See above* note 2.

pany did not shift services abroad or contract to have services supplied abroad, AR378—and quoted AT&T’s assertion that the union focused on the call centers’ closures rather than the reasons for such closures. AR379.

## **F. Labor’s decision on reconsideration**

Following the reconsideration investigative report, Labor—through the same certifying officer who granted reconsideration—issued a “Notice of Negative Determination on Reconsideration.” This document echoed the prior boilerplate finding that the union’s “request for reconsideration included new information and allegations regarding a shift in services to a foreign country.” AR385. The document’s substantive discussion was also boilerplate:

Information obtained during the reconsideration investigation confirmed that the workers’ firm neither shifted the supply of call center support services, billing support services, or network operations center support services (or like or directly competitive services) to a foreign country nor contracted to have such services supplied by a foreign country.

After careful review of previously-submitted information and additional information obtained during the reconsideration investigation, the Department determines that 29 CFR 90.18(c) [governing reconsideration] has not been met.

AR386. The determination then concluded that the requirements of 19 U.S.C. § 2272 had not been met; therefore, the original determination, which found the union’s members ineligible to apply for trade adjustment assistance, was affirmed. AR386.

## **G. This litigation**

After Labor issued its negative reconsideration determination, Communications Workers of America Local 4123 sent a letter to the clerk “to request a judicial appeal to [Labor’s] negative determination” of the union’s petition. ECF 1, at 1. The clerk deemed this *pro se* letter as the union’s complaint and summons. *See* ECF 4.

The union—now represented by counsel<sup>6</sup>—moves for judgment on the agency record and asks the Court “to hold that neither substantial evidence nor the law supports Labor’s negative determinations” and “to vacate Labor’s negative determinations and remand this matter to

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<sup>6</sup> At the invitation of the clerk, attorneys at the law firm of Akin Gump Strauss Hauer & Feld entered their *pro bono* appearances as counsel for the union. *See* ECF 10, 11, 19. Counsel for the union have ably discharged their assignment. *Cf. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543 n.2 (2012).



Labor so that the agency may take further evidence pursuant to 19 U.S.C. § 2395(b) and issue a determination consistent with the Court's order and opinion in this matter." ECF 23, at 1–2;<sup>7</sup> see USCIT R. 56.1. The government opposes. ECF 24.

### Jurisdiction and Standard of Review

The union brings this action under 19 U.S.C. § 2395(a). In addition to conferring a cause of action, § 2395(a) in effect codifies the associational standing of unions to represent their members aggrieved by Labor's denial of benefits.<sup>8</sup> See *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 281–82 (1986) (explaining associational standing of organization to represent its members).

The Court has jurisdiction over § 2395(a) claims pursuant to 28 U.S.C. § 1581(d)(1), which grants this Court exclusive jurisdiction over any civil action commenced to review "any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act." See also 19 U.S.C. § 2395(c) (same).

The standard of review for factual issues is prescribed by 19 U.S.C. § 2395(b), which provides that "[t]he findings of fact by the Secretary of Labor, . . . if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings."

"Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. A reviewing court must consider the record as a whole, including that which fairly detracts from its weight, to determine whether there exists such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (cleaned up).

Beyond the substantial evidence standard of review applicable to factual issues, Labor's decision is also subject to the default standard

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<sup>7</sup> In this opinion, citations to the parties' briefing use the CM/ECF docket entry (ECF 23 for the union's opening brief, ECF 24 for the government's brief, and ECF 25 for the union's reply).

<sup>8</sup> Here, the administrative record includes evidence—not merely allegations—establishing that the union's members were employed at the five relevant call centers and thus were injured by Labor's denial of eligibility. See AR3–4; cf. *Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002) ("In many if not most cases the petitioner's standing to seek review of administrative action is self-evident; no evidence outside the administrative record is necessary for the court to be sure of it.").

of the Administrative Procedure Act, which allows a reviewing court to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); see *Former Emps. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1362 (Fed. Cir. 2003) (stating, in trade adjustment case, that “[t]he Court of International Trade also has the authority under the Administrative Procedure Act to set aside the decision as contrary to law or arbitrary and capricious”);<sup>9</sup> see also *United States Capitol Police v. Off. of Compliance*, 908 F.3d 748, 756 (Fed. Cir. 2018) (“A reviewing court must apply the APA’s . . . review standards in the absence of an exception.”) (cleaned up and quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)).

### Discussion

This case presents two issues. First, is Labor’s negative determination<sup>10</sup> on its own terms supported by substantial evidence and otherwise consistent with law? Second, did Labor act arbitrarily by treating the union’s petition in this case differently than it treated allegedly similarly situated petitioners in other cases involving other AT&T call centers? The Court addresses each issue in turn.

#### I.

As the union’s reply brief explains, the critical question here—in view that there is no dispute that the union’s members were separated from their call center jobs, see 19 U.S.C. § 2272(a)(1)—is whether Labor properly concluded for purposes of 19 U.S.C. § 2272(a)(2)(B)(i) that AT&T “had not (1) shifted the supply of call center support services, billing support services, or network operations center support services to a foreign country, or (2) contracted to have such services supplied by a foreign country.” ECF 25, at 2.

<sup>9</sup> At oral argument, the government disputed the APA’s applicability to this case. This argument is foreclosed by *Motorola*.

<sup>10</sup> The parties’ briefing did not address what happens if the Court concludes that only one of the two determinations before it—the initial negative determination or the later reconsideration determination—passes muster. At argument, the union took the position that a remand is required if either decision is not supported by substantial evidence or is contrary to law; the government argued that so long as one of the determinations is supported by substantial evidence and is otherwise consistent with law, the Court can sustain Labor. The Court agrees with the government; in this situation, Labor’s two determinations amount to alternative grounds, and the Court can sustain either one as the Department’s decision. *Cf. Packers Plus Energy Servs. Inc. v. Baker Hughes Oilfield Operations, LLC*, 773 F. App’x 1083, 1088 (Fed. Cir. 2019) (court can sustain administrative decision on alternative grounds where the parties had the opportunity to address each ground and the agency considered each of the facts underlying the alternative grounds).

## A.

As noted above, the analysis in Labor's initial negative determination consisted of two sentences:

[T]he investigation revealed that the firm did not shift the supply of call center, billing, or network operations services or like or directly competitive services to a foreign country or acquire call center, billing, or network operations services or like or directly competitive services from a foreign country. AT&T officials have confirmed the work remained in the United States.

AR160 (emphasis added).

### 1.

The union's first two lines of attack are that Labor failed to "identify the particular record evidence on which it relied for its finding or explain why it reached the conclusion that it did in view of the record as a whole." ECF 23, at 13. Relatedly, the union asserts that Labor did not discuss the record evidence "that cuts against its finding and how, nevertheless, the substantiality of the record points to its proffered finding." *Id.*

As to the first point, although it is true that the Court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974), the problem here is that the certifying officer did not identify AT&T's evidence that she found persuasive—as noted above, she merely stated that "AT&T officials have confirmed the work remained in the United States." AR160. While the Court can reasonably discern that she found AT&T's evidence convincing, that fact alone is not enough because portions of AT&T's evidence (its questionnaire responses) were certified pursuant to 19 U.S.C. § 2272(d)(3)(A)(i) while other portions (the e-mail exchanges between AT&T's in-house counsel and Labor's investigator) were not. The Court explains the significance of that distinction in Part I.A.3., *below*, but the upshot is that the Court is unable to determine whether, or to what extent, the certifying officer relied upon AT&T's noncertified evidence. The Court must remand so that Labor can do so unless the Department's reconsideration determination independently supports its denial of benefits.

The union's second line of attack also lands on target. Labor's negative determination simply did not acknowledge, much less discuss, the union's evidence, which as discussed above consisted of a job

report and certain anecdotal examples of offshoring of work. See AR17–25 (job report), AR129–30 (anecdotal evidence).<sup>11</sup> Nor did that determination explain—directly or indirectly—why the certifying officer chose AT&T’s explanation over the union’s evidence. “[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). That means it’s the agency’s job to weigh the evidence—not to ignore the evidence on one side of the scale and leave it to the court to surmise why the agency made the decision it did.

The government offers two responses. First, as to the job report, it argues that no such discussion was necessary because nothing in the report “mentions any connection between the work of the foreign call centers and any of the five AT&T call centers in question. It is not readily obvious why or how the information in the job report could reasonably be interpreted to ‘cut against’ Labor’s determination.” ECF 24, at 16.

Although the government is certainly correct that the job report does not directly contradict the certifying officer’s conclusion—as the union’s counsel conceded at argument, the job report contains no “smoking gun”—“the substantiality of evidence must take into account whatever in the record fairly detracts from its weight, including contradictory evidence or evidence from which conflicting inferences could be drawn.” *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380–81 (Fed. Cir. 2008) (cleaned up and emphasis added). Here, a fair reading of the job report permits the drawing of inferences that conflict with the certifying officer’s conclusion.

Specifically, the report stated that AT&T has closed multiple call centers and laid off several thousand workers while shifting work to lower-wage contract workers, many of them located abroad. AR20. The report mentioned the Indianapolis, Kalamazoo, and Appleton call centers as locations facing imminent closure, and asserted that “the company can decide where to route calls and continues to contract with global third-party call centers to handle collections cases.” AR21. The report quoted a longtime employee in Appleton who contended that AT&T was moving jobs to offshore locations with lower-wage

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<sup>11</sup> The government argues that the investigative report’s reference to the job report obviates the absence of any such reference in the initial negative determination. ECF 24, at 16–17. The problem with this argument is twofold. First, insofar as the investigator addressed the job report, the Court is unable to reasonably discern the certifying officer’s view of it—the negative determination does not even make an oblique reference to the job report. Second, the investigative report itself did not address the job report, except in a passing reference that simply quoted the petition’s reference to it. See AR145.

workers. AR21–22. The union further contended that AT&T opened a call center in Mexico and planned to expand it by moving jobs away from U.S.-based locations. AR22. All of this, fairly read, at least allows for an inference that the closures of the call centers in question will result in the offshoring of job functions previously performed in those facilities.<sup>12</sup>

Although an agency adjudicator, such as the certifying officer at Labor, need not address every piece of evidence in the record, *see, e.g., Novartis AG v. Torrent Pharms. Ltd.*, 853 F.3d 1316, 1328 (Fed. Cir. 2017) (explaining that it was not necessary for agency to “expressly discuss each and every negative and positive piece of evidence lurking in the record . . .,” and noting that agency’s citation of relevant record pages established that it had considered them even though it did not discuss them in its written decision), the failure to do so risks a remand if such evidence is susceptible of a fair inference that detracts from the agency’s conclusion. Because the certifying officer failed to discuss or even indirectly reference the union’s evidence from which reasonable conflicting inferences can be drawn, the Court must remand unless Labor’s reconsideration determination independently supports the Department’s denial of benefits.

## 2.

The union’s third line of attack on the initial negative determination is that Labor’s investigator did not take “additional investigative steps” that the union contends were required under *Former Employees of Marathon Ashland Pipe Line LLC v. Chao*, 370 F.3d 1375 (Fed. Cir. 2004), due to the presence of conflicting evidence. *See* ECF 23, at 16–17. In that decision, which apparently involved noncertified employer statements, the Federal Circuit stated that Labor could rely on such representations “if the Secretary reasonably concludes that those statements are creditworthy and are not contradicted by other evidence.” *Marathon*, 370 F.3d at 1385 (citing *Former Emps. of Barry Callebaut v. Chao*, 357 F.3d 1377, 1383 (Fed. Cir. 2004)).<sup>13</sup> A “conflict over the underlying facts in the evidence” would require that the

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<sup>12</sup> The government does not respond to the union’s argument that Labor’s certifying officer also overlooked the union’s anecdotal evidence. In any event, that evidence is also susceptible of the fair inference that the jobs in question were offshored. *See* AR129–30 (“We have two examples below of calls made regarding products our Reps do support for that have been routed to overseas vendors.”).

<sup>13</sup> The Federal Circuit’s statement that Labor could rely on noncertified employer representations “if the Secretary reasonably concludes that those statements are creditworthy” appears to be an allusion to 19 U.S.C. § 2272(d)(3)(A)(ii), which requires that “the Secretary ha[ve] a reasonable basis for determining that such information is accurate and complete without being certified.” *Id.*

“Secretary take further investigative steps before making her certification decision.” *Id.*

Even if it represents a correct statement of the law,<sup>14</sup> *Marathon* does not apply here. To begin with, AT&T’s questionnaire responses were certified under penalty of law and were thus presumptively creditworthy under the statute. *See* 19 U.S.C. § 2272(d)(3)(A)(i). Moreover, Labor *did* undertake additional investigative steps here. The initial investigative report reveals that Labor’s investigator had several exchanges with AT&T’s in-house counsel *after* receiving the company’s questionnaire responses. *See* AR113–28; AR135–40. Then, Labor granted reconsideration, and a new investigator had several more exchanges with AT&T’s in-house counsel. *See* AR188–220; AR222–61; AR295–312; AR325–61.

Insofar as *Marathon* requires additional investigative steps, Labor took them here. The problem with Labor’s initial negative determination is not with the Department’s investigation, but rather with the certifying officer’s failure to sufficiently explicate her reasons based on the results of that investigation.

### 3.

Finally, the union challenges the investigator’s—and by extension, the certifying officer’s—reliance on “uncorroborated statements from AT&T officials whose accuracy Labor never confirmed.” ECF 23, at 17. Specifically, the union complains—citing *Former Employees of Tyco Toys, Inc. v. Brock*, 12 CIT 781 (1988), and *Former Employees of BMC Software, Inc. v. U.S. Secretary of Labor*, 454 F. Supp. 2d 1306 (CIT 2007)—that “Labor failed to establish that the officials certifying each response had personal knowledge over what transpired at each location” and “likewise failed to identify other record evidence that corroborated what the officials certified.” ECF 23, at 17–18.

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<sup>14</sup> The Court doubts the correctness of *Marathon*’s suggestion that Labor may not rely on noncertified but reasonably creditworthy representations of company officials when such representations are contradicted by other evidence. That proposition—which is dicta—is untethered to the statute, which charges the Department—not the courts—with “establish[ing] standards . . . for investigations of petitions . . . and criteria for making determinations.” 19 U.S.C. § 2273(e)(1). Nor is it tethered to *Barry Callebaut*, which *Marathon* cites.

In the Court’s view, the only question for the courts in trade adjustment assistance cases is whether Labor’s determinations are supported by substantial evidence and otherwise consistent with the APA. Under those standards, Labor *can* rely on noncertified representations from an employer—*if*, as explained below, it finds them reasonably creditworthy and explains its reasons for doing so—so long as it addresses the conflicting evidence (or evidence giving rise to conflicting inferences) and adequately explains its reasons for choosing the employer’s noncertified but reasonably creditworthy evidence over conflicting evidence or inferences.

As discussed above, the statutory provision governing Labor's obligation to verify information is 19 U.S.C. § 2272(d)(3)(A). It imposes two requirements. Labor must mandate certification of all questionnaire responses. See 19 U.S.C. § 2272(d)(3)(A)(i). As to other information "obtained . . . from the firm" on which Labor "relies," the Department must require certification *unless* Labor "has a reasonable basis for determining that such information is accurate and complete without being certified." See *id.* § 2272(d)(3)(A)(ii). Significantly, the statute imposes no personal knowledge requirement on company officials responding to Labor's inquiries. Insofar as *Tyco Toys* and *BMC Software* impose an extratextual personal knowledge requirement, the Court disagrees with and declines to follow them.

In the Court's view, § 2272(d)(3)(A) is functionally analogous to Federal Rule of Civil Procedure 30(b)(6), which likewise imposes no personal knowledge requirement on representatives designated to testify on behalf of a corporation.<sup>15</sup> As Judge Sutton explains:

The personal knowledge requirement works differently in this [Rule 30(b)(6)] setting, where a human being (Moreno) speaks for a corporation (Midland). . . . It is not easy to take a deposition of a corporation or for that matter obtain an affidavit from one. In one sense, indeed, it is not even possible to do so, as inanimate objects are not known for their facility with language. That means, whenever a corporation is involved in litigation, "the information sought must be obtained from natural persons who can speak for the corporation." 8A Charles Alan Wright et al., *Federal Practice and Procedure* § 2103 (3d ed. 2015). And that means "[t]here is no obligation to select a person with personal knowledge of the events in question," so long as the corporation "proffer[s] a person who can answer regarding information known or reasonably available to the organization." *Id.* (emphasis added) (quotation omitted).

*Lloyd v. Midland Funding, LLC*, 639 F. App'x 301, 305 (6th Cir. 2016) (emphasis in original). As in the Rule 30(b)(6) context, a company representative responding to Labor in a trade adjustment assistance

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<sup>15</sup> Rule 30(b)(6) provides in relevant part:

*Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. . . . *The persons designated must testify about information known or reasonably available to the organization.* . . .

Fed. R. Civ. P. 30(b)(6) (emphasis added); see also USCIT R. 30(b)(6) (same).



investigation need not have personal knowledge. It's up to Congress, not the federal judiciary, to impose any such requirement.

Nevertheless, insofar as Labor chooses to rely on noncertified information from a company representative, the statute requires that the Department have “a reasonable basis for determining that such information is accurate and complete without being certified.” 19 U.S.C. § 2272(d)(3)(A)(ii). The Court interprets this as requiring Labor—when it relies upon noncertified information—to expressly find that it has a reasonable basis for determining the accuracy and completeness of such information and to explain the basis for that finding.

During its initial investigation, Labor received AT&T's certified questionnaire responses as well as noncertified information from AT&T's in-house counsel. As discussed above in Part I.A.1., the certifying officer's decision did not address what portion(s) of AT&T's evidence she found convincing. The Court is therefore unable to determine whether she relied on the certified questionnaire responses, the noncertified e-mail correspondence with AT&T's in-house counsel, or some combination of both. Nor, to the extent she may have relied on the noncertified information, did her decision address whether she had a reasonable basis for determining that the information was accurate and complete without being certified. The Court must therefore remand so that Labor can address these questions unless Labor's reconsideration determination independently supports Labor's denial of the union's petition.

## **B.**

As discussed above, all information Labor obtained from AT&T in its reconsideration investigation was noncertified. After that investigation, Labor's negative reconsideration determination consisted of the following two sentences:

Information obtained during the reconsideration investigation confirmed that the workers' firm neither shifted the supply of call center support services, billing support services, or network operations center support services (or like or directly competitive services) to a foreign country nor contracted to have such services supplied by a foreign country.

After careful review of previously-submitted information and additional information obtained during the reconsideration investigation, the Department determines that 29 CFR 90.18(c) has not been met.

Labor's reconsideration determination suffered from the same defects as its initial determination. It failed to identify AT&T's evidence upon which it relied. It also failed to grapple with the union's evidence from which conflicting inferences might be fairly drawn. And insofar as the reconsideration determination relied on noncertified information obtained from AT&T, Labor made no finding that it could reasonably rely on such information. The Court therefore cannot sustain the reconsideration determination.

## II.

The union also argues that because Labor recently granted trade adjustment assistance certification to former AT&T employees in Brecksville, Ohio, *see Notice of Determinations Regarding Eligibility to Apply for Trade Adjustment Assistance*, 84 Fed. Reg. 57,762, 57,765 (Dep't Labor Oct. 28, 2019), and Harrisburg, Pennsylvania, *see Notice of Determinations Regarding Eligibility to Apply for Trade Adjustment Assistance*, 83 Fed. Reg. 53,297, 53,300 (Dep't Labor Oct. 22, 2018), Labor was obligated to explain why it reached a different result here.<sup>16</sup> Plaintiffs contend that failure to do so is "unreasoned and unexplained decision-making that results in the disparate treatment of similarly situated parties [and] is arbitrary and therefore unlawful." ECF 23, at 25.

Neither Federal Register publication is even remotely informative as to the basis for Labor's decisions in the prior cases. Both notices referred to the affected former AT&T employees in a table of employee groups collected under the umbrella category of cases in which "[t]he requirements of Section 222(a)(2)(B) (Shift in Production or Services to a Foreign Country Path or Acquisition of Articles or Services from a Foreign Country Path) of the Trade Act [i.e., 19 U.S.C. § 2272(a)(2)(B)] have been met." 83 Fed. Reg. at 53,299–300; 84 Fed. Reg. at 57,764–65. Because Labor does not publish its final decisions or its investigative reports in the Federal Register, that bare-bones language is the extent of the material in the record before this Court regarding the Harrisburg and Brecksville decisions. Therefore, as an initial matter the government is correct in arguing that there is no evidence in the record before the Court demonstrating that Plaintiffs "are similarly situated with workers from different call centers who

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<sup>16</sup> There is no indication in the record that the union argued to Labor that its members in the five call centers were similarly situated to its members in the Harrisburg call center, even though Labor's affirmative eligibility decision in that case antedated the union's petition here by just over four months. (Labor issued its affirmative eligibility determination regarding the Brecksville facility after the Department granted reconsideration of the union's petition here.)

submitted a different petition.” ECF 24, at 24.<sup>17</sup> That alone is reason to sustain the agency’s determination against the union’s “similarly situated” challenge.

Nevertheless, the implication of the union’s argument is that Labor had an affirmative duty to compare the union’s petition here with the facts and circumstances of the eligibility determinations in Brecksville and Harrisburg, notwithstanding that the union’s petition made no claim that its members here were similarly situated to the AT&T employees in Brecksville and Harrisburg and the record lacked any such evidence. But why stop there? If Labor had such an obligation notwithstanding the lack of any evidence, then presumably it was also obligated to compare the union’s petition here with the facts and circumstances of every other Labor eligibility determination as to AT&T employees in recent years (or perhaps recent decades?). The absence of any discernable limiting principle to the union’s argument demonstrates that it cannot be right.

The question before Labor was whether AT&T off-shored the services at the call centers identified in the union’s petition. Labor was required to make that determination based on the evidence in the record in this matter, not on whether Labor had certified other groups of AT&T workers at different locations as to whom there was no evidence in the record. On this record, Labor had no affirmative obligation to compare the union’s petition here with previous trade assistance determinations involving other AT&T call centers. *Cf. ABB Inc. v. United States*, 437 F. Supp. 3d 1289, 1301 (CIT 2020) (explaining that different proceedings representing different exercises of agency authority allow for “different conclusions based on different facts in the record”).

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<sup>17</sup> In its reply, the union argues that its members employed by AT&T at the Kalamazoo, Appleton, and Indianapolis call centers “worked in the very same ‘Digital, Retail & Care’ division as those former AT&T employees certified” as eligible for trade adjustment benefits in Labor’s Harrisburg determination. ECF 25, at 17–18. The first problem with this is that the Harrisburg workers were employed by the Digital, Retail & Care division of “AT&T Mobility Services,” see 83 Fed. Reg. at 53,300, whereas the Kalamazoo, Appleton, and Indianapolis call center union workers were employed by the Digital, Retail & Care division of “AT&T Teleholdings, Inc.” See AR 144–45. Moreover, even if the union members were in fact working for the same entity and performing identical jobs—facts that are not established on this record—that would still not necessarily establish that the employees in Kalamazoo, Appleton, and Indianapolis were similarly situated to the workers in Harrisburg. It might merely mean that the services in Harrisburg were offshored, while the services in Kalamazoo, Appleton, and Indianapolis were not.

### Conclusion

For the reasons provided above, the Court will remand this matter to Labor for further proceedings consistent with this opinion.<sup>18</sup> A separate remand order will issue.

Dated: May 4, 2021  
New York, NY

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

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<sup>18</sup> On remand, insofar as Labor agrees with the union on the points remanded, Labor must then address whether the offshoring of work “contributed importantly” to the separation of the union’s members here. *See* 19 U.S.C. § 2272(a)(2)(B)(ii).

## Slip Op. 21–54

FERROSTAAL METALS GMBH AND VNSTEEL-PHU MY FLAT STEEL CO., LTD.  
 Plaintiffs, v. UNITED STATES Defendant, and NUCOR CORPORATION,  
 UNITED STATES STEEL CORPORATION, ARCELOR MITTAL USA LLC, STEEL  
 DYNAMICS, INC., CALIFORNIA STEEL INDUSTRIES, Defendant-  
 Intervenor.

Before: Timothy M. Reif, Judge  
 Court No. 20–00018

[Judgment sustaining the U.S. Department of Commerce Final Determination will be entered.]

Dated: May 4, 2021

*Donald B. Cameron*, Morris, Manning and Martin LLP, of Washington, DC, argued for plaintiffs. With him on the brief were *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, *William H. Barringer*, *Eugene Degnan*, *Sabahat Chaudhary*, *Edward J. Thomas III* and *Jordan L. Fleischer*.

*Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Elizabeth Speck*, Senior Trial Counsel. Of counsel on the brief was *Brendan Saslow*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Theodore P. Brackemyre*, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor Nucor Corporation. On the brief were *Alan H. Price*, *Christopher B. Weld*, and *Tessa V. Capeloto*, Wiley Rein LLP, of Washington, DC; *Thomas M. Beline*, *Jeffrey B. Denning*, *Sarah E. Schulman*, and *Chase J. Dunn*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenor United States Steel Corporation; *Paul C. Rosenthal*, *R. Alan Luberta* and *Joshua Morey*, Kelley Drye and Warren LLP, of Washington, DC, for defendant-intervenor Arcelor Mittal USA LLC; and *Roger B. Schagrin* and *Christopher Cloutier*, Schagrin Associates, of Washington, DC, for defendant-intervenor Steel Dynamics, Inc.

## OPINION

### Reif, Judge:

This action involves the final affirmative determination of circumvention by the U.S. Department of Commerce (“Commerce”) of the antidumping duty and countervailing duty orders (collectively, “CRS Orders”) covering certain cold-rolled steel flat products (“CRS”) from the Republic of Korea (“Korea”). *See Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Affirmative Final Determinations of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 84 Fed. Reg. 70,934 (Dep’t Commerce Dec. 26, 2019) (“Final Determination”); *see also* the accompanying Issues and Decision Memorandum (Dep’t Commerce Dec. 13, 2019) (“IDM”).

Before the court is a USCIT Rule 56.2 motion for judgment on the agency record filed by plaintiffs Ferrostaal Metals Gmbh and Vnsteel-

Phu My Flat Steel Co., Ltd. (“PMF”).<sup>1</sup> Plaintiffs challenge the Final Determination and argue that: (1) the rejection of PMF’s responses to the quantity and value (“Q&V”) questionnaire was not in accordance with law and an abuse of discretion; and, (2) application of adverse facts available (“AFA”) to determine that PMF was unable to trace its inputs was not supported by substantial evidence and was not in accordance with law. Pls.’ Br. in Supp. of Mot. J. Agency R., ECF No. 48 (“Pl. Br.”) at 11–12.

This court has jurisdiction pursuant to sections 516A(a)(2)(A)(ii) and 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(ii) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(vi) (2018),<sup>2</sup> and 28 U.S.C. § 1581(c) (2018). For the reasons set forth below, the court sustains the Final Determination.

## BACKGROUND

### I. Anti-Circumvention Inquiries

Dumping occurs when a foreign company sells a product in the United States for a price that is lower than the cost of production or lower than the price at which the company sells the product in its home market. *See Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012); *see also* 19 U.S.C. § 1677(34). A countervailable subsidy exists when “a foreign government provides a financial contribution, a benefit is thereby conferred, and the subsidy is specific.” *POSCO v. United States*, 42 CIT \_\_, \_\_, 353 F. Supp. 3d 1357, 1363 (2018); *see also* 19 U.S.C. § 1677(5).

Congress enacted the Tariff Act of 1930 (“Tariff Act”) to empower Commerce and the U.S. International Trade Commission (“Commission”) to address imports that are dumped or that benefit from countervailable subsidies and that cause injury to a domestic industry. *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 913 (Fed. Cir. 2019). Commerce typically opens an antidumping or countervailing duty investigation in response to a petition filed by a domestic industry. *Id.* If Commerce determines that imports subject to investigation have been dumped or have received countervailable subsidies and the Commission determines that those imports have injured a domestic industry producing the like product, “Commerce must issue an order imposing countervailing or antidumping duties.” *Id.*

In an anti-circumvention inquiry, Commerce determines “whether a product outside an order’s literal scope should nevertheless be

<sup>1</sup> Ferrostaal Metals GmbH is an importer of the merchandise produced by PMF. Pls.’ Br. in Supp. of Mot. J. Agency R., ECF No. 48 (“Pl. Br.”) at 18.

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

included within the scope to prevent circumvention of antidumping and countervailing duty orders pursuant to statutory criteria . . . and regulatory criteria . . .” *U.K. Carbon & Graphite Co. v. United States*, 37 CIT 1295, 1300, 931 F. Supp. 2d 1322, 1328 (2013). When imported merchandise is completed or assembled in a third country other than the country named in the antidumping or countervailing duty order, Commerce may determine that the merchandise is circumventing the order if, “before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which — (i) is subject to such order or finding, or (ii) is produced in the foreign country with respect to which such order or finding applies.”<sup>3</sup> 19 U.S.C. § 1677j(b)(1)(B). Commerce must further determine that the “process of assembly or completion in the foreign country . . . is minor or insignificant” and that “the value of the merchandise produced in the foreign country . . . is a significant portion of the total value of the merchandise exported to the United States.” 19 U.S.C. § 1677j(b)(1)(C)-(D); *see also Macao Commer. & Indus. Spring Mattress Mfr. v. United States*, 44 CIT \_\_, \_\_, 437 F. Supp. 3d 1324, 1333 (2020).

## II. Relevant Facts

On July 25, 2016, Commerce issued the CRS Orders on CRS from Korea. *See Certain Cold-Rolled Steel Flat Products From the Republic of Korea: Affirmative Preliminary Determination of Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 84 Fed. Reg. 32,875 (Dep’t Commerce July 10, 2019) (“Preliminary Determination”); *see also* the accompanying Preliminary Decision Memorandum (Dep’t Commerce June 28, 2019) (“PDM”) at 1. On June 12, 2018, ArcelorMittal USA LLC, United States Steel Corporation, California Steel Industries, Nucor Corporation and Steel Dynamics, Inc. filed submissions alleging that CRS produced in Vietnam using Korean hot-rolled steel (“HRS”) was circumventing the CRS Orders. PDM at 2, n.5. On August 2, 2018, Commerce initiated anti-circumvention inquiries of the CRS Orders “covering Korean-origin HRS exported to Vietnam for completion into CRS and subsequently exported to the United States.” *Id.*

On October 5, 2018, Commerce issued Q&V questionnaires to 31 Vietnamese producers and exporters of CRS that Commerce identified as potential respondents. *Id.* at 3. The Q&V questionnaire asked for the total quantity of “cold-rolled coil purchased during the period

<sup>3</sup> “Order or finding” refers to an antidumping order issued under 19 U.S.C. § 1673e, a finding issued under the Antidumping Act of 1921, or a countervailing duty order issued under 19 U.S.C. § 1671e or 19 U.S.C. § 1303. 19 U.S.C. § 1677j(b)(1)(A).



November 1, 2016, through August 31, 2018, from all sources, and separately, from the Republic of Korea.” Commerce’s Q&V Questionnaire, PD 17 (Oct. 5, 2018). The Q&V questionnaire did not ask specifically about “the source of the substrate used in production or whether producers could trace substrates used in their production process.” Pl. Br. at 3; *see also* Commerce’s Q&V Questionnaire, PD 17 (Oct. 5, 2018). The Q&V questionnaire stated in bold that a “failure to provide accurate information or to cooperate to the best of your ability may result in [Commerce] resorting to the use of facts available and adverse inferences within the meaning of section 776 of the Tariff Act of 1930.” Commerce’s Q&V Questionnaire, PD 17 (Oct. 5, 2018).

On October 19, 2018, PMF submitted its response to the Q&V questionnaire (“original Q&V response”). IDM at 12; *see also* PMF’s Rejected Q&V Questionnaire Response, PD 33 (Oct. 19, 2018). On December 14, 2018, Commerce rejected PMF’s original Q&V response due to filing deficiencies. Commerce Request for Revised Q&V Questionnaire Response at 1, PD 58 (Dec. 14, 2018). Commerce explained in its notice to PMF that the original Q&V response was rejected, and, therefore, not placed on the record, because PMF failed to indicate appropriately and explain business proprietary information (“BPI”) in accordance with 19 C.F.R. §§ 351.303(b)(4), 351.303(d)(2)(v) and 351.304(b)(1)(i). *Id.* Commerce provided PMF with an opportunity to revise its original Q&V response and set the deadline for December 19, 2018. *Id.* Commerce also provided instructions to PMF on how to request an extension of time, should PMF need more time to prepare the revised Q&V response. *Id.*

On December 28, 2018, PMF submitted its revised Q&V response (“revised Q&V response”), nine days after the deadline and without an explanation for the delay. IDM at 12. As plaintiffs note in their brief, “the underlying data was [sic] unchanged, but the [revised Q&V] response explained why [PMF’s] specific quantity and value figures were business proprietary.” Pl. Br. at 5. On March 4, 2019, Commerce rejected the revised Q&V response as “untimely filed” in accordance with 19 C.F.R. § 351.301(c)(1) and 19 C.F.R. § 351.104(a)(1)(iii). Commerce’s Rejection of Revised Q&V Questionnaire Response at 1, PD 82 (Mar. 4, 2019); *see also* IDM at 15.

On March 26, 2019, Commerce selected China Steel Sumikin Vietnam Joint Stock Company and POSCO Vietnam Co., Ltd. as the mandatory respondents in the anti-circumvention inquiry. Commerce’s Respondent Selection Memorandum at 2, PD 90 (Mar. 26, 2019). On July 10, 2019, Commerce preliminarily determined that

CRS imports into the United States, completed in Vietnam from HRS sourced from Korea, were circumventing the CRS Orders. Preliminary Determination.

Commerce also stated in its PDM that, of the 31 companies to which Q&V questionnaires were sent, 25 companies did not respond or did not respond in a timely manner — including PMF. *Id.* at 4. Commerce collectively referred to the 25 companies as “the non-responsive companies.” *Id.* Commerce determined that it needed to rely on facts otherwise available for the non-responsive companies pursuant to 19 U.S.C. § 1677e(a) because necessary information was missing from the record. *Id.* at 12. Commerce also determined that the non-responsive companies did not act to the best of their ability to comply with Commerce’s requests and, therefore, that the application of AFA was appropriate pursuant to 19 U.S.C. § 1677e(b). *Id.*

Relying on its application of AFA, Commerce preliminarily determined that the non-responsive companies were using “CRS made from Korean-origin sourced substrate that are [sic] completed in Vietnam and then exported to the United States” in circumvention of the CRS Orders. *Id.* at 13. As a result, Commerce preliminarily determined that the non-responsive companies, including PMF, were precluded from participating in the Korean certification process. *Id.* As such, PMF was not provided an opportunity to certify that its “HRS substrate further processed into CRS in Vietnam did not originate in Korea.” *See id.* at 8.

On August 19, 2019, PMF submitted a letter to Commerce requesting that Commerce use its discretion and accept the Q&V response<sup>4</sup> so that PMF could participate in the certification process. Phu My Flat’s Clarification Letter, PD 197–199 (Aug. 19, 2019); *see also* Pl. Br. at 7. In this letter, PMF — for the first time in the nearly eight months since submitting its revised Q&V response — notified Commerce as to the reason that the revised Q&V response was nine days late. *Id.* PMF stated that its submission “failed because of [sic] unknown transferring error at the time of sending” and explained that when PMF found this error, it submitted its response again.<sup>5</sup> *Id.*

On December 26, 2019, Commerce issued its Final Determination, which, consistent with the Preliminary Determination, concluded that “there was circumvention of the *CRS Orders* as a result of Korean-origin HRS being completed into CRS in Vietnam and exported to the United States.” IDM at 11. Additionally, Commerce

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<sup>4</sup> In the letter, PMF did not specify whether PMF was asking Commerce to accept the original Q&V response or the revised Q&V response. Phu My Flat’s Clarification Letter, PD 197–199 (Aug. 19, 2019).

<sup>5</sup> PMF’s error is unsubstantiated in the record before the court.

continued to apply AFA to the non-responsive companies, including PMF, and excluded the non-responsive companies from the certification process. *Id.* at 19. On January 24, 2020, plaintiffs brought this action against the United States (“Government” or “defendant”) before the court to challenge the results of the Final Determination. Compl., ECF No. 11 at 2; Pl. Br. at 1.

### STANDARD OF REVIEW

In reviewing a final affirmative circumvention determination by Commerce, the Court “shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law.” 19 U.S.C. § 1516a(b)(1)(B)(i); *see also Deacero S.A. de C.V. v. United States*, 37 CIT 1437, 1460, 942 F. Supp. 2d 1321, 1325 (2013). Substantial evidence is “more than a mere scintilla” of relevant and reasonable evidence to support the underlying conclusions. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The requisite showing amounts to “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion” in light of “the entire record, including whatever fairly detracts from the substantiality of the evidence.” *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) (footnote omitted) (internal quotation marks omitted).

To review the reasonableness of agency action, “courts look for a reasoned analysis or explanation for an agency’s decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion.” *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998). “An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represent an unreasonable judgment in weighing relevant factors.” *WelCom Prods. v. United States*, 36 CIT 1336, 1341, 865 F. Supp. 2d 1340, 1344 (citing *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005)). , 393 F.3d 1277, 1281 (Fed. Cir. 2005)).

### *Commerce’s Rejection of Phu My Flat’s Quantity and Value (Q&V) Responses*

### LEGAL FRAMEWORK

The conduct of investigations and administrative reviews is governed by 19 U.S.C. § 1677m. *See* 19 U.S.C. § 1677m. In particular, 19 U.S.C. § 1677m(d) (“section 1677m(d)”) governs the conduct by Commerce in the event of a deficient submission from a respondent. 19 U.S.C. § 1677m(d). If Commerce determines that a submission is deficient, Commerce “shall promptly inform the person submitting

the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits . . .” *Id.* Additionally, if the respondent submits further information that Commerce finds is “not satisfactory” or “such response is not submitted within the applicable time limits . . . [Commerce] may, subject to subsection (e), disregard all or part of the original and subsequent responses.” *Id.*

19 U.S.C. § 1677m(e) (“section 1677m(e)”) controls the “use of certain information” by Commerce in reaching a determination. 19 U.S.C. § 1677m(e). Commerce “shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by [Commerce]” provided that five conditions are met. *Id.* The five conditions as stated in section 1677m(e) are:

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information, and
- (5) the information can be used without undue difficulties.

*Id.* Further, the Uruguay Round Agreements Act, Statement of Administrative Action (“SAA”)<sup>6</sup> states that “[t]he agencies will be required, consistent with new section 782(e), to consider information requested from interested parties that: (1) is on the record; (2) was filed within the applicable deadlines; and (3) can be verified.”<sup>7</sup> SAA, H.R. Doc. No. 103–316, vol. 1, at 869 (1994), *reprinted in* 1994 U.S. C.C.A.N. 4,040, 4,198.

The Supreme Court has ruled that “[t]he function of filling in the interstices of [a law] should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in

<sup>6</sup> “The statement of administrative action approved by the Congress under section 101(a) [19 U.S.C. § 3511(a)] shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.” 19 U.S.C. § 3512(d).

<sup>7</sup> Section 782(e) of the Tariff Act of 1930 is codified at 19 U.S.C. § 1677m(e).

the future.” *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). The authority of Commerce to create regulations extends to the creation of regulations governing the procedure for conducting anti-circumvention inquiries. See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (“[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.” (citations omitted) (internal quotation marks omitted)). This authority includes the ability of Commerce to promulgate regulations governing the development of the agency record. See *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760 (Fed. Cir. 2012) (“[a]ccordingly, absent such constraints or circumstances, courts will defer to the judgment of an agency regarding the development of the agency record.”). Further, “[i]t is fully within Commerce’s discretion to ‘set and enforce deadlines’ and [a] court ‘cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered.’” *Dongtai Peak Honey Indus. v. United States*, 777 F.3d 1343, 1351 (Fed. Cir. 2015) (quoting *PSC VSMPO-Avisma*, 688 F.3d at 760–61).

## DISCUSSION

Plaintiffs challenge the rejection of the Q&V responses by Commerce through two overarching arguments. First, plaintiffs argue that Commerce failed to follow sections 1677m(d) and 1677m(e) and, therefore, that Commerce’s rejection of the original Q&V response was not in accordance with law. Reply Br. of Pls. in Supp. of Mot. J. Agency R., ECF No. 54 (“Pl. Reply Br.”) at 3. Second, plaintiffs argue that Commerce abused its discretion in rejecting, respectively, the original Q&V response and the revised Q&V response. Pl. Br. at 11.

Commerce’s rejection of the original Q&V response was in accordance with sections 1677(d) and 1677m(e). Further, Commerce’s rejections, respectively, of the original Q&V response and the revised Q&V response were consistent with the Commerce regulations and were not an abuse of discretion.

### **I. Whether Commerce’s Rejection of the Original Q&V Response Was in Accordance with 19 U.S.C. §§ 1677m(d) and (e)**

Plaintiffs make three supporting arguments that Commerce’s rejection of the original Q&V response was not in accordance with sections 1677m(d) and 1677m(e). First, plaintiffs make a temporal

argument that Commerce was authorized by section 1677m(d) to reject the original Q&V response only after Commerce conducted an analysis under section 1677m(e). *See* Pl. Reply Br. at 3. Plaintiffs base this argument on the following premise — that Commerce “may only disregard *both the original and subsequent submissions* if it has first conducted an analysis under section 782(e), 19 U.S.C. [§] 1677m(e).” Pl. Reply Br. at 3 (emphasis in original).

Plaintiffs’ premise — and reading of section 1677m(d) — are incorrect. The language on which plaintiffs seek to rely follows the conditional language — “*If* that person submits further information in response to such deficiency. . . .” 19 U.S.C. § 1677m(d) (emphasis supplied).<sup>8</sup> If, as here, plaintiffs submitted no further information, the statute, by its clear terms, does not require Commerce to consider such information since none has been provided.

The purpose of section 1677m(d) is to provide a party that submitted a deficient response with an opportunity to correct the “deficiency,” to the extent practicable. *See* 19 U.S.C. § 1677m(d). Section 1677m(d) does not proscribe Commerce from rejecting an original response before Commerce receives a subsequent response. Nor does section 1677m(d) require that Commerce analyze section 1677m(e) before Commerce acts under section 1677m(d).

Second, plaintiffs argue that PMF’s original Q&V response met the five criteria under section 1677m(e) and, as such, should have been considered notwithstanding that the original Q&V response did not meet the BPI requirements. Pl. Reply Br. at 4. The court disagrees. The submission failed to meet the fourth criterion — PMF failed to “demonstrate[] that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority . . . .” 19 U.S.C. § 1677m(e)(4). Commerce reviewed section 1677m(e)(4) and determined “that these non-responsive companies did not cooperate to the best of their ability by failing to provide the requested information.” PDM at 13. The record supports Commerce’s determination that PMF did not act to the best of its ability. *See* Commerce Request for Revised Q&V Questionnaire Response at 1, PD 58 (Dec. 14, 2018) (stating that Commerce was giving PMF an opportunity to revise and resubmit its original Q&V response

<sup>8</sup> Plaintiffs’ use of the word “only” is not found in the statute. The statute provides as follows:

If that person submits further information in response to such deficiency and either — (1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or (2) such response is not submitted within the applicable time limits, then the administering authority or the Commission (as the case may be) may, subject to subsection (e), disregard all or part of the original and subsequent responses.

19 U.S.C. § 1677m(d).



to correct its deficiency). PMF missed the deadline that Commerce set for the submission of the revised Q&V response and, when PMF submitted its revised Q&V response past the deadline, PMF did not offer an explanation. IDM at 15. In sum, Commerce's determination that the original Q&V response did not meet the requirements of section 1677m(e) was reasonable.

The third argument that plaintiffs present is that Commerce regulations — 19 C.F.R. §§ 351.104(a)(2)(i) and (ii) (“section 351.104(a)(2)”) — which permitted Commerce to reject from the record and yet retain the original Q&V response, are not in accordance with 19 U.S.C. §§ 1677m(d) and (e). *See* Transcript of Oral Argument at 6, ¶¶ 7–13, ECF No. 68 (“Tr.”); Tr. at 7, ¶¶ 12–15. Plaintiffs assert that sections 1677m(d) and 1677m(e) require Commerce to consider information submitted by a respondent if it meets the five criteria of section 1677m(e), even if that information was rejected from the record but retained for purposes of documenting its rejection from the record. Pl. Reply Br. at 4–5. To support their position, plaintiffs direct the court to the SAA, which states that “[t]he agencies will be required, consistent with new section 782(e), to consider information requested from interested parties that: (1) is on the record; (2) was filed within the applicable deadlines; and (3) can be verified.” *Id.* at 5 (citing SAA, H.R. Doc. No. 103–316, vol. 1, at 869 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198) (emphasis omitted). Plaintiffs argue that the SAA “contemplates these precise circumstances, i.e., where requested information is not available on the record, [and that] Commerce must consider record evidence that was rejected but retained.” *Id.* at 4–5.

Defendant disagrees with plaintiffs' reading of the SAA and characterizes the relevant text from the SAA as a “generic description of how Commerce is supposed to rely on facts available that are on the record.” Recording of Oral Argument at 6:14–6:20.<sup>9</sup> Defendant asserts that the relevant section of the SAA is silent on how Commerce is to treat information that is retained. Tr. at 7, ¶¶ 20–22. Therefore, defendant argues that Commerce's regulation establishing a rejected but retained procedure for the official record is not contrary to the statute. Tr. at 8, ¶¶ 20–24.

The court agrees. Section 351.104(a)(2) provides that Commerce “will not use factual information, written argument, or other material that [Commerce] rejects,” 19 C.F.R. § 351.104(a)(2)(i) (2011), and that “[t]he official record will include a copy of a rejected document, solely

<sup>9</sup> Citations to the oral argument are to the transcript except for instances in which the transcript is inaccurate. The transcript states: “it's a pretty generic description of how Commerce is supposed to rely, in fact, available. That's on the record.” Transcript of Oral Argument, ECF No. 68 (“Tr.”) at 7, ¶¶ 22–24.



for purposes of establishing and documenting the basis for rejecting the document, if the document was rejected because . . . the submitter made a nonconforming request for business proprietary treatment of factual information (see § 351.304) . . .” 19 C.F.R. § 351.104(a)(2)(ii).

Commerce has the authority to promulgate regulations, including regulations governing the development of the agency record. *See PSC VSMPO-Avisma*, 688 F.3d at 760. “The Court need consider only whether the regulation is based on a permissible construction of the statute.” *Hoogovens Staal BV v. United States*, 22 CIT 139, 141, 4 F. Supp. 2d 1213, 1216 (1998) (citing *Melamine Chem., Inc. v. United States* 732 F.2d 924, 928 (Fed. Cir. 1983)). It is a permissible construction of the statute that Commerce is required to consider deficient documents under sections 1677m(d) and 1677m(e) only if those documents are (1) placed on the record and (2) not retained solely for the purpose of referencing the reason that a document was rejected. As a consequence, Commerce regulations — sections 351.104(a)(2)(i) and 351.104(a)(2)(ii) — are consistent with sections 1677m(d) and 1677m(e).

In sum, Commerce’s rejection of the original Q&V response was in accordance with 19 U.S.C. §§ 1677m(d) and (e).

## **II. Whether Commerce’s Rejection of the Q&V Responses Was in Accordance with Its Regulations and Whether It Was an Abuse of Discretion**

Plaintiffs assert that the rejection by Commerce of the original Q&V response in October 2018 and the revised Q&V response in December 2018 was an abuse of discretion. Pl. Br. at 11. Plaintiffs do not argue that Commerce did not have discretion under the statute and its regulations to reject the Q&V responses, only that Commerce had discretion and should have exercised its discretion favorably to accept PMF’s submissions. *See* Pl. Reply Br. at 16. The court concludes that Commerce did not abuse its discretion in rejecting both the original and revised Q&V responses.

Plaintiffs argue that Commerce abused its discretion when it rejected PMF’s original Q&V response for “purely technical procedural reasons.” Pl. Br. at 11. As noted, Commerce rejected PMF’s original Q&V response because PMF failed to indicate appropriately and explain BPI in accordance with 19 C.F.R. §§ 351.303(b)(4),<sup>10</sup>

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<sup>10</sup> “Each document must be clearly identified as one of the following five document classifications and must conform with the requirements under paragraph (d)(2) of this section. Business proprietary document or business proprietary/APO version, as applicable, means a document or a version of a document containing information for which a person claims business proprietary treatment under § 351.304.” 19 C.F.R. § 351.303(b)(4) (2020).

351.303(d)(2)(v)<sup>11</sup> and 351.304(b)(1)(i).<sup>12</sup> Commerce Request for Revised Q&V Questionnaire Response at 1, PD 58 (Dec. 14, 2018). Commerce regulations instruct it to reject submissions that do not comply with the procedures for submitting responses with BPI: “The Secretary *will reject* a submission that does not meet the requirements of section 777(b) of the Act and this section with a written explanation.”<sup>13</sup> 19 C.F.R. § 351.304(d)(1) (2011) (emphasis supplied).

As to the revised Q&V response that PMF submitted nine days late, plaintiffs argue that Commerce “should have exercised its discretion to extend Phu My Flat’s deadline” and that “its refusal to do so was an abuse of discretion . . . .” Pl. Br. at 11. However, Commerce regulations expressly provide that Commerce shall reject an untimely response. *See* 19 C.F.R. § 351.301(c)(1) (2013). In particular, 19 C.F.R. § 351.301(c)(1) states explicitly that “[t]he Secretary *will not consider* or retain in the official record of the proceeding . . . untimely filed questionnaire responses.” *Id.* (emphasis supplied).

Plaintiffs argue that Commerce could have extended PMF’s deadline for good cause. Pl. Reply Br. at 14–15. 19 C.F.R. § 351.302(b) states that “the Secretary may, for good cause, extend any time limit established by this part.” 19 C.F.R. § 351.302(b). Indeed, “Commerce may extend a time limit for ‘good cause’ on its own.” *Neo Solar Power Corp. v. United States*, 40 CIT \_\_, \_\_, 190 F. Supp. 3d 1255, 1260 (2016) (citing 19 C.F.R. § 351.302(b)). A party may also request an extension of a time limit for good cause before the time limit expires, or after the time limit expires if the party demonstrates that an extraordinary circumstance exists. 19 C.F.R. §§ 351.302(a)–(c).

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<sup>11</sup> “On the fifth and subsequent lines, indicate whether any portion of the document contains business proprietary information and, if so, list the applicable page numbers and state either: ‘Business Proprietary Document—May Be Released Under APO,’ ‘Business Proprietary Document—May Not Be Released Under APO,’ or ‘Business Proprietary/APO Version—May Be Released Under APO,’ as applicable, and consistent with § 351.303(b)(4). Indicate ‘Business Proprietary Treatment Requested’ on the top of each page containing business proprietary information. In addition, include the warning ‘Bracketing of Business Proprietary Information Is Not Final for One Business Day After Date of Filing’ on the top of each page containing business proprietary information in the business proprietary document filed under paragraph (c)(2)(i) of this section (one-day lag rule). Do not include this warning in the final business proprietary document filed on the next business day under paragraph (c)(2)(ii) of this section (see § 351.303(c)(2) and § 351.304(c)) . . . .” 19 C.F.R. § 351.303(d)(2)(v).

<sup>12</sup> “A person submitting information must identify the information for which it claims business proprietary treatment by enclosing the information within single brackets. The submitting person must provide with the information an explanation of why each item of bracketed information is entitled to business proprietary treatment. A person submitting a request for business proprietary treatment also must include an agreement to permit disclosure under an administrative protective order, unless the submitting party claims that there is a clear and compelling need to withhold the information from disclosure under an administrative protective order.” 19 C.F.R. § 351.304(b)(1)(i).

<sup>13</sup> Section 777(b) of the Tariff Act of 1930 is codified at 19 U.S.C. § 1677f(b).

Plaintiffs did not request an extension at any point during the proceeding.<sup>14</sup> Tr. at 13, ¶¶ 14–15. Plaintiffs’ argument, therefore, “must be taken as asserting that Commerce’s failure to extend the deadline for interested parties to submit [a revised Q&V response] on its own amounted to an abuse of discretion.” *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT \_\_, \_\_, 163 F. Supp. 3d 1255, 1293 (2016). In *Tri Union*, in which the party also failed to request an extension of time, the court stated, “[i]t is hard to think of a reason why Commerce should be expected to *sua sponte* grant an extension of its deadlines given this context when [the party] itself did not ask for one.” *Id.* (emphasis in original). This court too cannot think of a reason that Commerce should be expected, given the context, to extend its deadline when PMF did not ask for an extension.

Plaintiffs also ask the court to “weigh [ ] the interests of accuracy and fairness against any burden placed on Commerce and its interest in finality” in determining whether it was reasonable for Commerce to reject a submission on a procedural basis in this case. Pl. Br. at 14 (citing *Grobtest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT 98, 122, 815 F. Supp. 2d 1342, 1365 (2012)).<sup>15</sup> According to plaintiffs, it is inaccurate and unfair that “importers of merchandise produced by Phu My Flat, such as Plaintiff Ferrostaal, must now pay cash deposits of 24.22 percent . . . upon entry, even though there is zero evidence that Phu My Flat uses inputs produced in Korea for production of its cold-rolled steel products.” Pl. Br. at 18. Plaintiffs allege that Commerce has a “minimal at best” interest in finality because PMF submitted its revised Q&V response three months prior to respondent selection and over seven months prior to the preliminary results. Pl. Br. at 17. Plaintiffs argue further that “Commerce failed to articulate any way in which Phu My Flat’s nine-day delay impacted or delayed the respondent-selection decision it made three months thereafter.”<sup>16</sup> *Id.* at 11.

Plaintiff’s reliance on *Grobtest* is not persuasive. That case is inapposite to the instant case in several key respects.

<sup>14</sup> In fact, PMF did not offer any explanation for submitting its revised Q&V response nine days late until nearly eight months later, after Commerce had published the Preliminary Determination. See Phu My Flat’s Clarification Letter, PD 197–199 (Aug. 19, 2019). Plaintiffs categorically deny that this explanation constituted a request for extension. Pl. Reply Br. at 15.

<sup>15</sup> In *Grobtest*, the Court invalidated Commerce’s rejection of an untimely separate rate certification (“SRC”) in which a respondent filed the SRC 95 days late. *Grobtest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT 98, 125, 815 F. Supp. 2d 1342, 1367 (2012).

<sup>16</sup> In this case, Commerce did explain the burden: “The Q&V questionnaire responses were used for purposes of respondent selection, and timely responses from all potential respondents was [sic] necessary in order for the respondent selection process to progress in a timely manner.” IDM at 14.

First, the Court in *Grobest* found that the respondent was “diligent” in correcting its untimely submission. *Grobest*, 815 F. Supp. 2d at 1365, 1367. The Court looked favorably on that respondent for filing the separate rate certification (“SRC”) as soon as the respondent realized the omission and for sending a letter to Commerce shortly after filing the SRC requesting that Commerce accept its late-filed submission. *Id.* In the instant case, as noted, PMF did not explain its late submission or ask Commerce to accept its late submission until after the publication of the Preliminary Determination.

Second, in *Grobest*, the respondent had already complied previously in three segments of the proceeding and Commerce found no information on the record in any of the prior segments indicating that the company’s export activities were controlled by the Vietnamese government. *Grobest*, 815 F. Supp. 2d at 1366. In the instant case, there were no prior segments on the record of the proceeding and, therefore, there was no record of PMF not using Korean substrate in its Vietnamese operations.

Finally, in *Grobest*, the untimely submission was a stand-alone occurrence. *Grobest* at 1364–1365. *Grobest* does not contain any facts indicating that there was a noncompliant submission prior to the untimely SRC. See *id.* In the instant case, PMF filed a noncompliant submission and then, after Commerce provided PMF with an opportunity to remedy its deficient submission, PMF missed, without explanation, a deadline to do so.

Commerce has a strong interest to ensure that its regulations are followed. See *Dongtai Peak*, 777 F.3d at 1351 (“In order for Commerce to fulfill its mandate to administer the anti-dumping duty law . . . it must be permitted to enforce the time frame provided in its regulations.” (citing *Yangtai Timken Co. v. United States*, 31 CIT 1741, 1754, 521 F. Supp. 2d 1356, 1371 (2007))). PMF failed to comply with Commerce regulations — not once, but twice. Accordingly, Commerce was reasonable in not accepting PMF’s original and revised Q&V responses.

***Application of Adverse Facts Available to Phu My Flat,  
Resulting in the Preclusion of Phu My Flat From the  
Certification Process***

**LEGAL FRAMEWORK**

Commerce determines whether the use of facts otherwise available (“facts available” or “FA”) is proper under 19 U.S.C. § 1677e(a) (“section 1677e(a)"). See 19 U.S.C. §§ 1677e(a)-(b). Section 1677e(a) states that Commerce may make determinations on basis of facts available if:

- (1) necessary information is not available on the record, or
- (2) an interested party or any other person —
  - (A) withholds information that has been requested by the administering authority . . .
  - (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1)<sup>17</sup> and (e) of section 1677m of this title,
  - (C) significantly impedes a proceeding under this subtitle, or
  - (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,

the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a). If Commerce determines that the use of facts available is warranted and that an interested party has not acted to the “best of its ability to comply with a request for information,” Commerce may apply AFA. *See* 19 U.S.C. § 1677e(b)(1).

This Court has described the interaction of sections 1677e(a), 1677m(d) and 1677m(e) as follows: “The Department’s use of facts otherwise available, therefore, generally requires that Commerce (1) find that the response to a request for information is deficient; (2) provide, when practicable, an opportunity to the party submitting the information to explain or correct the deficiency; and (3) determine whether such explanation or correction is either unsatisfactory or untimely.” *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 35 CIT 1398, 1402 (2011).

## DISCUSSION

Plaintiffs dispute Commerce’s decision to apply AFA to PMF, which resulted ultimately in PMF’s exclusion from the certification program. Pl. Br. at 12. Plaintiffs assert that the application of AFA to PMF was unreasonable based on two principal arguments. The court addresses each in turn.

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<sup>17</sup> 19 U.S.C. § 1677m(c) governs the conduct of Commerce in the event that an interested party notifies Commerce that it is unable to submit the information in the requested manner. *See* 19 U.S.C. § 1677m(c). This subsection is not at issue in the instant case.

First, plaintiffs argue that there was no “gap” in the record to which Commerce could apply AFA. Pl. Br. at 12. In fact, there was a “gap” in the record — the lack of a Q&V response — because PMF failed to correct its original Q&V response by indicating appropriately and explaining BPI in accordance with Commerce’s regulations by the deadline. As such, the application of AFA was reasonable because there was a “gap” in the record and Commerce determined that PMF did not act to the best of its ability.

Plaintiffs’ second argument is that the AFA applied by Commerce was not based on the record. Pl. Br. at 27. In fact, the AFA rate was based on record — namely, the finding by Commerce that “CRS produced in the Socialist Republic of Vietnam (Vietnam) using carbon hot-rolled steel (HRS) flat products manufactured in Korea, is circumventing the AD and CVD orders on CRS from Korea.” IDM at 1. Therefore, Commerce’s selection of AFA is based on the record of the proceeding.

### **I. Gap in the Record**

Plaintiffs argue that in order for there to be a “gap,” to which Commerce may apply AFA, Commerce must have specifically requested the missing information that the application of AFA would address. Pl. Reply Br. at 9, 12. In the instant case, plaintiffs allege that for a gap to have existed in this case, Commerce would have needed to request information from PMF pertaining to its ability to source its substrate. Pl. Reply Br. at 10. Plaintiffs maintain that Commerce would have needed to take this step before Commerce could determine, as AFA, that PMF was using CRS made from Korean-origin sourced substrate, completed in Vietnam and then exported to the United States in circumvention of the CRS Orders. *Id.*

Defendant counters that the “gap” is the absence of information on the record as to the quantity and value of PMF’s imports of substrate from Korea stemming from PMF’s failure to file a revised Q&V response by the required deadline. Def. Resp. to Pls.’ Mot. J. Agency R., ECF No. 53 (“Def. Br.”) at 26–27. Commerce maintained that obtaining this information was essential for Commerce to be able to determine which potential respondents to select as mandatory respondents. IDM at 14. Accordingly, defendant argues that this “gap” during the respondent selection stage justified Commerce’s decision to apply AFA and to disallow PMF from participation in the next stage of the proceeding, the certification program. Def. Br. at 31–32.

The court determines that PMF’s failure to respond in a timely manner to Commerce’s Q&V questionnaire created a “gap” on the record because Commerce did not have information from PMF to use



during the respondent selection stage. Plaintiffs argue that Commerce was required to ask for the specific information (PMF's ability to source its substrate) to which Commerce would eventually apply AFA. *See* Pl. Br. at 20. The language of the statute and case law applying that language do not support this construct. The statute provides that Commerce may make determinations using facts available if: (1) necessary information is not available on the record; or (2) an interested party withholds requested information, fails to provide information by the deadlines or in the form and manner requested, significantly impedes a proceeding or provides information that cannot be verified. 19 U.S.C. § 1677e(a). The Federal Circuit has made clear that Commerce may not apply AFA when a respondent fully and accurately responds to Commerce's questionnaires. *See Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990).<sup>18</sup> In the instant case, PMF did not respond fully and accurately to Commerce's Q&V questionnaire. Therefore, plaintiffs' argument that the application of AFA to PMF was unreasonable and not in accordance with law is without support.

Additionally, the SAA makes clear that the application of AFA is a tool given to Commerce "to ensure that [a] party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." SAA, H.R. Doc. Rep. No. 103-316, vol. 1, at 870 (1994), *reprinted in 1994 U.S.C.C.A.N.* 4040, 4198. In the Q&V questionnaire, Commerce notified the 31 companies that "failure to provide accurate information or to cooperate to the best of your ability may result in [Commerce] resorting to the use of facts available and adverse inferences within the meaning of section 776 of the Tariff Act of 1930."

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<sup>18</sup> *Olympic Adhesives, Inc. v. United States* pertains to the second review of an antidumping order on animal glue imported from Sweden issued in 1977 by the Department of the Treasury (the agency responsible for antidumping investigations at that time shortly before the responsibility was transferred to Commerce). *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990). In its review, Commerce solicited information from the plaintiff, an importer, regarding the grades of the animal glue at issue. *Id.* at 1569. The plaintiff supplied Commerce with answers to all of its questions by forwarding telexes from its Swedish manufacturer. *Id.* Commerce then sent questionnaires directly to the Swedish manufacturer. *Id.* The Swedish manufacturer informed Commerce that it could not answer questions concerning the Swedish manufacturer's sales to the United States because the Swedish manufacturer stopped producing animal glue, stopped selling to the United States and, as a result, had no staff able to Commerce's questions. *Id.* at 1569-1570. When Commerce put a 92.72% duty on the animal glue, plaintiff sued asserting that Commerce did not notify the Swedish manufacturer that its answers were deficient. *Id.* at 1570. The Federal Circuit held that Commerce "may not properly conclude that resort to the best information rule is justified in circumstances where a questionnaire is sent and completely answered, just because [Commerce] concludes that the answers do not definitely resolve the overall issue presented." *Id.* at 1574. The Federal Circuit continued, "section 1677e(b) clearly requires *noncompliance with an information request* before resort to the best information rule is justified. . . ." *Id.* (emphasis in original). The Federal Circuit concluded that Commerce needed to give notice of a deficiency. *Id.*



Commerce's Q&V Questionnaire, PD 17 (Oct. 5, 2018). In the Preliminary and Final Determinations, Commerce, applying AFA, determined that the non-responsive companies were "not eligible to certify their entries and avoid paying cash deposits because they are circumventing the Orders and had failed to fully participate in Commerce's inquiries." Def. Br. at 5 (*citing* IDM at 19). Commerce explained that if AFA were not applied, and if the non-responsive companies were allowed to certify their entries after their failure to submit useable Q&V responses, the companies "would be able to avoid certain immediate costs and inconvenience by ignoring Commerce's requests for information while having no reason to fear any specific future negative consequences from their unwillingness to cooperate." IDM at 29. In fact, Commerce attributes the relative lack of Q&V responses in the proceeding in the instant case to Commerce's leniency in the *China CRS Circumvention* anti-circumvention inquiry in which Commerce allowed non-responsive companies to participate in the certification process. *Id.* at 27; *see also Certain Cold-Rolled Steel Flat Products From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 Fed. Reg. 23,891 (Dep't Commerce May 23, 2018) ("*China CRS Circumvention*").

Plaintiffs' second argument is that there is no record that PMF is using substrate produced in Korea and, therefore, Commerce's application of AFA is uncorroborated and not in accordance with law. Pl. Br. at 27. Plaintiffs, relying on a comparison to *Trina Solar*, argue that "Commerce disregarded its obligation to point to any facts on the record to support its determination that Phu My Flat does not have the ability to trace its exports or the HR substrate it uses to produce CRS." *Id.* at 28. In *Trina Solar*, the court determined that "Commerce [had] placed no relevant factual information on record, and so cannot even rely on the low bar set by 19 U.S.C. § 1677e(b)(2)(D) — that its adverse inferences be derived from 'any other information placed on the record.'" *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 40 CIT \_\_, \_\_ 195 F. Supp. 3d 1334, 1348 (2016). The court continued, "Commerce has not indicated that it relied on any information, from any source, to find that all of the Solar I PRC programs and verification grants and tax deduction satisfy the elements for countervailability." *Id.*

Plaintiff fails to recognize a fundamental difference between the instant case and *Trina Solar*. In the instant case, the application of AFA was based on information contained in the record of the proceeding. PDM at 13; IDM at 7. After a review of the mandatory respondents, Commerce determined that "CRS produced in the Socialist

Republic of Vietnam (Vietnam) using carbon hot-rolled steel (HRS) flat products manufactured in Korea, is circumventing the AD and CVD orders on CRS from Korea.” *Id.* PMF’s information was not a part of the record due to PMF’s failure to submit a revised Q&V response by the deadline.

As a final argument, plaintiffs assert that the application of AFA to PMF was unreasonable because PMF did not, in essence, *intend* to evade Commerce’s inquiry. Pl. Br. at 26. Plaintiffs note that PMF’s behavior of submitting a timely, but noncompliant response with regard to BPI, and then an untimely, but compliant response with regard to BPI, is not indicative of PMF “attempting to obtain a more favorable result in this proceeding.” Pl. Br. at 26.

To assess whether a respondent in an investigation or review acted to the best of its ability, it is well established that intent is irrelevant. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1383 (Fed. Cir. 2003) (“The statutory trigger for Commerce’s consideration of an adverse inference is simply a failure to cooperate to the best of respondent’s ability, regardless of motivation or intent.”). Therefore, this argument is unsuccessful.

In sum, PMF created a “gap” in the record when it failed to correct its “deficiency” and provide Commerce with a timely revised Q&V response. Commerce acted reasonably to apply AFA to PMF, bar PMF from participating in the certification program and determine that PMF was circumventing the Orders.

## II. Plaintiffs’ Additional Arguments

Plaintiffs offer several additional arguments as to the reasons that, in plaintiffs’ view, it was not reasonable for Commerce to apply AFA to PMF. The court addresses them briefly.

Plaintiffs argue that PMF’s untimely Q&V response did not hinder Commerce’s inquiry because it was a foregone conclusion that the two largest producers would be selected for respondent selection instead of PMF — and in fact, that is what Commerce did. *See* Pl. Br. at 19 n.4.<sup>19</sup> Commerce reasonably stated that “timely responses from all potential respondents was [sic] necessary in order for the respondent selection process to progress in a timely manner.” IDM at 14. It is well established that “[i]t is Commerce, not the respondent, that determines what information is to be provided for an administrative review.” *Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986). Plaintiffs may not justify noncompliance with Commerce’s Q&V questionnaires by maintaining that Com-

<sup>19</sup> Plaintiffs add that, in their view, PMF’s failure to respond had no impact on the investigation. Tr. at 48, ¶¶ 14–17.

merce did not actually need PMF's cooperation as a smaller producer; such an approach would sanction non-participation by any respondent that, it turned out, was not one of the two largest.

Plaintiffs also express discontent that it took two months for Commerce to reject PMF's original Q&V response and another two months to reject PMF's revised Q&V response. Pl. Br. at 16. At oral argument, plaintiffs questioned whether Commerce's notice was prompt in light of the language of section 1677m(d) that Commerce "shall promptly inform." Tr. at 10, ¶¶ 9–12; Tr. at 12, ¶¶ 2–6. When pressed, plaintiffs conceded that they are not aware of a definition under the statute or regulations for "promptly" and that their point was to suggest that PMF's nine-day delay was "a pittance compared to the two months and the two months." Tr. at 12, ¶¶ 17–25.

Plaintiffs' counsel raises a series of what could be characterized almost as equitable arguments: *e.g.*, PMF filed a noncompliant document and missed a deadline without explanation or request for extension, but Commerce took two months in each case to render its decision, Tr. at 12, ¶¶ 2–9; PMF did not appear to be trying to hiding the ball, *see* Pl. Br. at 26; there was no harm or even impact on the investigation in PMF not responding in this case because PMF is a smaller company. Tr. at 14, ¶¶ 13–15. The court has listened to and understood these arguments. However, as the foregoing indicates, the court's mandate is to review whether Commerce's decision is unsupported by substantial evidence or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). There is no basis in the statute to address these arguments. *Id.*

In light of the foregoing, the court concludes that Commerce applied the statutes and its regulations reasonably in its determinations with regard to the rejection of the Q&V responses and the application of AFA.

## CONCLUSION

In the 1996 movie, *Fargo*, police officer Marge Gunderson (portrayed by Frances McDormand, who took home her first of three (so far) Academy Awards for Best Actress in a Leading Role), turns up unannounced at the car dealership run by Jerry Lundegaard (William H. Macy). She is searching for a missing vehicle. She walks into Lundegaard's office — scene played to comic-dramatic perfection by McDormand and Macy — the scene's and film's underlying narrative bearing slim relationship to the facts of the case before the court.

Marge: "Sorry to bother you, again." She is well into his office: "May I come in?"

Jerry: “Yeah...no! I’m kinda . . . I’m kinda busy here,” he stammers, pained expression on his face.

She sits down across from him.

Marge: “Mind if I sit down? I was kinda wondering . . .”

Jerry: “Like I told ya, we haven’t had any vehicles go missing.”

Marge: “Okay!” she says, chipper, smile on her face. Pauses, looks down. “Are ya sure? So how do ya – have ya done any kind of inventory recently?”

Jerry: “The car’s not from our lot, ma’am.”

Marge: “But do ya know that for sure without . . .”

Jerry: “Well, I would know! I’m the Executive Sales Manager.”

Marge: “Yah, but . . .”

Jerry: “We run a pretty tight ship here.”

Marge: “I know but . . . well, how do ya establish that, sir? Are the cars, uh, counted daily or what kind of . . .”

Jerry, voice raised: “Ma’am! I answered your question.”

Marge, pauses, eyes wide, serious, stares at him with a look that could stop a charging Rhino: “I’m sorry, sir?”

Jerry, quieter, smiling: “I answered your question. I answered the darn. . . . I’m cooperating here. . . . I’m not. . . .”

Marge, death stare continuing: “You got no cause to get snippy with me. I’m just doin’ my job here.”

Jerry: “I’m not arguin’ here. I’m not, uh . . . I’m cooperatin’ . . . And, there’s no . . . We’re doin’ all we can.”

Marge, stands, over him, her eyes still boring into him: “Sir, could I talk to Mr. Gustafson?” Gustafson owns the car dealership, is Jerry’s boss and father-in-law of whom he is terrified. Jerry looks up at her, deer in the headlights. Silence. She says, quietly: “Mr. Lundegaard?”

Jerry gets up, yanking his parka from the hook, grabbing his hat and scarf and slipping on his galoshes: “Well, heck! If you wanna. . . if you wanna play games here. . . I’m workin’ with ya on this thing here, but . . . okay . . . I . . . I’ll do a [damn] lot count!”

Marge, staring out the window at the snow and freezing lot: “Sir, right now?!”

Jerry: “Yah, right now! You’re darned tootin’!”<sup>20</sup>

\* \* \*

In conclusion, Commerce’s decision to reject PMF’s Q&V responses was reasonable and in accordance with law. Commerce requires that companies participate and comply with its regulations to conduct its anti-circumvention inquiries. PMF failed twice to provide Commerce with the information it required in the manner in which Commerce required it. As such, Commerce’s application of AFA was also reason-

<sup>20</sup> FARGO (Joel Coen and Ethan Coen/Gramercy Pictures 1996).

able and in accordance with law. Therefore, the court sustains Commerce's Final Determination. Judgment will enter accordingly.

Dated: May 4, 2021

New York, New York

*/s/ Timothy M. Reif*

TIMOTHY M. REIF, JUDGE

## Slip Op. 21–55

RISEN ENERGY CO., LTD., Plaintiff, and SUNPOWER MANUFACTURING OREGON, LLC, Consolidated Plaintiff, and SHANGHAI BYD CO., LTD. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SUNPOWER MANUFACTURING OREGON, LLC et al., Defendant-Intervenor and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge  
Consol. Court No. 19–00153

[Sustaining the U.S. Department of Commerce’s remand redetermination in the fifth administrative review of the antidumping duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules from the People’s Republic of China.]

Dated: May 5, 2021

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## OPINION

### Kelly, Judge:

Before the court is the U.S. Department of Commerce’s (“Commerce”) remand redetermination filed pursuant to the court’s order in

*Risen Energy Co. v. United States*, 44 CIT \_\_\_, 477 F. Supp. 3d 1332 (2020) (“*Risen I*”). See also Final Results of Redetermination Pursuant to Ct. Order, Jan. 27, 2021, ECF No. 86–1 (“*Remand Results*”). In *Risen I*, the court sustained in part and remanded in part Commerce’s final determination in the fifth administrative review of the anti-dumping duty (“ADD”) order on crystalline silicon photovoltaic cells, whether or not assembled into modules (“solar cells”) from the People’s Republic of China (“PRC” or “China”). See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 84 Fed. Reg. 36,886 (Dep’t Commerce July 30, 2019) (final results of [ADD] admin. review and final determination of no shipments; 2016–2017) (“*Final Results*”) and accompanying Issues and Decisions Memo for the [*Final Results*], A-570–979, (July 24, 2019), ECF No. 33–2 (“*Final Decision Memo*”).

The court ordered Commerce to 1) reconsider or explain application of partial facts otherwise available with an adverse inference (“AFA”)<sup>1</sup> to *Risen*, and 2) incorporate, to the extent required by law, any adjustments to *Risen*’s dumping margin resulting from the remand redetermination into its calculation of the separate rate or separate rates applicable to individual respondents. See *Risen I*, 44 CIT at \_\_\_, 477 F. Supp. 3d at 1348. In its *Remand Results*, Commerce, under respectful protest,<sup>2</sup> decides not to apply an adverse inference in selecting from among the facts otherwise available in calculating *Risen*’s dumping margin. See *Remand Results* at 1–2. Commerce instead “average[s] consumption rates reported by *Risen* for the relevant control numbers in place of the unreported [factors of production (“FOP”)] consumption rates.” *Id.* at 4. No party filed comments on the *Remand Results* with the court. Defendant requests that this court sustain Commerce’s remand results. See Defendant’s Request to Sustain [*Remand Results*] at 1–2, Mar. 26, 2021, ECF No. 88 (“*Def.’s Br.*”). For the reasons that follow, the court sustains Commerce’s *Remand Results*.

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<sup>1</sup> 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 Section 776 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677e(a)–(b) (2018). 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.*

<sup>2</sup> By adopting a position forced upon it by the Court “under protest,” Commerce preserves its right to appeal. See *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).



## BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinion ordering remand to Commerce, and now recounts those relevant to the court's review of the Remand Results. *See Risen I*, 44 CIT at \_\_, 477 F. Supp. 3d at 1337–39. In 2012, Commerce published the ADD order covering solar cells from China. *See generally Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value, and [ADD] order). On February 23, 2018, in response to timely requests, Commerce initiated its fifth administrative review of the ADD Order. *See generally Initiation of [ADD] & Countervailing Duty Admin. Reviews*, 83 Fed. Reg. 8,058 (Dep't Commerce Feb. 23, 2018). Commerce chose Risen and Chint Solar Zhejiang Co., Ltd. (“Chint Solar”) as mandatory respondents. *See* Resp't Selection Memo [for 2016–2017 Admin. Review] at 6, A-570–979, PD 79, bar code 3682915–01 (Mar. 15, 2018) (selection of Risen as mandatory respondent);<sup>3</sup> Second Resp't Selection Memo [for 2016–2017 Admin. Review] at 1, A-570–979, PD 147, bar code 3696673–01 (Apr. 19, 2018) (selection of Chint Solar as additional mandatory respondent); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 83 Fed. Reg. 67,222 (Dep't Commerce Dec. 28, 2018) (prelim. results of [ADD] admin. review and prelim. determination of no shipments; 2016–2017) (“*Prelim. Results*”) and accompanying Decision Memo for the [*Prelim. Results*] at 2–3, 7–9, A-570–979, PD 497, bar code 3785207–01 (Dec. 20, 2018) (“*Prelim. Decision Memo*”).

Plaintiff Risen and Plaintiff-Intervenors challenged Commerce's decision to apply partial AFA when calculating the normal value of Risen's entries of subject merchandise to fill gaps in the record caused by the refusal of certain unaffiliated suppliers to cooperate with Commerce's investigation. *See, e.g.*, Pl. [Risen's] Memo Supp. Mot. J. Agency R. at 1–2, 14–34, Mar. 26, 2020, ECF No. 40–2; Pl.-Intervenors' [Canadian Solar & Shanghai] Memo Supp. Mot. J. Agency R. at 2–3, 9–18, Mar. 26, 2020, ECF No. 42–1. In *Risen I*, the

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<sup>3</sup> On November 12, 2019, Defendant submitted indices to the confidential and public administrative records underlying Commerce's final determination. These indices are located on the docket at ECF No. 33–3–4, respectively. Subsequently, on February 1, 2021, Defendant submitted indices to the confidential and public administrative record underlying Commerce's remand redetermination. These indices are located on the docket at ECF No. 87–2–3, respectively. All further references in this opinion to documents from the initial administrative record are identified by the numbers assigned by Commerce in those indices and preceded by “PD” and “CD” to denote public or confidential documents. All references to documents in the administrative record underlying the remand redetermination are similarly identified by the numbers assigned by Commerce in those indices and preceded by “PRR” and “CRR” to denote public or confidential documents.

court remanded on the issue of applying partial AFA to Risen. *See Risen I*, 44 CIT at \_\_\_, 477 F. Supp. 3d at 1348.

In its *Remand Results*, Commerce reconsiders its application of partial AFA to Risen, and under respectful protest, Commerce declines to apply partial AFA, and instead relies on consumption rates provided by Risen to fill in the missing FOP consumption rates. *See Remand Results* at 1–2, 4. No party filed comments to the *Remand Results*. Defendant requests that this court sustain the *Remand Results*. *See* Def.'s Br. at 1–2.

### JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018)<sup>4</sup> and 28 U.S.C. § 1581(c) (2018),<sup>5</sup> 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). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT \_\_\_, \_\_\_, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

### DISCUSSION

On remand, Commerce reconsiders its decision and, under respectful protest, decides not to apply partial AFA to Risen when calculating the normal value of Risen's entries of subject merchandise to fill gaps in the record (missing FOP consumption rates) that exist because of uncooperative, unaffiliated suppliers. *See Remand Results* at 1–2. Rather, Commerce averages the consumption rates that Risen provided and uses the calculated average to fill in the missing FOP consumption rates. *See id.* at 4. No party filed comments on the *Remand Results*, and Defendant requested that the court affirm the remand redetermination. *See* Def.'s Br. at 1–2.

To determine the normal value of the subject merchandise in NME countries Commerce solicits input data and surrogate values for those inputs from the parties. *See e.g., Globe Metallurgical, Inc. v. United States*, 32 CIT 1070, 1075 (2008). Where, despite its sollicita-

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<sup>4</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

<sup>5</sup> Further citations to Title 28 of the U.S. Code are to the 2018 edition.

tions, information necessary to calculate normal value is not available on the record, Commerce uses “facts otherwise available” in place of the missing information. See 19 U.S.C. § 1677e(a)(1).<sup>6</sup> If Commerce further “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information,” Commerce may apply “an inference that is adverse to the interests of that party in selecting from among the facts otherwise available[.]” *Id.* § 1677e(b)(1). However, under certain circumstances, Commerce may incorporate an adverse inference under § 1677e(a) in calculating a cooperative respondent’s margin, if doing so will yield an accurate rate, promote cooperation, and thwart duty evasion. See *Mueller Comercial de Mexico S. De R.L. de C.V. v. United States*, 753 F.3d 1227, 1232–36 (Fed. Cir. 2014) (“*Mueller*”). When analyzing the use of an adverse inference as a part of a § 1677e(a) analysis, the predominant concern must be accuracy. See *id.* at 1233.

Commerce’s decision is supported by substantial evidence and complies with the court’s remand order. Commerce’s use of facts otherwise available—namely, the consumption rates provided by Risen—comports with the relevant statute that instructs Commerce to refer to such facts to fill in missing information. See 19 U.S.C. § 1677e(a)(1). Moreover, Commerce’s decision not to use partial AFA to calculate Risen’s dumping margin is consistent with the directive from *Mueller* that accuracy must be the driving force behind a decision to draw an adverse inference. See *Mueller*, 753 F.3d at 1233. As the court noted in its opinion ordering remand, Commerce, in its final results, did not point to any evidence that applying an adverse inference to Risen, and thus applying the highest FOP consumption rates on the record, would thwart duty evasion, promote cooperation or lead to calculation of an accurate dumping margin. See *Risen I*, 44

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<sup>6</sup> 19 U.S.C. § 1677e(a) also applies where an interested party or any other person—

(A) withholds information that has been requested by the administering authority or the Commission under this title,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 [19 USCS § 1677m(c)(1) and (e)],

(C) significantly impedes a proceeding under this title, or

(D) provides such information but the information cannot be verified as provided in section 782(i) [19 USCS § 1677m(i)], the administering authority and the Commission shall, subject to section 782(d) [19 USCS § 1677m(d)], use the facts otherwise available in reaching the applicable determination under this title.

19 U.S.C. § 1677e(a)(2).

CIT at \_\_\_, 477 F. Supp. 3d at 1343–44.<sup>7</sup> Commerce now explains the method it uses on remand and no party challenges Commerce’s results or its chosen methodology.

### CONCLUSION

For the foregoing reasons, Commerce’s *Remand Results* are supported by substantial evidence and comply with the court’s order in *Risen I*, and are therefore sustained. Judgment will enter accordingly.

Dated: May 5, 2021

New York, New York

*/s/ Claire R. Kelly*

CLAIRE R. KELLY, JUDGE

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<sup>7</sup> The court also questioned whether application of the highest FOP on the record furthered Commerce’s policy objectives of encouraging cooperation in its investigations by interested parties. See *Risen I*, 44 CIT at \_\_\_, 477 F. Supp. 3d at 1342–43.

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