U.S. Customs and Border Protection

CBP Dec. 24–17

NOTICE OF FINDING THAT ALUMINUM EXTRUSIONS AND PROFILE PRODUCTS AND DERIVATIVES PRODUCED OR MANUFACTURED WHOLLY OR IN PART BY KINGTOM ALUMINIO S.R.L. WITH THE USE OF CONVICT, FORCED OR INDENTURED LABOR ARE BEING, OR ARE LIKELY TO BE, IMPORTED INTO THE UNITED STATES

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

ACTION: General notice of forced labor finding.

SUMMARY: This document notifies the public that U.S. Customs and Border Protection (CBP), with the approval of the Secretary of Homeland Security, has determined that aluminum extrusions and profile products and derivatives produced or manufactured wholly or in part by Kingtom Aluminio S.R.L. with the use of convict, forced or indentured labor, are being, or are likely to be, imported into the United States.

DATES: This Finding applies to any merchandise described in Section II of this Notice that is imported on or after December 4, 2024. It also applies to any merchandise described in Section II of this Notice that has already been imported and has not been released from CBP custody before December 4, 2024.

FOR FURTHER INFORMATION CONTACT: Brian M. Hoxie, Director, Forced Labor Division, Trade Remedy Law Enforcement Directorate, Office of Trade, (202) 841–3081 or *forcedlabor@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to section 307 of the Tariff Act of 1930, as amended (19 U.S.C. 1307), "[a]ll goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited."

Under this section, "forced labor" includes "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily" and includes forced or indentured child labor.

U.S. Customs and Border Protection (CBP) regulations promulgated under the authority of 19 U.S.C. 1307 are found at sections 12.42 through 12.45 of title 19 of the Code of Federal Regulations (CFR) (19 CFR 12.42–12.45). Among other things, these regulations allow any person outside of CBP to communicate a belief that a certain "class of merchandise . . . is being, or is likely to be, imported into the United States [in violation of 19 U.S.C. 1307]." 19 CFR 12.42(a), (b). Upon receiving such information, the Commissioner of CBP will initiate an investigation if warranted by the circumstances. 19 CFR 12.42(d). CBP also has the authority to self-initiate an investigation. 19 CFR 12.42(a).

If the Commissioner of CBP finds that the information available "reasonably but not conclusively" demonstrates that such merchandise within the purview of 19 U.S.C. 1307 is being, or is likely to be, imported into the United States, the Commissioner of CBP will order port directors to seize and withhold the merchandise pending further instructions. 19 CFR 12.42(e). After issuance of such a withhold release order, the covered merchandise will be detained by CBP for an admissibility determination and will be excluded unless the importer demonstrates that the merchandise was not made using labor in violation of 19 U.S.C. 1307. 19 CFR 12.43–12.44. The importer may also export the merchandise. 19 CFR 12.44(a).

These regulations also set forth the procedure for the Commissioner of CBP to issue a Finding when he determines that the merchandise is subject to the provisions of 19 U.S.C. 1307. Pursuant to 19 CFR 12.42(f), if the Commissioner of CBP finds that merchandise within the purview of 19 U.S.C. 1307 is being, or is likely to be, imported into the United States, the Commissioner will, with the approval of the Secretary of Homeland Security, publish a Finding to that effect in the Customs Bulletin and in the **Federal Register**.[1] Under the authority of 19 CFR 12.44(b), CBP may seize and forfeit imported merchandise covered by a Finding.

[1] Although the regulation states that the Secretary of the Treasury must approve the issuance of a Finding, the Secretary of the Treasury delegated this authority to the Secretary of Homeland Security in Treasury Order No. 100–16, 68 FR 28322 (May 23, 2003). Under Delegation Order 7010.3, Section II.A.3, the Secretary of Homeland Security delegated the authority to issue a Finding to the Commissioner of CBP, with the approval of the Secretary of Homeland Security. The Commissioner of CBP, in turn, delegated the authority to make a Finding regarding prohibited goods under 19 U.S.C. 1307 to the Executive Assistant Commissioner, Office of Trade.

Through its investigation, CBP has determined that there is sufficient information to support a Finding that Kingtom Aluminio S.R.L. is using convict, forced, or indentured labor in a factory in the Dominican Republic to produce or manufacture in whole or in part aluminum extrusions and profile products and derivatives, and that such products are being, or are likely to be, imported into the United States.

II. Finding

A. General

Pursuant to 19 U.S.C. 1307 and 19 CFR 12.42(f), it is hereby determined that certain articles described in section II.B. of this Notice, that are produced or manufactured in whole or in part with the use of convict, forced, or indentured labor by Kingtom Aluminio S.R.L., are being, or are likely to be, imported into the United States. Based upon this determination, the port director may seize the covered merchandise for violation of 19 U.S.C. 1307 and commence forfeiture proceedings pursuant to 19 CFR part 162, subpart E, unless the importer establishes by satisfactory evidence that the merchandise was not produced or manufactured in any part with the use of prohibited labor specified in this Finding. 19 CFR 12.42(g).

B. Articles and Entities Covered by This Finding

This Finding covers aluminum extrusions and profile products and derivatives produced or manufactured wholly or in part with aluminum and articles thereof classified under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7604.21.0010, 7604.29.1010, 7604.29.3060, 7604.29.5050, 7604.29.5090, 7608.20.0090, 7610.90.0080 and any other relevant subheadings under Chapter 76, which are produced or manufactured wholly or in part by Kingtom Aluminio S.R.L. The Secretary of Homeland Security has reviewed and approved this Finding.

ROSE M. BROPHY,
Acting Executive Assistant Commissioner,
Office of Trade.

U.S. Court of International Trade

Slip Op. 24–128

JIANGSU ZHONGJI LAMINATION MATERIALS CO., LTD.; JIANGSU ZHONGJI LAMINATION MATERIALS CO., (HK) LTD.; SHANTOU WANSHUN PACKAGE MATERIAL STOCK CO., LTD.; JIANGSU HUAFENG ALUMINIUM INDUSTRY CO., LTD.; ANHUI MAXIMUM ALUMINIUM INDUSTRIES COMPANY LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and ALUMINUM ASSOCIATION TRADE ENFORCEMENT WORKING GROUP AND ITS INDIVIDUAL MEMBERS; JW ALUMINUM COMPANY; NOVELIS CORPORATION; REYNOLDS CONSUMER PRODUCTS LLC, Defendant-Intervenors.

Before: Timothy M. Reif, Judge
Court No. 21–00133
PUBLIC VERSION

[Sustaining Commerce's final remand redetermination in its first administrative review of the countervailing duty order on certain aluminum foil from the People's Republic of China.]

Dated: November 22, 2024

Kristin H. Mowry and *Yixin (Cleo) Li*, Mowry & Grimson, PLLC, of Washington, D.C., argued for plaintiffs Jiangsu Zhongji Lamination Materials Co., Ltd.; Jiangsu Zhongji Lamination Materials Co., (HK) Ltd.; Shantou Wanshun Package Material Stock Co., Ltd.; Jiangsu Huafeng Aluminium Industry Co., Ltd.; and Anhui Maximum Aluminium Industries Company Limited. With them on the brief were *Jeffrey S. Grimson* and *Sarah M. Wyss*.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Jesus N. Saenz*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Grace W. Kim, Kelley Drye & Warren LLP, of Washington, D.C., argued for defendant-intervenors Aluminum Association Trade Enforcement Working Group; JW Aluminum Company; Novelis Corporation; and Reynolds Consumer Products LLC. With her on the brief was *John M. Herrmann*.

OPINION

Reif, Judge:

Before the court is the remand redetermination of the U.S. Department of Commerce ("Commerce") issued pursuant to the Court's order in *Jiangsu Zhongji Lamination Materials Co. v. United States* ("*Jiangsu Zhongji I*," or the "Remand Order"), 47 CIT __, 625 F. Supp. 3d 1355 (2023). *See* Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 67–68, Rem PR 6, PJA Tab 1.

In *Jiangsu Zhongji I*, the Court sustained in part and remanded in part Commerce's final determination in its first administrative review of the countervailing duty ("CVD") order on certain aluminum foil from the People's Republic of China for the period of review ("POR") August 14, 2017, through December 31, 2018. 47 CIT at __, 625 F. Supp. 3d at 1359–60; *see Certain Aluminum Foil from the People's Republic of China: Final Results of the Countervailing Duty Administrative Review; 2017–2018* ("*AR 1 Final Results*"), 86 Fed. Reg. 12,171 (Dep't of Commerce Mar. 2, 2021) and accompanying Issues and Decision Memorandum ("IDM") (Dep't of Commerce Feb. 24, 2021); *see also Certain Aluminum Foil from the People's Republic of China: Preliminary Results of the Countervailing Duty Administrative Review and Rescission of Review, in Part; 2017–2018* ("*AR 1 Preliminary Results*"), 85 Fed. Reg. 38,861 (Dep't of Commerce June 29, 2020) and accompanying Preliminary Decision Memorandum ("PDM") (Dep't of Commerce June 17, 2020); *Certain Aluminum Foil from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 Fed. Reg. 17,360 (Dep't of Commerce Apr. 19, 2018). The Court remanded to Commerce its selection of data to calculate the benchmark for the aluminum plate, sheet and strip program ("aluminum plate/sheet program"). *Jiangsu Zhongji I*, 47 CIT at __, 625 F. Supp. 3d at 1370. In addition, the Court remanded to Commerce its selection of data to calculate the benchmark for the land program. *Id.* at __, 625 F. Supp 3d at 1373.

On remand, Commerce provided explanation and analysis for its conclusion that the Trade Data Monitor ("TDM") data source is superior to the proposed benchmarks of the Zhongji Respondents. *See* Remand Results at 5–20, 33–41. Commerce also provided explanation and analysis for its conclusion that the Coldwell Banker Richard Ellis ("CBRE") Asia Marketview Report containing 2010 data from Thailand (the "2010 CBRE Report") is better suited to serve as a benchmark than are the proposed land benchmarks of the Zhongji Respondents. *See id.* at 20–30, 44–48; *see* Letter from Commerce to File Pertaining to Interested Parties Land Benchmark (July 29, 2019) at Attach. I ("2010 CBRE Report"), PR 57–58, PJA Tab 2.

Jiangsu Zhongji Lamination Materials Co., Ltd. ("Jiangsu Zhongji"), Jiangsu Zhongji Lamination Materials Co., (HK) Ltd., Shantou Wanshun Package Material Stock Co., Ltd. ("Shantou Wanshun"), Jiangsu Huafeng Aluminium Industry Co., Ltd. ("Jiangsu Huafeng") and Anhui Maximum Aluminium Industries Company Limited (collectively, the "Zhongji Respondents," or "plaintiffs") challenge the Remand Results. *See* Remand Results.

For the reasons discussed below, the court sustains the Remand Results.

BACKGROUND

The court presumes familiarity with the facts as set out in *Jiangsu Zhongji I* and recounts only those facts relevant to the issues before the court on remand.

On March 21, 2023, the Court concluded that Commerce did not explain adequately: (1) Commerce's selection of the TDM data source to calculate the benchmark for the aluminum plate/sheet program; (2) Commerce's rejection of the proposed benchmarks of the Zhongji Respondents for the aluminum plate/sheet program; (3) Commerce's selection of the 2010 CBRE Report to calculate the benchmark for the land program; and (4) Commerce's rejection of the proposed benchmarks of the Zhongji Respondents for the land program. *Jiangsu Zhongji I*, 47 CIT at __, 625 F. Supp. 3d at 1370, 1373.

The Court ordered Commerce on remand to explain further or reconsider, consistent with *Jiangsu Zhongji I*, Commerce's selection of data to calculate the benchmark for the aluminum plate/sheet program. *Id.* at __, 625 F. Supp. 3d at 1377. In addition, the Court ordered Commerce to provide the following explanations on remand with respect to Commerce's selection of a benchmark for the land program:

> (1) explain further or reconsider [Commerce's] evaluation of the contemporaneity of data sources in the record — particularly Commerce's purported practice to select data sources that correspond most closely to the point in time at which land use rights were *purchased*; (2) explain the reasons that Commerce's selected benchmark on remand is consistent with such a practice in evaluating the contemporaneity of data sources; (3) explain the reasons that *each* data source that Commerce may decide to select on remand — should Commerce select more than one data source — is consistent with Commerce's practice in determining whether a data source provides an appropriate remuneration benchmark; and (4) explain further or reconsider its selection of the 2010 CBRE Report specifically with reference to the adequacy, context and references for the data in that report in comparison to Commerce's criticism of the adequacy, context and references for the data in the Nexus Reports[.]

Id.

On June 6, 2023, Commerce issued its draft redetermination. *See* Remand Results at 4.

On June 14, 2023, the Court granted defendant United States' consent motion for an extension of time to file the Remand Results. Ct.'s Order Granting Def.'s Mot. Extension of Time, ECF No. 66.

On June 26, 2023, the Aluminum Association Trade Enforcement Working Group and its Individual Members (JW Aluminum Company, Novelis Corporation and Reynolds Consumer Products LLC) (collectively, "defendant-intervenors") and the Zhongji Respondents provided comments on the draft redetermination. *See* Remand Results at 4.

On August 4, 2023, Commerce filed the Remand Results. *See id.* On September 18, 2023, plaintiffs filed comments in response to the Remand Results. Objs. Remand Results of Pls. ("Pls. Br."), ECF No. 74–75.

On October 19, 2023, the Court granted defendant's second consent motion for extension of time to file comments in support of the Remand Results. Ct.'s Order Granting Def.'s Mot. Extension of Time, ECF No. 77.

On October 31, 2023, defendant-intervenors filed comments in support of the Remand Results. Def.-Intervenors' Cmts. Supp. Remand Redetermination ("Def.-Intervenors Br."), ECF No. 78–79. On October 31, 2023, defendant filed comments in support of the Remand Results. Def.'s Cmts. Supp. Remand Redetermination ("Def. Br."), ECF No. 80–81. The Court reviewed parties' filings and responses thereto.

On October 24, 2024, the Court heard oral argument. *See* Oral Arg. Tr., ECF No. 87.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c). Plaintiffs bring the instant action pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018).[1]

On remand, the Court will sustain Commerce's determinations "if they are in accordance with the remand order, are supported by substantial evidence, and are otherwise in accordance with law." *MacLean-Fogg Co. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1349, 1355 (2015) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)); *see Prime Time Com. LLC v. United States*, 45 CIT __, __, 495 F. Supp. 3d 1308, 1313 (2021) ("The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'") (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United*

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

States, 38 CIT 189, 190, 968 F. Supp. 2d 1255, 1259 (2014)), *aff'd*, 2022 WL 2313968 (Fed. Cir. June 28, 2022); *see also Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 44 CIT __, __, 435 F. Supp. 3d 1273, 1276 (2020).

Substantial evidence constitutes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," but it requires "more than a mere scintilla." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). Moreover, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488.

For a reviewing court to "fulfill [its] obligation" to determine whether a determination of Commerce is supported by substantial evidence and in accordance with law, Commerce is required to "examine the record and articulate a satisfactory explanation for its action." *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016) (quoting *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013)).

Further, "the Court will not disturb an agency determination if its factual findings are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusion." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001) (citing *Heveafil Sdn. Bhd. v. United States*, 25 CIT 147, 149 (2001)), *aff'd sub nom. Shandong Huarong Gen. Grp. Corp. v. United States*, 60 F. App'x 797 (Fed. Cir. 2003). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)).

Finally, "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981)).

DISCUSSION

The court addresses whether the Remand Results as related to: (1) Commerce's benchmark selection for the aluminum plate/sheet pro-

gram; and (2) Commerce's benchmark selection for the land program are supported by substantial evidence and comply with the Remand Order.

I. Commerce's selection of data to calculate the benchmark for the aluminum plate/sheet program

A. Background

In the *AR 1 Preliminary Results*, Commerce explained that it relied on Tier 2 world market prices for the benchmark for the aluminum plate/sheet program in accordance with 19 C.F.R. § 351.511(a)(2). Remand Results at 5 (citing *AR 1 Preliminary Results* PDM at 15–16).

The Zhongji Respondents provided 2017 and 2018 Global Trade Atlas ("GTA") data from certain [[ ]] and [[ ]] countries specific to Harmonized Commodity Description and Coding System, or Harmonized System ("HS") subheading 76.06.12 for the Tier 2 benchmark. *Id.* at 5–6. The Zhongji Respondents submitted also a Commodities Research Unit report ("CRU Report") on 1050 aluminum alloy grade rolled product prices which incorporates London Metal Exchange ("LME") data. *Id.* at 6. The Zhongji Respondents used these data sources to derive price estimates for 1050 aluminum alloy grade rolled products. *Id.* at 9.

Petitioners submitted TDM data covering HS subheading 76.06.12 for the Tier 2 benchmark. *Id.* at 6–7.

In the final results of the first administrative review, Commerce determined that it would select the TDM data source to calculate the benchmark for the aluminum plate/sheet program. *See AR 1 Final Results* IDM at 21–24.

The Court concluded in *Jiangsu Zhongji I* that Commerce "did not explain adequately its decision to select the TDM data source and to reject the submissions of the Zhongji Respondents to calculate the benchmark for the aluminum plate/sheet program." 47 CIT at __, 625 F. Supp. 3d at 1370. The Court concluded further that Commerce "did not explain adequately its conclusion regarding the relevance of LME data with respect to Commerce's rejection of the CRU Report." *Id.* at __, 625 F. Supp. 3d at 1371–72. Accordingly, the Court remanded Commerce's selection of the TDM data source for further explanation or reconsideration. *Id.* at __, 625 F. Supp. 3d at 1372.

B. Whether Commerce explained adequately its decision to select the TDM data source and to reject the proposed benchmarks of the Zhongji Respondents

The court concludes that Commerce explained adequately its decision to select the TDM data source covering HS subheading 76.06.12 and to reject the benchmark submissions of the Zhongji Respondents. *See* Remand Results at 8–17, 33–38.

In *Jiangsu Zhongji I*, the Court concluded that Commerce "did not explain adequately its determination that the TDM data source corresponded more closely to the purchases of the Zhongji Respondents than did their own benchmark submissions." 47 CIT at __, 625 F. Supp. 3d at 1371. In particular, Commerce "did not explain adequately its conclusion that there was '*wider* variation between' the alloy 1050 products referenced in the CRU Report and the purchases of the Zhongji Respondents than there was between the products referenced in the TDM data source and the purchases of the Zhongji Respondents." *Id.* (quoting *AR 1 Final Results* IDM at 22).

The Court concluded also that Commerce did not explain the relevance of two record exhibits, NSAS-1 and NSAS-2, that Commerce cited to support its "wider variation" conclusion. *Id.* (citing *AR 1 Final Results* IDM at 22 n.104); *see* Response from Mowry & Grimson PLLC to Sec'y of Commerce Pertaining to Jiangsu Zhongji Supp. NSA Questionnaire (Feb. 6, 2020) at Exs. NSAS-1, NSAS-2, CR 148, CJA Tab 3. The Court remanded for further explanation or reconsideration. *Jiangsu Zhongji I*, 47 CIT at __, 625 F. Supp. 3d at 1372.

Plaintiffs argue that Commerce's continued selection of the TDM data on remand is not supported by substantial evidence for two reasons. Pls. Br. at 4.

1. Commerce's selection of the TDM data

Plaintiffs' first reason is that Commerce did not explain adequately the "superiority of the TDM data over the CRU data" because the CRU data covering aluminum alloy grade 1050 rolled products "correspond more closely to Zhongji's . . . purchases than TDM's overbroad global export data covering [HS subheading 76.06.12]." *Id.* (footnote omitted).

On remand, Commerce continued to determine that the TDM data are superior to the Zhongji Respondents' proposed benchmarks. *Id.* at 9. Commerce explained that the TDM data for HS subheading 76.06.12 "provide world market export quantities and total values from which average unit values [("AUVs")] may be derived." *Id.*

By contrast, the CRU Report provides Region 1 price data for 1050 aluminum alloy rolled products only.[2] *Id.* The Zhongji Respondents introduced also GTA export data for HS subheading 76.06.12 and proposed that Commerce use the CRU Report and the GTA export data together to derive a world price benchmark through a five-step process. *Id.* at 9–10.

Commerce explained that the Zhongji Respondents' proposed benchmark "is calculated by reducing certain [Region 2] export AUVs for HS subheading [76.06.12] by the ratio of [Region 1] 1050 aluminum alloy rolled product prices to [Region 1] export AUVs for HS subheading [76.06.12]." *Id.* at 10. Next, the "adjusted [Region 2] export AUVs are . . . averaged with the [Region 1] 1050 aluminum alloy rolled product prices themselves to create a combined [Region 1]-[Region 2] *estimate* for 1050 aluminum alloy rolled product prices." *Id.*

Commerce maintained that the estimate resulting from the Zhongji Respondents' calculation is "based largely on extrapolation" and continued to find that the estimate "did not satisfy the requirements of 19 C.F.R. [§] 351.511(a)(2)(ii), 'where it is reasonable to conclude that such prices would be available to purchasers in' China." *Id.* Commerce concluded that there were "serious flaws" in the use of "either the [Region 1] 1050 aluminum alloy rolled product prices or the Zhongji Respondents' estimates of worldwide 1050 alloy prices as the proposed aluminum sheet benchmark." *Id.*

Commerce's explanation on remand complies with the court's instructions. The TDM data provide "world market export quantities and total values from which [AUVs] may be derived" such that it is "reasonable to conclude that such price[s] would be available to purchasers in" China. *Id.* at 9–10; 19 C.F.R. § 351.511(a)(2)(ii). In setting forth the "extrapolation" required to arrive at the Zhongji Respondents' proposed benchmark, as compared to the prices and AUVs available readily in the TDM data, Commerce explained adequately that the TDM data "correspond[] more closely to the purchases of the Zhongji Respondents than did [the Zhongji Respondents'] own benchmark submissions." *Jiangsu Zhongji I*, 47 CIT at __, 625 F. Supp. 3d at 1371; *see* Remand Results at 10.

In addition, Commerce complied with the Court's remand instructions when Commerce cited to exhibits NSAS-1 and NSAS-2 and listed the different specifications of the aluminum sheet products that

[2] Region 1 and Region 2 are [[ ]] and [[ ]], respectively. *See* Remand Results at 10.

the Zhongji Respondents purchased.[3] Remand Results at 8 n.25. Commerce noted that each of the purchases of the Zhongji Respondents is "covered by HS subheading [76.06.12]," which is the "most detailed tariff schedule classification covering these products at the internationally harmonized (six-digit) level of specification." *Id.* at 9. Moreover, neither mandatory respondent purchased 1050 aluminum alloy rolled products during the POR. *Id.* at 14. Commerce observed that the majority of the Zhongji Respondents' purchases involve products manufactured with a non-1050 aluminum alloy. *Id.* at 35.

Plaintiffs object that "[b]eing the most inclusive product category does not make the data more representative than a narrower set of data with minor mismatches." Pls. Br. at 8. In support of their argument, plaintiffs quote the following language from the *Solar Cells 13 AR*: "[Commerce] normally attempts to rely on data reflecting the narrowest category of products encompassing the input product, where possible." *Id.* at 9 (quoting *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2013* (the "*Solar Cells 2013 AR*"), 81 Fed. Reg. 46,904 (Dep't of Commerce July 19, 2016) and accompanying IDM (Dep't of Commerce July 12, 2016) at cmt. 6) (alteration in original).

Commerce conceded that the TDM data for HS subheading 76.06.12 are "imperfect in terms of the exact range of products covered by the data and their relative proportions *vis a vis* the range and proportions of the products found in the Zhongji Respondents' . . . purchase data." Remand Results at 13. However, Commerce concluded that "this imperfection does not by itself automatically rule out the petitioners' proposed benchmark in favor of the Zhongji Respondents' proposed benchmark." *Id.*

Commerce's conclusions are reasonable and supported by the record as a whole. *See Shandong Huarong*, 25 CIT at 837, 159 F. Supp. 2d at 718 ("[T]he Court will not disturb an agency determination if its factual findings are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusion."). The *Solar Cells 2013 AR* is inapposite. The 1050 alloy data cannot be said to "encompass[] the input product" because the Zhongi Respondents did not purchase 1050 aluminum alloy rolled products during the POR. Remand Results at 14. Instead, Commerce explained that each of the Zhongji Respondents' purchases are "cov-

[3] Xiamen Xiashun Aluminum Foil Co., Ltd. ("Xiashun"), the other mandatory respondent in the underlying administrative review, purchased aluminum sheet products of one non-1050 alloy only during the POR. *Id.* at 8.

ered by HS subheading [76.06.12]," which is the "most detailed tariff schedule classification covering these products at the internationally harmonized (six-digit) level of specification." *Id.* at 9.

For that reason, Commerce's selection of the TDM data is more aligned with Commerce's practice of "rely[ing] on data reflecting the narrowest category of products encompassing the input product, where possible" than would be Commerce's selection of the Zhongji Respondents' proposed benchmark. *Solar Cells 2013 AR* IDM at cmt. 6.

2. Commerce's treatment of the expert declaration and the ITCReport

The Zhongji Respondents provided (1) a declaration from a third party with "extensive experience in trading aluminum sheet in a wide range of alloys"; and (2) a U.S. International Trade Commission report on the aluminum industry (the "ITC Report") to buttress the CRU Report data covering 1050 aluminum alloy products. Pls. Br. at 45; *see* Letter from Mowry & Grimson PLLC to Sec'y of Commerce Pertaining to Jiangsu Zhongji Benchmark Submission (Apr. 1, 2020) ("Zhongji Benchmark Submission") at Ex. 11, CR 205–206, CJA Tab 4; *id.* at Ex. 10, PR 311–314, PJA Tab 6. Plaintiffs' second reason for arguing that Commerce's selection of the TDM data is not supported by substantial evidence is that Commerce "unreasonably found the expert declaration non-authoritative and dismissed both the expert declaration and the ITC Report because they do not specify the exact export volumes of irrelevant products under the six-digit code." *Id.* at 5 (citing Remand Results at 39–41).

The court concludes that Commerce explained adequately its evaluation of the third-party expert declaration and the ITC Report. *See* Remand Results at 11–12, 39–41.

a. The third-party expert declaration

The Court directed Commerce, in the event that it continued to select the TDM data source on remand, to explain further or reconsider whether Commerce's evaluation of the Zhongji Respondents' third-party expert declaration aligned with Commerce's past practice with respect to the probative value of standalone third-party declarations. *Jiangsu Zhongji I*, 47 CIT at __, 625 F. Supp. 3d at 1372.

Contrary to plaintiffs' allegation, Commerce did not find the declaration to be "non-authoritative," but rather "no more specific and no more authoritative than the Zhongji Respondents' own assertions." Pls. Br. at 5; Remand Results at 11. Commerce noted that the declaration is "contradicted by the petitioners, who comprise multiple U.S. producers of aluminum foil with expertise in these [aluminum sheet]

product comparisons." Remand Results at 11. Commerce then noted different ways in which the "statements contained in the declaration" failed to provide elucidation as to the import or validity of the database: e.g., the statements "do not specify how much of world exports under HS subheading [76.06.12] are represented by foil stock aluminum sheet of the kind that the Zhongji Respondents used, or of 1050 aluminum alloy rolled products, or how much of these export volumes are made up of the types of sheet and plate which are unsuitable for use as foil stock." *Id.*

Plaintiffs argue that the Court's decision in *Shenzhen Xinboda Indus. Co. v. United States* supports plaintiffs' contention that Commerce's decision to reject the third-party expert declaration was not supported by substantial evidence. *See* Pls. Br. at 6 (citing *Shenzhen Xinboda Indus. Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1265, 1289 (2017)). In *Shenzhen Xinboda*, the Court held that Commerce's decision to reject a third-party declaration that respondents placed on the record was not supported by substantial evidence. *Shenzhen Xinboda*, 41 CIT at __, 279 F. Supp. 3d at 1289. The declaration was the "sole record evidence" that spoke to the relevant issue, and "neither Commerce nor the [petitioners] point[ed] to any record evidence to controvert the facts set forth" in the declaration. *Id.* at __, 279 F. Supp. 3d at 1280–81. The Court reasoned that "this is not a situation where Commerce is confronted with two authorities that address the same point but take positions that are diametrically opposite, thus requiring Commerce to determine which of the two authorities is accurate or correct or more reliable." *Id.* at __, 279 F. Supp. 3d at 1284 n.17.

Shenzhen Xinboda is inapposite. In this case, unlike *Shenzhen Xinboda*, Commerce *was* "confronted with two authorities," namely the petitioners' statements on the record and the third-party expert declaration, "that address the same point but take positions that are diametrically opposite." *Id.* With regard to the declaration and plaintiffs' contention that "most aluminum products under [HS subheading 76.06.12] are not suitable for foil production," Commerce determined reasonably that there was nothing in the record to support those contentions. *See* Remand Results at 11, 40; Pls. Br. at 5; Zhongji Benchmark Submission at Ex. 11. The declaration demonstrates only that "the majority of the alloy series under [HS subheading 76.06.12]" cannot be used as foil stock. Pls. Br. at 5. In the absence of an accounting of the *proportion* of the goods under HS subheading 76.06.12 that can be used as foil stock, Commerce's rejection of the third-party expert declaration was reasonable and supported by sub-

stantial evidence. *See Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1306, 1322 (2015) (stating that on review, a "court may [not] displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.") (alterations in original) (quoting *Universal Camera Corp.*, 340 U.S. at 488).

b. The ITC Report

Plaintiffs also cite the ITC Report to support their argument that "ample record evidence indicates that a majority of aluminum plate, sheets and strip classified under [HS subheading 76.06.12] are not foil stock." Pls. Br. at 6. Plaintiffs explain that, within HS subheading 76.06.12, "[o]ne eight-digit subheading and two ten-digit subheadings . . . cannot possibly be used for foil stock." *Id.* at 6–7.

Commerce determined that the ITC Report did not demonstrate that 1050 alloy rolled products "better represent the products that the Zhongji Respondents purchased than the TDM subheading [76.06.12] export data." Remand Results at 12. Commerce noted that the ITC Report presents the same flaw as does the third-party expert declaration: the ITC Report discusses neither the "relative proportions" of the identified applications of aluminum plate, "nor their proportions relative to the overall uses of aluminum plate and sheet." *Id.* at 12, 40. Commerce observed further that the ITC Report's "apparent purpose is not to distinguish between the relative volumes of different commercial grades of aluminum sheet exported from around the world, but merely to list examples of applications of aluminum plate and sheet." *Id.* at 12.

In sum, Commerce explained adequately its decision to select the TDM data source and to reject the proposed benchmarks of the Zhongji Respondents. *See* Remand Results at 8–17, 33–38. The court concludes that Commerce's explanation complies with the Remand Order and is supported by substantial evidence. *See MacLean-Fogg*, 39 CIT at __, 100 F. Supp. 3d at 1355; 19 U.S.C. § 1516a(b)(1)(B)(i).

C. Whether Commerce explained adequately its conclusions regarding the LME data in the CRU Report

The court concludes that Commerce's explanation on remand regarding the LME data in the CRU Report complies with the Remand Order and is supported by substantial evidence. *See* Remand Results at 17–19, 38–41.

In *Jiangsu Zhongji I*, the Court concluded that "Commerce did not explain adequately its conclusion regarding the relevance of LME

data with respect to Commerce's rejection of the CRU Report." 47 CIT at __, 625 F. Supp. 3d at 1371–72. "Specifically, Commerce did not elucidate whether one or both of its particular findings regarding the LME data — (1) that these data contain only a 'cash price' for primary aluminum or (2) that this cash price pertains only to primary aluminum with a 'minimum aluminum content of 99.7 percent' — provided the basis for Commerce's rejection of the CRU Report." *Id.* at 1372 (quoting *AR 1 Preliminary Results* PDM at 18). The Court remanded to Commerce for further explanation or reconsideration. *Id.*

Plaintiffs argue that Commerce's "explanation of its rejection of CRU data based on the LME data in the [CRU] [R]eport is entirely unreasonable and unsupported" and fails to comply with the Court's instructions in the Remand Order. Pls. Br. at 4, 10.

On remand, Commerce explained that it is "not clear from the information in the CRU Report that the [Region 1] prices for 1050 aluminum alloy rolled products are derived from LME data in the CRU Report, rather than possibly being simply reported separately, independent of each other." Remand Results at 17–18. Commerce reasoned that the possibility that these data were reported separately undermined Commerce's original basis for rejecting the CRU Report. *Id.* at 18; see *AR 1 Final Results* IDM at 21. Accordingly, Commerce determined that its original finding "that the 1050 aluminum alloy rolled product prices appear to be derived from LME prices" is not a valid reason for rejecting the CRU Report or the Zhongji Respondents' proposed benchmarks. Remand Results at 18.

Commerce reconsidered also its determination that "LME data contained in the CRU Report reflect[] only a 'cash' price for primary aluminum." *Id.* Commerce found on remand that the LME prices in the CRU Report "appear to be '3-month' LME prices, not 'cash' settlement prices." *Id.* However, Commerce explained that the distinction between "3-month" prices and "cash" prices "is largely unimportant to this analysis and it does not argue in favor of using either of the LME prices which the Zhongji Respondents submitted as benchmarks for aluminum plate, or sheet." *Id.* at 18–19. Commerce reasoned that "the important distinction is that the LME prices are for primary aluminum," which is "a significantly different product than the aluminum sheet which the Zhongji Respondents . . . purchased." *Id.*

In addition, Commerce expressed concern with respect to the origin of certain "conversion fees." *Id.* at 18, 39. Commerce explained that the "conversion fees represent the difference between the 1050 aluminum alloy rolled product prices and the LME primary aluminum prices." *Id.* at 39. But Commerce suggested that "[i]t is not clear whether the 1050 aluminum alloy rolled product prices are derived

from the LME primary aluminum prices and the conversion fees or whether the conversion fees are derived from the LME primary aluminum prices and the 1050 aluminum alloy rolled product prices." *Id.*

Ultimately, Commerce put aside its concern with respect to the origin of the conversion fees and explained that the "distinction is not necessary to the results of our analysis" and that "as long as this matter is in doubt, it would not be reasonable for [Commerce] to reject the CRU 1050 aluminum alloy rolled product prices merely on the basis that they are derived from LME prices." *Id.* Commerce determined that the LME data is not a sufficient basis for its rejection of the CRU Report. *Id.*

However, Commerce asserted that "there are other sufficient reasons to reject the CRU 1050 aluminum allot [sic] prices and the Zhongji Respondents' proposed benchmarks derived therefrom." *Id.* Elsewhere in the Remand Results, Commerce explained its decision to reject the CRU 1050 aluminum prices for "other sufficient reasons," *see id.* at 19–20; *see also supra* Section I.B, such that the "path" of Commerce's decision to reject the CRU Report data is "reasonably discernible." Remand Results at 39; *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court.").

In sum, Commerce reconsidered and offered an adequate explanation of why Commerce rejected the Zhongji Respondents' proposed benchmark. Remand Results at 18. The explanation and reconsideration comply with the Remand Order and are supported by substantial evidence. *See MacLean-Fogg*, 39 CIT at __, 100 F. Supp. 3d at 1355; 19 U.S.C. § 1516a(b)(1)(B)(i).

II. Commerce's selection of data to calculate the benchmark for the land program

A. Background

In the *AR 1 Preliminary Results*, Commerce determined to use land prices external to China to calculate a Tier 3 benchmark for the land program pursuant to 19 C.F.R. § 351.511(a)(2)(iii). *See AR 1 Preliminary Results* PDM at 15–18. Commerce selected the 2010 CBRE Report as the data source for the benchmark and decided not to use the CBRE Reports from 2016, 2017 and 2018 (the "2016 to 2018 CBRE Reports") and reports compiled by Nexus Innovative Real Estate Solutions (the "Nexus Reports") from 2018 submitted by the Zhongji Respondents. *AR 1 Final Results* IDM at 31–33; *see* Zhongji Benchmark Submission at Exs. 13–14.

In *Jiangsu Zhongji I*, the Court concluded that Commerce "did not explain adequately its decision to: (1) select for a Tier 3 benchmark the 2010 CBRE Report; and (2) reject the 2016 to 2018 CBRE Reports and the Nexus Reports. 47 CIT at __, 625 F. Supp. 3d at 1375 (citing *AR 1 Final Results IDM* at 31–33). The Court directed Commerce to "explain further or reconsider its evaluation of the contemporaneity of data sources in the record — particularly Commerce's purported practice to select data sources that correspond most closely to the point in time at which land use rights were *purchased*." *Id.* at __, 625 F. Supp. 3d at 1376.

B. Whether Commerce explained adequately its purported practice in evaluating the contemporaneity of data sources

The court concludes that Commerce's explanation of its purported practice in evaluating the contemporaneity of data sources complies with the Remand Order and is supported by substantial evidence. *See* Remand Results at 23–25, 44–45. Plaintiffs argue that Commerce failed to explain adequately its purported practice in evaluating the contemporaneity of data sources on the record. Pls. Br. at 12–13.

Commerce on remand stated that, pursuant to Commerce's regulations, contemporaneity is identified with "reference to the year in which the subsidy is approved." Remand Results at 24. Commerce explained that when identifying a discount rate for the purposes of allocating a "non-recurring subsidy," 19 C.F.R. § 351.524(d)(3) requires that Commerce "select a discount rate based [upon] . . . data for the year in which the government agreed to provide the subsidy." *Id.* (quoting 19 C.F.R. § 351.524(d)(3)). Commerce further noted that "in identifying a land for LTAR benchmark, Commerce's practice is to look to the year in which the land use rights were acquired from the government providing the subsidy to determine the appropriate time period for calculating the land benchmark." *Id.*

Commerce maintained that it evaluates the contemporaneity of benchmark data "*vis a vis* the company or government transaction at issue." *Id.* at 45. For subsidies approved "before the POR, like the provision of land-use rights under examination here, the POR is not the relevant time period." *Id.* Commerce explained that the relevant time period for cases in which the subsidy is approved before the POR is "the year in which the government agreed to provide the subsidy." *Id.* (quoting 19 C.F.R. § 351.524(d)(3)(i)).

Plaintiffs argue that Commerce's explanation of its purported practice is not supported by substantial evidence for two reasons. *See* Pls. Br. at 12–14.

1. The timing of Commerce's placement of the 2010 CBRE Report on the record

Plaintiffs assert first that Commerce "undermine[d] its own reasoning that Commerce considered land purchasers [sic] years in determining the contemporaneity of benchmark sources" because Commerce placed the 2010 CBRE Report on the record before the Zhongji Respondents reported their land purchase dates. *Id.* at 13–14. Commerce did not address plaintiffs' allegation on remand. *See generally* Remand Results.

However, plaintiffs' allegation is unavailing. The intent of Commerce when it placed the 2010 CBRE Report on the record is not relevant to the question whether Commerce's purported practice is supported by substantial evidence.

2. Commerce's practice in previous proceedings

Plaintiffs' second contention is that "Commerce has relied on the same outdated [2010 CBRE Report] in numerous cases even when the land purchase years by respondents do not correspond more closely to 2010." Pls. Br. at 14. Plaintiffs cite to the administrative review of the CVD order on solar cells from China for the POR January 1, 2019, through December 31, 2019, in which Commerce did not mention its purported practice and relied on the 2010 CBRE Report while acknowledging its lack of contemporaneity with the POR. *See* Pls. Br. at 14 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2019* (the "*Solar Cells 2019 AR*"), 87 Fed. Reg. 40,491 (Dep't of Commerce July 7, 2022) and accompanying IDM (Dep't of Commerce June 29, 2022) at cmt. 17).

Plaintiffs also argue that Commerce did not follow its purported contemporaneity practice in the administrative review of the CVD order on multilayered wood flooring from China for the POR January 1, 2020, through December 31, 2020. Pls. Br. at 14 (citing *Multilayered Wood Flooring from the People's Republic of China: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review; 2020* (the "*Wood Flooring AR*"), 87 Fed. Reg. 78,644 (Dep't of Commerce Dec. 22, 2022) and accompanying PDM (Dep't of Commerce Dec. 15, 2022) at 51). In that proceeding, Commerce stated that its selected CBRE report was "suitable . . . to measure any benefit received . . . through the provision of land or land-use rights by the Chinese government during *the AUL period of this review*." *Wood Flooring AR* PDM at 51 (emphasis supplied) (unchanged in final results).

Plaintiffs insist that "[t]he absence of Commerce's use of this purported [contemporaneity] practice in numerous cases . . . shows that Commerce . . . has no such established past practice to select land benchmarks corresponding to land purchase years." Pls. Br. at 15. Plaintiffs assert that, instead, "Commerce has routinely used the POR as the contemporaneity standard." *Id.*

In response, defendant argues that "[n]one of the cases relied upon by Zhongji state that Commerce's practice is to rely on the [POR] for assessing contemporaneity." Def. Br. at 19.

It is true that Solar Cells 2019 AR does not state explicitly that Commerce's practice is to rely on the POR for assessing contemporaneity. *See id.*; *see generally Solar Cells 2019 AR*. However, Commerce in the *Solar Cells 2019 AR* conceded that the 2010 CBRE Report data were not as contemporaneous as they were when Commerce was sustained in *Canadian Solar*, a case that concerned an *earlier* administrative review for the POR January 1, 2016, to December 31, 2016. *Solar Cells 2019 AR* IDM at cmt. 17 (citing *Canadian Solar Inc. v. United States*, 45 CIT __, __, 537 F. Supp. 3d 1380, 1389 (2021)). This explanation suggests that Commerce in the *Solar Cells 2019 AR* evaluated the contemporaneity of the benchmark data based on its correspondence to the POR January 1, 2019, through December 31, 2019, rather than to the year in which the land use rights were purchased. *Id.*

However, with respect to the *Wood Flooring AR*, the section that plaintiffs cite describes the "*AUL* period of *this* review," not the 'period of review.' *Wood Flooring AR* PDM at 51 (emphasis supplied); *see* Pls. Br. at 14. Commerce explained on remand that "for subsidies approved during the *AUL period*, or *before the POR*, like the provision of land-use rights under examination here, the POR is not the relevant time period." Remand Results at 45 (emphases supplied). Commerce's usage on remand and its regulations both indicate that the "AUL period" and the "POR" are distinct but potentially overlapping periods of time. *Id.*; *see* 19 C.F.R. § 351.524(b)(1) (stating that nonrecurring benefits are allocated normally "over the number of years corresponding to the average useful life . . . of renewable physical assets"); *see also id.* § 351.213(e)(2) (defining the POR for CVD proceedings as covering, in general, "entries or exports of the subject merchandise during the most recently completed calendar year"). Contrary to plaintiffs' assertion, the *Wood Flooring AR* does not undermine Commerce's explanation of its purported practice. *See* Pls. Br. at 14.

Moreover, Commerce buttressed its explanation further by reference to two prior proceedings. Remand Results at 24 (citing *Laminated Woven Sacks from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances* ("*LWS from China*"), 73 Fed. Reg. 35,639 (Dep't of Commerce June 24, 2008) and accompanying IDM (Dep't of Commerce June 16, 2008) at 17 ("In order to calculate the benefit, we first multiplied the benchmark land rate (deflated from 2007 to the year the transaction was officially approved by the country) . . . ."); *Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 Fed. Reg. 18,521 (Dep't of Commerce Apr. 4, 2011) and accompanying IDM (Dep't of Commerce Mar. 28, 2011) at cmt. 24 ("New Zhongya acquired its land-rights in 2006, and the Guang Ya Companies acquired their land-use rights in 2007. As 2007 is more contemporaneous with the times of these purchases, we have used the 2007 prices for Thai industrial land for benchmark purposes.")).

Commerce also maintained that the Court in *Zhaoqing New Zhongya Aluminum Co. v. United States*, 38 CIT 203, 961 F. Supp. 2d 1346 (2014), "acknowledged" Commerce's purported practice of evaluating contemporaneity. Remand Results at 24 (citing *id.* at 211–13, 961 F. Supp. 2d at 1354–55). That is not correct. The Court in *Zhaoqing* did not "acknowledge" Commerce's purported practice. *See generally Zhaoqing*; Remand Results at 24. The Court upheld only Commerce's decision not to discount the land benchmark for inflation. *Zhaoqing*, 38 CIT at 212–13, F. Supp. 2d at 1354.[4]

Based on the foregoing reasons, the court concludes that Commerce explained adequately its purported practice. Commerce demonstrated that its purported practice in evaluating the contemporaneity of data sources for benchmark determinations follows two prior proceedings and adheres to Commerce's regulations at 19 C.F.R. § 351.524(d)(3). *See* Remand Results at 23–25, 44–45. Plaintiffs offered only one proceeding that appears to undermine Commerce's explanation on remand. *See* Pls. Br. at 14; *see also Solar Cells 2019 AR* IDM at cmt. 17. Accordingly, Commerce's explanation of its purported practice complies with the Remand Order and is supported by substantial evidence.

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[4] But in *Toscelik Profil ve Sac Endustrisi A.S. v. United States*, Slip Op. 15–28, 2015 WL 1455445 (CIT Apr. 1, 2015), a case that Commerce did not cite on remand, the Court sustained Commerce's determination to use land benchmark prices close to the year of the sale of land in the absence of "benchmark prices that correspond[] to the year in which the land transaction at issue occurred, which would otherwise have been [Commerce's] preferred choice." 2015 WL 1455445, at *2. Commerce in that case determined to use land prices for 2009, 2010 and 2011, indexed to 2008 for a 2008 sale of land. *Id.*

C. Whether Commerce explained adequately that the selection of the 2010 CBRE Report is consistent with its purported practice

The court concludes that Commerce's explanation that the selection of the 2010 CBRE Report is consistent with Commerce's purported practice in evaluating the contemporaneity of data sources complies with the Remand Order and is supported by substantial evidence. *See* Remand Results at 25–26, 45.

In *Jiangsu Zhongji I*, the Court instructed Commerce to "explain the reasons that its selected benchmark on remand is consistent" with its "practice in evaluating the contemporaneity of data sources." 47 CIT at __, 625 F. Supp. 3d at 1376.[5]

Plaintiffs argue that "[b]ecause Commerce failed to adequately explain its purported practice of associating contemporaneity with respondents' land purchase years, Commerce failed to explain why the 2010 CBRE Report is more contemporaneous than Zhongji's proposed data covering the POR." Pls. Br. at 15. Plaintiffs assert, as a result, that Commerce's selection of the 2010 CBRE Report was "unreasonable and inconsistent with the [Remand Order]." *Id.*

As discussed above, Commerce explained adequately its purported practice of evaluating contemporaneity based on the points in time at which land use rights were purchased. *See supra* Section II.B.2.

In light of that practice, Commerce insisted that the Zhongji Respondents' argument that the 2016 to 2018 CBRE Reports and the Nexus Reports were more contemporaneous than the 2010 CBRE Report was "misplaced." Remand Results at 25. The Zhongji Respondents argued that their proposed benchmarks were more contemporaneous because they were closer in time to the POR. *Id.* Commerce responded that "the relevant time periods to consider are the years when the Zhongji Respondents acquired the land use rights, which took place in [[ ]] . . . and not during the POR." *Id.* at 25–26.

Commerce explained that the 2010 CBRE Report data are more contemporaneous with the above land purchase years than are the 2016 to 2018 CBRE Reports data and the Nexus Reports data. *Id.* at 26, 45. Commerce determined to continue to use the 2010 CBRE Report data "inflated or deflated, as appropriate, to the year of government's approval [sic] of the land-use rights." *Id.* at 26.

[5] The Court stated also that "should Commerce decide on remand to select more than one data source to calculate the benchmark for the land program, the court directs Commerce to explain the reasons that *each* selected data source is consistent with Commerce's practice in determining whether a data source provides an 'appropriate remuneration benchmark.'" *Jiangsu Zhongji Lamination Materials Co. v. United States,* 47 CIT __, __, 625 F. Supp. 3d 1355, 1376 (2023). Because Commerce continued to select the 2010 CBRE Report alone on remand, the court need not evaluate Commerce's compliance with those instructions. *See* Remand Results at 25, 44.

Commerce demonstrated adequately that the 2010 CBRE Report is consistent with its purported practice because the report is relatively close in time to the years of the land purchases of the Zhongji Respondents. *See id.* at 26, 45. By contrast, the 2016 to 2018 CBRE Reports and the Nexus Reports "pertain to data collected[] nearly a decade after Zhongji's land-use-rights [sic] purchases." *Id.* at 45. Accordingly, Commerce's explanation on remand is supported by substantial evidence and complies with the Remand Order.[6] *See id.* at 25–26, 45.

CONCLUSION

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

Dated: November 22, 2024
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

[6] Even so, the court wishes to address one point. In *Jiangsu Zhongji I*, this court directed Commerce on remand "to explain further or reconsider its selection of the 2010 CBRE Report specifically with reference to the adequacy, context and references for the data in that report in comparison to Commerce's criticism of the adequacy, context and references for the data in the Nexus Reports." 47 CIT at __, 625 F. Supp. 3d at 1376. Commerce on remand maintained that "there is no explanation of the methodology used to collect the data used in the Nexus Report[s] on our administrative record." Remand Results at 29. Commerce also cited three determinations in support of its assertion that "Commerce has used the 2010 CBRE Report many times and has addressed the methodology used in the CBRE Report in other proceedings." *Id.* at 47 (citing *LWS from China* IDM at 17–18, cmt. 11; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 Fed. Reg. 63,788 (Dep't of Commerce Oct. 17, 2012) and accompanying IDM (Dep't of Commerce Oct. 9, 2012) at 6; *Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Final Affirmative Determination*, 81 Fed. Reg. 75,037 (Dep't of Commerce Oct. 28, 2016) and accompanying IDM (Dep't of Commerce Oct. 21, 2016) at 13–14).

The court notes that not one of the cited proceedings supports Commerce's assertion. At oral argument, defendant conceded as much. Oral Arg. Tr. at 52:18–54:7. However, this unfortunate mistake is not outcome-determinative and does not invalidate the court's conclusion that Commerce explained adequately its decision to select the 2010 CBRE Report.

Slip Op. 24–132

SKYVIEW CABINET USA, INC., Plaintiff, v. UNITED STATES, Defendant, and MASTERBRAND CABINETS, INC., Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Court No. 1:22-cv-00080 (SAV)

[Sustaining Customs' Remand Determination.]

Dated: November 27, 2024

Kyl J. Kirby, Kyl J. Kirby, Attorney and Counselor at Law, P.C., of Fort Worth, TX, for Plaintiff Skyview Cabinet USA, Inc.

Ioana C. Meyer, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Tara K. Hogan*, Assistant Director, Commercial Litigation Branch; *Chelsea A. Reyes* and *John M. Flanagan*, Attorneys, Enforcement and Operations Office of the Chief Counsel, U.S. Customs and Border Protection.

Timothy C. Brightbill, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor MasterBrand Cabinets, Inc. With him on the brief were *Elizabeth S. Lee* and *Laura El-Sabaawi*.

OPINION

Vaden, Judge:

Plaintiff Skyview Cabinet USA, Inc. (Skyview) comes before the Court once again to challenge U.S. Customs and Border Protection's (Customs) Remand Determination that Skyview evaded tariffs on its wooden cabinets. Like its prior case before this Court, Skyview argues that Customs did not support its findings with substantial evidence. For the reasons set forth below, Customs' Remand Determination is **SUSTAINED**.

BACKGROUND

The Court presumes familiarity with the facts of this case as set out in its previous opinion and now recounts those facts relevant to the review of the Remand Determination. *See Skyview Cabinet USA, Inc. v. United States*, No. 1:22-cv-00080, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 95 (June 20, 2023) (*Skyview I*).

I. Procedural Background Prior to Remand

This case arises from the Department of Commerce's (Commerce) antidumping and countervailing duty orders on wooden cabinets and vanities from China. *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Antidumping Duty Order*, 85 Fed. Reg. 22,126 (Dep't of Com. Apr. 21, 2020); *Wooden Cabinets and Vanities and Components Thereof from the People's Republic*

of China: Countervailing Duty Order, 85 Fed. Reg. 22,134 (Dep't of Com. Apr. 21, 2020) (collectively, the Orders). MasterBrand alleged that Skyview attempted to evade the Orders by transshipping Chinese cabinets through Malaysia via Rowenda Kitchen Sdn Bhd (Rowenda), a Malaysian company. MasterBrand Allegation at 9, J.A. at 80,166, ECF No. 33. In its allegation, MasterBrand presented photographs taken by a third-party market researcher who visited Rowenda's facility in Malaysia. *Id.* at 80,239–243. Customs redacted these photographs as business confidential information and provided a narrative description of what those photographs depicted. Oral Arg. Tr. at 37:7–14, ECF No. 40; Resp. to Mot. for J. on the Agency R. at 10, ECF No. 25. Although Customs used these photographs in its determination, Customs only gave Skyview access to the public version of the record with the narrative description. Pl.'s Reply at 10, ECF No. 31; Oral Arg. Tr. at 37:8–14, ECF No. 40; Remand Determination at 2, ECF No. 53.

Skyview also presented its own photographs and videos to Customs depicting Rowenda's Malaysian facility. Skyview Req. for Information Resp., J.A. at 80,551–554, 80,694–768, ECF No. 33. Skyview represented that Rowenda manufactured the products at issue. *See* Compl. ¶ 11, ECF No. 2; Pl.'s Mot. for J. on Agency R. at 7–10, ECF No. 30 (Pl.'s Br.). To prove Rowenda manufactured its cabinets, Skyview claimed it sent a "local contact" to verify Rowenda's production facility. Skyview Req. for Information Resp., J.A. at 80,996–997, ECF No. 33. The only evidence Skyview presented regarding the local contact's efforts, however, was an airline ticket and accompanying itinerary. Skyview Suppl. Req. for Information Resp., J.A. at 81,409–413, ECF No. 33. No new photographs, videos, or affidavits emerged from the contact's visit.

After submitting its evidence allegedly depicting Rowenda's manufacturing process, Skyview changed its story. It now claimed that Rowenda did not manufacture the cabinets alone; instead, Roxy Heritage Furniture Manufacturer Sdn Bhd (Roxy Heritage) either manufactured or helped manufacture the wooden cabinets at issue. Skyview Voluntary Submission, J.A. at 2,515–516, ECF No. 32. According to Skyview, this switch was because Skyview only recently learned about Roxy Heritage's involvement. *Id.* at 2,507.

Customs finished its investigation and determined there was "substantial evidence that ... [Skyview] ... evaded [the Orders]." Final Determination, J.A. at 81,613, ECF No. 33. Relevant to the Remand Determination, Customs found that Skyview's photographs and videos allegedly depicting Rowenda's Malaysian manufacturing facility

were not credible. *Id.* at 81,618. Conversely, it found MasterBrand's photographs and videos to be reliable evidence showing a lack of manufacturing capability at Rowenda's factory. *Id.* at 81,620. Skyview never saw MasterBrand's photographs during the entire pendency of the original proceedings before Customs. Oral Arg. Tr. at 64:20–65:6, ECF No. 40.

Skyview timely filed an action in this Court on March 10, 2022, challenging Customs' affirmative Final Determination of Evasion and the administrative review affirming that determination. *See* Compl. ¶ 1, ECF No. 2. It alleged multiple claims, including that Customs failed to support its Final Determination with substantial evidence and that Customs violated Skyview's due process rights by withholding the business confidential information. Pl.'s Br. at 12–20, 30–34, ECF No. 30.

The Court held oral argument on March 30, 2023. ECF No. 39. The resulting opinion sustained Customs' Final Determination of Evasion. *Skyview I*, 47 CIT__, 2023 Ct. Intl. Trade LEXIS 95, at *46. Based on an assessment of both Customs' Final Determination of Evasion and its administrative review, this Court determined that Skyview's complaints were without merit. *Id.* at *17. The Court found, "Although Customs redacted the adverse photos and videos of [Rowenda's] Malaysia facility as business confidential information, Skyview was on notice that it needed to provide evidence that actual manufacturing occurred in Malaysia; and Skyview had numerous opportunities to present contrary evidence refuting the allegation." *Id.* at *17–18. Skyview appealed to the United States Court of Appeals for the Federal Circuit. Notice of Appeal, ECF No. 44.

II. *Royal Brush* Opinion from the Federal Circuit

Soon after Skyview appealed this Court's decision, the Federal Circuit decided *Royal Brush Manufacturing v. United States*. 75 F.4th 1250 (Fed. Cir. 2023). *Royal Brush* concerned a pencil importer accused of violating the Enforce and Protect Act by transshipping pencils from China through the Philippines to avoid antidumping duties on pencils of Chinese origin. *Id*. at 1253. The pencil company argued that Customs based its determination on confidential information that was improperly withheld, denying the pencil company an opportunity to rebut this evidence. *Id.* at 1254–55.

The Federal Circuit agreed and held that Customs' refusal to disclose the confidential information was a "clear violation of due process" because it deprived the parties of notice and an opportunity to

respond. *Id.* at 1259. Moreover, the Federal Circuit observed that no "legitimate government interest" protected Customs' practice of not disclosing evidence used against parties during an administrative investigation. *Id*. Although the Federal Circuit highlighted Customs' constitutional violation, the court also held that Customs' failure to follow its own regulations was sufficient for a remand. *Id.* at 1262–63. Those regulations allowed for rebuttal when Customs "relied on new factual information" in its verification report. *Id.* at 1262; *see also* 19 C.F.R. § 165.23(c)(1). Customs had therefore violated its own regulations by denying Royal Brush an opportunity to rebut the withheld information. *Royal Brush*, 75 F.4th at 1262.

III. Remand and the Present Dispute

On January 25, 2024, Customs sought a voluntary remand of this case from the Federal Circuit to address the *Royal Brush* decision. Order, ECF No. 46. The Federal Circuit remanded the case to the Court of International Trade with instructions to remand to Customs for further proceedings consistent with *Royal Brush*. *Id.* This Court complied with the Federal Circuit's order and remanded to Customs that same day. Remand Order, ECF No. 48.

On May 20, 2024, Customs issued its Remand Determination. Remand Determination, ECF No. 53. Customs granted Skyview access to the business confidential information contained in the administrative record that it had not made available during the initial investigation. *Id.* at 2. Customs also allowed Skyview to submit rebuttal factual information and written arguments. *Id.* Although Skyview now had access to the previously confidential information, Skyview only relied for its defense on the same information it previously had used. *Id.* at 13; Pl.'s Letter Re: Ct. Ordered Remand Proceedings at 1–12, ECF No. 59 (Pl.'s Letter). Because Skyview did not present any new information, Customs continued to find that Skyview evaded the Orders. Remand Determination at 2, ECF No. 53.

Skyview now argues the Remand Determination was incorrect for the same reasons it raised previously in this Court. Namely, Skyview continues to argue that Customs' determination was not based on substantial evidence because "[Customs] clearly did not take into account metadata available to it during the administrative proceedings but made conclusory statements that the photographs and videos were irrelevant and unreliable." Pl.'s Remand Comments at 3, ECF No. 61.

The Government argues that, even though Skyview was able to view the previously withheld business confidential information, it "chose to submit written arguments that were almost the same as its

written submissions during Customs' investigation." Def.'s Resp. to Comments on Final Results of Remand Determination at 8, ECF No. 62. Additionally, the Government asserts that the metadata taken together with the "submitted exhibits 'do not demonstrate actual production' and fail to confirm the country of origin of the merchandise as Malaysia." *Id.* at 9.

Defendant-Intervenor MasterBrand likewise argues that Skyview "seeks to relitigate arguments that [Skyview] previously raised before this Court." MasterBrand's Comments in Supp. of Remand Determination at 2, ECF No. 63. It retorts that the photographs' and videos' metadata cannot be substantiated, and the metadata are based on business confidential information that Skyview already had access to during Customs' initial investigation. *Id.* at 3. MasterBrand notes that Skyview's photographs and videos of Rowenda's Malaysian facility "were not the sole, or even principal, basis for [Customs'] determination." *Id.* at 4. Customs instead found that Skyview's "submissions were replete with discrepancies and unreliable." *Id.* One of those discrepancies is that, during the original agency proceedings, Skyview changed its story and asserted that it was *not* Rowenda that manufactured the cabinets but rather Roxy Heritage. *Id.* Thus, MasterBrand observes that Skyview is once again modifying its claim — back to Rowenda — as to which company is the true manufacturer of the cabinets. *Id.* at 4–5.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c). Under the Enforce and Protect Act, the reviewing court must examine Customs' final determination, *see* 19 U.S.C. § 1517(c), and administrative review, *see id.* § 1517(f). *Id.* § 1517(g) (providing for court review of both determinations). In its review of Customs' determinations, the Court examines "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 1517(g)(2)(B). Agency action constitutes an abuse of discretion "where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors." *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005). Where the agency "offers insufficient reasons for treating similar situations differently," such actions are arbitrary. *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)).

In reviewing agency action, it is "the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351–52 (Fed. Cir. 2006) (citations omitted). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). Additionally, "The court reviews remand determinations for compliance with the court's [remand] order." *Bonney Forge Corp. v. United States*, No. 1:20-cv-03837, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 125 at *7 (Aug. 21, 2023) (quoting *Nakornthai Strip Mill Pub. Co. Ltd. v. United States*, 32 CIT 1272, 1274 (2008)).

DISCUSSION

After *Royal Brush*, this Court remanded to Customs for it to cure the procedural error. Customs did so. All that remains for this Court to consider is whether the parties submitted any additional arguments in response to the newly disclosed information. Skyview reiterates its claim that Customs failed to support its determination with substantial evidence; and it makes the general assertion that Customs ignored relevant evidence, like photographs and videos with metadata, that disproves evasion. The Government and MasterBrand respond that Skyview is attempting to relitigate the same issues it raised previously without providing any new information. This Court agrees with the Government and MasterBrand. Skyview did not make any new arguments on remand, and the merits of Skyview's metadata argument reinforces Customs' evasion determination.

A procedural error is not a substantive error. A substantive error is an error that "affects a party's substantive rights or the outcome of the case." *Substantive Error*, *Black's Law Dictionary* (10th ed. 2014); *see NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207 (Fed. Cir. 1995) (defining substantive errors as "errors that result from errors of judgment"). In contrast, a procedural error is a "mistake in complying with the rules or steps in the legal process." *Procedural Error*, *Black's Law Dictionary* (10th ed. 2014); *see Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1383 (Fed. Cir. 2017) (defining procedural error as either a "technical failure ... with the APA's procedural requirements[,]" or a "complete failure to [comply with the APA's procedural requirements.]") (internal quotation marks omitted).

The Federal Circuit's *Royal Brush* opinion identified a procedural error of constitutional magnitude regarding Customs' prior practice.

In *Royal Brush*, the Federal Circuit explained that, when an agency makes certain information confidential, bases its determination on that information, and refuses to allow the accused to view it, a procedural due process violation occurs. *See Royal Brush*, 75 F.4th at 1262; *see also Stone v. FDIC*, 179 F.3d 1368, 1376 (Fed. Cir. 1999) ("Procedural due process guarantees are not met if [the party adverse to the agency action] has notice only of ... portions of the evidence and the deciding official considers new and material information."). As the United States Supreme Court has repeatedly held, "The essential requirements of due process ... are notice and an opportunity to respond." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). When an agency cures the procedural due process error by providing the affected party with notice and an opportunity to respond, the court is then left to consider the underlying substantive validity of the agency's action. *Cf. Ward v. United States Postal Serv.*, 634 F.3d 1274, 1282 (Fed. Cir. 2011).

Here, Customs did not initially allow Skyview to view the business confidential information used to make Customs' evasion determination. Pl.'s Br. at 33–34, ECF No. 30. This was a procedural due process error. On remand, Customs corrected the error and allowed Skyview to view the previously confidential information. Remand Determination at 5–6, ECF No. 53. With the procedural error corrected, Skyview must submit new evidence or new arguments into the record to succeed. Otherwise, the record evidence remains the same; and the substantive result will not change. This is so because of an interesting wrinkle in pre-*Royal Brush* procedure in Enforce and Protect Act cases.

Although Skyview did not have access to all the evidence before Customs, once its case reached this Court, it *did* receive access to *all* the evidence — including the confidential business information. USCIT R. 73.3(a)(3); Oral Arg. Tr. at 37:23–38:10, ECF No. 40. Skyview then had the ability to make any argument it wished regarding the insufficiency of that evidence before this Court. For a *Royal Brush* procedural error to cause a change of substantive result, Skyview's lack of access to the confidential information at the agency level must have prevented it from either (1) introducing evidence into the record that would have proven exculpatory or (2) making an argument in its own defense before the agency. *Cf. Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1215 (2012) (noting that, without a substantive error, the procedural error can be harmless). Absent the introduction of new evidence or a new substantive argument, correc-

tion of the *Royal Brush* procedural error will not result in ultimate victory for the accused evader. The evidentiary balance will remain unchanged.

The Court previously determined that the record evidence was sufficient to find Skyview had evaded Customs duties. *Skyview I*, 47 CIT__, 2023 Ct. Intl. Trade LEXIS 95, at *46. Skyview has not introduced new evidence on remand, and its legal arguments remain nearly unchanged from *Skyview I*. *Compare* Pl.'s Br. at 3–5, 12–20, ECF No. 30 (describing Plaintiff's substantial evidence argument for *Skyview I*), *with* Pl.'s Remand Comments at 5–10, ECF No. 61 (describing Plaintiff's substantial evidence argument post remand in virtually identical language). Customs provided Skyview with ample opportunity to rebut MasterBrand's allegations. Remand Determination at 6–7, ECF No. 53 ("It was on this day that the remand parties were officially permitted to receive the business confidential information for purposes of the remand proceeding .... [Customs] advised the parties that they could submit written arguments pertinent to the business confidential information on the administrative record ....."). Despite Customs' providing Skyview with the unredacted business confidential information and an opportunity to respond, *id.*, Skyview did not provide any new evidence and merely restated its previous, unsuccessful arguments. Pl.'s Letter at 3–12, ECF No. 59; Pl.'s Remand Comments at 5–10, ECF No. 61. Because Skyview has not produced any new record evidence, the Court's previous holding regarding Skyview's substantial evidence argument stands. *Skyview I*, 47 CIT__, 2023 Ct. Intl. Trade LEXIS 95, at *20–27.

Skyview's claims about the photographs' and videos' metadata likewise fails. First, the photographs do not depict anything that discredits Customs' determination. Second, Skyview's flip-flopping on the question of who manufactured the cabinets discredits Skyview's arguments and reinforces Customs' determination.

Skyview points to the photographs' and videos' metadata as proving that they were taken outside Rowenda's Malaysian facility before the export date of the goods in question. Pl.'s Remand Comments at 4–5, ECF No. 61. Accepting that as true, the photographs and videos still do not undermine Customs' determination. Customs asked Skyview for proof of actual manufacturing in Malaysia. CF-28 Req., J.A. at 80,451–454, ECF No. 33. Skyview presented photographs depicting Rowenda's company sign and office building; wooden pallets in a warehouse; various machines, including a grooving machine, banding machine, and a panel saw machine; an office waiting room; and a conference table. *See* Skyview Req. for Information Resp., J.A. at

80,475–476, 80,694–715, 80,744–745, ECF No. 33; *Skyview I*, 47 CIT__, 2023 Ct. Intl. Trade LEXIS 95, at *5–6. Skyview also presented short, four- to fifteen-second video clips depicting a handful of workers using the various machines. Skyview Email Resp. to Customs., J.A. at 80,562, ECF No. 33. On remand, Skyview presents these same piecemeal photographs and videos. Pl.'s Remand Comments at 4, ECF No. 61.

The evidence still does not depict actual manufacturing of cabinetry. *Skyview I*, 47 CIT__, 2023 Ct. Intl. Trade LEXIS 95, at *17–18. As this Court previously stated, "Skyview was free to begin outside the alleged manufacturing facility and create a video walkthrough demonstrating actual manufacturing," but Skyview did not. *Id.* at *43. Because the photographs and videos do not depict anything different from *Skyview I* — even when considering the metadata — this Court's prior holding stands. *Id.* at *40–44.

Skyview has further discredited itself by changing its story once again and alleging that Rowenda — not Roxy Heritage — manufactured the cabinets. Pl.'s Remand Comments at 4–5, ECF No. 61. Skyview has been anything but consistent on what entity it claims manufactured the cabinets at issue. At first, Skyview claimed Rowenda manufactured its cabinets. Skyview CF-28 Resp., J.A. at 80,514–529, ECF No. 33. Rowenda submitted the "piecemeal" photos and videos that Skyview then turned over to Customs. Skyview Suppl. CF-28 Response, J.A. at 80,694–762, ECF No. 33 (photographs of Rowenda's facility submitted to Customs); *Skyview I*, 47 CIT ___, 2023 Ct. Intl. Trade LEXIS 95, at *43. Skyview also sent a "local contact" to "verify [Rowenda's] capacity, review[] manpower, machines, and raw material." Skyview Req. for Information Resp., at 3–4, J.A. at 80,996–997, ECF No. 33. Although Skyview claimed this contact verified Rowenda's manufacturing capabilities, Skyview did not provide any evidence collected by the local contact other than an airline ticket and itinerary as proof he made the trip. Skyview Suppl. Req. for Information Resp., J.A. at 81,409–413, ECF No. 33; Final Determination, J.A. at 81,617 n.36, ECF No. 33. Skyview then changed its story and claimed Roxy Heritage manufactured its cabinets. Skyview Voluntary Submission, J.A. at 2,516, ECF No. 32. It explained the change by claiming it only recently learned of Roxy Heritage's involvement in the manufacturing process. *Id.* at 2,507. On remand, Skyview is returning to its original theory of the case: Rowenda, not Roxy Heritage, manufactured Skyview's cabinets. Pl.'s Remand Comments at 4–5, ECF No. 61.

At this point, there should be no question as to the basic facts of the case. Yet, based on Skyview's representations, the record is torn

between two possible manufacturers. This ambiguity suggests that, instead of basing its claims on a clear understanding of the facts, Skyview shifts its story depending on what facts may give it the better result at any given stage of the litigation. It was exactly this type of story-shifting that led Customs to find MasterBrand's evidence more reliable than Skyview's. *See* Remand Determination at 18, ECF No. 53 (finding that Skyview's shifting story for which company manufactured the cabinets "led [Customs] to the conclusion that the information submitted by Skyview was unreliable."). By shifting its story yet again about who manufactured its cabinets, Skyview further discredits itself and reinforces Customs' determination that MasterBrand had more reputable photographs, videos, and descriptions of Rowenda's Malaysian facility. *Id.* at 24.

Customs carried out its statutory duty to investigate the allegation of evasion by soliciting information from the parties, issuing supplemental questionnaires to clarify apparent errors and omissions in the evidence, and assessing the record as a whole to make a determination as to the credibility of the parties' claims. *See* Remand Determination at 37–38, ECF No. 53. It identified the discrepancies and omissions that it deemed fatal to the Plaintiff's case and explained why Skyview's evidence did not fill the gaps it identified. *See id.* at 5–8. As this Court previously wrote, "Skyview was on notice that it needed to provide evidence that actual manufacturing occurred in Malaysia; and Skyview had numerous opportunities to present contrary evidence refuting the allegation." *Skyview I*, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 95, at *17–18. The remand provided Skyview with yet another opportunity to supplement the evidentiary record. It failed to do so. The evidentiary balance therefore remains the same.

CONCLUSION

Although Customs provided Skyview with an opportunity to submit new evidence bolstering its claims on remand, Skyview did not submit any new factual information. Because of that failure, Skyview has failed to shift the evidentiary balance in its favor. For the same reasons stated in *Skyview I*, Customs' Remand Determination is **SUSTAINED**. 47 CIT __, 2023 Ct. Intl. Trade LEXIS 95, at *20–40, *44–46.

Dated: November 27, 2024
New York, New York

/s/ *Stephen Alexander Vaden*
STEPHEN ALEXANDER VADEN, JUDGE

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