U.S. Customs and Border Protection

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Declaration for Free Entry of Returned American Products (CBP Form 3311)

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

ACTION: 60-Day notice and request for comments

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than February 18, 2025) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0011 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_ PRA@cbp.dhs.gov.*

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Declaration for Free Entry of Returned American Products.

OMB Number: 1651–0011.

Form Number: 3311.

Current Actions: This submission will extend the expiration date without a change to the information collected or method of collection.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 3311, Declaration for Free Entry of Returned American Products, which is authorized by, among others, 19 CFR 10.1, 10.66, 10.67, 12.41, 123.4, and 143.23, is used to collect information from the importer or authorized agent in order to claim duty-free treatment for articles entered under certain provisions of Subchapter I of Chapter 98 of the Harmonized Tariff Schedule of the United States (HTSUS, *https://hts.usitc.gov/current*). The form serves as a declaration that the articles are: (1) the growth, production, and manufacture of the United States; (2) are returned to the United States without having been advanced in value or improved in condition

while abroad; (3) the goods were not previously entered under a temporary importation under bond provision; and (4) drawback was never claimed and/or paid.

This collection of information applies to members of the importing public and trade community who seek to claim duty-free treatment based on compliance with the aforementioned requirements. These members of the public and trade community are familiar with import procedures and with CBP regulations. Obligation to respond to this information collection is required to obtain benefits.

Type of Information Collection: Form 3311.

Estimated Number of Respondents: 12,000.

Estimated Number of Annual Responses per Respondent: 35.

Estimated Number of Total Annual Responses: 420,000.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 42,000.

Dated: December 12, 2024.

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

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Documentation Requirements for Articles Entered Under Various Special Tariff Treatment Provisions

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

ACTION: 60-Day notice and request for comments

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than February 18, 2025) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0067 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

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

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the

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

Overview of This Information Collection

Title: Documentation Requirements for Articles Entered Under Various Special Tariff Treatment Provisions.

OMB Number: 1651–0067.

Form Number: N/A.

Current Actions: This submission will extend the expiration date without a change to the information collected or method of collection.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: U.S. Customs and Border Protection (CBP) is responsible for determining whether imported articles that are classified under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 9801.00.10, 9802.00.20, 9802.00.40, 9802.00.50, 9802.00.60 and 9817.00.40 are entitled to duty-free or reduced duty treatment. In order to file under these HTSUS provisions, importers, or their agents, must have the declarations that are provided for in 19 CFR 10.1(a), 10.8(a), 10.9(a) and 10.121 in their possession at the time of entry and submit them to CBP upon request. These declarations enable CBP to ascertain whether the requirements of these HTSUS provisions have been satisfied.

These requirements apply to the trade community who are familiar with CBP regulations and the tariff schedules.

Type of Information Collection: Declarations under Chapter 98.

Estimated Number of Respondents: 19,445.

Estimated Number of Annual Responses per Respondent: 3.

Estimated Number of Total Annual Responses: 58,335.

Estimated Time per Response: 1 minute.

Estimated Total Annual Burden Hours: 972.

Dated: December 12, 2024.

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

U.S. Court of Appeals for the Federal Circuit

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

Appeal No. 2023–1570

Appeal from the United States Court of International Trade in Nos. 1:13-cv-00154-TJA, 1:13-cv-00181-TJA, 1:13cv-00182-TJA, 1:13-cv-00226-TJA, 1:13-cv-00227-TJA, 1:13-cv-00258-TJA, 1:13-cv-00259-TJA, 1:13-cv-00266TJA, 1:13-cv-00322-TJA, 1:13-cv-00323-TJA, 1:13-cv-00405-TJA, 1:14-cv-00118-TJA, 1:14-cv-00277-TJA, 1:15-cv-00018-TJA, 1:15-cv-00019-TJA, 1:15-cv-00091-TJA, 1:15-cv-00092-TJA, 1:15-cv-00191-TJA, 1:15-cv-00332TJA, 1:16-cv-00112-TJA, 1:16-cv-00271-TJA, 1:17-cv-00186-TJA, 1:20-cv-03835-TJA, 1:21-cv-00103-TJA, Senior Judge Thomas J. Aquilino, Jr.

Decided: December 13, 2024

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

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

Before PROST, HUGHES, and CUNNINGHAM, *Circuit Judges*.

HUGHES, *Circuit Judge*.

This case returns to us on appeal following a remand in *Meyer Corp., U.S. v. United States*, 43 F.4th 1325 (Fed. Cir. 2022). In that case, we held that the United States Court of International Trade had misinterpreted our precedent by imposing requirements beyond what the statute and regulations demand when determining that Meyer Corporation, U.S. was not entitled to rely on a "first-sale" price for the dutiable value of its imported cookware. On remand, the trial court again held that Meyer was not entitled to rely on its first-sale price, finding that Meyer's failure to produce financial documents for its parent holding company was dispositive of the issue. Because the trial court improperly applied an evidentiary presumption against Meyer and failed to address record evidence, we once again vacate and remand for the trial court to reconsider whether Meyer may rely on its first-sale price.

I

We briefly discuss the parties and the history of this case before turning to the merits of the current appeal. This case concerns duties that U.S. Customs and Border Protection assessed on cookware imported by Meyer Corporation, U.S. (Meyer). Some cookware was manufactured in Thailand, and some was manufactured in China. The manufacturers in Thailand and China sold finished cookware to distributors in Macau and Hong Kong, respectively, and then to the U.S. importer, Meyer. The manufacturers, distributors, and importer are all related, with common parent and shareholder Meyer International Holdings, Ltd. (Meyer Holdings).

Relevant here, Meyer requested that Customs value its cookware based on the first-sale price that its affiliated distributors paid to the manufacturers. *See Meyer Corp., U.S. v. United States*, No. 13–00154, 2021 WL 777788, at *3 (Ct. Int'l Trade Mar. 1, 2021) (*Meyer II*).[1] Customs rejected Meyer's request to use the first-sale price and instead assessed duties based on the second-sale price that Meyer paid to its distributors. *Id.* at *4.

Meyer protested Customs' decisions and then appealed to the Court of International Trade. *Id.* Following a bench trial, the trial court affirmed Customs' decision "to deny 'first sale' treatment." J.A. 89. In doing so, the trial court held that, under our decision in *Nissho Iwai Am. Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992), an importer wishing to rely on the first-sale price bears the burden to show that the first sales were "(1) bona fide sales that are (2) clearly destined for the United States (3) transacted at arm's length and (4) absent any distortive nonmarket influences." *Meyer II*, 2021 WL 777788, at *1, *5 (citing *Nissho Iwai*, 982 F.2d 505. For both Meyer's Chinese-manufactured products and its Thai-manufactured products that were made in part from Chinese inputs, the trial court found that Meyer had not provided adequate information to prove that its first sales met the last requirement: that they were free of "market-distortive influence, either with respect to the plaintiff directly or the provision of inputs generally." *Id.* at *6, *51. The trial court thus concluded that Meyer could not rely on the first-sale prices. *Id.* at *50–51.

Meyer appealed to this court, and we held that "[t]he trial court misinterpreted our decision in *Nissho Iwai* to require any party to show the absence of all 'distortive nonmarket influences.'" *Meyer Corp., U.S. v. United States*, 43 F.4th 1325, 1332 (Fed. Cir. 2022)

[1] For clarity, we adopt the same short form references as the trial court. "*Meyer I*," as used by the trial court, refers to its pre-trial opinion granting-in-part summary judgment, *Meyer Corp. v. United States*, 255 F. Supp. 3d 1348 (Ct. Int'l Trade 2017). *See* J.A. 1–2.

(*Meyer III*). We explained that "[t]here is no basis in the statute for Customs or the court to consider the effects of a non-market economy on the transaction value" and that "[t]he statute requires only that 'the relationship between [the] buyer and seller did not influence the price actually paid or payable.'" *Id.* (quoting 19 U.S.C. § 1401a(b)(2)(B)) (third alteration in original). Accordingly, we vacated and remanded "for the court to reconsider whether Meyer may rely on the first-sale price." *Id.* at 1333.

On remand, the trial court repeated many of its previous findings—with references to non-market economy effects excised—and again held that Meyer was not entitled to first-sale valuation of its cookware and subsequently "affirmed" its earlier judgment in *Meyer II*. *Meyer Corp., U.S. v. United States*, 614 F. Supp. 3d 1376, 1381 (Ct. Int'l Trade 2023) (*Meyer IV*). Meyer timely appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

II

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

III

On appeal, Meyer asserts that the trial court failed to comply with our remand order requiring reconsideration of whether Meyer may rely on the first-sale price. In raising this argument, Meyer alleges that the trial court improperly relied on an adverse evidentiary inference and failed to give due consideration to other record evidence. Meyer also argues that this case requires us to provide a definitive interpretation of "the firm" as used in 19 C.F.R. § 152.103(l)(1)(iii). We address each issue in turn.

A

1

Under Section 402(b) of the Tariff Act of 1930, as amended, Customs is instructed to set the transaction value of imported merchandise as "the price actually paid or payable for the merchandise when sold for exportation to the United States" plus additional amounts for certain specified costs not relevant here. 19 U.S.C. § 1401a(b)(1). Where the transaction takes place between a related buyer and seller, the statute states that the transaction value is viable "if an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between such buyer and seller did not influence

the price actually paid or payable." *Id.* § 1401a(b)(2)(B). The transaction price between related parties is also acceptable "if the transaction value of the imported merchandise closely approximates . . . the transaction value of identical merchandise, or of similar merchandise, in sales to unrelated buyers in the United States." *Id.* § 1401a(b)(2)(B)(i).

The statute's corresponding regulation, 19 C.F.R. § 152.103(l)(1), lists ways for Customs to find that the relationship between the buyer and seller did not influence the price. Two of the three tests are relevant here: the "normal pricing practices" test and the "all costs plus profit" test. As the name suggests, Customs will find that the "normal pricing practices" test is satisfied "[i]f the price has been settled in a manner consistent with the normal pricing practices of the industry in question." *Id.*§ 152.103(l)(1)(ii). Likewise, the "all costs plus profit test" is met "[i]f it is shown that the price is adequate to ensure recovery of all costs plus a profit which is equivalent to the firm's overall profit realized over a representative period of time . . . , in sales of merchandise of the same class or kind." *Id.* § 152.103(l)(1)(iii).

In *Nissho Iwai*, we addressed which price Customs should use as the transaction value in a multi-tiered import scheme in which all the entities are related—the first-sale price the distributor paid to the manufacturer or the second-sale price the importer paid to the distributor. 982 F.2d at 508–11. There, we explained that "once it is determined that both the first-and second-sale prices are statutorily viable transaction values, the rule is straightforward: the manufacturer's first-sale price, rather than the distributor's second-sale price, is used as the basis for determining transaction value." *Meyer III*, 43 F.4th at 1332 (quoting *Nissho Iwai*, 982 F.2d at 509) (cleaned up and alterations omitted). The *Nissho Iwai* decision also elaborated on the meaning of "statutorily viable," stating that "[t]he manufacturer's price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and middleman deal with each other at arm's length, in the absence of any non-market influences that affect the legitimacy of the sales price." *Id.*

2

As explained above and in our *Meyer III* opinion, the trial court in *Meyer II* erroneously interpreted *Nissho Iwai's* statement about "the absence of any non-market influences" to mean that, because China was a non-market economy, Meyer had "the burden of demonstrating

that inputs from [China], as well as with respect to the transactions from its producer/seller to its middleman/buyer, were procured at undistorted prices." *Meyer II*, 2021 WL 777788, at *6. To that end, the trial court held that financial records pertaining to Meyer Holdings, the ultimate parent company of the Meyer group, were "relevant to examining whether any non-market influences affect the legitimacy of the sales price." *Id.* Meyer did not produce any Meyer Holdings financials, asserting that it did not possess such records and that they were not relevant to the issues posed by the case. Subsequently, the trial court's rejection of Meyer's first-sale price hinged almost entirely on the absence of Meyer Holdings financials. The trial court noted that for the "all costs plus profit" test, "costs are obviously critical to that determination, and the real costs of inputs from [China] are suspect, given its status as a nonmarket economy country." *Id.* at *50. The trial court went on to explain its concerns about interference by Meyer Holdings:

> Even if "true" costs of such inputs could be determined, Meyer Holding presumptively has had the ability to influence the price paid or payable for them, for example by providing its subsidiaries access to credit and capital on terms that are not available to competitors without the same level of bargaining power with creditors, or even at "below market" rates. Without financial statements, the court has no concept of the extent to which the finances of the Meyer group units are truly independent "silos" of one another, or the extent to which there might have been state influence or assistance to some degree. Statutory assists do not encompass financial assistance, of course, but the broader concern here is over market-distortive influence, either with respect to the plaintiff directly or the provision of inputs generally.

Id. at *51. The trial court also acknowledged that Meyer Holdings was not a party to the litigation and Meyer was entitled to assert its inability to obtain parent company information, but it nevertheless found the lack of documents meaningful, stating:

> However, given that the parent has an interest in seeing these types of matters resolved favorably, it is therefore presumed to be forthcoming, even unprompted, to provide whatever [Customs] deems necessary to assist in their resolution, and the fact that in that regard there has apparently been considerable "resistance" throughout this case to that not-unreasonable discovery request and the "assistance" that the parent could have

> provided its subsidiary to address necessary questions with respect to concerns over nonmarket influences, speaks volumes.

Id. In conclusion, the court held that "[a]ll of the foregoing leads the court to doubt that accurate ascertainment of the 'true' value of the 'price paid or payable' at the first sale level in the customs duty sense has been demonstrated in this case." *Id.*

Following our remand order, the trial court's *Meyer IV* opinion once again held that the lack of Meyer Holdings documents was dispositive to Meyer's case. The trial court concluded that "[e]ven ignoring the fact that the claimed transaction values involve inputs from a nonmarket economy country in the merchandise at issue, this court still cannot ignore plaintiff's non-responsiveness to defendant's request for information during discovery." *Meyer IV*, 614 F.Supp.3d at 1380. The court also stated that "[t]he fact that the government herein was not provided with the financial information pertinent to plaintiff 's parent company hampered its ability to discern whether or not the parent of the plaintiff provided any form of assistance to reduce costs." *Id.* Next, the trial court quoted nearly the entirety of its analysis from *Meyer II* but noted that it had "excis[ed] any inference of 'nonmarket consideration' in accordance with the CAFC opinion." *Id.* The trial court concluded this opinion by stating:

> [T]he prior analysis shows that plaintiff's failure to provide the financial information requested by it during discovery provided an independent reason as to why Meyer could not demonstrate a true first-sale value absent of influence—not from a nonmarket-economy country *per se*—but from the relationships of the related parties. And the plaintiff had been forewarned by the court's *Meyer I* decision as to the importance of that financial information but chose not to supplement its discovery responses.

Id. at 1380–81.

3

We agree with Meyer that the trial court failed to comply with our remand order instructing it to "reconsider whether Meyer may rely on the first-sale price" by disregarding the trial record and instead applying an improper evidentiary presumption. The trial court's opinion makes clear that it suspected Meyer of being dishonest in its reporting of "costs" for use in the "all costs plus profit" test. *See id.* at 1379 (trial court repeating its prior statement that, even ignoring nonmarket economy effects, "the costs of the inputs from [China] are

suspect"); *id.* at 1380 ("[T]he foregoing leads the court to doubt that accurate ascertainment of the 'true' value of the 'price paid or payable' at the first sale level in the customs duty sense has been demonstrated in this case."). In reaching this conclusion, the trial court cites no record evidence to support its belief that Meyer inaccurately reported costs. Rather, the court relied entirely on speculation that, because Meyer did not produce the Meyer Holdings financial documents, the documents might have shown underreported costs.

During discovery, Meyer objected to the production of Meyer Holdings' documents on the grounds that it did not have possession, custody, or control of such documents. J.A. 33. There is nothing in the record to show that the government ever objected to the lack of production or pursued a motion to compel or subpoena against Meyer or Meyer Holdings. *See* Appellant's Br. 14 n.6. Further, other record evidence seems to support Meyer's position that it did not possess Meyer Holdings' documents. *See, e.g., Meyer II*, 2021 WL 777788, at *8 (noting that Mr. Johnston, Meyer's former managing director, "averred that, despite being related companies within the Meyer [g]roup," each separate company is "structured with different 'silos' of business that operate independently of and competitively with each other, and that" Meyer "was accountable for its own profitability, independent of any other Meyer group entity."). Yet, without citing any of this record evidence, the trial court presumed ill intent. The trial court mused that "Meyer Holding[s] presumptively has had the ability to influence the price paid or payable" and that Meyer Holdings was "presumed to be forthcoming, even unprompted, to provide whatever [Customs] deems necessary to assist in their resolution." *Meyer IV*, 614 F.Supp. 3d at 1380. The trial court accordingly found that it "sp[oke] volumes" that Meyer exhibited "considerable 'resistance' throughout this case to that not unreasonable discovery request," given "the 'assistance' that the parent could have provided its subsidiary to address necessary questions." *Id.*

The trial court's language here is tantamount to the discovery sanction of an adverse inference. Rule 37(b)(2)(A) of the Court of International Trade states that if a party "fails to obey an order to provide or permit discovery, . . . the court . . . may issue further just orders" including "directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims." Given that there were no discovery orders with which Meyer failed to comply—a prerequisite for adverse inferences under Rule 37(b)(2)(A)—the trial court had no basis to speculate about what the Meyer Holdings documents might have revealed, had they been produced. While some statutory provi-

sions that fall within the purview of the Court of International Trade more freely authorize the imposition of adverse inferences, assessing transaction value for related parties under 19 U.S.C. § 1401a(b)(2)(B) is not one of them. *C.f. Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1370 (Fed. Cir. 2014) (explaining that, in the context of countervailing and antidumping duties under 19 U.S.C. § 1677e, "the statute permits Commerce to apply an adverse inference in selecting from among the facts otherwise available when an interested party fails to cooperate by not acting to the best of its ability to comply with a request for information").

Further, the trial court's finding that Meyer could not prove its case without Meyer Holdings financial documents is particularly inappropriate because, in doing so, the trial court ignored other record evidence produced by Meyer, including sworn testimony from employees and an expert opinion that was based on examination of company records. The trial court did not grapple with any of this evidence: it did not evaluate the credibility of the witnesses, weigh the evidence that was before it, or explain why, as a matter of law, that record evidence was or was not sufficient for Meyer to meet its burden. Indeed, aside from the trial court's wholesale adoption of the government's proposed findings of fact in *Meyer II*, the court's analysis does not even acknowledge—in its original determination or on remand—that there *was* other record evidence besides the missing Meyer Holdings documents. *See Meyer II*, 2021 WL 777788, at *50–51; *Meyer IV*, 614 F. Supp. 3d at 1379–81.

In our previous decision, we instructed the trial court to "reconsider whether Meyer may rely on the first-sale price." *Meyer III*, 43 F.4th at 1333. It did not do so in any meaningful way. Accordingly, we vacate and remand once more.[2] The trial court should evaluate, on the extensive record before it, whether Meyer has met its burden to show that its first-sale price is a viable transaction value under 19 U.S.C. § 1401a(b)(2)(B). As discussed above, there are two alternate ways that Meyer may prove its case: the "all costs plus profit" test and the "normal pricing practices" test. *See* 19 C.F.R. § 152.103(l)(1). Because

[2] By ordering a remand for further consideration, we reject Meyer's argument that a new trial is necessarily required. *See* Appellant's Br. 43–46. Meyer had the opportunity to present evidence during a weeklong trial, after which the trial court adopted the government's proposed findings of facts and stated that Meyer's facts were "not inaccurate," *Meyer II*, 2021 WL 777788 at *50, but did not make extensive conclusions of law based on those facts. The "extensive record" developed before the trial court, that record is "more than sufficient for conducting reconsideration." *Meyer IV*, 614 F. Supp. 3d at 1381. Allowing for additional evidentiary proceedings would only prolong this already protracted case. To the extent that Meyer continues to seek a new trial, that request is best directed to the trial court.

Meyer raised both tests as possible bases for using first-sale price, *see* J.A. 106, 108, so too should the trial court consider both tests in its opinion. We note that this decision should not be read as putting a thumb on the scale regarding the outcome on remand. Rather, it is an acknowledgement that Meyer was entitled to have its case heard on the merits of the record it presented, not disposed of based on conclusory speculation.

B

Meyer also argues on appeal that this case requires us to provide an interpretation of "the firm" as used in the "all costs plus profit" test. *See* 19 C.F.R. § 152.103(l)(1) ("If it is shown that the price is adequate to ensure recovery of all costs plus a profit which is equivalent to *the firm's* overall profit realized over a representative period of time (e.g., on an annual basis), in sales of merchandise of the same class or kind, this would demonstrate that the price has not been influenced." (emphasis added)). Meyer notes that "[i]n an uncodified policy statement interpreting this Regulation, Customs has stated that the term 'firm' is 'normally' interpreted to be the parent company." Appellant's Br. 26; *see also id*. at n.14 (citing *Determining the Acceptability of Transaction Value for Related Party Transactions (an Informed Compliance Publication)*, U.S. Customs and Border Protection (April 2007), at 9; J.A. 38–39). Meyer asserts that this interpretation is incorrect, and the correct interpretation is that "firm" refers to "the firm which charged the price in the related party sale." *Id.* at 26. Accordingly, Meyer argues that "[s]ince the [Meyer Holdings] financials could not be used in an 'all costs plus profits' test, they lost their 'consequence to the determination of the action' and became irrelevant." *Id.* at 33.

We decline to address Meyer's arguments about the correct interpretation of "the firm" because the trial court's opinion was not based on any interpretation—correct or incorrect—of that phrase. The government's brief explains: the trial court's relevancy determination regarding the Meyer Holdings financials "did not rest on [Customs'] interpretation of the term 'firm' in 19 C.F.R. § 152.103(l)(1)(iii) as meaning a parent company, but instead turned on whether the parent holding company provided support or guidance that caused a market distortive effect on the first sale prices." Appellee's Br. 15. We agree.

In *Meyer II*, the trial court acknowledged Meyer's arguments regarding "the appropriate 'firm' to analyze under the 'all costs plus profit test,'" but noted that regardless of whether Meyer's argument was correct, it wanted the Meyer Holdings financial statements in order to assess whether Meyer had accurately reported the "costs"

arm of the "all costs plus profit" test. *Meyer II*, 2021 WL 777788, at *50 ("[W]hether it is true that for the 'all costs plus profit' test no [Customs] regulation requires that the 'firm' mentioned in 19 C.F.R § 152.103(l)(1)(iii) be the 'parent' of the importing party . . . , costs are obviously critical to that determination, and the real costs of inputs from [China] are suspect, given its status as a nonmarket economy country."). The *Meyer IV* opinion also did not rely on any interpretation of "the firm" in its decisions, even though the trial court appears to have voiced agreement with Meyer on its proposed interpretation. *Meyer IV*, 614 F. Supp. 3d at 1380 (trial court restating its own findings from *Meyer II* and noting that "[i]t also found that 'no [Customs] regulation requires that the "firm" mentioned in 19 C.F.R. § 152.103(l)(1)(iii) be the "parent" of the importing party.'"). However, because the trial court's opinion was not based on the challenged statutory term, we reserve the question of proper interpretation of 19 C.F.R. § 152.103(l)(1)(iii) for another day.

IV

Because the Court of International Trade failed to meaningfully evaluate whether Meyer was entitled to rely on first-sale price in accordance with our remand order, we again vacate and remand for the court to reconsider whether Meyer may rely on the first-sale price. We need not reach Meyer's alternative argument that the trial court should have also rejected Meyer's second-sale price if it found that the costs were inaccurate for first-sale price.

VACATED AND REMANDED

COSTS

No costs.

U.S. Court of International Trade

Slip Op. 24–127

CALIFORNIA STEEL INDUSTRIES, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: M. Miller Baker, Judge
Court No. 21–00015

[The court sustains the agency in part, remands in part, and grants injunctive relief.]

Dated: November 13, 2024

Sanford Litvack, Chaffetz Lindsey LLP, New York, NY, for Plaintiff. With him on the comments were *Andrew L. Poplinger* and *R. Matthew Burke*.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for Defendant. With him on the comments were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Tara K. Hogan*, Assistant Director.

Lydia C. Pardini, Polsinelli PC, Washington, DC, for *amicus curiae* United States Steel Corporation. With her on the brief were *Alissa M. Chase* and *Joonho Hwang*.

OPINION

***Baker*, Judge:**

In this return visit following a voluntary remand, a domestic importer asserts an Administrative Procedure Act challenge to the Department of Commerce's refusal to exclude certain foreign-made steel from national security tariffs. For the reasons explained below, the court sustains the agency in part, remands in part, and awards injunctive relief to ensure that any exclusions issued on remand will be effectual.

I

"Section 232 of the Trade Expansion Act of 1962 authorizes the President to restrict imports of goods 'so that such imports will not threaten to impair the national security.'" *AM/NS Calvert LLC v. United States*, 654 F. Supp. 3d 1324, 1333 (CIT 2023) (quoting 19 U.S.C. § 1862(c)(1)(A)(ii)). In 2018, he used that authority to impose a 25 percent tariff on steel imports. *See* 83 Fed. Reg. 11,625. At the same time, he allowed Commerce to exclude (exempt) such transactions from the duties in certain circumstances, including when the products in question were not manufactured in this country "in a sufficient and reasonably available amount." *Id.* at 11,627 cl. 3.

The Department established procedures for seeking such relief. *See* 83 Fed. Reg. 46,026; 15 C.F.R. Pt. 705 Supp. 1 (2020).[1] An importer "using steel in business activities . . . in the United States" may request an exclusion. *Id.* Supp. 1(c)(1). In so doing, it must explain "the basis" for the submission. *Id.* Supp. 1(c)(5).[2]

As relevant here, Commerce will grant an exclusion only if the steel "is not produced in the United States in a sufficient and reasonably available amount," *id.* Supp. 1(c)(5), meaning "that the amount . . . needed . . . is not available immediately" from domestic sources, *id.* Supp. 1(c)(6)(i). For purposes of this regulation, steel is available "immediately" when it "is currently being produced or could be produced and delivered 'within eight weeks' in the amount needed for the business activities described in the exclusion request." 83 Fed. Reg. at 46,038.

Domestic manufacturers may object to exclusion requests, 15 C.F.R. Pt. 705 Supp. 1(d)(1), but have "the burden . . . to demonstrate that [a submission] should be denied because of failure to meet the specified criteria," 83 Fed. Reg. at 46,029. An objector must "clearly identify, and provide support for, its opposition to the proposed exclusion, with reference to the specific basis identified in, and the support provided for, the . . . request." 15 C.F.R. Pt. 705 Supp. 1(d)(4). Such an entity that is not currently producing steel "must identify how it will be able to produce the article within eight weeks," including explaining the timeline it anticipates for commencing or restarting production. *Id.*

"If the Department denies an exclusion request based on a representation made by an objector, which is later determined to be inaccurate . . . , the requester may submit a new exclusion request that refers back to the original . . . and explains that the objector was not able to supply the steel." *Id.* Supp. 1(c)(6)(i). There is "[n]o time limit for submitting exclusion requests," *id.* Supp. 1(c)(4), meaning that an ostensibly "new" filing referring to a previous application can be filed "at any time," *id*.

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[1] Commerce has amended its exclusion procedures several times. The most recent requests at issue date to April 21, 2020. Citations in this opinion to 15 C.F.R. Pt. 705 Supp. 1 therefore refer to the edition in effect on that date—which was the same as the 2018 version in all relevant ways—unless otherwise noted.

[2] The regulation requires importers to submit "[s]eparate exclusion requests . . . for steel products with . . . distinct critical dimensions . . . covered by a common [Harmonized Tariff Schedule of the United States] subheading." *Id.* Supp. 1(c)(2). In plain English, importers may not lump together requests for otherwise-identical steel imports of differing sizes.

Absent any objections, "Commerce will grant properly filed exclusion requests which meet the requisite criteria . . . and present no national security concerns." *Id*. Supp. 1(h)(2)(ii).[3]

II

A

Between April 29 and July 2, 2018, California Steel Industries, Inc. (CSI) filed 170 exclusion requests claiming that "[s]teel slabs are not produced in the United States in a sufficient and reasonably available amount." Appx06678 (internal quotation marks omitted).[4] It explained that it cannot make such slab, Appx06678—the "raw material" that it "roll[s] into sheet (coil) products," Appx06671. The company said it can manufacture around 2.7 million metric tons[5] of such goods per year. Appx06683. With tariff-free imported slab it hoped to increase its production from 50 percent to 85 percent of that capacity. *Id.*; Appx06685.

The company asserted that three domestic entities produce slab, but only one, Pennsylvania-based U.S. Steel Corporation, "currently makes it available on the commercial market for purchase, in minimal quantities of less than [330,693 metric tons] per year, of all possible ordered sizes." Appx06675. According to CSI's request, these vertically integrated producers (meaning they manufacture both slab inputs and finished products) sell little slab because their ability to make that material is "less than their capacity to hot-roll slabs into coil sheet, the final product." Appx06683 (emphasis removed). For that reason, they also import slab. Appx06682. And even if these companies "wanted to sell slabs" to CSI, shipping "costs pose a significant hurdle" because their mills are in the central and eastern U.S., and "rail is much more expensive than ocean transport." Appx06680.

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[3] An importer tenders an exclusion—in effect, a get-out-of-tariff-free card—to U.S. Customs and Border Protection, which then applies it at liquidation. *See Calvert*, 654 F. Supp. 3d at 1334. Once granted, an exclusion is generally valid for one year. 15 C.F.R. Pt. 705 Supp. 1(h)(2)(iv). As to entries that have not finally liquidated by the time an importer presents an exclusion to Customs, *see Calvert*, 654 F. Supp. 3d at 1334–35, "retroactive relief" is available "dating back to the date of the request's submission," *id*. at 1334 (quoting 15 C.F.R. Pt. 705 Supp. 1(h)(2)(iii)(A)).

[4] The parties agree that the administrative record for request BIS-2018–0006–5348 is representative of all 170 exclusions sought in 2018. *See* ECF 103, at 4 n.2 & Appendix 1 (CSI); ECF 108, at 31 n.5 (government). CSI asserts that it made 170 bite-size submissions rather than one omnibus filing because the relevant regulation required it "to make its requests piecemeal." ECF 121, at 6 (citing 15 C.F.R. Pt. 705 Supp. 1(c)(2)); *see also* note 2.

[5] The parties refer to both metric tons and net tons (the latter also known as short tons or U.S. tons) because the administrative record uses both. A metric ton (1,000 kilograms) is about 10 percent larger than a U.S. ton (2,000 pounds). This opinion converts U.S. tons, pounds, or kilograms to metric tons.

U.S. Steel objected to all 170 of the requests, stating as to each that it had "significant excess production capacity" and could provide "100% of the volume cited." Appx06725.[6] It stated that it had supplied its California customer with "a wide variety of . . . slabs within the last decade," Appx06722, and "displayed a willingness across all market conditions" to do so, *id*. Finally, it emphasized that it "has enormous incentive to sell [CSI] . . . slabs." *Id*.

On rebuttal, CSI challenged U.S. Steel's capability to make steel in "sufficient quantity"[7] and timely deliver it. Appx06760–06761. In its accompanying narrative response, the former reiterated that the latter and other domestic slab manufacturers "simply do not produce slab for commercial sales on any sustained basis with volume or price competitiveness. They elect to use the slab themselves to produce value-added products, rather than make any real effort to sell slab to CSI as a value-added competitor." Appx06764.

CSI acknowledged that "[f]or many years," U.S. Steel has been its "lone domestic supplier . . . , at times offering slabs for sale and at times not." *Id.* "Recently"—apparently around the time the former filed its exclusion requests—the two companies signed "a multimonth contract for a range of amounts equal to 8–12% of CSI's current requirements and less than 5–7.5% of [its] goal of 85% capacity utilization." *Id*. "This is typical of the volume offer that U.S. Steel has periodically made in the past—when it made slabs available for sale at all." *Id*.

The California company also stressed that it wished to "buy domestic slabs under feasible economic conditions." *Id.* Because of steep rail transportation expenses and U.S. Steel's "significant single-domesticsupplier pricing power," *id*., the former was "healthier . . . by avoiding the high cost of buying from U.S. Steel," *id*. And it wasn't "good business" for the Pennsylvania company to "sell much slab," as it could "make a higher return using its slabs to minimize its excess rolling capacity." *Id*.

U.S. Steel then filed a surrebuttal. Appx06778. In response to the contention that it could "only supply a percentage of the requested volume stated in the exclusion request," Appx06781, the Pennsylva-

[6] The Pennsylvania company noted that when aggregated, the requests "exceed[ed] [30.7 million metric tons]—which is equivalent to more than eleven times [CSI's] stated rolling capacity." Appx06726 (emphasis removed). It did not, however, represent that it could supply that total amount or some lesser fraction of it.

[7] As for quantity, CSI "clarified" that it sought "tariff exclusions for a total of [2.3 million metric tons] of slabs from all combined import sources, an amount that would roughly equal 85% of [its] current rolling capacity." Appx06762. In so reducing its original aggregate requested tonnage by more than 92 percent, the company did not explain whether it was abandoning some of its requests or instead reducing pro rata the amount at issue in each request.

nia company asserted that "there is significant domestic production and the product is available from [it] as well as several other domestic producers," *id*. It also submitted proprietary data showing that its slab-manufacturing capacity exceeded the 2.3 million metric tons that CSI claimed to need. Appx06787.

As for its willingness to sell, U.S. Steel stressed that it

> remains open to increasing the ongoing, monthly supply to CSI, and did not limit the contractual volume. Rather, the stated monthly volume range of [9,000–14,000 metric tons] was defined by CSI as *the amount they were willing to commit to buy*. Further, to date for the late third and fourth quarters 2018, CSI has only placed orders for the absolute minimum monthly volume, despite U.S. Steel's urging and solicitation to increase the ordered amounts to the maximum of the agreed range and beyond through incremental sales or an increase to the agreement.

Appx06782 (emphasis in original). It elaborated on these points, noting that the monthly slab supply contract with its California customer was "through 2019" and that the latter "indicated that [it was] not comfortable with a higher volume . . . ." Appx06787. Moreover, U.S. Steel "has more steel available to sell them than the contract quantity *as early as 4th quarter 2018*." *Id*. (emphasis added).

Finally, U.S. Steel dismissed the assertion that it was not interested in selling slab to CSI because it was not—in the latter's words—"good business":

> To the contrary, [we] would not have solicited or consummated the monthly supply contract, if it was not "good business" from our perspective, and we would neither have made the commitment nor repeatedly requested additional ordered volume within and beyond the stated terms of the contract.

Appx06782.

Commerce denied all 170 requests. *See, e.g.*, Appx06667–06668. After CSI sued and the court granted the government's request for a voluntary remand, *see Calvert*, 654 F. Supp. 3d at 1352–53, the agency again denied every application. For each, the Department relied on U.S. Steel's representations that it "has a contractual agreement to supply slabs" to CSI, Appx01409, it "is open to producing additional volume," *id*., and "the contracted volume represents the

maximum [its California customer] would commit to buy," *id*.[8] The Pennsylvania company's "certified statements and supporting documentation" established that it "produces or could produce a sufficient amount of the product to meet CSI's specified business activity." *Id.*

The agency gave "greater weight to U.S. Steel's statements" because that company was "in the best position to know its own production schedule and abilities" to manufacture the slab. *Id*. Commerce also noted that CSI's "economic reasons" for not buying from its Pennsylvania supplier—transportation costs and price—"are not among the [relevant] regulatory criteria." Appx01410.

Respecting U.S. Steel's ability to *timely* manufacture and ship the slab volume needed by CSI, the Department relied on the former's surrebuttal documentation "indicating that it could feasibly produce and deliver the requested quantity within eight weeks." *Id.* That material "refute[d] CSI's more-generalized allegations suggesting that" its Pennsylvania supplier "completely lacks" the capacity to make and transport slab "within eight weeks . . . in a sufficient and reasonably available amount." *Id*.

CSI's brief asserts that in 2018 it "could source only" a small fraction "of its minimum annual needs" domestically. *See* ECF 103, at 12. It imported the balance from Mexico and Japan and thereby incurred substantial Section 232 duties. *Id.* at 11–12.

B

In April 2020, CSI submitted 23 more exclusion requests aggregating 425,000 metric tons of slab. *See id.* at 14.[9] It asserted that in all but one month since the tariffs began in 2018, the Pennsylvania company offered to sell "35,000 metric tons or less," Appx22883—with "less" including, in many months, zero tonnage, *id*. From August 2018 through October 2019, U.S. Steel supplied only 23 percent of its California customer's requirements, Appx22885, and 37 percent of that total was delivered more than eight weeks from the purchase order date, *id*.—which meant it was untimely under Commerce's regulation. And worse yet, the Pennsylvania company had "recently announced a series of reductions in [its] . . . discrete slab production capability." *Id*.

U.S. Steel objected to every request, claiming that it "has *never* established a maximum slab quantity available" to CSI. Appx22914 (emphasis in original). Not only that, the latter "declined to extend"

[8] Because it relied on U.S. Steel's objections, Commerce did not evaluate submissions by two other slab producers. *See* Appx01408.

[9] The parties agree that the administrative record for Request No. 82953 is representative of all 23 exclusions sought in 2020. *See id.* at 4 n.2 & Appendix 2 (CSI); ECF 108, at 31 n.5 (government).

the one-year contract that expired in August 2019. *Id.* All purchases since then were spot sales, which the Pennsylvania company has consistently offered. *Id.* In negotiating those spot transactions, its West Coast customer (1) "repeatedly indicated that most shipments . . . did not require priority [transport] ([*i.e.*], delivery in less than eight weeks)," *id.*, and (2) "expressly declined to buy the full volume of slab offered . . . to date in 2020," *id*.

As to its ability to produce what CSI needed, U.S. Steel claimed that it had "an additional eight million MT of available steelmaking capacity beyond current internal demand that can be quickly restarted to facilitate commercial slab sales if the market for American-made steel increases." *Id*. Thus, it could "provide CSI with the combined quantity of its 23 pending exclusion requests for Japanese slab." Appx22915 n.15.

On rebuttal, the California company asserted that U.S. Steel "has never offered anywhere near 100% of the volume" it required. Appx22931. The former "agreed to purchase all spot slab offers from [the latter] in 2018 and through the third quarter 2019." *Id.* Total slab offers in 2019 "were [293,928 metric tons], just 28%" of CSI's slab buys. *Id*. In the first half of 2020, U.S. Steel "supplied just 10% of CSI's needs." *Id*. The former's "sales team . . . stated that there is slim to no slab availability for [the latter] when the market is good and they would ideally like to supply [it] in the range of [approximately 18,000 to 36,000 metric tons] a month," *id*., which would not "cover 50% of CSI's monthly slab needs," *id*.

On surrebuttal, U.S. Steel asserted that the reason it supplied less slab to its West Coast customer in 2020 year-to-date was because the latter "declined to buy the full volume of slab offered," Appx22949—a point not contested, *id*. It reiterated "that it has never put a cap on the volume of slab available to CSI," which "chose not to extend its supply contract . . . beyond July 2019 and, since October 2019, has repeatedly declined the full spot sale volume offered." Appx22951. The Pennsylvania company also proffered an email communication from October 2019 in which CSI stated that it wished to pause spot purchases "at this time." Appx22958.

In any event, U.S. Steel reaffirmed that it was "eager to continue increasing the volume of slab it provides . . . and is immediately capable of supplying significantly more than the volume" for which its California customer sought exclusions. Appx22951. If the latter would agree to "another supply contract, rather than relying exclusively on spot sales," *id.*, the former could factor that into its "annual operating plan and even further increase the [amount] of steel slab that is available to CSI each month," *id*.

Regarding its ability to timely provide slab to its West Coast customer—that is, within eight weeks of order—U.S. Steel observed "that the majority" of its slab sales were delivered within that time frame. Appx22952. Moreover, in their dealings, the former "repeatedly indicated that most shipments were for stock and, as such, did not require priority delivery." *Id*.

Commerce denied all 23 requests. *See, e.g*., Appx22870–22871. On voluntary remand from this litigation challenging those denials, *see Calvert*, 654 F. Supp. 3d at 1352–53, the Department did so again based on U.S. Steel's objections. Appx01012.[10] As for the company's willingness and capacity to provide its California customer with the needed volume of slab, the agency surveyed the evidence. *See* Appx01016. What was decisive, in its view, was that CSI didn't address or rebut claims by its Pennsylvania supplier that it was the former's "decision not to extend its contract with [the latter] into 2020, nor to purchase via spot sales . . . in late 2019." Appx01017.

With respect to U.S. Steel's ability to timely supply slab, Commerce acknowledged that the two companies agreed that almost 50 percent of the shipments to CSI took more than eight weeks, *id.*, but it also noted the former's argument about its customer not needing "priority delivery," *id.* (quoting Appx22952). Most conveyances were timely, *id*., and "there is nothing in CSI's documentation that demonstrates that current and future production and deliveries are impacted by any past delivery issues," *id*.

The California company now asserts that because it was "unable to secure the slabs it needed" in 2020, ECF 103, at 14, it "once again had to import slabs" and pay "million[s]" of dollars in tariffs, *id*. at 15.

C

Invoking the court's jurisdiction under 28 U.S.C. § 1581(i)(1)(B) and (D),[11] *see* ECF 2, ¶ 18, CSI brought this suit challenging the Department's original denials of the 193 exclusion requests as arbitrary and capricious under the APA, *id.* ¶¶ 60, 64, 68, 72, 76.[12] The government moved for voluntary remands in this case and its companion actions without confessing error. *See Calvert*, 654 F. Supp. 3d at 1335–36. After first disposing of mootness and other questions about the avail-

[10] As a result, the agency did not evaluate objections by another slab producer. Appx01014.

[11] The court previously found this invocation proper. *See Calvert*, 654 F. Supp. 3d at 1337–38.

[12] Concurrent with CSI's suit, several other importers brought similar challenges to Commerce's denials of their exclusion requests. The court consolidated these actions for purposes of resolving overlapping intervention motions by U.S. Steel and other objectors, which the court denied. *See N. Am. Interpipe, Inc. v. United States*, 519 F. Supp. 3d 1313 (CIT 2021), *aff'd sub nom. Cal. Steel Indus., Inc. v. United States*, 48 F.4th 1336 (Fed. Cir. 2022).

ability of relief as to finally liquidated entries, *see id*. at 1338–49, the court ultimately granted remands subject to various conditions, *see id*. at 1352–53.

As outlined above, Commerce again denied each of CSI's 193 requests. The company now challenges 45 denials—those applicable to its actual imports of slab made to compensate for the alleged unavailability of domestic sources. *See* ECF 103, at 4 n.2 & Appendices 1 & 2.[13] The government defends those denials, *see* ECF 108, as does *amicus curiae* U.S. Steel, *see* ECF 117.

By properly invoking § 1581(i) jurisdiction, CSI "challenge[s] agency action under the cause of action created by the APA's general statutory review provisions." *Calvert*, 654 F. Supp. 3d at 1340 n.15 (citing 28 U.S.C. § 2631(i)). APA § 706 therefore applies. *See* 28 U.S.C. § 2640(e) ("In [§ 1581(i) cases], the Court of International Trade shall review the matter as provided in section 706 of title 5."). That provision allows the court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

This standard of review "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That said, "the 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." *Id*.

III

Before turning to the merits, the court first considers whether CSI exhausted its administrative remedies. At the time of Commerce's denials, the relevant regulation provided:

> If the Department denies an exclusion request based on a representation made by an objector, *which later is determined to be inaccurate* (*e.g.*, if the objector was not able to meet the requirement of being able to "immediately" supply the steel that was included in a denied exclusion request in the quantity needed), *the requester may submit a new exclusion request that refers back to the original denied exclusion request and explains that the objector was not able to supply the steel*. . . . Commerce would take that into account in reviewing a subsequent exclusion request.

15 C.F.R. Pt. 705 Supp. 1(c)(6)(i) (emphasis added).

[13] By not challenging Commerce's other 148 denials, CSI has abandoned those requests. The court therefore sustains those agency actions.

In December 2020, Commerce revised the regulation to eliminate the express language allowing for the filing of exclusion requests "referring back" to a previous submission, but that amendment did not make a substantive change:

> Ultimately, if an exclusion request is not approved because of an objection, *the exclusion requester will be able to determine definitively whether an objector is in fact able to provide the steel or aluminum article in question by attempting to obtain the product from the objector*. Should all objectors be unable to produce a requested product as they represented in their objections, the requester may submit a new request with documentation evidencing this refusal.

85 Fed. Reg. 81,060, 81,065 (emphasis added). And because requesters have such a right to submit a new application based on an objector's failure to follow through with promised steel, it was unnecessary—as one commentator proposed—that "[o]bjecting parties should be required to fill orders." *Id*. at 81,066 (Comment (d)(5)). "The current process" thus "addresse[d] . . . sufficiently" the concern that producers might "object[] to an exclusion request and then refus[e] to fill orders." *Id*.

Putting all this together with the related provision that there is "[n]o time limit for submitting exclusion requests," 15 C.F.R. Pt. 705 Supp. 1(c)(4), the administrative scheme appears to allow—but does not mandate—an importer to effectively renew a denied submission.[14] It can do so by filing an ostensibly "new" application presenting evidence that the objector failed to deliver, figuratively and literally. The court therefore directed the parties to address whether it should dismiss this action because of CSI's failure to avail itself of that optional remedy. *See* ECF 128 (order); 28 U.S.C. § 2637(d) (providing that in civil actions "not specified in this section"—thus including APA actions such as this brought under 28 U.S.C. § 1581(i)—the CIT "shall, *where appropriate*, require the exhaustion of administrative remedies") (emphasis added).

Both parties argue that Commerce's scheme does not permit an importer to so renew an exclusion request or otherwise seek reconsideration. *See* ECF 129, at 2–6 (government); ECF 131, at 2–6 (CSI). Although the court disagrees, it nevertheless concludes that demanding exhaustion of this optional intra-agency appeal is not "appropriate" because the APA itself preempts any such mandate. Under sec-

[14] There is no dispute here that Commerce's denial of an exclusion request is "final agency action" for APA purposes. *See* 5 U.S.C. § 704, discussed below.

tion 10(c) of that statute, 5 U.S.C. § 704,[15] "courts may not require exhaustion of administrative remedies upon appeal from final agency action, except where exhaustion is expressly required by statute or rule." *Martinez v. United States*, 333 F.3d 1295, 1305 (Fed. Cir. 2003) (en banc). Thus, while the APA "explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule," *Darby v. Cisneros*, 509 U.S. 137, 147 (1993), "'it would be inconsistent with the plain language of § 10(c) for courts to require litigants to exhaust *optional* appeals as well,'" *Martinez* 333 F.3d at 1305 (emphasis added) (quoting *Darby*, 509 U.S. at 147).

Given the APA's categorical preclusion of requiring exhaustion of optional administrative remedies, it can hardly be "appropriate" under § 2637(d) for the CIT to do so in such cases. To read the latter otherwise would invest authority in this tribunal that no district court possesses, and thereby render the CIT an island unto itself in the sea of APA law—to say nothing of creating an unnecessary conflict between the two statutes. *Cf.* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, at 252 (2012) ("[L]aws dealing with the same subject—being *in pari materia* (translated as 'in a like manner')—should if possible be interpreted harmoniously.").

The better reading of § 2637(d) is that whether demanding exhaustion in any given case is "appropriate" turns on the legal regime governing the asserted cause of action, insofar as it speaks to the question. *Cf. Darby*, 509 U.S. at 144–45 ("Whether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether *Congress has provided otherwise*, for 'of "paramount importance" to any exhaustion inquiry is congressional intent.'") (emphasis added and quoting *McCarthy v.*

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[15] This "somewhat difficult" provision, 33 Wright & Miller, *Federal Practice and Procedure* § 8363 (2d ed. June 2024 update), states as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section *whether or not there has been presented or determined* an application for a declaratory order, *for any form of reconsideration*, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704 (emphasis added). "The last sentence . . . indicates that, subject to two exceptions, the availability of intra-agency review does not affect whether an action is 'final' for purposes of applying the APA's cause of action." 33 Wright & Miller, § 8363. Those exceptions are when (1) "some other statute governing review of a particular agency's actions might provide otherwise," and (2) "the agency requires" an intra-agency appeal "by rule" and "also provides that the action will not take effect during the pendency of such . . . appeal." *Id.*

Madigan, 503 U.S. 140, 144 (1992)); *see also Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007) ("Where the issue of exhaustion of administrative remedies *is not* governed by a particular statutory provision or an overall statutory scheme, the decision whether to require exhaustion in a particular case is a matter committed to the discretion of the trial court . . . .") (emphasis added).[16] Such a reading harmonizes § 2637(d), which only requires exhaustion "where appropriate," with the relevant statutory framework.

Where, as here, that framework does provide otherwise, § 2637(d) is no license—much less a directive—for the CIT to compel exhaustion.[17] *Cf. Calvert*, 654 F. Supp. 3d at 1346 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates.")).

But when the statutory framework creating the cause of action is silent, it is long settled that "parties [must] exhaust prescribed administrative remedies before seeking relief from the federal courts." *McCar thy*, 503 U.S. at 144–45 (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 & n.9 (1938)). As there is no indication to the contrary, § 2637(d) must be read as ratifying that preexisting

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[16] In *Corus Staal*, an antidumping case—where the relevant statutory regime is silent about exhaustion—the Federal Circuit observed that § 2637(d) "indicates a congressional intent that, *absent a strong contrary reason*, the [CIT] should insist that parties exhaust their remedies before the pertinent administrative agencies." 502 F.3d at 1379 (emphasis added). When the statutory cause of action expressly precludes requiring exhaustion of optional administrative remedies, as the APA does, that's more than a "strong contrary reason"—it's a command.

[17] *But see Ninestar Corp. v. United States*, 687 F. Supp. 3d 1308, 1323–25 (CIT 2024), where in a careful and thoughtful opinion the court reached the contrary conclusion. It reasoned that "Section 2637 is the statute here that 'expressly requires' exhaustion and, therefore, exempts CIT cases from the APA default rule of no prudential exhaustion." *Id*. at 1325 (brackets omitted; citing *Corus Staal*, 502 F.3d at 1379, and quoting 5 U.S.C. § 704).

The former statute, however, only requires exhaustion "where *appropriate*." 28 U.S.C. § 2637(d) (emphasis added). The APA's preclusion of compelling exhaustion of optional administrative remedies resolves whether it's "appropriate" to do so. Moreover, rather than harmonizing the two statutes, reading 2637(d) as overriding the APA's prohibition negates the latter altogether. It also produces the anomalous result of suspending—uniquely in the CIT—the laws of jurisprudential physics that govern APA cases in district courts nationwide.

Finally, *Ninestar*'s reliance on the general/specific canon to interpret § 2637(d) as overriding 5 U.S.C. § 704, *see* 687 F. Supp. 3d at 1325, is misplaced. That canon only applies "when conflicting provisions simply *cannot* be reconciled . . . ." Scalia & Garner, at 193 (emphasis added). As discussed above, it *is* possible to reconcile the two statutes by reading "where appropriate" in § 2637(d) as pointing to the applicable substantive law—here, the APA—to determine whether requiring exhaustion is "appropriate."

doctrine.[18] *See United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 900 (11th Cir. 2003) ("We presume that Congress legislates against the backdrop of established principles of state and federal common law, and that when it wishes to deviate from deeply rooted principles, it will say so.") (citing *United States v. Texas*, 507 U.S. 529, 534 (1993)). And that body of law, of course, is subject to various defined exceptions, *see McCarthy*, 503 U.S. at 145–47, which determine whether exhaustion is "appropriate" in such cases.

In short, § 2637(d) neither adds to nor subtracts from the applicable substantive law (statutory, as with the APA, or judge-made doctrine where the statute creating the cause of action does not speak to the question) governing exhaustion in any given context. Instead, that substantive law necessarily determines whether requiring exhaustion is "appropriate."[19] Here, the APA tells us that the answer is "no" when the relevant regulations allow, but do not require, a party to seek reconsideration of final agency action.

But even if § 2637(d) were read to countermand the APA, the court would still find it inappropriate to require exhaustion here because doing so would deny CSI any remedy. As explained in *Calvert*, Customs will not honor an exclusion with respect to entries that have finally liquidated by the time an importer tenders it to the agency. *See* 654 F. Supp. 3d at 1334–35. Because all the California company's relevant entries have done so, *see id*. at 1336 n.8, even if on reconsideration Commerce were to reverse its denials based on evidence that U.S. Steel's promises were empty, the exclusions would be "worthless—the administrative equivalent of bounced checks." *Id*. at 1348. Insofar as § 2637(d) might otherwise mandate exhaustion despite the APA, that doctrine has no application when (as here) there is "some doubt as to whether the agency [is] empowered to grant effective relief." *McCarthy*, 503 U.S. at 147. The court therefore turns to the merits.

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[18] Congress enacted § 2637(d) in 1980. *See* Pub. L. 96–417, § 301, 94 Stat. 1727, 1735 (Oct. 10, 1980).

[19] Thus, § 2637(d) is analogous to 28 U.S.C. § 2643(c)(1), which enables the CIT to grant injunctive relief "that is appropriate in a civil action." As explained in *Calvert*, whether such relief is "appropriate" must be determined by reference to "the specific 'requirements of equity practice with a background of several hundred years of history'" rather than unpredictable idiosyncratic considerations. 654 F. Supp. 3d at 1346 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). Neither statute imbues the CIT with authority to deviate from statutory law and doctrine governing district courts. *Cf.* 28 U.S.C. § 1585 (stating that the CIT "shall possess all the powers in law and equity of, or as conferred by statute upon, a district court").

IV

A

Post-remand, CSI only contests Commerce's denials of 31 of its 2018 requests, which total 1.373 million metric tons. *See* ECF 103, at 4 n.2 & Appendix 1 (identifying challenged denials); ECF 144, at Annex p. 1 (stipulation by the parties regarding tonnage). It argues that the Department ignored evidence that U.S. Steel could not supply most of this amount because the latter "needed the slab capacity to meet its *own* needs." ECF 103, at 22 (emphasis in original). To meet those internal requirements, the latter itself "import[ed] slab in 2017 and 2018." *Id*.

The government and *amicus* do not directly respond to this point. Instead, they argue at length that Commerce only needed to consider each request in isolation and it reasonably concluded that U.S. Steel could supply the amount of slab specified in any given application. *See* ECF 108, at 27–31 (government); ECF 117, at 15 (*amicus*). As the government puts it, "CSI does not contest that [the Pennsylvania company] had capacity to produce enough steel to cover any *individual* request." ECF 108, at 29 (emphasis added). That is, the California company didn't dispute the obvious.

But "what is reasonable depends on the context." *Coal. of Am. Mfrs. of Mobile Access Equip. v. United States*, Ct. No. 22–00152, Slip Op. 24–66, at 11, 2024 WL 2796654, at *4 (CIT May 31, 2024) (quoting *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991)). Here, CSI clarified to Commerce that it sought exclusions for 85 percent of its production capacity (2.3 million metric tons). By not considering whether U.S. Steel carried its burden of showing that it could and would supply *that* amount, the Department acted unreasonably.

The applicable regulation reinforces this conclusion. It required the Pennsylvania producer to demonstrate that it could provide slab "in a sufficient and *reasonably available* amount." 15 C.F.R. Pt. 705 Supp. 1(c)(5) (emphasis added).[20] Highly relevant to whether it could do so is the extent to which it "overcomitt[ed]" its "current or future capacity" to "*users of the article other than the applicant*," 83 Fed. Reg. at 46,037 (Comment (f)(6)(iii)(A) and agency response) (emphasis added)—necessarily including itself as well as its other customers. According to CSI, U.S. Steel's own internal demands for slab pre-

[20] Commerce was surely correct that an objector's refusal to buy otherwise-available slab based on "economic reasons" such as price and transportation costs is not a reason to grant an exclusion. Appx01410. After all, the entire purpose of the Section 232 tariffs is to encourage the purchase of domestic steel. But CSI argues, *see* ECF 103, at 21 n.46—and the court agrees—that slab is not "reasonably available" insofar as an objector simply declines to put it on the market.

vented it from selling significant quantities in the American market, Appx06683, which is why the latter's total sales in that market were only 330,693 metric tons, Appx06675—a small fraction of the 2.3 million metric tons for which the former sought exclusions.

By not addressing these questions, Commerce "entirely failed to consider . . . important aspect[s] of the problem," *State Farm*, 463 U.S. at 43, which requires a remand for it to undertake that analysis. The agency must step back and consider not just the individual trees (each submission in isolation) but also the forest (the aggregate of those applications). In so doing, it must ask whether U.S. Steel carried its burden of showing that it could and would provide the total amount represented by CSI's requests (now reduced to 1.373 million metric tons).

The government and *amicus* both point to evidence that CSI declined to buy the maximum available under the companies' contract. *See* ECF 108, at 34 (government); ECF 117, at 19 (*amicus*). That evidence supports Commerce's denial of the exclusions for the quantity covered by that agreement. But it also begs the question whether U.S. Steel, in view of its *own* internal needs, its relatively limited sales in the domestic market, and its commitments to other customers, demonstrated that it could and would sell the California company *all* the tonnage for which the latter now seeks relief. On remand, the agency must consider these issues.[21]

CSI also challenges the finding that U.S. Steel could timely provide slab. It points to the latter's surrebuttal admission that it could not supply any more than the contract amount of 9,000–14,000 metric tons per month until the "4th quarter 2018." *See* ECF 102, at 23 (citing Appx06787 n.1).[22] Thus, the Pennsylvania company "implicitly acknowledged that it could not 'produce and deliver' any new steel slabs 'within eight weeks' of its June 2018 objections as required by the regulation." *Id*. at 28 (quoting 15 C.F.R. Pt. 705 Supp. 1(d)(4); 83

[21] It must do in light of an objector's burden of "clearly identify[ing], and provid[ing] support for, its opposition to the proposed exclusion, *with reference to the specific basis identified in*, and the support provided for, the . . . request." 15 C.F.R. Pt. 705 Supp. 1(d)(4) (emphasis added).

[22] U.S. Steel stated that it "has established a slab supply contract with [CSI] for [9,000–14,000 metric tons per month] through 2019. [The latter] indicated that they were not comfortable with a higher volume commitment in the contract. [The former] *has more steel available to sell them than the contract quantity as early as the 4th quarter 2018*." Appx06787 n.1 (emphasis added).

Fed. Reg. at 46,038).[23] Commerce failed to address this concession, which bore on another vital aspect of the problem—U.S. Steel's ability, whatever its capacity to produce and willingness to sell slab, to *timely* deliver the 1.373 million metric tons for which CSI seeks exclusions.

Neither the government nor the *amicus* confronts this issue, even though it's front and center in CSI's brief. *See* ECF 103, at 23, 27–28. The court therefore remands for the Department to reconsider its denials for tonnage beyond the companies' contract limit given U.S. Steel's acknowledgment that it could not deliver beyond that amount until the fourth quarter of 2018—more than eight weeks after its California customer sought the exclusions.

B

As to its 14 requests now at issue for 2020, CSI argues that "the uncontroverted evidence . . . established that U.S. Steel could not provide [it] with 425k MTs of slab in 2020." ECF 103, at 29.[24] In support of this proposition, it asserts that its Pennsylvania supplier "could not and did not provide the slab [it] needed" in 2019. ECF 103, at 30. As a result, that year it "was only able to procure [317,000] MTs of slab—13 percent of its utilization target—from U.S. Steel." *Id.* (citing Appx22883).[25]

But as Commerce explained, CSI did "not address or rebut U.S. Steel's claims that it was [the former's] decision not to extend its contract . . . into 2020, nor to purchase via spot sales . . . in late 2019." Appx01017. This evidence, on which the Department reasonably relied, supports the inference that the California company *chose* to limit the slab obtained from its Pennsylvania supplier to 317,000 metric tons in 2019.

CSI's argument that U.S. Steel would only sell limited quantities of slab in 2020 fares no better. The former contends that "from January 2020 through June 2020, [the latter] only supplied [it] with 82k MTs of slabs—a miniscule [portion] of its needs for target utilization." ECF 102, at 30 (citing Appx22957). But the cited record page does not

[23] The parties have since stipulated that CSI submitted the 31 requests still at issue between April 29, 2018, and May 8, 2018, and that U.S. Steel filed the corresponding objections between June 14, 2018, and July 5, 2018. *See* ECF 144, Annex p. 1.

[24] As described above, in 2020 CSI submitted 23 exclusion requests for 425,000 metric tons of slab. Now, however, it states that it only seeks relief concerning 14 of them, *see id.* at 4 n.2 & Appendix 2, which according to the parties total 278,800 metric tons, *see* ECF 144, at Annex p. 2.

[25] CSI's brief uses the figure of 294,000 metric tons, but the cited record page does not support that assertion. Later, however, it contends that in 2019 U.S. Steel supplied it with 317,000 metric tons of slab. ECF 102, at 32 (citing Appx22956–22957). The cited material supports that number. The court accordingly substitutes 317,000 metric tons for the figure used on page 30 of CSI's brief.

explain *why* the Pennsylvania company's sales were so limited. The record supports Commerce's finding that it was because of "CSI's decision to not purchase the full volume offered by U.S. Steel in 2020." Appx01016. As the California customer's own rebuttal filing said, it agreed to "all spot slab offers from U.S. Steel in 2018 *and through the third quarter 2019*." Appx22931 (emphasis added). The unstated implication, confirmed by an email communication in the record, *see* Appx22958, is that the former *stopped* agreeing to "all spot offers" in the fourth quarter of 2019 and beyond.

Relatedly, CSI asserts that historical data confirmed that U.S. Steel "could not furnish 425k MTs . . . in 2020." ECF 103, at 32. Given the former's abandonment of nine of its exclusion requests for that year, however, the relevant question now is whether the latter could have provided 278,800 metric tons of slab. *See* note 24.

But Commerce looked at the historical data, *see* Appx01016–01017, which showed that U.S. Steel sold CSI 317,000 metric tons of slab in 2019, ECF 102, at 32. As the Department explained, that number would have been considerably higher if the latter had *not* declined to renew the contract in August 2019 and had *not* declined spot offers in the fourth quarter. *See* Appx01016–01017. But even with those CSI-imposed limitations, that total exceeds the 278,800 metric tons for which the company now seeks exclusions. Thus, the agency reasonably explained the basis for its conclusion that "U.S. Steel produces or could produce" what CSI needed in 2020.

CSI also attacks what it characterizes as Commerce's failure to address evidence that plant shutdowns compromised U.S. Steel's ability to produce slab. It points to record pages showing that its Pennsylvania supplier idled production at three plants that the latter "stated in its objections would be the source of the slabs it claimed it could [provide]." ECF 103, at 30–31 (citing Appx22885, Appx22912, Appx22908). But the Department did consider this material, explaining that the former did not provide any information showing that "U.S. Steel cannot manufacture the requested quantity of the product at the three plants it has listed." Appx01016–01017. The agency gave "greater weight" to the latter's certification that it could produce the slab at these facilities because the company was "in a better position than CSI to know the limits of its own production schedule and ability to produce the full volume of the requested product." Appx01017.

Finally, as for whether U.S. Steel could timely supply the slab that CSI needed in 2020, recall that there is no dispute on this record that "[a]lmost 50%" of the former's deliveries in 2018–2019 were delivered more than eight weeks after the order was placed. Appx22928. The

latter attacks Commerce's reliance on the Pennsylvania company's "'you didn't ask for priority delivery' defense," ECF 103, at 35, indignantly characterizing it as "ridiculous," *id*.

Ridiculous it may be, but the place to assert that argument was before the Department. Instead, even though U.S. Steel raised its priority-delivery defense in its objection, *see* Appx22914, CSI's rebuttal didn't respond. Given that the latter didn't contest that defense, the agency reasonably relied on it, and it's too late now to complain that it did so. "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Deseado Int'l, Ltd. v. United States*, 600 F.3d 1377, 1380–81 (Fed. Cir. 2010) (quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952)).[26]

Regarding its denials of the 14 exclusion requests for 2020 that CSI still contests, the agency reviewed all the relevant evidence before it and reasonably explained the basis for finding that U.S. Steel carried its burden of showing that it could and would timely supply 278,800 metric tons those submissions encompass. The court therefore sustains those denials.

V

Where, as here, the court finds that "agency action violates the APA, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Calvert*, 654 F. Supp. 3d at 1349 n.28 (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). But even if on remand Commerce reverses itself and grants CSI's 31 requests from 2018 that the court returns to the Department today, those exclusions will be useless. That's because the company's entries have all long since liquidated, *see id.* at 1336 n.8, and under the administrative regime, "Customs will not honor an exclusion as to entries that have finally liquidated by the time an importer seeks relief," *id*. at 1335.

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[26] CSI also challenges Commerce's statement that the company failed to present any evidence "that demonstrates that current and future production and deliveries are impacted by any past delivery issues." ECF 103, at 35–36 (quoting Appx01017). The court agrees that this "impermissibly shifts the burden" of demonstrating that the exclusion should be denied from the objector to the requester. *Id*. at 36. But because the Department also reasonably relied on U.S. Steel's uncontested "priority-delivery" defense, the agency's burden-shifting is harmless error. *See* 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."); *Oracle Am., Inc. v. United States*, 975 F.3d 1279, 1290–91 (Fed. Cir. 2020) ("[P]rinciples of harmless error apply to judicial review of agency action generally. A remand is unnecessary when . . . there is no reason to believe that the decision would have been different" even without the error.).

Commerce, however, "may not structure its scheme to administer Section 232 exclusions to thwart effectual judicial review of unlawful agency action." *Id*. at 1348. Under the APA, the court can "fashion[] equitable relief [to] ensure the vindication" of a plaintiff's rights. *Id.* at 1349 (quoting *Cobell v. Norton*, 240 F.3d 1081, 1108 (D.C. Cir. 2001)). CSI seeks such relief. *See* ECF 2, at 20.

An injunction is "appropriate" under 28 U.S.C. § 2643(c)(1) when (1) a plaintiff is "threatened with irreparable injury"; (2) it "ha[s] no adequate remedy at law for that loss"; (3) "considering the balance of hardships, a remedy in equity [is] warranted"; and (4) "the public interest would not [be] disserved by such relief." *Calvert*, 654 F. Supp. 3d at 1348 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). "When the defendant is the government, factors (3) and (4) merge." *Anatol Zukerman & Charles Krause Reporting, LLC v. United States Postal Serv.*, 64 F.4th 1354, 1364 (D.C. Cir. 2023) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

CSI's request for an injunction satisfies the *eBay* elements. Absent such relief requiring Commerce to direct Customs to honor any exclusions granted on remand, the company will be unable to recover its Section 232 duties, an irreparable injury. It has no other adequate remedy at law for that loss. The harm is self-evident, and the government "has no legitimate interest in collecting [duties]" to which it has no legal claim. *Oman Fasteners, LLC v. United States*, Ct. No. 22–00348, Slip Op. 23–17, at 38, 2023 WL 2233642, at *13 (CIT, as amended Feb. 22, 2023), *appeal pending*, No. 23–1661 (Fed. Cir.); *cf. Am. Signature, Inc. v. United States*, 598 F.3d 816, 830 (Fed. Cir. 2010) ("The public interest is served by ensuring that governmental bodies comply with the law, and interpret and apply trade statutes uniformly and fairly."). Thus, the government would suffer no cognizable harm from refunding money owed to the company.

The court therefore awards injunctive relief in addition to remanding for reconsideration. Insofar as Commerce grants any exclusions on remand, it must instruct Customs to honor them by reliquidating entries and restoring CSI "to the position[it] would have occupied had [its] original requests been granted." *Calvert*, 654 F. Supp. 3d at 1349.

* * *

The court sustains 162 of Commerce's exclusion denials and remands the remaining 31 for reconsideration. A separate order and injunction will issue. *See* USCIT R. 58(a).

Dated: November 13, 2024
New York, NY

/s/ M. Miller Baker
JUDGE

Slip Op. 24–135

HYUNDAI STEEL COMPANY, Plaintiff, and GOVERNMENT OF THE REPUBLIC OF KOREA, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and NUCOR CORPORATION, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 23–00211
PUBLIC VERSION

[Granting in part and denying in part Plaintiff's motion for judgment on the agency record.]

Dated: December 12, 2024

Brady Warfield Mills, *Donald Bertrand Cameron, Jr.*, *Eugene Degnan*, *Jordan L. Fleischer*, *Julie Clark Mendoza*, *Mary Shannon Hodgins*, *Nicholas C. Duffey*, *Rudi Will Planert*, and *Ryan R. Migeed*, Morris, Manning & Martin, LLP, of Washington D.C., for Plaintiff, Hyundai Steel Company.

Yujin Kim McNamara, *Daniel Martin Witkowski*, *Devin Scott Sikes*, and *Sung Un K. Kim*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington D.C., for Plaintiff-Intervenor, Government of the Republic of Korea.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. Also 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 is *Jesus Nieves Saenz*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Alan Hayden Price, *Adam Milan Teslik*, *Christopher Bright Weld*, *Derick G. Holt*, *Enbar Toledano*, *Maureen Elizabeth Thorson*, *Paul A. Devamithran*, and *Theodore Paul Brackemyre*, Wiley Rein, LLP, of Washington D.C., for Defendant-Intervenor, Nucor Corporation.

OPINION AND ORDER

Kelly, Judge:

Before the Court is a motion for judgment on the agency record pursuant to United States Court of International Trade Rule 56.2, filed by Plaintiff Hyundai Steel ("Hyundai"). *See generally* Pls.' Mot. J. Agency Rec., Mar. 12, 2024, ECF No. 30 ("Hyundai Mot."); *see also* USCIT R. 56.2. Specifically, Hyundai argues that (1) the U.S. Department of Commerce's ("Commerce") determination that the provision of electricity for less than adequate remuneration ("LTAR") program ("Electricity Program") is de facto specific under Section 771(5A)(D)(iii)(III) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(5A)(D)(iii)(III),[1] is unsupported by substantial evidence and otherwise not in accordance with law, and (2) Commerce's determination not to provide the Government of Korea ("GOK") with an

[1] 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.

opportunity to submit the 2021 Korea Electric Power Corporation ("KEPCO") cost data, and to instead rely on facts otherwise available, is an abuse of discretion, unsupported by substantial evidence and otherwise not in accordance with law.[2] *See generally* Hyundai Mot. For the reasons that follow, Hyundai's motion is granted in part and denied in part.

BACKGROUND

On April 12, 2022, Commerce initiated an administrative review of the Countervailing Duty ("CVD") order on Certain Cut-to-Length Carbon-Quality Steel Plate for the 2021 POR. *See Initiation of Anti-dumping and Countervailing Duty Administrative Reviews*, 87 Fed. Reg. 21,619 (Dep't Commerce Apr. 12, 2022). Commerce evaluated many subsidy programs, including the Electricity Program. *Certain Cut-to-Length Carbon-Quality Steel Plate From the Republic of Korea: Preliminary Results and Preliminary Intent To Rescind, in Part, the Countervailing Duty Administrative Review; 2021*, 88 Fed. Reg. 13,433 (Dep't Commerce, March 3, 2023) ("*Preliminary Results*"), PD 186, bar code 4347830–03 (Mar. 6, 2023) and accompanying Prelim. Issues & Decision Mem. ("Prelim. Decision Memo.") at 24–30, PD 183, bar code 4347830–02 (Feb. 28, 2023).[3]

On May 2, 2022, Hyundai was named as the sole mandatory respondent in the instant administrative review. Resp't Select. Memo., PD 21, bar code 4237020–01 (May 2, 2022). Commerce issued an initial questionnaire to the GOK, requesting information relevant to the Electricity Program including the 2021 cost data report filed annually by the administering agency, KEPCO. Commerce Initial Questionnaire at 17–22, PD 22, bar code 4237266–01 (May 2, 2022). The GOK responded to the Initial Questionnaire on June 27, 2022, explaining that the 2021 cost data had not yet been completed. [GOK] Quest. Resp. at 27, 32, 35, PD 60, CD 29, bar code 4256088–01 (June 27, 2022) ("GOK IQR").

The GOK did not provide the 2021 cost data, but instead submitted KEPCO's 2020 cost and sales data that was filed in 2021. *Id.* at 45 (citing Response from Yoon & Yang LLC To Sec. Of Commerce Pertaining to GOK IQR, CD 65, bar code 4255901–37 (June 27, 2022)). On January 11, 2023, Commerce issued a supplemental questionnaire, once again requesting that the GOK provide the 2021 cost data.

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[2] Where "necessary information is not available on the record," Commerce "shall, subject to Section 1677m(d), use the facts otherwise available" to fill the gap in information and reach a determination. 19 U.S.C. § 1677e(a).

[3] Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices, and all references to such documents are preceded by "PD" or "CD" to denote public or confidential documents.

Commerce Supp. Quest. at 2, PD 161, bar code 4330479–01 (Jan. 12, 2023) (Commerce Supp. Quest.). On January 30, 2023, the GOK explained that it was "unable to submit a revised Exhibit E-9 reflecting the cost and sales data sheet for 2021." *Id.* On January 31, 2023, for the third time, Commerce requested the 2021 cost data and an estimated date for when the data would be available. Commerce Sec. Supp. Quest. at 1, PD 174, bar code 4335935–01 (Jan. 31, 2023) (Commerce Sec. Supp. Quest.). The GOK responded by stating it was unable to provide the data or a date on which the data would be available. [GOK] Sec. Supp. Resp. at 1–2, PD 175, bar code 4338189–01 (Feb. 6, 2023) ([GOK] Sec. Supp. Resp.).

Commerce published its preliminary results on March 3, 2023, assigning Hyundai a net countervailable subsidy rate of 1.10 percent. *Preliminary Results*, 88 Fed. Reg. 13,433 and accompanying Prelim. Decision Memo. at 24–30. Without the 2021 data, Commerce relied on facts otherwise available to determine whether Hyundai benefited from the Electricity Program. Prelim. Decision Memo. at 10–11.

On March 14, 2023, the GOK emailed Commerce stating that the 2021 cost data was available but only "substantially complete" and "still subject to review," however, the GOK did not submit the data at that time. *See* Memorandum from David Lindgren, Program Manager, AD/CVD Operations, Office III to Interested Parties, 'Countervailing Duty Administrative Review of Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Communication with Counsel', PD 194, bar code 4374960–01 (May 10, 2023) ("Counsel Comm."). On April 26, 2023, the GOK again requested that Commerce re-issue a questionnaire requesting the 2021 cost data. [GOK] Req. Supp. Quest., PD 190, bar code 4369276–01 (Apr. 26, 2023). In response, Commerce explained that despite requesting the 2021 data multiple times, the GOK never provided it; thus, Commerce declined to re-solicit the 2021 cost data a fourth time. *See* Counsel Comm. at 1.

On September 7, 2023, Commerce published its final determination. *Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea; 2021*, 88 Fed. Reg. 61,509 (Dep't Commerce Sep. 7, 2023) (final results of CVD review), PD 225, bar code 4424955–03 (Sep. 7, 2023) ("*Final Results*"), and accompanying Issues and Decision Memo., PD 222, bar code 4425793–01 (Aug 31, 2023) ("Final Decision Memo."). Ultimately, Commerce continued to rely on facts otherwise available, assigning Hyundai a net countervailable subsidy rate of 1.08 percent. Final Decision Memo. at 8, 10–15.[4]

[4] On December 13, 2023, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination. *See* ECF No. 24 at 2–3.

On March 12, 2024, Hyundai filed the instant motion for judgment on the agency record, arguing that Commerce's final determination is unsupported by substantial evidence and otherwise not in accordance with law. *See generally* Hyundai Mot. On April 2, 2024, the GOK filed a brief in support of Hyundai's motion for judgment on the agency record, arguing that Commerce arrived at its determination that the GOK provided electricity for LTAR due to a "flawed finding that the provision of electricity is de facto specific and an inaccurate cost-recovery analysis stemming from Commerce's refusal to accept the data needed to reach an accurate decision." [GOK's] Br. Supp'n [Hyundai Mot.] at 1, Apr. 2, 2024, ECF No. 32 ("GOK Br."). On June 3, 2024, Defendant filed its response to Hyundai's motion for judgment on the agency record, arguing Commerce's determination should be sustained as lawful and is supported by substantial evidence. *See generally* Def. Resp. [Hyundai Mot.], June 03, 2024, ECF No. 34 ("Def. Resp."). On June 25, 2024, Nucor similarly filed a brief supporting Commerce's determination. [Nucor's] Resp. [Hyundai Mot.], June 25, 2024, ECF No. 38 ("Nucor Br."). On July 27, 2024, Hyundai filed its reply. *See generally* [Hyundai's] Reply Br. Supp'n [Hyundai Mot.], July 22, 2024, ECF No. 42 ("Hyundai Reply"). On Sept. 4, 2024, the Court granted Plaintiffs' motion for oral argument. *See* Order Granting Motion for Oral Argument, Sept. 4, 2024, ECF No. 47. On November 19, 2024, the Court held oral argument. *See* Oral Argument, Nov. 19, 2024, ECF No. 49.

JURISDICTION AND STANDARD OF REVIEW

This Court exercises jurisdiction over this action contesting the final determination in an administrative review of an antidumping duty order pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). A determination rendered by Commerce will be sustained 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). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). An abuse of agency discretion occurs when the agency bases a determination on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or the decision represents an unreasonable judgment when weighing factors. *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005).

DISCUSSION

I. Specificity

Defendant and Defendant-Intervenor contend that Commerce's final determination is supported by substantial evidence and in accordance with law because Commerce reasonably determined that the steel industry consumed a disproportionately large amount of electricity under the Electricity Program, and thus, received a de facto specific countervailable subsidy. Def. Br. at 24; Nucor Br. at 3; *see* Final Decision Memo. at 15–16. Plaintiff and Plaintiff-Intervenor contend that the Electricity Program is not de facto specific because the steel industry did not receive a disproportionately large amount of the subsidy alone, or when grouped together with three other industries, making Commerce's determination unsupported by substantial evidence and not in accordance with law. Hyundai Reply at 14; GOK Br. at 3. For the following reasons, Commerce's determination is remanded for further explanation or reconsideration.

Under 19 U.S.C. § 1677(5), a subsidy is countervailable when a government authority provides a financial contribution that confers a benefit upon the recipient which is deemed to be specific. 19 U.S.C. § 1677(5)(B) & (5A). A government can provide financial contributions in several ways, including but not limited to, the direct transfer of funds, provision of goods or services, or foregoing revenue;[5] however, the provision of general infrastructure does not constitute a financial contribution for the purposes of 19 U.S.C. § 1677(5)(E).[6] *See* 19 U.S.C. § 1677(5)(D)(iii); *see also* 19 C.F.R. § 351.511(d); SAA at 4242. "General infrastructure" is "infrastructure created for the broad societal welfare of a country, region, state or municipality." 19 C.F.R. § 351.511(d).[7]

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[5] The term "financial contribution" means "(i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees; (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income; (iii) providing goods or services, other than general infrastructure; or (iv) purchasing goods." 19 U.S.C. § 1677(5)(D).

[6] Relatedly, Commerce's specificity analysis functions "as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout the economy" such as "public highways and bridges." Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA"), H.R. Rep. No. 103–316, Vol. 1 at 873, reprinted in 1994 U.S.C.C.A.N. 4040, 4242 (quoting *Carlisle Tire & Rubber Co v. U.S.*, 5 CIT 229, 233 (Ct. Int'l Trade 1983)).

[7] In the case where goods or services are provided, a benefit shall be treated as conferred where the goods or services are provided for less than adequate remuneration, or in the case where goods are purchased, for more than adequate remuneration. 19 U.S.C. § 1677(5)(E). The adequacy of remuneration shall be determined in relation to: (1) prevailing market conditions for the good or service being provided; or (2) the goods being purchased in the country which is subject to the investigation or review; "Prevailing market conditions" include: (1) price; (2) quality; (3) availability; (4) marketability; (5) transportation; and (6) other conditions of purchase or sale. *Id.*

A subsidy may be specific as a matter of law or as a matter of fact. 19 U.S.C. § 1677(5A)(D). A domestic subsidy is de facto specific if, inter alia[8] "(III) an enterprise or industry receives a disproportionately large amount of the subsidy." 19 U.S.C. § 1677(5A)(D)(iii)(III).[9] The term disproportionate refers to "having or showing a difference that is not fair, reasonable, or expected," and disproportionality exists when something is "too large or too small in relation to something [else]." *See Disproportionate*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/thesaurus/disproportionate (last visited Dec. 9, 2024). Thus, when analyzing whether an industry or group of industries receives a disproportionate amount of the benefit conferred by the subsidy pursuant to 19 U.S.C. § 1677(5A)(D)(iii), receipt of a greater monetary benefit from the program than others is not determinative of disproportionality. *AK Steel Corp. v. United States*, 192 F.3d 1367, 1385 (Fed. Cir. 1999). Rather, the disproportionality inquiry involves a case-by-case analysis which assesses benefits, not in relation to the benefits of others, but in relation to some other comparator depending on the circumstances. *Id.* at 1385;[10] *see also Royal Thai Government v. United States*, 436 F.3d 1330, 1336 (Fed. Cir.

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[8] A subsidy is specific as a matter of fact if "(I) the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number; (II) an enterprise or industry is a predominant user of the subsidy; (III) an enterprise or industry receives a disproportionately large amount of the subsidy; and (IV) the manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others." 19 U.S.C. § 1677(5A)(D)(iii).

Although not at issue here, a subsidy is specific as a matter of law where an authority or legislation expressly limits access to a subsidy to a sufficiently small number of enterprises, industries, or groups. 19 U.S.C. § 1677(5A)(D)(i).

[9] For the purposes of determining whether a specific subsidy exists under Section 1677(5A)(D), any reference to an enterprise or industry includes a group of such enterprises or industries. 19 U.S.C. § 1677(5A). In determining whether a subsidy is provided to a group of enterprises or industries, Commerce is not required to determine whether there are shared characteristics among the enterprises or industries. 19 C.F.R. § 351.502(b). When considering whether a subsidy is specific, Commerce considers (1) the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy; and (2) the length of time the subsidy program has been in operation. 19 U.S.C. § 1677(5A)(D).

[10] *AK Steel* involved a tax exemption program that allowed some companies to revalue assets without meeting the stringent requirements in the Asset Revaluation Act. *AK Steel*, 192 F.3d at 1382–83. The respondent, a steel company, revalued its assets under the program, resulting in a drastic increase in asset value. *Id.* at 1383. Commerce determined that while the steel company received a large benefit, it was not disproportionate to the benefit other producers received from the program. *Id.* at 1384–85. The Court held this proportionality determination was reasonable because it relied on "relative percentage benefit rather than on the absolute benefit conferred on [the party.]" *Id.* at 1385. Although the domestic producers in that case argued that Commerce should analyze "disproportionality by looking at the percentage of the total benefit of a subsidy program accruing to a particular company or industry," the Court rejected that analysis, as it "could produce an untenable result, i.e., that a benefit conferred on a large company might be disproportionate merely because of the size of the company." *Id.*

2006) (stating that Commerce properly exercised the latitude afforded to it when comparing relative percentage benefits rather than absolute benefits).[11]

Commerce's determination that the Electricity Program subsidy is de facto specific because the steel industry and three other industries received a "disproportionately large amount of the subsidy" within the meaning of 19 U.S.C. § 1677(5A)(D)(iii)(III) is not supported by substantial evidence. Final Decision Memo. at 15–16. Commerce fails to provide an explanation for its determination that the benefit received by a group of entities and industries it identifies is disproportionate. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Nowhere does Commerce identify to what the benefit is disproportionate. Commerce simply concludes that the GOK data on the record demonstrates "the steel industry and three other industries combined, consume a disproportionately large amount of electricity in Korea."[12] Final Decision Memo. at 16. Commerce concedes that Article 14 of the GOK's Electricity Business Law provides KEPCO must supply electricity to all with automatic eligibility. *Id.* at 15. The four industries Commerce grouped together specifically benefit according to usage. *Id.* at 15–16; *see also* GOK IQR at 30, Ex. E-10 (explaining that the Electricity Program is based on usage and the electricity prices are set using a standard pricing mechanism ensuring that no one company or industrial user receives a more preferential rate for electricity). Yet, Commerce elides the reality that programs designed to confer benefits on usage levels will necessarily result in larger users receiving a proportionally larger percentage of the subsidy. Final Decision Memo. at 16. Disproportionality requires that an enterprise or industry is favored

[11] Both parties address *Bethlehem Steel Corp. v. United States*, 25 CIT 307 (Ct. Int'l Trade 2001). Although prior CIT cases do not bind this Court, they can be persuasive based upon their reasoning where they confront similar records. In *Bethlehem Steel*, the Court reviewed a program that granted discounts based on electricity usage, resulting in high discounts for steel companies. *Bethlehem Steel*, 25 CIT at 320. Commerce determined the program was not specific and the Court was asked to determine whether that decision was reasonable while also noting its obligation to give deference to Commerce's reasonable interpretation of "disproportionate". *Id.* at 308–09, 322–23. The Court took note of the steel industry's large consumption of electricity and concluded that although the steel industry's benefit was "disparate," it was not "disproportionate" to what other industries or entities received based on their usage. *Id.* at 322. In holding that disparity alone was insufficient to support a finding of disproportionality, the Court noted that a program designed to confer benefits based on usage levels will necessarily result in one or more groups receiving a greater share than another group, simply because of differences in usage. *Id.*

[12] The data relied upon by Commerce in its determination showed that the steel industry consumed [[ ]] of the total electricity consumption in Korea, and [[ ]] of the total industrial electricity consumption in Korea. *See* GOK IQR at 35–36. When viewing the steel industry's electricity consumption, togetherwith the three other industries Commerce relied on for its determination, the four industries combined consume [[ ]] of the total electricity consumption in Korea, and [[ ]] of the total industrial electricity consumption in Korea. *See id*.

in some way (*i.e.*, it receives more than its fair share). Commerce must explain how the combined industries it identifies benefit more than would be expected, based on their usage given that the subsidy in question is designed to confer benefits on usage levels, or in relation to some other comparator.

Moreover, Commerce must explain why these industries are grouped together for purposes of its analysis. At first glance one might conclude that Commerce's regulation specifically providing that it need not determine there are "shared characteristics" among the enterprises or industries grouped together for purposes of its specificity analysis would permit Commerce to randomly group industries when conducting a specificity analysis. *See* 19 C.F.R. § 351.502(b). However, in its preamble, Commerce makes clear that the regulation, consistent with the SAA, obviates the need for explanation only when the subsidies are not widely available. Countervailing Duties, 63 Fed. Reg. 65348–01, 65,357 (Dep't Commerce 1998) ("Preamble"); *see also* SAA at 873. In the preamble Commerce explained "there is no basis for adding the further requirement that subsidies that are not widely distributed are also confined to a group of enterprises or industries that share similar characteristics." Preamble at 65,357. Thus, where the number of recipients is limited, Commerce can nonetheless conclude that those recipients are the beneficiaries of a specific subsidy without showing that they share any characteristics. *See* 19 C.F.R. § 351.502(D). Here, the recipients are not limited. Final Decision Memo. at 15–16 (explaining that Commerce applied the disproportionality test because the Electricity Program was provided to numerous and diverse industries); *see also* GOK IQR at 208, Ex. E-4, Ex. E-10. Commerce asserts that, while Section 1677 and the regulations do not mandate any specific methodology when conducting a de facto analysis, it chose the four industries because they were the top industrial users of electricity in Korea. Def. Br. at 26–28; *see also* 19 U.S.C. § 1677(5A)(D)(iii); 19 C.F.R. § 351.502(D). Without more, Commerce's explanation is insufficient. Even where an agency has discretion to act it must act reasonably and explain itself. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Where a subsidy is widely distributed, Commerce cannot create a group to limit the subsidy for purposes of satisfying the specificity requirement without providing a rational basis for the grouping. *See* 19 U.S.C. § 1677(5A); *see also* SAA at 4242; *see also State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 48. Commerce's determination is not supported by substantial evidence and is remanded for further explanation or reconsideration.

II. Cost Data

Plaintiff and Plaintiff-Intervenor contend that Commerce's determination to reject KEPCO's 2021 cost data and rely on facts otherwise available is an abuse of discretion, unsupported by substantial evidence, and not in accordance with law. Hyundai Mot. at 21; GOK Br. at 10. Defendant and Defendant-Intervenor argue that Commerce's refusal to solicit additional factual information from the GOK and rely on facts otherwise available is supported by substantial evidence, not an abuse of its discretion, and in accordance with law. Def. Br. at 13; Nucor Br. at 9; *see* Final Decision Memo. at 9–12. For the reasons that follow, Commerce's decision to decline to re-issue the fourth questionnaire and apply facts otherwise available is sustained.

Commerce has broad authority to set and extend its deadlines for submissions of requested information. *SKF USA Inc. v. United States*, 33 CIT 1866, 1876 (Ct. Int'l Trade 2009). An abuse of agency discretion occurs when the agency bases a determination on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or the decision represents an unreasonable judgment when weighing factors. *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005). Commerce can also abuse its discretion if it refuses to accept updated data when there is ample time to verify or consider it, or if it departs from a consistent practice without a reasonable explanation. *Goodluck India Limited v. United States*, 11 F.4th 1335, 1342 (Fed. Cir. 2021) (citations and quotations omitted); *see e.g. Grupo Acerero S.A. De C.V. v. United States*, 698 F.Supp.3d 1320, 1333 (Ct. Int'l Trade 2024) (holding Commerce abused its discretion in denying an extension request after accepting the extension request of a similarly situated respondent). Commerce must consider "the interests of accuracy and fairness, and the burden imposed by the agency by accepting the late submission." *Goodluck India Ltd.*, 11 F.4th at 1342 (holding Commerce did not abuse its discretion in rejecting non-minor revised submissions); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208–09 (Fed. Cir. 1995) ("NTN") (holding Commerce abused its discretion when denying a request for a correction of a clerical error); *Timken U.S. Corp. v. United States*, 434 F. 3d 1345, 1357 (Fed. Cir. 2006) (expanding *NTN* to allow clarifications of clerical, methodology, and substantive errors depending on the amount of time Commerce had to consider the clarifications); *but see Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 C.I.T. 98, 123 (Ct. Int'l Trade 2012) (concluding Commerce abused its discretion denying an untimely separate rate certification early in the review process).

Commerce "will reject any untimely filed or unsolicited questionnaire response and provide, to the extent practicable, written notice stating the reasons for rejection." 19 C.F.R. § 351.301(c)(1). If factual information is submitted to rebut, clarify, or correct questionnaire responses, Commerce will "reject any untimely filed rebuttal, clarification, or corrections submission," and if insufficient time remains before the due date of the final determination, Commerce "may specify shorter deadlines under this section." 19 C.F.R. § 351.301(c)(1)(v). Further, Commerce may exercise its discretion in the rejection of untimely filed or unsolicited material. *See* 19 C.F.R. § 351.502(d).

Subject to 19 U.S.C. § 1677m(d), Commerce applies facts otherwise available in a countervailing duty case if (1) "necessary information is not available on the record" or (2) an interested party "withholds information that has been requested by [Commerce]," "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," or "significantly impedes a proceeding." 19 U.S.C. 1677e(a)(1)-(2)(A)-(C); *see also* 19 C.F.R. § 351.308(a).[13] When using facts otherwise available, Commerce must promptly inform parties of any deficiency in a questionnaire response and, "to the extent practicable, provide [...] an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle." 19 U.S.C. § 1677m(d); *see also* 19 U.S.C. § 1677e(a).

Here, Commerce reasonably declined to request cost information for a fourth time from the GOK and applied facts otherwise available. As explained above, Commerce issued an initial questionnaire to the GOK, requesting information regarding 2021 cost data filed annually by the administering agency, a supplemental questionnaire, and a subsequent third request for 2021 cost data. *See* Commerce Initial Quest. at 22, Commerce Supp. Quest. at 2; Commerce Sec. Supp. Quest. at 1. At that time, the GOK indicated it was unable to provide the data or a date on which the data would be available. [GOK] Sec. Supp. Resp. at 1–2. After Commerce had issued its preliminary decision, the GOK contacted Commerce offering the "substantially complete" 2021 cost data. Final Decision Memo. at 10.

Commerce explains that it declined "to solicit and analyze" the 2021 cost data the GOK offered because there would have been insufficient

[13] Commerce may make determinations based on facts otherwise available whenever "necessary information is not available on the record, an interested party [...] withholds or fails to provide information requested in a timely manner and in a form required or significantly impedes a proceeding, [or Commerce] is unable to verify submitted information." 19 U.S.C. 1677e(a)(1)–(2)(A)–(C); *see also* 19 C.F.R. § 351.308(a).

time to review the information and ensure that interested parties had an opportunity to comment before the deadline for issuing the final results. *Id.* at 10, 12. Additionally, Commerce would have had to evaluate the data, which might require supplemental questionnaires and allow interested parties time to comment. *Id.* at 11–12. Further, since Commerce would have been evaluating the revisions to the electricity pricing system for the first time, it may have had to conduct a post-preliminary analysis of the program, where parties would have been provided an opportunity to comment on the analysis in their briefs. *Id.* Commerce acted within its discretion to conclude that there was not enough time to properly review the late information before it had to issue its final results.[14] *See e.g. Yantai Timken Co., Ltd. V. United States*, 36 CIT 1741, 1755 (Ct. Int'l Trade 2007) (finding Commerce did not abuse its broad discretion to enforce time limits in rejecting supplemental information provided after the deadline).

Further, Commerce fulfilled its duty under Section 1677m(d) to allow the GOK to "remedy or explain" the deficiency in Commerce's original request for the 2021 cost data. *See* 19 U.S.C. 1677m(d). Commerce provided the GOK with multiple opportunities to submit the information before issuing its preliminary results. Final Decision Memo. at 10–12. The GOK offered to submit the data after the deadline. *Id.* at 10. Even when the GOK offered the data, it indicated the data had been compiled but was not complete. *Id.* at 10–11. Commerce explained it "generally does not consider information unless it is finalized and completed." *Id.* at 11. Section 1677m(d) does not compel Commerce to give a party that has intentionally submitted incomplete information a further opportunity to remedy and explain. *See Papierfabrik*, 843 F.3d at 1384. Therefore, because the KEPCO data was not submitted by the deadline and incomplete, Commerce's decision is reasonable on this record and in accordance with law.

CONCLUSION

For the foregoing reasons, the Court sustains Commerce's decision to decline to issue the fourth questionnaire and apply facts otherwise available to determine whether Hyundai benefited from the Electricity Program. Commerce's determination that the Electricity Program is de facto specific is remanded for further explanation or reconsideration. In accordance with the foregoing, it is

[14] Hyundai likens its situation to *American Honey Producers Association v. United States* ("AHPA"), where Commerce accepted financial statements at verification despite respondents' numerous delays, because Commerce determined they had complied with requests for information by indicating the financial statements would be provided when available. *AHPA*, 653 F.Supp.3d 1329, 1344 (Ct. of Int'l Trade 2023). However, in that case, Commerce accepted these financial statements not as new factual information, but for the purposes of verifying the accuracy of the accounting balances previously submitted. *Id.* at 1335.

ORDERED that the final results, *see* Final Results, are remanded for further explanation or reconsideration consistent with this opinion; and it is further

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

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

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

ORDERED that the parties shall file the joint appendix within 14 days after the filing of replies to the comments on the remand redetermination; and it is further

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

Dated: December 12, 2024
New York, New York

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

Slip Op. 24–138

CALIFORNIA STEEL INDUSTRIES, INC., Plaintiff, v. UNITED STATES, Defendant.

Ct. No. 21–00015-MMB

[The court unseals Slip Opinion 24–127 without redactions.]

Dated: December 13, 2024

ORDER

***Baker*, Judge:**

In this Administrative Procedure Act case brought under the court's residual jurisdiction, *see* 28 U.S.C. § 1581(i), Plaintiff California Steel, Inc. (CSI), challenges the Commerce Department's denials of its requests for exclusions from Section 232 national security tariffs on imported steel slab. The agency based those denials on objections proffered by U.S. Steel Corporation, including material that the latter denominated as confidential.[1]

After merits briefing, the court issued Slip Opinion 24–127 (ECF 145) under provisional seal.[2] Concurrently, it informed the parties and *amicus curiae* U.S. Steel[3] that absent any protest, it would unseal its unredacted decision. *See* ECF 147. In so doing, it flagged the opinion's citations to the confidential record. *See id*. at 1–2. It also reminded the parties and U.S. Steel that any proponent of redaction confronts a heavy burden. *See id*. at 2 n.1. "The public's right of access to judicial records is a fundamental element of the rule of law." *Id.* (quoting *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021)). "[C]ourts are duty-bound to protect public access to judicial proceedings and records." *Id.* (quoting *Binh Hoa Le*, 990 F.3d at 417).

U.S. Steel timely opposed unsealing the opinion and sought redactions. *See* ECF 148. The government agreed with the company. *See* ECF 150. CSI took no position.

For the reasons explained below, the court holds that U.S. Steel has not carried its burden. Because "[t]ransparency is a touchstone of our

[1] Exclusion requestors and objectors may both submit "confidential or proprietary business information" to the agency. 15 C.F.R. Pt. 705 Supp. 1(b)(5)(iii) (2020). Such filings are not "subject to public review." *Id*. Supp. 1(b)(5)(i).

[2] The court sustained most of Commerce's denials and remanded the balance.

[3] The court denied the company's attempt to intervene, *see N. Am. Interpipe, Inc. v. United States*, 519 F. Supp. 3d 1313 (CIT 2021), *aff'd sub nom. Cal. Steel Indus., Inc. v. United States*, 48 F.4th 1336 (Fed. Cir. 2022), but later granted its request to file an *amicus* brief, *see* ECF 116.

judicial system," *CVB, Inc. v. United States*, 681 F. Supp. 3d 1313, 1323 (CIT 2024), *appeal pending sub nom*. *In re United States*, No. 2024–1566 (Fed. Cir.), the court directs the clerk to unseal Slip Opinion 24–127 without redactions.[4]

I

"There is a strong presumption in favor of a common law right of public access to court proceedings." *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–99 (1978)). It "is especially strong" as to "[a] court's decrees, its judgments, [and] its orders," which "are the quintessential business of the public's institutions." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996).

This presumption "serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally." *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017) (quoting *United States v. Hubbard*, 650 F.2d 293, 314–15 (D.C. Cir. 1980)). Most importantly, it undergirds the American experiment in self-government. As James Madison observed, "[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 The Writings of James Madison 103 (Gaillard Hunt ed. 1910); *see also United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("[P]rofessional and public monitoring is an essential feature of democratic control" of the federal judiciary, and "[s]uch monitoring is not possible without access to testimony and documents . . . used in the performance of Article III functions.").

The presumption of public access, however, "is not absolute." *In re Violation*, 635 F.3d at 1356 (quoting *Nixon*, 435 U.S. at 598). It is rebuttable in various circumstances, including when such access "'might . . . become a vehicle for improper purposes,' for example, 'as sources of business information that might harm a litigant's competitive standing.'" *Id*. (quoting *Nixon*, 435 U.S. at 598). In considering whether to limit "the public's access to [judicial] documents, the court must 'weigh the interests advanced by the parties in light of the public interest and duty of the courts.'" *Id*. at 1356–57 (alteration omitted) (quoting *Nixon*, 435 U.S. at 602).

[4] In so doing, the court observes that the statutory cause of action asserted by CSI—the APA—does not address the court's public access obligations. *Cf*. 19 U.S.C. § 1516a(b)(2)(B) (providing that the court "shall . . . preserve[] . . . in any action *under this section*," i.e., antidumping and countervailing duty cases, the "confidential or privileged status accorded to any documents, comments, or information," except that it "may disclose such material under such terms and conditions as it may order") (emphasis added). The court expresses no view about the extent, if any, to which § 1516a(b)(2)(B) limits the right of public access to judicial records in such cases.

Under this balancing test, "the ordinary showing of good cause which is adequate to protect discovery materials from disclosure cannot alone justify protecting such material after it has been introduced at trial," *id*. at 1358 (quoting *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993))—and, by extension, submitted in connection with dispositive motions. Instead, "'only the *most compelling* showing can justify' limitations on the disclosure of 'testimony or documents actually introduced at trial.'" *Id*. (emphasis added) (quoting *Poliquin*, 989 F.2d at 533). This principle necessarily applies to material placed in "the joint appendix," where a "court will look to find the administrative record" in cases involving "judicial review of agency action," *Metlife*, 865 F.3d at 667—at least where, as here, the court's decision cites it.

In considering whether a proponent of redaction has made the necessary showing, it is of no moment that "the parties agree to maintain confidentiality" of such information. *DePuy Synthes Prods., Inc. v. Veterinary Orthopedic Implants, Inc.*, 990 F.3d 1364, 1370 (Fed. Cir. 2021). That's because the federal judiciary has "an independent duty to protect the public's right of access." *Id*. This duty is surely at its zenith when it comes to this court's opinions, as "[a]ll decisions of the Court of International Trade shall be preserved and open to inspection." 28 U.S.C. § 257; *cf. In re Application of Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121, 1128 (D.C. Cir. 2020) ("[S]ince at least the time of Edward III" in the 14th century, "judicial decisions have been held open for public inspection.") (citing 3 Edward Coke, *Reports*, at iii–iv (London, E. & R. Nutt & R. Gosling 1738) (1602)).[5]

II

Slip Opinion 24–127 addresses Commerce's denials of CSI's exclusion requests in 2018 and 2020. U.S. Steel objects to unsealing the opinion's quotations of confidential submissions it made opposing both sets of requests.

As to CSI's 2018 requests, U.S. Steel *publicly* represented to the Department that it could supply slab within eight weeks. *See* Appx06778. The agency relied on that representation. *See* Slip Op. at 11 (citing Appx01410). But in a confidential filing with Commerce that the opinion repeatedly quotes, *see id*. at 9, 30 & n.22, the latter company said something different—that it could not provide slab

[5] For an in-depth examination of the venerable history of the right of public access to judicial records, *see* Steven Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 Fed. Cts. L. Rev. 177, 181–202 (2009).

beyond the companies' contract amount until a date in 2018 that was *more than* eight weeks after the former sought its exclusions.

U.S. Steel contends that the latter submission is "sensitive" because it relates to "the company's capacity to provide specific slab products on very short notice." ECF 148, at 6. And even though the material is "now several years old," disclosing "such information about [its] available capacity to supply a particular product in a specific quantity and time frame undermines [the company's] negotiating position." *Id.* at 6–7. The supporting declaration of Robert Kopf, vice president for sales, asserts that the relatively small market of domestic purchasers of slab can be "manipulat[ed]" through "public release of confidential information related [to] . . . delivery, availability, [or] timing." ECF 148–1, at 2.

The company has not carried its burden. As it acknowledges, the detail in question—when it could supply CSI with slab volume greater than that specified in the companies' 2018 contract—is more than six years old. "[I]nformation may lose its confidential nature once it becomes stale." *AmerGen Energy Co. by & through Exelon Generation Co. v. United States*, 115 Fed. Cl. 132, 141 (2014) (collecting cases). "[V]ague and speculative allegations of injury from the disclosure of years-old information are not sufficient to overcome the strong presumption favoring public access." *Id*. The company hasn't explained with particularity how disclosure of this old data can impair its current competitive position.

Moreover, even if the information weren't stale, the court concludes that U.S. Steel's *public* representation that it could supply slab within eight weeks waived any confidentiality claim about its concession undermining that same assertion. In effect, it was a subject-matter waiver. *Cf. Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed. Cir. 2005) (in the context of the attorney-client privilege, "a party is prevented from disclosing communications that support its position while simultaneously concealing communications that do not").

The company also seeks to claim confidentiality as to its statement that CSI "indicated that [it was] not comfortable with a higher volume" in the companies' supply contract. Slip Op. at 9, 30 n.22 (quoting Appx06787); ECF 148, at 5 (asking court to redact "the direct quote"). In substance, however, the former publicly disclosed the same information in its surrebuttal: "[T]he stated monthly volume range of [9,000–14,000 metric tons] was defined by CSI as *the amount they were willing to commit to buy*." Slip Op. at 9 (quoting Appx06782) (emphasis in surrebuttal original). That disclosure waived any confi-

dentiality claim. *See Jiangsu Alcha Aluminum Co. v. United States*, 712 F. Supp. 3d 1376, 1381 n.3 (CIT 2024) (noting that parties can "waive[] any confidentiality claim by referring to [assertedly business proprietary information] in their public briefs and in open court") (citing Fed. Cir. R. 25.1(c)).

As for the 2020 exclusion requests, U.S. Steel asks (*see* ECF 148, at 8) that the court "publicly summarize rather than quote the timing and contents" of an email from CSI that the former company proffered to Commerce. *See* Slip Op. at 14 (quoting Appx22958). According to Mr. Kopf, to publicly release "statements made while negotiating a sale" would undermine the company's "ability to negotiate with *all* buyers of a product." ECF 148–1, at 1 (emphasis in original). Such disclosure, he contends, might cause other customers to "try to leverage this information in their own negotiations with U.S. Steel." *Id*. The company, however, disclosed the substance of that email on the public record when it told Commerce that CSI "delayed October 2019 spot sale negotiations . . . ." Appx22915; *see also* Appx22951 (stating on surrebuttal that "since October 2019, [CSI] has repeatedly declined the full spot sale volume offered by U.S. Steel"). Any damage to its negotiating position with other customers—if any—has already occurred.

Finally, U.S. Steel seeks redaction of the exact tonnage that it supplied to CSI in the first half of 2020. *See* ECF 148, at 9–10; Slip Op. at 32. It asserts that revealing the "precise volume of supplied product to a customer in such a recent, narrow timeframe could impact current and future business dealings with [its] other customers." ECF 148, at 9–10. But it doesn't explain how or why that's so, and Mr. Kopf's declaration is even less helpful. In any event, subject-matter waiver applies here as well. U.S. Steel stated on the public record the precise tonnage it sold to CSI in 2018 and 2019. *See* Appx22949. The former can hardly claim now that disclosure of the same information for the first half of 2020 will harm its competitive position.

* * *

The court holds that U.S. Steel has not made the "most compelling showing" that is necessary to justify restricting full public access to Slip Opinion 24–127. *In re Violation*, 635 F.3d at 1358 (quoting *Poliquin*, 989 F.2d at 533). The clerk shall immediately unseal the decision without any redactions.

Dated: December 13, 2024
New York, New York

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

Slip Op. 24–139

NEIMENGGU FUFENG BIOTECHNOLOGIES CO., SHANDONG FUFENG FERMENTATION CO., LTD., and XINJIANG FUFENG BIOTECHNOLOGIES CO., LTD., Plaintiffs, and MEIHUA GROUP INTERNATIONAL (HONG KONG) LIMITED, and XINJIANG MEIHUA AMINO ACID CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Consol. Court No. 23–00068

[Commerce's determination is sustained in part and remanded in part. Defendant's motion to dismiss in part is granted.]

Dated: December 16, 2024

Dharmendra N. Choudhary, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., argued for the Plaintiffs. With him on the briefs were *Ned H. Marshak*, *Brian M. Petelin*, *Elaine F. Wang*, and *Jordan C. Kahn*.

Daniel Bertoni, Trial Attorney, U.S. Department of Justice, Washington, D.C., argued for Defendant United States. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director.

AMENDED OPINION AND ORDER

Katzmann, Judge:

Xanthomonas campestris is an obligately aerobic, Gram-negative bacterium whose economic value far exceeds what its non-Latin name—the "cabbage black rot pathogen"—might suggest.[1] To be sure, that name is no misnomer: the bacterium afflicts crops of cabbage and related vegetables with darkening, wilting, and tissue death. But modern industrial science has put this stubborn pest to better use. At the right temperature, and under certain other conditions, the bacterium ferments simple sugars into a polysaccharide called xanthan gum—a substance commonly used as a tasteless thickener in foods, medicines, and toothpastes, and as an anti-separation agent in oil drilling. *See* Xanthan Gum from China, Inv. No. 731-TA-1203 (Second Review), USITC Pub. 5501 at 7 (Apr. 1, 2024).

While some xanthan gum production occurs within the United States, the U.S. market depends heavily on imports from overseas. *See id.* at 7. And for some of these imports, the enforcement of U.S. trade remedy laws presents a sticking point. Imports of xanthan gum

[1] This background information appears in a series of exhibits to an administrative filing by a party to the agency proceeding underlying this case. The relevant exhibits are public documents but do not appear in the joint appendix. *See* Surrogate Value Cmts., Pt. 4 at Exs. 10A, 10E, Case No. A-570–985, Bar Code: 4227779–04 (Mar. 31, 2022).

from the People's Republic of China ("China") have been subject to an antidumping duty order imposed by the U.S. Department of Commerce ("Commerce") since 2013. *See Xanthan Gum from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 78 Fed. Reg. 43143 (Dep't Com. July 19, 2013) ("*Antidumping Duty Order*").

This case involves a challenge to Commerce's eighth administrative review of the *Antidumping Duty Order*. *See Xanthan Gum from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2020–2021*, 88 Fed. Reg. 9861 (Dep't Com. Feb. 15, 2023) ("*Final Review*"); Compl., Apr. 17, 2023, ECF No. 13 ("Compl."). Plaintiffs Neimenggu Fufeng Biotechnologies Co., Shandong Fufeng Fermentation Co., Ltd., and Xinjiang Fufeng Biotechnologies Co., Ltd. (collectively, "Fufeng") and Consolidated Plaintiffs Meihua Group International (Hong Kong) Limited and Xinjiang Meihua Amino Acid Co., Ltd. (collectively, "Meihua") are Chinese producers of xanthan gum whose U.S. imports are subject to antidumping duties imposed by that order.

Plaintiffs and Consolidated Plaintiffs each move for judgment on the agency record under United States Court of International Trade ("USCIT") Rule 56.2, arguing that four aspects of the *Final Review* are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see* Pls.' Mot. for J. on the Agency R. at 1–3, Oct. 30, 2023, ECF No. 25 ("Pls.' Br."). Fufeng argues that (1) Commerce erred by directly valuing Fufeng's energy factors of production; that (2) Commerce incorrectly valued Fufeng's coal input under subheading 2701.12.9000 of the Harmonized Tariff Schedule ("HTS"); that (3) Commerce's application of the so-called "Cohen's *d* test" for effect size as part of its "differential pricing methodology" was unlawful; and that (4) Commerce improperly deducted duties imposed pursuant to 19 U.S.C. § 2411 ("Section 301") from its calculation of export value. *See* Pls.' Br. at 1–3. In its own motion, Meihua adopts Fufeng's arguments and argues that any modified antidumping duty rate assigned to Fufeng should apply to Meihua as well. *See* Consol. Pls.' Mot. for J. on the Agency R. at 4, Oct. 30, 2023, ECF No. 26 ("Consol. Pls.' Br.").

Defendant the United States ("the Government") asks the court to deny Fufeng and Meihua's Rule 56.2 motions. *See* Def.'s Mot. to Dismiss in Part & Resp. Opp'n to Pls.' Mots. for J. on the Agency R., Feb. 27, 2024, ECF No. 31 ("Gov't Br."). The Government also moves to dismiss Count Six of Fufeng's complaint, which pertains to Com-

merce's application of the Cohen's *d* test, for lack of standing. *See* USCIT R. 12(b)(1); Compl. ¶ 28.

For the reasons explained below, the court (1) remands the *Final Review* for Commerce's reconsideration or further explanation of its direct valuation of Fufeng's energy factors of production, (2) remands as well for Commerce's reconsideration of its classification of Fufeng's coal under a certain HTS subheading, conditional on a determination on remand to directly value Fufeng's coal, (3) dismisses Count Six of Fufeng's complaint for lack of standing, and (4) sustains the *Final Review* with respect to Commerce's deduction of Section 301 duties from its export value calculation.

BACKGROUND

I. Legal Background

The court notes at the outset that this case involves a number of disparate concepts of trade law, and briefly summarizes some of these concepts below.

A. Antidumping Duties

"Dumping occurs when a foreign company sells a product in the United States at a lower price than what it sells that same product for in its home market." *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). Where dumping occurs, federal law authorizes Commerce to impose an "antidumping duty . . . in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673.[2] This amount is the "dumping margin" of merchandise subject to the duty order issued by Commerce ("subject merchandise"). 19 U.S.C. § 1677(25), (35)(A).

Each year after the publication of an antidumping duty order, Commerce (upon a party's request) must "review, and determine . . . the amount of any antidumping duty . . . ." *Id*. § 1675(a)(1)(B). In conducting this administrative review, Commerce is to determine anew "the normal value and export price (or constructed export price) of each entry of the subject merchandise, and . . . the dumping margin for each entry." *Id*. § 1675(a)(2)(A).

[2] Generally speaking, "normal value" is "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). And "[t]he term 'export price' means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted . . . ." *Id.* § 1677a(a).

B. Calculating Normal Value Based on Factors of Production and General Expenses and Profits

Determining normal value can be an arduous task, particularly when the subject merchandise is exported from a non-market economy country like China. Unlike for market economies, where normal value may be calculated on the basis of home-market prices, for non-market economies Commerce is directed to "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . ." 19 U.S.C. § 1677b(c)(1)(B). Among these "factors of production" is "energy and other utilities consumed." Id. § 1677b(c)(3)(C).

Once Commerce calculates the value of the factors of production, there "shall be added an amount for general expenses and profit . . . based on the best available information regarding the values of such factors in a market economy country." *Id.* § 1677b(c)(1)(B). These additional general expenses include "(1) factory overhead, (2) selling, general, and administrative expenses [("SG&A")], and (3) profit." *Stanley Works (Langfang) Fastening Sys. Co. v. United States*, 37 CIT 1369, 1374, 964 F. Supp. 2d 1311, 1319 (2013). To value them Commerce gathers "surrogate" data from producers of comparable items in market economy countries of a similar level of economic development to the subject country. *Dorbest Ltd. v. United States*, 30 CIT 1671, 1679, 462 F. Supp. 2d 1262, 1271 (2006). "Commerce values these expenses 'by using financial ratios derived from financial statements of producers of comparable merchandise in the surrogate country.'" *Risen Energy Co. v. United States*, __ F.4th __, __, No. 2023–1550, 2024 WL 5036188, at *1 (Fed. Cir. Dec. 9, 2024) (quoting *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1319 (Fed. Cir. 2010)).

Commerce "normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country" to value "manufacturing overhead, general expenses, and profit," 19 C.F.R. § 351.408(c)(3), and often relies on the classification scheme of the Harmonized Tariff Schedule of the United States as a basis for its item-to-item comparisons. *See, e.g., Ancientree Cabinet Co. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1241, 1262 (2021); *Carbon Activated Tianjin Co. v. United States*, 46 CIT __, __, 586 F. Supp. 3d 1360 (2022). "Commerce frequently uses import data from HTS categories as the 'best available information' to calculate a specific surrogate price by weight (or unit) for the input under the HTS category chosen," and "[i]n doing so . . . seeks to select the HTS category that most precisely corresponds to the particular input."

Risen Energy, 2024 WL 5036188, at *3 (citation omitted). Commerce also "generally selects, to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review." *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014).

After gathering the "best available information" from surrogate producers of comparable merchandise, Commerce uses the following equation to derive an SG&A value to add to the value of the producer's factors of production (alongside overhead and profit). In the equation below, "MLE" denotes material, labor, and energy costs, subscript "S" indicates values derived from a surrogate producer's financial statements, and subscript "P" indicates the derived values that Commerce adds to the factors of production to calculate normal value pursuant to 19 U.S.C. § 1677b(c)(1)(B):

$$\frac{SG\&A_S}{MLE_S+Overhead_S} \times (MLE_P+Overhead_P)=SG\&A_P$$

Gov't Br. at 12; *see also Dorbest*, 30 CIT at 1715 n.36, 462 F. Supp. 2d 1301 n.36 (providing a detailed summary of each of Commerce's surrogate ratio calculations, including those used to calculate MLEP and OverheadP); 19 U.S.C. § 1677b(e)(1)–(3).

This series of calculations includes, as relevant here, two separate junctures at which Commerce may account for energy costs in its calculation of normal value. The first is Commerce's direct calculation of the subject producer's "energy and other utilities consumed" factor of production. *Id.* § 1677b(c)(1)(B)–(3). The second is Commerce's calculation of the surrogate SG&A ratio (the fraction on the left side of the equation above): if the surrogate producer's reported SG&A value (denoted as "SG&AS" in the formula above) includes energy costs, meaning the numerator of the surrogate SG&A ratio is greater, then multiplying the surrogate SG&A ratio by the sum of the subject producer's MLE and Overhead expenses will in turn yield a higher calculated subject-producer SG&A figure. And because Commerce includes this figure as part of the "general expenses" component of its normal value summation, 19 U.S.C. § 1677b(c)(1)(B), including a surrogate producer's energy expenses in its SG&A ratio numerator has the indirect effect of increasing normal value. *See Risen Energy*, 2024 WL 5036188, at *6 n.5 ("assum[ing]," on the basis of "the statutory scheme and the nature of the parties' dispute, that a larger overhead ratio correlates to an increase in normal value which, in turn, will lead to a higher dumping margin for an exporter.").

This introduces a possibility that Commerce will "double-count" energy in its normal value calculation—first by "directly" valuing the respondent's "energy and other utilities consumed" factor of production, *id.* § 1677b(c)(3)(C), and then by including energy costs in the numerator of the surrogate SG&A ratio. This outcome is disfavored. *See Zhaoqing Tifo New Fibre Co. v. United States*, 39 CIT 372, 375 n.6, 60 F. Supp. 3d 1328, 1333 n.6 (2015) (explaining that "the case-law holds that, as a general rule, double counting is not permitted in antidumping margin calculations, because it is distortive, rendering margins less accurate.").

Commerce attempts to avoid double-counting through a stated policy whereby it directly values energy costs only in circumstances where it can ensure that it can isolate and remove energy costs from the numerator of the SG&A ratio. *See* Mem. from J. Maeder to L. Wang, re: Issues and Decision Memorandum for the Final Results of the 2020–2021 Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China at 12 (Dep't Com. Feb. 1, 2023), P.R. 233 ("IDM") (citing *Citric Acid and Certain Citrate Salts from the People's Republic of China*, 74 Fed. Reg. 16838, 16838 (Dep't Com. Apr. 13, 2009) ("*Citric Acid*")). In *Citric Acid*, Commerce declined to directly value respondents' reported energy inputs because "[w]e were unable to segregate and, therefore, were unable to exclude energy costs from the calculation of the surrogate financial ratios." 74 Fed. Reg. at 16839.

C. Commerce's Differential Pricing Methodology

As normal value and export price may each rest on aggregate data (that is, sets of multiple sales at different prices), Commerce calculates the difference between the two by calculating a weighted-average dumping margin. Ordinarily, Commerce "compar[es]. . . the weighted average of the normal values with the weighted average of the export prices. . . for comparable merchandise." 19 C.F.R. § 351.414(b)(1) (the "average-to-average," or "A-A method"). But the A-A method sometimes fails to detect "targeted" or "masked" dumping in a scenario where "a respondent's sales of low-priced 'dumped' merchandise would be averaged with (and offset by) sales of higher-priced 'masking' merchandise, giving the impression that no dumping was taking place." *Stupp Corp. v. United States*, 5 F.4th 1341, 1345 (Fed. Cir. 2021) (internal quotation marks and citation omitted). In this scenario Commerce is authorized by statute to use two additional methods to compare normal value of subject merchandise to the export price. *See* 19 U.S.C. § 1677f-1(d)(1). Of these, only the "average-to-transaction" ("A-T") method is relevant to this case. The

A-T method "involves a comparison of the weighted average of the normal values to the export prices. . . of individual transactions for comparable merchandise," 19 C.F.R. § 351.414(b)(3), and is authorized only where "there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time." 19 U.S.C. § 1677f-1(d)(1)(B)(i).

To determine whether this statutory precondition is satisfied, Commerce conducts a sequence of statistical tests that it collectively terms a "differential pricing analysis." *Stupp*, 5 F.4th at 1346–47. The differential pricing analysis comprises the "Cohen's *d* test," the "ratio test," and the "meaningful difference test." *See Matra Ams., LLC v. United States*, 48 CIT __, __, 681 F. Supp. 3d 1339, 1347–49 (2024) (describing each phase of the differential pricing analysis and recounting relevant litigation before the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit")).[3] If the subject merchandise "passes" all three tests, Commerce applies the A-T methodology in accordance with its interpretation of the statutory condition imposed by 19 U.S.C. § 1677f-1(d)(1)(B).

D. Section 301 Duties

Section 301 of the Trade Act of 1974, Pub. L. 93–618, 88 Stat. 1978, 2041 (codified as amended at 19 U.S.C. § 2411), authorizes the United States Trade Representative ("USTR")[4] to impose duties ("Section 301 duties") on imported merchandise upon determining that "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce." *Id.* § 2411(b)(1)–(c)(1)(B). The President may also direct the USTR to begin such an investigation. *See id.* § 2411(b)(2).

The USTR's imposition of Section 301 duties may also have a downstream impact on Commerce's calculation of separate antidumping duties for products from the subject country. Under 19 U.S.C. § 1677a(c)(2)(A), export price is to be reduced by "the amount, if any,

[3] "The 'Cohen's *d* test' is Commerce's version of a general-purpose effect size metric devised in 1980 by statistician Jacob Cohen." *Id.* at __ n.3, 1348 n.3. The italicized "*d*" is a coefficient that denotes "a ratio whose numerator is the difference between means of the prices of the two groups and whose denominator is a figure, reflecting the general dispersion of the pricing data, that serves as a benchmark against which to judge the significance of the difference stated in the numerator." *Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367, 1369 (Fed. Cir. 2022). According to Commerce, "[t]he Cohen's [*d*] test is a generally recognized statistical measure of the extent of the difference in the means between a test group and a comparison group." *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26720, 26722 (Dep't Com. May 9, 2014) ("*Differential Pricing Analysis*").

[4] The USTR, whose office is "established within the Executive Office of the President," has "primary responsibility for developing, and for coordinating the implementation of, United States international trade policy," and "act[s] as the principal spokesman of the President on international trade." 19 U.S.C. § 2171.

included in such price, attributable to any . . . United States import duties . . . .” The Federal Circuit has explained that “these adjustments [are] designed to produce an ‘apples with apples’ comparison between the price at which the merchandise is sold in the U.S. and the price at which it is sold in the home country.” *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 63 F.4th 25, 28 (Fed. Cir. 2023) (quoting *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983)). But not all duties are deductible as “United States import duties.” *See id.* at 32–33. Antidumping duties themselves, for example, are considered non-deductible “special duties” that are distinct from “United States import duties,” because deducting them from the export price would create a circularity problem in which the antidumping duties would themselves lower the export price—and result in an inaccurately high dumping margin. *See Power Steel Co. v. United States*, 45 CIT __, __, 2021 WL 6098309 at *3 (2021) (citing *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 45 CIT__, __, 494 F. Supp. 3d 1365, 1376 (2021)).

The question in this case, as discussed below, is whether Commerce properly deducted the amount of a certain Section 301 duty imposed by the USTR from Fufeng’s export price as an “amount . . . attributable to . . . United States import duties” under 19 U.S.C. § 1677a(c)(2)(A).

II. Factual Background

On September 7, 2021, Commerce initiated its eighth administrative review of the *Antidumping Duty Order*. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. 50034 (Dep’t Com. Sept. 7, 2021), P.R. 30. Among seven Chinese producers of subject xanthan gum, Commerce selected only Fufeng—“the exporter that accounts for the largest volume of subject merchandise that can reasonably be examined”—for individual examination. Mem. from R. Anadio to A. Elouaradia, re: Selection of Mandatory Respondent for Individual Examination at 1, 5 (Dep’t Com. Oct. 21, 2021), P.R. 36, C.R. 9. Meihua was not selected for examination but participated in the underlying administrative review through the submission of documents and case briefs. *See id.*

On January 5, 2022, Commerce solicited the parties’ comments on “the selection of surrogate values” for factors of production. *See* Mem. from S. Bailey to All Interested Parties, re: Request for Economic Development, Surrogate Country and Surrogate Value Comments and Information at 1–2 (Dep’t Com. Jan. 5, 2022), P.R. 91. Both

Fufeng and CP Kelco U.S., Inc. ("CP Kelco"), a U.S. producer of xanthan gum and an interested party to the administrative review,[5] submitted comments in response. *See* Letter from B. Mitchell, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, to G. Raimondo, Sec'y of Com., re: Fufeng's First Surrogate Value Comments (Resubmission) (Feb. 2, 2022, refiled Mar. 31, 2022), P.R. 147–150 ("Fufeng's Surrogate Value Cmts."); Letter from M. Kanna, Greenberg Traurig, LLP to G. Raimondo, Sec'y of Com., re: Surrogate Values (Feb. 2, 2022), P.R. 110–13 ("Pet'r's Surrogate Value Cmts.").

In August of 2022, eleven months after initiation, Commerce published the preliminary results of its review. *See Xanthan Gum from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review, Partial Rescission of the Antidumping Duty Administrative Review, and Preliminary Determination of No Shipments; 2020–2021*, 87 Fed. Reg. 47970, 47972 (Dep't Com. Aug. 5, 2022), P.R. 202 ("*Preliminary Review*"), and accompanying memorandum, Mem. from S. Fullerton to L. Wang, re: Preliminary Results of the Eighth Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China (July 29, 2022), P.R. 196 ("PDM"). Commerce simultaneously issued a memorandum in which it announced its selection of Malaysia as "the primary surrogate country for the valuation of the [factors of production]," and "identfie[d] the data sources and values, and detail[ed] the analysis Commerce conducted[,] to determine the values assigned to the factors of production . . . in order to calculate normal value" for the *Preliminary Review*. Mem. from R. Anadio to The File, re: Fufeng's Preliminary Surrogate Value at 1–2, 13–14 (July 29, 2022), P.R. 197 ("Prelim. Surrogate Value Mem."). This memorandum included, as an attachment, a spreadsheet detailing Commerce's preliminary surrogate value data and including, at the "Fin Ratio" tab, a calculation of the preliminary surrogate SG&A ratio. *See* Surrogate Value Spreadsheet (July 29, 2022), P.R. 198 ("Prelim. Surrogate Value Spreadsheet").

Commerce preliminarily determined that Fufeng did not make sales at less than fair value during the period of review, and calculated a preliminary dumping margin of zero percent. *See Preliminary Review*, 87 Fed. Reg. at 47971. Commerce explained that in reaching this result it employed the standard A-A method to compare normal value to export value, and also noted that it included energy expenses in the numerator of the surrogate SG&A ratio. PDM at 17, 20. Commerce based its SG&A calculation on surrogate information drawn

[5] Despite having participated in the administrative review proceeding, CP Kelco is not a party to the present litigation before the court.

from the 2021 public financial statement of Ajinomoto (Malaysia) Berhad[6] ("Ajinomoto"), a Malaysia-based sub-entity of a Japanese company that produces monosodium glutamate ("MSG"), a chemical flavor enhancer. *Id*. at 21.

Commerce invited parties to the administrative review to submit case briefs by thirty days after the publication of the *Preliminary Review*, and later extended this deadline to September 12, 2022. *See Prelimiary Review*, 87 Fed. Reg. at 47972; Letter from S. Bailey to All Interested Parties, re: Case Brief Extension Request, Case No. A-570–985, Bar Code: 4281259–01 (Dep't Com. Sept. 2, 2022) ("Case Br. Extension Letter"). Fufeng, Meihua, and CP Kelco each timely filed a case brief in response to Commerce's invitation. *See* Letter from D. Craven, Craven Trade Law LLC, to G. Raimondo, Sec'y of Com., re: Meihua's Case Brief (Sept. 12, 2022), P.R. 208; Letter from B. Mitchell, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, to G. Raimondo, Sec'y of Com., re: Fufeng's Case Brief (Sept. 12, 2022), P.R. 209 ("Fufeng's Case Br."); Letter from M. Kanna, Greenberg Traurig LLP, to G. Raimondo, Sec'y of Com., re: Case Brief of CP Kelco U.S. (Sept. 12, 2022), P.R. 211, C.R. 173 ("Pet'r's Case Br.").

Fufeng then submitted what it styled a "rebuttal brief." *See* Letter from B. Mitchell, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, to G. Raimondo, Sec'y of Com., re: Fufeng's Rebuttal Case Brief (Sept. 21, 2022) (rejected and retained), P.R. 214, C.R. 175 ("First Rejected Rebuttal"). CP Kelco requested that Commerce reject this submission, arguing that "Fufeng's Rebuttal Brief responds to arguments not raised by Petitioner in its [case brief]" in violation of 19 C.F.R. § 351.309(d)(2), and that "Fufeng's Rebuttal Brief contains factual information not already present on the record of this segment, making it untimely filed." Letter from M. Kanna, Greenberg Traurig LLP to G. Raimondo, Sec'y of Com., re: Request to Reject Fufeng's Rebuttal Brief at 1–2 (Sept. 12, 2022), P.R. 216.

Commerce informed Fufeng that it would reject certain elements of Fufeng's rebuttal brief in accordance with CP Kelco's request. *See* Letter from S. Bailey to B. Petelin, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, re: Rejection Letter (Nov. 18, 2022), P.R. 223, C.R. 176 ("Rejection Letter"). Commerce requested Fufeng's resubmission of its rebuttal brief with certain redactions, *id.* at 4. Fufeng submitted a redacted document, *see* Letter from D. Choudhary, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, to G. Raimondo, Sec'y of Com., re: Fufeng's Resubmission of Redacted Rebuttal Case Brief (Nov. 21, 2022) (rejected and retained), P.R. 227,

[6] "Berhad" is Malay for "limited" in the sense of "limited liability."

C.R. 177 ("Second Rejected Rebuttal"), but Commerce rejected that submission as well, explaining that "Commerce has identified additional parts in Fufeng's Redacted Rebuttal Case Brief subject to rejection." Letter from S. Bailey to B. Petelin, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, re: Second Rejection Letter at 2 (Dec. 12, 2022), P.R. 229 ("Second Rejection Letter"). Fufeng then submitted a third version of its rebuttal brief, *see* Letter from D. Choudhary, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, to G. Raimondo, Sec'y of Com., re: Fufeng's Resubmission of Redacted Rebuttal Case Brief (Dec. 14, 2022), P.R. 231, C.R. 178 ("Fufeng's Rebuttal Br."), which remains on the administrative docket and is the version that Commerce considered in preparing its *Final Review*.

On February 15, 2023, Commerce published the final results of its administrative review. *See Final Review*; IDM. Commerce published a final dumping margin for Fufeng of 17.36 percent—up from the preliminary margin of zero percent—for Fufeng and Meihua. *Final Review*, 88 Fed. Reg. at 9862. Commerce continued to use the A-A method to compare normal value to export price. IDM at 34. Commerce also explained that for the *Final Review*, consistent with the calculation method it had adopted (but not explicitly addressed) in the *Preliminary Review*, it deducted the amount of Section 301 duties from its calculation of Fufeng's export price. *Id.* at 32. But Commerce explained that in a departure from the *Preliminary Review*, it directly valued Fufeng's reported energy factors of production and correspondingly removed what it considered to be energy expenses from the numerator of the surrogate SG&A ratio. *Id.* at 11–14.

Commerce also issued a pair of memoranda, detailing the agency's general and factors of production–specific calculations, in conjunction with the IDM. *See* Mem. from R. Anadio to The File, re: Final Analysis (Feb. 1, 2023), P.R. 234, C.R. 179 ("Final Calculation Mem."); Mem. from R. Anadio to The File, re: Final Surrogate Value Mem. (Feb. 1, 2023), P.R. 235–36 ("Final Surrogate Value Mem.").

III. Procedural History

Fufeng timely commenced this action, filing a summons on March 16, 2023 and a complaint on April 17, 2023. *See* Summons, Mar. 16, 2023, ECF No. 1; Compl. On July 5, 2023, the court granted the Government's consented-to motion to consolidate this case with a separate action initiated by Meihua, and the two cases were consolidated under Consolidated Court Number 23–00068. *See* Order, July

5, 2023, ECF No. 22. Fufeng and Meihua timely filed their respective motions[7] for judgment on the agency record on October 30, 2023. *See* Pls.' Br.; Consol. Pls.' Br.

The Government filed its response on February 27, 2024, asking the court to dismiss Count Six of Fufeng's complaint and deny both motions for judgment on the agency record. *See* Gov't Br. Fufeng (but not Meihua) filed a reply, *see* Pls.' Reply to Def.'s Resp. to Pls.' Mot. for J. on the Agency R., May 3, 2024, ECF No. 34 ("Pls.' Reply"), and subsequently moved for oral argument. *See* Mot. for Oral Arg., May 24, 2024, ECF No. 37. The court granted this unopposed motion and issued questions in advance of oral argument to Fufeng and the Government, *see* Ct.'s Letter re: Qs. for Oral Arg., Aug. 7, 2024, ECF No., 42, to which those parties filed written responses. *See* Def.'s Resps. to Ct.'s Qs. for Oral Arg., Sept. 4, 2024, ECF No. 43 ("Gov't OAQ Resp."); Pls's Resps. to the Ct.'s Qs. for Oral Arg., Sept. 4, 2024, ECF No. 44 ("Pls.' OAQ Resp.").

At oral argument, which took place on September 11, 2024, the court invited Fufeng and the Government to file supplemental post-argument submissions. Both did so. *See* Def.'s Post-Arg. Subm., Sept. 20, 2024, ECF No. 47 ("Def.'s Post-Arg. Subm."); Pls.' Post-Arg. Subm., Sept. 20, 2024, ECF No. 48 ("Pls.' Post-Arg. Subm.").

With all filings now in hand, the court turns to the merits of the case.

JURISDICTION AND STANDARD OF REVIEW

Jurisdiction lies under 28 U.S.C. § 1581(c), which grants the U.S. Court of International Trade "exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930." When reviewing antidumping determinations, the court is to sustain "'any determination, finding or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.'" *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)).

"Substantial evidence" refers to "such evidence that a reasonable mind might accept as adequate to support a conclusion." *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 840 (Fed. Cir. 2020) (internal quotation marks and citation omitted). This requires support from "less than the weight of evidence but more than a mere scintilla of evidence." *Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1356 (Fed. Cir. 2018) (internal quotation marks and

[7] Fufeng initially challenged seven aspects of the *Final Review*. *See generally* Compl. Fufeng now seeks judgment on the agency record as to only Counts One, Two, Five, Six, and Seven of its complaint. *See* Pls.' Br at 1–3; *see generally* Compl.

citation omitted). Substantial evidence must account for "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (internal quotation marks and citation omitted). An explicit statement of reasoning is not required: the court may uphold an agency's action even where "the agency's decisional path" is merely "reasonably discernable." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998).

Commerce is also required by statute to provide "an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review." 19 U.S.C. § 1677f(i)(3)(A).

DISCUSSION

I. Commerce's Direct Valuation of Fufeng's Energy Factors of Production Is Unsupported by Substantial Evidence as Currently Explained.

Commerce did not directly value Fufeng's reported energy costs in its normal value calculation in the *Preliminary Review*, and instead included an "administrative and other expenses" line item reported by surrogate Malaysian MSG producer Ajinomoto in the numerator of the surrogate SG&A ratio. *See* Prelim. Surrogate Value Mem. at 3, 5. But in the *Final Review*, Commerce directly valued Fufeng's reported energy costs and moved the "administrative and other expenses" line item to the MLE portion of the denominator of the SG&A ratio. *See* IDM at 12–13. This change, Commerce explained, reflected a corresponding change in the way Ajinomoto reported its costs in its financial statements. Whereas during previous administrative reviews of the *Antidumping Duty Order* Ajinomoto had reported an "other operating expenses" line item in its annual financial statements, in the 2021 financial statement it split this line item into two new line items: "selling and distribution expenses" and "administrative and other expenses." *Id.*; *see also* Pet'r's Surrogate Value Cmts. at Ex. 9. Commerce explained its reaction to this change as follows:

> [U]nlike prior reviews, the 2021 financial statements of Ajinomoto (Malaysia) breaks out the SG&A expense line item for "other operating expenses" into two sub-line items, "selling and distribution expenses," and "administrative and other expenses." The presentation of the 2021 financial statements of Ajinomoto (Malaysia) are otherwise identical to the financial statements relied on in previous reviews.

> For purposes of the final results, we determine that energy costs in the 2021 financial statements of Ajinomoto (Malaysia) are not captured in the "selling and distribution expenses" sub-line item for "other operating expenses." We find it is reasonable to conclude that electricity purchases would not fall under a line item for sales and distribution costs. Therefore, following that conclusion, we determine that energy costs are contained in the "administrative and other expenses" sub-line item of the 2021 financial statements of Ajinomoto (Malaysia). Further, we find that all other line items that comprise SG&A in the 2021 financial statements of Ajinomoto (Malaysia) have no direct or tangential descriptions that could capture energy expenses. This conclusion is consistent with prior reviews in which Commerce determined that energy costs in the financial statements of Ajinomoto (Malaysia) fell under the "other operating expenses" line item, and not under any other line item.

Id. at 13 (footnotes omitted). Commerce appears to have expressed the following point in these two paragraphs: whereas before the line-item split it was impossible to determine how much of Ajinomoto's "other operating expenses" represented energy costs, the split allowed Commerce to treat the "administrative and other expenses" subcategory as an adequately specific stand-in for energy costs. *Id.* Commerce seemingly supposed, in other words, that the removal of the obviously non-energy-related "selling and distribution expenses" element from a catchall "operating expenses" line item would result in a more targeted line item that, even if not literally labeled "energy expenses," would nevertheless constitute a workable metric for the purpose of avoiding a double-count of energy costs. *See* IDM at 13.

Commerce went on to cite *Chlorinated Isocyunarates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 4386 (Dep't Com. Jan. 22, 2013) ("*Chlorinated Isocyunarates*") and accompanying Issues and Decision Mem. ("*Chlorinated Isocyunarates* IDM") as an example of a past administrative review where Commerce removed an energy-related line item from the numerator of the surrogate SG&A ratio and instead directly valued a respondent's energy factor of production. *Id.* at 13–14. "The reasoning in *Chlorinated Isocyanurates* is applicable here," Commerce explained, "given that the 'administrative and other expenses' sub-line item in the 2021 financial statements of Ajinomoto (Malaysia) may include electricity expenses as well as expenses not related to electricity." *Id.* at 14 (underline added).

Fufeng argues that Commerce improperly treated "administrative and other expenses" line item as an isolatable stand-in for energy, as the line item is instead "a residual basket category encompassing myriad and disparate administrative and non-energy-related miscellaneous expenses." Pls.' Br. at 18. "Moreover," Fufeng argues, "there is no evidence that energy costs are a predominant component of this basket category line item." *Id.* Fufeng further avers that Commerce's resulting allocation of the "administrative and other expenses" line item to the MLA portion of the denominator of the surrogate SG&A ratio distorted the ultimate dumping margin calculation. *Id.* at 18–20.

Fufeng's concerns make intuitive sense. It does seem odd that such a generic-seeming line item as "administrative and other expenses" would primarily refer to an expense category as specific as energy. At the same time, the existence of colorable concerns about Commerce's factor-of-production valuation does not necessarily mean that that valuation is unsupported by substantial evidence. The question before the court is not whether Commerce made the only supportable determination on the basis of the record. "Where two different, inconsistent conclusions may reasonably be drawn from the evidence in record, an agency's decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial evidence." *Pokarna Engineered Stone Ltd. v. United States*, 56 F.4th 1345, 1349 (Fed. Cir. 2023) (alterations omitted) (quoting *In re Jolley*, 308 F.3d 1317, 1329 (Fed. Cir. 2002)). Nor does the substantial-evidence standard require that Commerce have made the *best* possible determination among reasonable alternatives—a determination can be supported by substantial evidence even where it rests on "less than the weight of the evidence . . . ." *Elbit*, 881 F.3d at 1356. And as the Government points out, Commerce's valuation of factors of production is an area of even-broader-than-usual statutory discretion. *See* Gov't Br. at 17–18; *see also Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (collecting cases and explaining that 19 U.S.C. § 1677b(c) provides "guidelines," but "accords Commerce wide discretion in the valuation of factors of production in the application of those guidelines").

But while "each administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record," and while "Commerce may change its conclusions from one review to the next based on new information and arguments," Commerce must nevertheless "articulate[] a reason-

able basis for the change." *Qingdao Sea-Line*, 766 F.3d at 1387. And here, Commerce did not adequately explain why isolating Ajinomoto's new "administrative and other expenses" line item as an energy expense was a permissible exercise of its "wide discretion." *Nation Ford*, 166 F.3d at 1377.

Commerce acknowledged in the IDM that in prior administrative reviews of the *Antidumping Duty Order* it had opted against direct valuation because "the surrogate financial statements of Ajinomoto (Malaysia) on which Commerce relied did not separately break out energy costs from selling expenses or G&A." IDM at 12 (referring, in the final abbreviation, to a "general and administrative expenses" sub-component of SG&A). But the financial reporting change on which Commerce premised its decision to directly value Fufeng's energy factors of production subtracted only "selling and distribution expenses" from the line item that Commerce had in earlier administrative reviews considered too broad to permit direct valuation. *See id.* at 12–13.

Commerce did not explain why the narrower "administrative and other expenses" line item—which it now considers to house energy expenses—does not continue to blend those expenses with the "G&A" expenses that remained within the line item even after Ajinomoto's spin-off of "selling and distribution" expenses. Nor did Commerce point to any evidence that energy expenses predominate over G&A within "administrative and other expenses," or over any other type of expense that might fall under that imprecisely-worded line item.

Commerce has thus failed to articulate why, if the *Citric Acid* approach precluded direct valuation of energy in previous administrative reviews of the *Antidumping Duty Order*, the disaggregation of "selling and distribution expenses" from "other operating expenses" would for the first time allow Commerce "to segregate and, therefore . . . exclude energy costs from the calculation of the surrogate financial ratios." *Citric Acid*, 74 Fed. Reg. at 16839. This means that Commerce did not fulfill its statutory duty to provide "an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review." 19 U.S.C. § 1677f(i)(3)(A); *see also* Fufeng's Rebuttal Br. at 11 (insisting, among other points, that "the issue is whether there is a separate line item in the surrogate financial statement for energy expenses").

Commerce's analogy to *Chlorinated Isocyunarates*, 78 Fed. Reg. 4386, does not render its "decisional path . . . reasonably discernable" on review. *Wheatland Tube*, 161 F.3d at 1369–70; *see* IDM at 13–14. Commerce explained as follows:

> In *Chlorinated Isocyanurates*, Commerce treated certain line items in the surrogate financial statements (i.e., rental, light, janitorial and security expenses) as energy expenses and excluded them from the surrogate ratio calculations despite our acknowledgement "that this line item may include certain expenses that are not related to electricity" in order "to avoid double counting of electricity costs, and likewise ensure we account for energy intensive nature of the production process by using the reported electricity [factors of production]." The reasoning in *Chlorinated Isocyanurates* is applicable here, given that the "administrative and other expenses" sub-line item in the 2021 financial statements of Ajinomoto (Malaysia) may include electricity expenses as well as expenses not related to electricity.

Id. at 14 (footnote omitted) (quoting *Chlorinated Isocyanurates* IDM at Cmt. 13). This may well have been a rational comparison. But even the direct applicability of *Chlorinated Isocyanurates*'s reasoning would leave open a key question that Commerce's IDM does not answer: if *Chlorinated Isocyanurates* supports treating "administrative and other expenses" as energy expenses, why should it not also have supported treating "other operating expenses" as energy expenses in previous administrative reviews of the *Antidumping Duty Order*?

Because "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained," *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), the court remands this element of the *Final Review* for Commerce's reconsideration or further explanation. The court does not compel a result on remand. Commerce may, for instance, attempt to explain why the change in Ajinomoto's financial reporting between prior administrative reviews and the *Final Review* constitutes substantial evidence for the direct valuation of Fufeng's reported energy costs. Alternatively, perhaps, Commerce may attempt to explain its rationale for any change in agency practice that the direct-valuation determination in this case might represent.

II. Fufeng's Non-Exhaustion of its Challenge to the Valuation of Coal Under HTS 2701.12.9000 Does not Preclude Judicial Review, and the Government Has Waived any Opposition on the Merits.

Fufeng next challenges a feature of the direct valuation itself, arguing that Commerce's valuation of coal under HTS 2701.12.9000 ("Coal, Whether Or Not Pulverised, But Not Agglomerated: Bitumi-

nous Coal: O/T Coking Coal"), as opposed to HTS 2701.19 ("Coal, Other Than Anthracite Or Bituminous, Whether Or Not Pulverized, But Not Agglomerated"), is unsupported by substantial evidence. Pls.' Br. at 22. Fufeng specifically argues that (1) the heat value of Fufeng's coal is too low to warrant the coal's categorization under HTS 2701.12.9000, that (2) Fufeng uses non-coking-grade coal, which similarly means that that subheading is inapplicable, that (3) agency and USCIT precedent supports the assignment of HTS 2701.19 to "bituminous coal having the same range of heat value as Fufeng's energy coal," that (4) the court in fact "rejected" the assignment of 2701.12.9000 to similar coal in *Carbon Activated Tianjin Co. v. United States*, 47 CIT __, 650 F. Supp. 3d 1354 (2023), and that (5) Commerce is bound to follow its "ordinary practice" of assigning HTS 2701.19 to the type of coal used by Fufeng. *See* Pls.' Br. at 22–26.

The Government does not engage with any of these arguments. Instead, the Government points out that Fufeng did not exhaust them during the administrative proceeding below and states that "the [c]ourt should not reach the merits" of them. Gov't Br. at 19.[8]

It is true that these arguments, as Fufeng develops them in its brief, do not appear in the record on which Commerce based its determination. Fufeng did not raise (or attempt to raise) the HTS subheading assignment issue in its opening administrative case brief. *See* Fufeng's Case Br.; *see also Qingdao Taifa Grp. v. United States*, 33 CIT 1090, 1092–93, 637 F. Supp. 2d 1231, 1236 (2009) (explaining that "[t]o exhaust its administrative remedies, a party usually must submit a case brief 'presenting all arguments that continue in its view to be relevant to Commerce's final determination or final results.'" (alterations omitted) (quoting 19 C.F.R. § 351.309(c)(2))). Fufeng first attempted to raise the HTS subheading assignment issue in its rebuttal brief. *See* First Rejected Rebuttal at 29–33. But Commerce rejected that submission[9] and provided the following explanation in a letter to Fufeng's counsel:

[8] The Government also states that "Fufeng does not provide an explanation for why it failed to raise this issue in its initial case brief." *Id.* at 24. But the Government points to no authority for the proposition that a movant under USCIT Rule 56.2 must affirmatively demonstrate its administrative exhaustion of each of the arguments it raises in its opening brief. *Cf. Jones v. Bock*, 549 U.S. 199, 212 (2007) (collecting cases involving a variety of statutory schemes and explaining that "the usual practice under the Federal Rules [of Civil Procedure] is to regard exhaustion as an affirmative *defense*." (emphasis added)); *cf. also Aluminum Extrusions Fair Trade Comm. v. United States*, 37 CIT 1482, 1484, 938 F. Supp. 2d 1337, 1340 (2013) (referring to "the doctrine of exhaustion of administrative remedies" as an "affirmative defense" in the context of a USCIT Rule 56.2 motion for judgment on the agency record).

[9] Because (as explained below) the court excuses Fufeng's non-exhaustion of its argument on the HTS subheading assignment issue, the court has no occasion to address Fufeng's separate argument that Commerce unlawfully declined to consider certain submissions. *See* Compl. ¶ 30; Pls.' Br. at 26–29; Pls.' Reply at 2.

> Commerce is rejecting and removing Fufeng's September 21, 2022, rebuttal brief submission from the record pursuant to 19 CFR [§] 351.309(d)(2) as it contains factual information not already present on the record of this segment, making it untimely filed. Further, Commerce is also rejecting and removing Fufeng's September 21, 2022 rebuttal brief submission from the record pursuant to 19 CFR [§] 351.302(d) as it contains unsolicited new factual information (*i.e.*, surrogate value HTS selection for coal . . .).

Rejection Letter at 2. Fufeng attempted to raise the issue again when it resubmitted its rebuttal brief, *see* Second Rejected Rebuttal at 29–33, but Commerce rejected that submission as well:

> Commerce has identified additional parts in Fufeng's Redacted Rebuttal Case Brief subject to rejection. In Fufeng's Redacted Rebuttal Case Brief, Fufeng challenged the surrogate value Harmonized Tariff Schedule (HTS) selection for coal. Although the petitioner argued for directly valuing reported energy FOP in its normal value calculation, the petitioner did not challenge Commerce's surrogate value selection (i.e., surrogate value HTS selection for coal). However, Fufeng challenged Commerce's surrogate value selection *(i.e.*, surrogate value HTS selection for coal) in Fufeng's Redacted Rebuttal Case Brief.

Second Rejection Letter at 2 (footnote omitted). Commerce accepted Fufeng's third submission. *See* Fufeng's Rebuttal Br. But that submission did not contain any argument that HTS 2701.19, rather than HTS 2701.12.9000, should be used to directly value Fufeng's coal. *See id.* Neither, as a result, does the official record on which Commerce based its determination.[10]

The circumstances of this case nevertheless warrant an exception to the ordinary exhaustion requirement, whose operation the Government appears to have assumed. *See* Gov't Br. at 23–24. As a statutory matter, "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). This ordinarily means that a party's "failure to raise its issue in its administrative case brief constitute[s] a failure to exhaust administrative remedies," which in turn precludes judicial consideration of the issue in subsequent litigation. *Dorbest Ltd. v.*

[10] The parties' joint appendix does include stricken copies of Fufeng's rejected filings that Commerce retained "solely for the purpose of establishing and documenting the basis for its rejection." Second Rejection Letter; *see* First Rejected Rebuttal; Second Rejected Rebuttal.

United States, 604 F.3d 1363, 1375 (Fed. Cir. 2010); *see also Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) ("[T]he Court of International Trade generally takes a strict view of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases." (internal quotation marks and citations omitted)).

But as § 2637(d)'s use of "where appropriate" implies, there also exist circumstances where requiring exhaustion would be inappropriate. *See CEMEX, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998); *see also Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002) ("By its use of the phrase 'where appropriate,' Congress vested discretion in the Court to determine the circumstances under which it shall require the exhaustion of administrative remedies."). In the past, the court has not required exhaustion in situations that include where: "(1) [the] plaintiff's argument involves a pure question of law; (2) there is a lack of timely access to the confidential record; (3) a judicial decision rendered subsequent to the administrative determination materially affected the issue; or (4) raising the issue at the administrative level would have been futile." *Ninestar Corp. v. United States*, 48 CIT __, __, 687 F. Supp. 3d 1308, 1326 (2024) (quoting *Gerber Food (Yunnan) Co. v. United States*, 33 CIT 186, 193, 601 F. Supp. 2d 1370, 1377 (2009)).

One of the circumstances that warrant the court's excusal of non-exhaustion is where a "party ha[s] no opportunity to raise [an] issue before the agency," *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013) (internal quotation marks and citations omitted), including where "the agency change[s] its position . . . after the party's case brief would have been filed." *Corus Staal*, 502 F.3d at 1381. In other words, if Commerce's adoption of a new position after the regulatory deadline for filing a case brief deprives a party of a meaningful opportunity to challenge the new position during the agency proceeding, the court in its discretion may excuse the non-exhaustion of any arguments related to the out-of-time challenge. Or, as the court held in *Qingdao Taifa*, "[a] party . . . may seek judicial review of an issue that it did not raise in a case brief if Commerce did not address the issue until its final decision, because in such a circumstance the party would not have had a full and fair opportunity to raise the issue at the administrative level." 33 CIT at 1093, 637 F. Supp. 2d at 1236.

That circumstance pertains here. Fufeng's deadline for filing a case brief—which Commerce extended by six calendar days—was Septem-

ber 12, 2022. *See* Case Br. Extension Letter. At that point, only the farthest-gazing of auguries could have supported an expectation that Commerce would directly value of Fufeng's coal under HTS 2701.12.9000.

Fufeng's response to Commerce's January 5, 2022 request for surrogate value information included a "Summary of Suggested Malaysian Surrogate Values" listing a "Malaysia HTS" of "270119" for "COAL." *See* Request for Info; Fufeng's Surrogate Value Cmts. at Ex. 1, 2. Commerce then listed "2701129000" as the "Malaysia HTS Number" for "Coal" on row 31 of a list of 106 factors of production. Prelim. Surrogate Value Spreadsheet at tab SV, cell D32. (The other 105 factors of production listed in this tab include, *exempli gratia*, "Corn Embryo," "Corn Rejects," "Wooden Pallet," and "Carton." *Id.*).

The Government argues that Commerce's issuance of this spreadsheet put Fufeng on notice, forty-five days before the eventual case brief deadline, that Commerce would value coal under HTS 2701.12.9000 in a direct-valuation scenario—and that Fufeng's subsequent omission of any discussion of the HTS subheading assignment issue in its case brief constitutes an inexcusable failure to exhaust the arguments Fufeng now presents. *See* Gov't Br. at 24. Because "Fufeng itself proposed a HTS number for coal, which Commerce declined to select," contends the Government, "Fufeng was therefore aware that Commerce desired information on its coal inputs and also that Commerce had selected an HTS number for coal that Fufeng had not proposed." *Id.* (citations omitted). The Government further argues that the court's "exhaustion analysis should be guided by" *Boomerang Tube LLC v. United States*, 856 F.3d 908 (Fed. Cir. 2017). Def.'s Post-Arg. Subm. at 2. In that case, the Federal Circuit rejected "the proposition that Commerce must expressly notify interested parties any time it intends to change its methodology between its preliminary and final determinations, despite the inclusion of the relevant data in the record and the advancement of arguments related to that data before Commerce." *Boomerang Tube*, 856 F.3d at 913.

This misses the mark in two ways. The first is that the HTS (sub)-headings that Commerce listed in its Preliminary Surrogate Value Spreadsheet do not by their terms pertain to Fufeng's factors of production. The spreadsheet instead represents Commerce's implementation of 19 U.S.C. § 1677b(c)(4), under which Commerce, "in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country,

and (B) significant producers of comparable merchandise." *Id.* The referenced "paragraph (1)," in turn, provides that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." *Id.* § 1677b(c)(1).

Commerce's listing of "2701129000" in the same row as "Coal," in other words, does not even propose to value Fufeng's coal under that subheading—it instead associates "2701129000" with an abstract category of "coal" derived from a database of "Malaysian import prices . . . published by the Global Trade Atlas (GTA)." Prelim. Surrogate Value Mem. at 2. Fufeng could not have reasonably predicted that Commerce would extend this association—between an HTS subheading and a grouping of Malaysian price data—as a means of directly valuing the specific coal that Fufeng uses to power its xanthan gum production. The Government does not identify any statute, regulation, or agency practice that would have supported a reasonable expectation that Commerce would use a surrogate-country HTS subheading assignment to directly value a respondent's energy factor of production instead of continuing to include energy expenses in the numerator of the SG&A ratio for Ajinomoto.

The Government's argument also goes astray for the reason that Fufeng, at the time of the case brief deadline, had no reason to expect that Commerce would directly value Fufeng's coal at all. Commerce had not directly valued Fufeng's energy inputs in any of the three administrative reviews immediately preceding the one at issue in this case. *See, e.g., Xanthan Gum from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017–2018* (Dep't Com. Nov. 25, 2019) and accompanying Issues and Decision Mem. at Cmt. 4. And during the administrative proceeding underlying the *Final Review*, neither Commerce nor any party referenced the possibility of direct valuation until September 12, 2022—the date of the case brief deadline—when Petitioner CP Kelco raised the issue in its submission. *See* Pet'r's Case Br. at 2–19. CP Kelco argued in that submission that "substantial record evidence in this segment indicates that Fufeng's energy costs should be valued directly and included in the calculation of Fufeng's [Cost of Manufacture], unlike [Commerce]'s treatment of energy costs in the past three administrative reviews." *Id.* at 2. As Fufeng notes, the presentation of this argument constituted the first meaningful indication to Fufeng that the direct valuation of energy inputs might be a matter under Commerce's consideration. *See* Pls.' Post-Arg. Subm. at 4.

CP Kelco's filing also marked the first time at which Fufeng could have reasonably appreciated the importance of arguing that its coal should be valued under HTS 2701.19 instead of HTS 2701.12.9000. At the time of the *Preliminary Results*, Commerce indicated that it would disregard Fufeng's reported energy input values and instead include Ajinomoto's "administrative and other expenses" line item in the numerator of the surrogate SG&A ratio. *See* Prelim. Surrogate Value Mem. at 3; IDM at 12–13. This means that even if Fufeng could have somehow intuited that Commerce's inclusion of "2701129000" in the Preliminary Surrogate Value Spreadsheet might convey information about Commerce's hypothetical direct valuation of Fufeng's coal, it would have been academic (if not outright impertinent) to argue that HTS 2701.19 should be assigned to a value that Commerce had stated it would disregard. Without the direct valuation of energy, Commerce's classification of Fufeng's coal would not have affected the ultimate normal value calculation. Fufeng thus had no reason to pursue the administrative remedy that the Government argues it should have pursued.

It cannot be, in other words, that Fufeng was "required to anticipate" at the case brief deadline "that Commerce would accept [a] certain argument[]" asserted in another party's case brief—let alone that that argument would be asserted at all. *Calgon Carbon Corp. v. United States*, 40 CIT 55, 62, 145 F. Supp. 3d 1312, 1320 (2016); *cf. also Gleason Indus. Prods., Inc. v. United States*, 32 CIT 382, 389 n.6, 559 F. Supp. 2d 1364, 1370 n.6 (2008) ("Plaintiffs have had no reason to focus on these subarguments of their main argument, which was preserved, that HTS 8483.20.00 data should be used, and therefore, they are not found to have waived their right to have the court review their arguments.").

Boomerang Tube does not support the Government's argument on this point. Boomerang Tube, a U.S. petitioner, failed in that antidumping case to exhaust an argument that Commerce should have classified certain sales between a Saudi entity ("JESCO") and a Colombian distributor as intra-company transfers in calculating a profit element of constructed normal value ("CV"). *See Boomerang Tube*, 856 F.3d at 912. Boomerang Tube submitted a rebuttal brief in which it addressed the general issue of whether Commerce should use those sales as a basis for its profit calculation, but not the specific issue of whether the sales were transacted within a single company. *Id.* at 911. The Federal Circuit held that this non-exhaustion was not excusable because Boomerang Tube had ample notice, at the time of the non-exhaustion, that Commerce might use the sales to the Colombian distributor in its profit calculation:

> It is undisputed that the data regarding JESCO's transactions with the affiliated distributor were in the record prior to Commerce's preliminary determination. At that point, U.S. Steel and Boomerang either knew or should have known that Commerce may consider those data during its calculations, especially given that the basis of CV profit was at issue. It is also undisputed that, in its case brief, JESCO suggested using those data to calculate CV before Commerce. At that point, Boomerang and U.S. Steel had notice of the potential that Commerce might use the Colombian data to calculate JESCO's CV profit. Indeed, Boomerang's rebuttal brief to Commerce reveals that it recognized JESCO's suggestion to use the Colombian data for CV profit and that Boomerang objected to that approach.

Id. at 913. Boomerang Tube had reason to know, in other words, that (1) the record contained data related directly to the potential affiliation issue, that (2) Commerce was actively considering calculating constructed value on the basis of the Colombia transactions, that (3) adverse parties to the administrative proceeding had argued in their case briefs that Commerce should do just that, and that (4) those adverse parties had specifically argued that Commerce should use the affiliated transaction–related data in calculating constructed value. *See id.* Despite all this, Boomerang Tube proceeded to file a rebuttal brief that did not address the affiliation issue.

Fufeng did not share these epistemic advantages at the analogous stage of this administrative review. As explained above, Fufeng did not even have a reason to know that Commerce's listing of "2701129000" in the Preliminary Surrogate Value Spreadsheet represented Commerce's intent to value Fufeng's own coal under that subheading in a hypothetical direct-valuation scenario. And even if Fufeng could have somehow perceived this, Fufeng would have still lacked timely notice that this hypothetical scenario might come to pass. While Boomerang Tube presumably could have exhausted its affiliation argument in its rebuttal brief, Fufeng's last opportunity to exhaust its HTS subheading classification argument turned out to be the case brief deadline—before any party to the administrative review had argued for direct valuation. *See* Rejection Letter; *cf. Boomerang Tube*, 856 F.3d at 913 (premising the non-excusability of Boomerang Tube's non-exhaustion on the "inclusion of the relevant data in the record *and the advancement of arguments related to that data before Commerce*" (emphasis added)).

Applying the ordinary exhaustion requirement here would effectively deprive Fufeng of a forum in which to argue against the as-

signment of HTS 2701.12.9000 to Fufeng's coal. The administrative forum in this case proved unavailable because, as outlined above, Fufeng had no reason to suspect that the argument would be relevant until after the regulatory case brief deadline that Commerce imposed. The additional unavailability of the judicial forum would close off Fufeng's path to relief altogether. Even "a strict view" of 28 U.S.C. § 2637(d)'s exhaustion provision, *Corus Staal*, 502 F.3d at 1379, cannot compel an outcome that would deprive a party of "a full and fair opportunity to raise [an] issue." *Qingdao Taifa*, 33 CIT at 1093, 637 F. Supp. at 1236.

While under other circumstances the court might proceed to decide the merits of an unexhausted argument upon concluding that the discretionary exhaustion bar does not apply, *see, e.g., Saha Thai Steel Pipe Co. v. United States*, 17 CIT 727, 730, 828 F. Supp. 57, 60 (1993), special considerations favor a different course here. This is because the issue of Commerce's HTS subheading assignment to Fufeng's coal—as distinct from the threshold issue of whether Fufeng exhausted its argument—remains substantially undeveloped below and only half-briefed before the court. The Government addressed only the exhaustion aspect of Fufeng's argument in its response brief, *see* Gov't Br. at 19–28, even though Fufeng had discussed the merits of its argument at some length in its opening brief. *See* Pls.' Br. at 21–26. This means that the Government cannot prevail on the basis of its presentation. "It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived." *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013).

But the effect of the Government's waiver here is not the compulsion of a particular result on remand, which the court ordered in *Calgon Carbon* after "the parties advised that nothing was conceded and the court should decide the matter as it stood." 40 CIT at 63, 145 F. Supp. 3d at 1322. In this case the matter does not stand anywhere—Commerce did not offer an affirmative explanation for why it selected HTS 2701.12.9000 during the proceeding below, and appeared instead to rest its determination on its non-consideration of the arguments in Fufeng's rejected rebuttal brief. *See generally* Final Surrogate Value Mem.; Rejection Letter; Second Rejection Letter. Otherwise put, the court does not have enough before it to "ask itself" the question of "whether substantial evidence on the record supports that the surrogate HTS heading is sufficiently product-specific to the [factor of production] at issue . . . ." *Ancientree Cabinet*, 45 CIT at __, 532 F. Supp. 3d at 1262 (internal quotation marks, alterations, and citation omitted). This is instead a case where "legitimate, prudential

concerns warrant[] both waiver of [Fufeng's] failure to exhaust its administrative remedies and a remand to Commerce for further consideration of the issue." *ABB, Inc. v. United States*, 920 F.3d 811, 818 (Fed. Cir. 2019).

The court accordingly remands this element of the *Final Review* for Commerce to determine in the first instance—upon consideration of Fufeng's agency- and USCIT-level filings—whether HTS 2701.12.9000 or HTS 2701.19 is the proper subheading for the valuation of Fufeng's coal factor of production. Of course, if Commerce reverses course on remand after reconsidering the issue of direct valuation itself, *see* Section I, *supra*, no such determination will be necessary.

III. Fufeng Lacks Standing to Challenge Commerce's Differential Pricing Methodology.

The court next turns to Fufeng's challenge to Commerce's application of its differential pricing methodology as a means of calculating Fufeng's weighted-average dumping margin. Fufeng lacks standing to assert this particular challenge,[11] and the Government's motion to dismiss in part is granted.

In the *Preliminary Review*, Commerce "found that a total of 88.4 percent of Fufeng's [Export Price] and [Constructed Export Price] sales pass the Cohen's *d* test" and stated that this "confirms the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods." PDM at 17. But Commerce nevertheless used the standard A-A method rather than the A-T method to compare normal value to export price, explaining that "there is not a meaningful difference in the weighted-average dumping margins calculated using the A-A comparison method and the A-T comparison method." *Id.*[12]

In its case brief, Fufeng acknowledged that "the Department's preliminary choice of A-A instead of A-T comparison was compelled solely by the results of the meaningful difference test." Fufeng's Case Br. at

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[11] Standing is a claim-by-claim inquiry. As the U.S. Supreme Court explained in *TransUnion LLC v. Ramirez*, "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press . . . ." 594 U.S. 413, 431 (2021) (citations omitted); *see also Dow Jones & Co. v. Ablaise Ltd.*, 606 F.3d 1338, 1348 (Fed. Cir. 2010) ("According to the U.S. Supreme Court: 'a plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, (2006))); USCIT R. 12(b) (referring to "[e]very defense to a claim for relief in any pleading . . . .").

[12] Recall that Commerce uses the A-T method only if all three of the Cohen's *d*, ratio, and meaningful difference tests confirm that choice. *See Differential Pricing Analysis*, 79 Fed. Reg. at 26723.

18. But even though this meant that the "passage" of the Cohen's *d* test was immaterial to Commerce's dumping margin calculation, Fufeng persisted in arguing that Commerce's application of the Cohen's *d* test to Fufeng's U.S. sales data was unlawful. *Id.* at 19. Fufeng stated that Commerce's application of the A-T method "could have" resulted in a higher calculated dumping margin, and framed its argument in hypothetical terms:

> In the event that other modifications of Fufeng's preliminary margin result in the Department concluding that a meaningful difference exists, and that Fufeng's margin should be calculated based on A-T rather than A-A, we believe that resort to A-T would be contrary to law, for the reasons discussed below.

Id.

Fufeng's fear that Commerce might reverse its meaningful-difference finding in the *Final Review*, and that such a reversal might render material the outcome of the Cohen's *d* test, proved unfounded. Commerce in the *Final Review* continued to find that under the meaningful difference test,

> there is no meaningful difference between the weighted-average dumping margin calculated using the A-to-A method and the weighted-average dumping margin calculated using an alternative comparison method based on applying the A-to-T method to those U.S. sales which passed the Cohen's *d* test and the A-to-A method to those sales which did not pass the Cohen's *d* test.

IDM at 34.[13] Commerce accordingly used the A-A method to calculate Fufeng's weighted-average dumping margin. *See* Final Calculation Mem. at 7. And because Commerce would have selected this method regardless of the result of the Cohen's *d* test, the lawfulness of that test's implementation did not affect Fufeng's dumping margin in either direction.

But now, even after successfully averting Commerce's calculation of a "higher margin" in the administrative review proceeding, Fufeng's Case Br. at 19, Fufeng will not let the matter drop. Fufeng represents to the court that "[w]hile the Final Results retained the A-A methodology simply because there was no 'meaningful difference' between the A-A and A-T margins, Commerce's differential pricing methodology as applied to Fufeng's U.S. sales is unlawful.'" Pls.' Br. at 38. This, Fufeng argues, is because "the *Final Results* are potentially flawed because Commerce failed to analyze, much less demonstrate,

[13] The A-to-A method yielded a 17.36 percent dumping margin, and the A-to-T method yielded a 19.91 percent dumping margin. Final Calculation Mem. at 7.

whether Fufeng's pricing data satisfy the conditions for the Cohen's *d* test to be considered valid." *Id.* at 43.

The Government responds that Fufeng lacks standing to bring this particular challenge and moves to dismiss the relevant count of Fufeng's Complaint pursuant to USCIT Rule 12(b)(1), which provides for a party's assertion of a defense on the basis of the court's "lack of subject matter jurisdiction." *See* Gov't Br. at 10; Compl. ¶ 28. The Government is correct, and its motion to dismiss is granted.

The three elements of the "'irreducible constitutional minimum' of standing" are that "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339 (quoting *Lujan*, 504 U.S. at 560). "[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination." *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009). And "[i]n the antidumping context," this means that "a party challenging a purported error by Commerce must show that it was harmed as a result of the error." *SolarWorld Ams., Inc. v. United States*, 962 F.3d 1351, 1359 (Fed. Cir. 2020).

Fufeng has not made this showing here. Even if Commerce erred in applying the Cohen's *d* test, Fufeng does not establish how that error would constitute an injury in fact, let alone one that would "likely to be redressed by a favorable judicial decision." *Spokeo*, 578 U.S. at 338. This is because the precise administrative outcome that Fufeng seeks—Commerce's application of the A-A method as opposed to the A-T method—has already occurred. Even if Fufeng as a commercial entity has an interest in how Commerce conducts its Cohen's *d* analysis in future investigations and reviews, that interest lacks any material connection to the particular administrative review that is the subject of this case.

The circumstances of this case almost precisely mirror those of *Best Mattresses Int'l Co. v. United States*, another antidumping duty–related case. 47 CIT __, 622 F. Supp. 3d 1347 (2023). In the administrative proceeding underlying *Best Mattresses*, Commerce's Cohen's *d* test yielded a finding of a pattern of significant price disparities among a respondent's U.S. sales. *Id.* at 1367. But upon finding no meaningful difference between the dumping margins that would result (respectively) from the A-A and A-T methods, Commerce used the

A-A method to calculate a marginally smaller dumping margin. *Id.* In subsequent litigation before this court, the plaintiffs argued against the hypothetical application of the A-T method on the ground that Commerce's finding of a pattern of significant price disparities through the Cohen's *d* test was not supported by substantial evidence. *Id.* The Government moved under USCIT Rule 12(b)(1) to dismiss the relevant count of the plaintiffs' complaint for lack of standing, and the court granted that motion:

> Because Commerce ultimately applied the method of calculation that Plaintiffs requested, and Commerce's use of the Cohen's *d* test is not dispositive to the final dumping margin, the alleged harm of a potentially misapplied Cohen's *d* test amounts to a "bare procedural violation" and does not "entail a degree of risk sufficient to meet the concreteness requirement."

Id. (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016)).

The issue the court confronted in *Best Mattresses* does not differ from the issue at hand in any material respect. Fufeng, recognizing this similarity, states that it "respectfully disagrees with the contrary result ordered by this Court in [*Best Mattresses*], and asks this Court to reconsider . . . the analysis which led to its decision in that case." Pls.' Reply at 16 n.1. But Fufeng offers no compelling reason why the court should depart from *Best Mattresses*. The main argument for standing that Fufeng advances in its reply—that "[c]ontinued application of the Cohen's *d* test upon remand could require additional rounds of briefing regarding an inflated [antidumping duty] rate and would waste the resources of the Court and all parties to this proceeding," Pls.' Reply at 16—was squarely addressed in *Best Mattresses* itself. The court explained in that case that "prudential concerns about repetitive briefing at a later stage cannot justify an extension of judicial power beyond Article III's mandatory limits," and cautioned that "if the court were to rule for Plaintiffs now, and if the Cohen's *d* test is once again immaterial to the final dumping margin on remand, then the court will have opined on a hypothetical legal matter outside the live controversy of this case." *Best Mattresses*, 47 CIT at __, 622 F. Supp. 3d at 1369 (citing *NLRB v. Globe Sec. Servs., Inc.*, 548 F.2d 1115, 1118 (3d Cir. 1977)). To this line of reasoning, Fufeng offers only the most basic expression of disagreement. The court is unpersuaded.

For these reasons, the Government's motion to dismiss Count Six of Fufeng's Complaint for lack of standing pursuant to USCIT Rule 12(b)(1) is granted.

IV. Commerce Lawfully Deducted Section 301 Duties from its Calculation of Fufeng's Export Price.

Fufeng also challenges Commerce's reduction of Fufeng's export price by the amount of a separate Section 301 duty imposed on Fufeng's imports of subject xanthan gum. *See* Compl. ¶ 26. Commerce deducted the amount in question under 19 U.S.C. § 1677a(c)(2)(A), which provides that a respondent's export price "shall be reduced by the amount, if any, included in such price, attributable to any . . . United States import duties . . . ." *See* IDM at 31–32.

Whether this deduction is in accordance with law turns on whether this particular Section 301 duty is a "United States import dut[y]" covered by 19 U.S.C. § 1677a(c)(2)(A). The court concludes that the answer is yes, and accordingly denies this element of Fufeng's motion for judgment on the agency record.

First, some background. On August 18, 2017, the President initiated a Section 301 investigation by directing the USTR to "determine . . . whether to investigate any of China's laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development." *Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology*, 82 Fed. Reg. 39007, 39007 (Exec. Off. of the President Aug. 17, 2017); *see also* 19 U.S.C. §§ 2411—2412. After a year-long investigation, the USTR imposed Section 301 duties on a number of goods imported from China. *See Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301*, 83 Fed. Reg. 14906, 14906 (U.S. Trade Rep. Apr. 6, 2018) ("*Notice of Determination*"); *Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301*, 83 Fed. Reg. 28710, 28711–12 (U.S. Trade Rep. June 20, 2018) ("*Notice of Action*"); *Notice of Action Pursuant to Section 301*, 83 Fed. Reg. 40823, 40824 (U.S. Trade Rep. Aug. 16, 2018). The USTR then extended the scope of these duties—which until then applied to products classified under two lists of HTS subheadings—to a third list of subheadings that includes HTS 3913.90.20 ("Polysaccharides and their derivatives, nesoi,[14] in primary forms"). *See Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47974, 48076 (U.S.

[14] "Nesoi" is an acronym for "not elsewhere specified or included." The Year in Trade 2018, Operation of the Trade Agreements Program, 70th Rep. at 12, USITC Pub. 4986 (Oct. 2019).

Trade Rep. Sept. 21, 2018) ("*Notice of Modification*"). As the subject xanthan gum is classified under this subheading, these Section 301 duties (the "List 3 Duties") applied to Fufeng's imports of subject xanthan gum during the period of review. *See* IDM at 3, 32.

In the *Final Review* Commerce deducted the List 3 Duties from its calculation of Fufeng's export price in accordance with 19 U.S.C. § 1677a(c)(2)(A), an act that increased Fufeng's final dumping margin. IDM at 31. Commerce determined that Section 301 duties as a general category are deductible from export price, and explained its reasoning for the deduction as follows:

> Section 301 duties are imposed to address a variety of unfair trading acts, policies, and practices of U.S. trading partners. As explained in [*Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1362 (Fed. Cir. 2007)], special duties are intended to provide remedial relie[f] from the adverse effects of imports, while normal U.S. customs duties are imposed regardless of whether a U.S. industry is suffering from such adverse effects and, instead, address broad national concerns. For example, section 301 duties are imposed to address three broad categories of acts, policies, or practices of a foreign country that may include: (i) trade agreement violations; (ii) acts, policies or practices that are unjustifiable (defined as those that are inconsistent with U.S. international legal rights) and that burden or restrict U.S. Commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and that burden or restrict U.S. Commerce. Therefore, harm from imports is not a [prerequisite] for the imposition of section 301 duties. On the contrary, special duties, such as antidumping, countervailing, and section 201 duties, are imposed to address the specific threat of injury or actual injury to a domestic industry as a result of imported merchandise. Thus, section 301 duties are distinguished from special duties and meet the definition of normal U.S. import duties under section 772(c)(2)(A) of the Act.

Id. at 31–32.

Fufeng, seemingly adopting Commerce's implied premise that the deductibility of the List 3 Duties depends on whether Section 301 duties are categorically deductible, argues in its brief before the court that Section 301 duties are categorically non-deductible under what it characterizes as the Federal Circuit's holding in *Wheatland Tube*. *See* Pls.' Br. at 30–37. In Fufeng's view, Section 301 duties belong (alongside antidumping and countervailing duties) to the category of

non-deductible "special duties" that "are imposed to remedy the harm arising from unfairly traded goods." *Id.* at 31.

In assessing the merits of Fufeng's challenge, the court need not decide whether Section 301 duties—as an entire category—are inherently non-deductible "special duties" under *Wheatland Tube* or any other authority. This is because under *Borusan*, which the Federal Circuit decided after Commerce issued its IDM in this case, the court instead looks to "the authorized governmental action that actually prescribed the duty on imports at issue." 63 F.4th at 34; *see also Jinko Solar Imp. & Exp. Co. v. United States*, 48 CIT __, __, 701 F. Supp. 3d 1367, 1392 (2024) ("*Borusan* . . . rejects such statute-wide distinctions. Rather, it is the text of the order imposing the duty that controls.").

Fufeng disputes *Borusan*'s applicability to this case, pointing out that it involved the deductibility under 19 U.S.C. § 1677a(c)(2)(A) of duties imposed via presidential proclamation pursuant to the distinct Section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87–794, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862). *See* Pls.' Br. at 32; Pls.' OAQ Resp. at 4–5. Fufeng seizes on this distinction, arguing that *Borusan*'s rationale is limited to "the context of Section 232 duties, having a materially different purpose of safeguarding national security instead of providing trade remedies." Pls.' Br. at 33.

But the Federal Circuit's opinion in *Borusan* suggests a much wider sweep than that.[15] The Federal Circuit explained its implementing instrument–specific approach by stating that "[n]othing in § 1677a(c)(2)(A) requires the uniform treatment of all duties prescribed under a particular statutory authorization," and that "[n]or, more specifically, have we been shown anything in the § 232 framework that requires the uniform treatment of all duties imposed by the President under § 232." *Id.* at 33–34.

The court in this case follows the Federal Circuit's holding as to the general requirements of § 1677a(c)(2)(A), a holding that is independent of Section 232's particular features. And as for the Federal Circuit's holding regarding "the § 232 framework," *id.* at 33, the court observes that the text of Section 301—just like that of Section

[15] The court confronted this precise scenario—involving the exact Section 301 duties, imposed on a product on List 2—one year ago in *Shanghai Tainai Bearing Co. v. United States*, 47 CIT __, 658 F. Supp. 3d 1269, 1294 (2023). The court reached the same conclusions as it does here regarding both *Borusan*'s applicability and the deductibility of the Section 301 duty at issue. The court took up the issue again eight months later in *Jinko Solar*, and there too applied *Borusan*'s rationale in concluding that a Section 301 duty was deductible from export price. *See* 48 CIT at __, 701 F. Supp. 3d at 1392 ("Although Jinko contends that *Borusan* involved Section 232 duties concerning national security, *Borusan* rejects such statute-wide distinctions. Rather, it is the text of the order imposing the duty that controls. Here, the text of the notice of determination pursuant to Section 301 indicates that the Section 301 duties imposed are to be in addition to normal duties." (cleaned up)).

232—does not compel a uniform conclusion regarding the deductibility of all duties imposed under it. Section 301 contemplates a broad range of possible remedies, *see* 19 U.S.C. § 2411(c)(1), to an equally broad range of possible harms. *See id.* § 2411(d)(2)–(5). Also like Section 232, it is not a duty-creating instrument in itself but a "statute [that] merely authorizes a governmental officer or body to impose a duty." *Borusan*, 63 F.4th at 33. *Borusan* is accordingly on point, meaning that for duties imposed under Section 301 "it is the particular exercise of the authority that determines—based on the character of that exercise—whether the prescribed duty comes within § 1677a(c)(2)(A)." *Id.*[16]

The court now turns to whether the USTR's specific exercise of authority under Section 301 to implement the List 3 Duties supports Commerce's deduction of those duties from its calculation of Fufeng's export price. Here, too, the Federal Circuit's holding in *Borusan* (in the Section 232 context) is instructive.

The President implemented the Section 232 duty at issue in *Borusan* by issuing a proclamation whose language "[made] clear that the duty newly being imposed was to add to, and not partly or wholly offset, the antidumping duties that would be due without the new duty." *Borusan*, 63 F.4th at 34 (citing *Proclamation No. 9705*, 83 Fed. Reg. 11625 (Mar. 8, 2018) ("*Proclamation 9705*")). Because that proclamation stated that the Section 232 duty was to be imposed "in addition to any other duties," the Federal Circuit "conclude[d] that the only fair reading of Proclamation 9705 is that, when applied to an article covered by antidumping duties, the Proclamation 9705 and antidumping duties must together result in a full imposition of both duties." *Id.* at 34–35. Otherwise, the Federal Circuit reasoned, "the Proclamation 9705 duty would be offset substantially or completely by a reduction in the antidumping duty itself." *Id.* at 35. The Federal Circuit then distinguished *Proclamation 9705* from the implementing presidential proclamation at issue in *Wheatland Tube*, 495 F.3d 1355, which unlike *Proclamation 9705* lacked language "requir[ing] that its duty be treated as a United States import duty to be subtracted under § 1677a(c)(2)(A)." *Borusan*, 63 F.4th at 36 (internal quotation marks and alterations omitted). While the Federal Circuit also noted Commerce's "background recognition" in the *Wheatland Tube* proceeding "concerning potential overlap of § 201 duties and antidumping duties," it ultimately concluded that "[i]n the present matter, as in the

[16] As a result, the court construes Commerce's explanation in the IDM as supporting only the deductibility under § 1677a(c)(2)(A) of the particular List 3 Duties at issue. The court's holding in this case does not necessarily preclude a future determination that some other action undertaken pursuant to Section 301 might qualify as a non-deductible duty.

earlier [*Wheatland Tube*] one, the duty's treatment under § 1677a(c)(2)(A) is effectively determined by the President in exercising the broad power to shape the particular duty imposition." *Id.*

The court now applies this analysis to the USTR's "duty-creating action" (or, more precisely, actions) in this case. These are the April 6, 2018 *Notice of Determination*, through which the USTR proposed the Section 301 duties, the August 16, 2018 *Notice of Action*, through which it enacted them, and the September 21, 2018 *Notice of Modification*, through which it extended the duties to cover the products enumerated in List 3. The *Notice of Determination* states, much like *Proclamation 9705* in *Borusan*, that "the proposed action is an *additional duty* of 25 percent on a list of products of Chinese origin." 83 Fed. Reg. at 14907 (emphasis added). The *Notice of Determination* further states that:

> if a good of Chinese origin is currently subject to a zero ad valorem rate of duty, the product would be subject to a 25 percent ad valorem rate of duty; if a good of Chinese origin were currently subject to a 10 percent ad valorem rate of duty, the product would be subject to a 35 percent ad valorem rate of duty, and so on.

Id.; *see also Notice of Modification*, 83 Fed. Reg. at 47974–75 (referring repeatedly to an "additional duty" and stating that the modification is "in accordance with the specific direction of the President").

The *Notice of Action* lends yet sturdier support to Commerce's determination that the List 3 Duty on xanthan gum is deductible from Fufeng's export price. In addition to restating that the Section 301 duty is an "additional duty," it goes on to specify that "the rates of duty . . . apply *in addition to all other applicable duties, fees, exactions, and charges*." *Notice of Action*, 83 Fed. Reg. at 40824 (emphasis added). This language almost exactly tracks that of *Proclamation 9705*, which "directed that the [Section 232] duty was to be imposed 'in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles.'" *Borusan*, 63 F.4th at 29 (quoting *Proclamation 9705*, 83 Fed. Reg. at 11627).

Taken together, these explanations for executive action leave little doubt that the List 3 Duty on xanthan gum is a remedy that supplements, rather than substitutes, any antidumping duties that Commerce imposes pursuant to 19 U.S.C. § 1673.

A case may one day arise that will require the court to assess the Congressional policies expressed in Section 301, and to issue a categorical holding as to some general feature of all duties imposed thereunder. But that is not this case. Here, it is necessary to observe

only that Commerce's deduction of the List 3 Duty is in accordance with law, where the "law" comprises a series of authoritative statements by the President and the Executive Office about the character of the specific action at issue. *See* 19 U.S.C. § 1516a(b)(1)(B).

This element of Commerce's *Final Review* is accordingly sustained.

CONCLUSION

For the foregoing reasons, it is hereby:

ORDERED that Count Six of Plaintiffs' Complaint, Apr. 17, 2024, ECF No. 13, is **DISMISSED**; and it is further

ORDERED that the U.S. Department of Commerce's determination in *Xanthan Gum from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2020–2021*, 88 Fed. Reg. 9861 (Dep't Com. Feb. 15, 2023), is **REMANDED** for further proceedings consistent with this opinion, and it is further

ORDERED that the U.S. Department of Commerce is instructed to reconsider the antidumping duty rate applied to Consolidated Plaintiffs Meihua Group International (Hong Kong) Limited, and Xinjiang Meihua Amino Acid Co., Ltd., based on any changes to the margin calculated for Plaintiffs, and it is further

ORDERED that Commerce shall file its remand redetermination with the court within ninety days of the date of this opinion. The timeline for filings and comments regarding the second remand redetermination shall proceed according to USCIT Rule 56.2(h).

SO ORDERED.

Dated: December 16, 2024
New York, New York

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

Slip Op. 24–140

HARDWARE RESOURCES, INC., Plaintiff, v. UNITED STATES, Defendant, COALITION OF AMERICAN MILLWORK PRODUCERS, Defendant-Intervenor.

Before: Joseph A. Laroski, Jr., Judge
Court No. 23–00150

[Remanding to the Department of Commerce a decision interpreting the scope of the antidumping and countervailing duty orders on wood mouldings and millwork products from the People's Republic of China.]

Dated: December 16, 2024

Jill A. Cramer, Mowry & Grimson, PLLC, of Washington, DC, argued for plaintiff Hardware Resources, Inc. With her on the brief were *Jeffrey Sheldon Grimson*, *Bryan Patrick Cenko*, *Clemence Dongwoo Kim*, *Evan P. Drake*, *Kristin Heim Mowry*, *Ronalda G. Smith*, *Sarah Marie Wyss*, and *Yixin (Cleo) Li*.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant United States Government. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Deputy Director. Of counsel, arguing for defendant, was *Leslie Mae Lewis*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Wesley E. Weeks, Wiley Rein, LLP, of Washington, DC, argued for defendant-intervenor Coalition of American Millwork Producers. With him on the brief were *Timothy C. Brightbill*, *Adam Milan Teslik*, *Elizabeth Seungyon Lee*, *Laura El-Sabaawi*, *Maureen Elizabeth Thorson*, and *Theodore Paul Brackemyre*.

OPINION AND ORDER

Laroski, Judge:

This action is a challenge to the final scope ruling of the U.S. Department of Commerce ("Commerce") regarding edge-glued wood boards imported by Hardware Resources, Inc. ("Hardware Resources"). Commerce's final scope ruling found that Hardware Resources' edge-glued boards are included in the antidumping duty ("AD") and countervailing duty ("CVD") orders on wood mouldings and millwork product from the People's Republic of China (collectively, the "Orders"). *Final Scope Ruling on Hardware Resources' Edge-Glued Boards*, P.R. 25 (Aug. 2, 2023) ("*Final Scope Ruling*"). Commerce ruled that the edge-glued boards fit the physical description of subject merchandise based on the plain language of the Orders because the boards are made of wood and continuously shaped; thus, the boards are within the scope of the Orders. *Final Scope Ruling* at 9. Hardware Resources asserts that Commerce skipped a threshold requirement contained in the scope description when it did not first determine that the merchandise was a moulding or a millwork product. Hardware Resources moves for judgment on the agency record.

The United States (the "Government") and the Coalition for American Millwork Producers ask that the court sustain Commerce's scope ruling.

BACKGROUND

I. Antidumping and Countervailing Duty Orders

On February 16, 2021, Commerce issued antidumping and countervailing duty orders on Wood Mouldings and Millwork Products from the People's Republic of China ("China"). *AD Order*, 86 Fed. Reg. at 9,486; *CVD Order*, 86 Fed. Reg. at 9,484. Commerce defined the scope of the Orders, in relevant part, as follows:

> The merchandise subject to the Orders consists of wood mouldings and millwork products that are made of wood (regardless of wood species), bamboo, laminated veneer lumber (LVL), or of wood and composite materials (where the composite materials make up less than 50 percent of the total merchandise), and which are continuously shaped wood or finger-jointed or edge-glued moulding or millwork blanks (whether or not resawn). The merchandise subject to [the Orders] can be continuously shaped along any of its edges, ends, or faces.
>
> The percentage of composite materials contained in a wood moulding or millwork product is measured by length, except when the composite material is a coating or cladding. Wood mouldings and millwork products that are coated or clad, even along their entire length, with a composite material, but that are otherwise comprised of wood, LVL, or wood and composite materials (where the non-coating composite materials make up 50 percent or less of the total merchandise) are covered by the scope.
>
> The merchandise subject to the Orders consists of wood, LVL, bamboo, or a combination of wood and composite materials that is continuously shaped throughout its length (with the exception of any end-work/dados), profiled wood having a repetitive design in relief, similar milled wood architectural accessories, such as rosettes and plinth blocks, and finger-jointed or edge-glued moulding or millwork blanks (whether or not resawn). The scope includes continuously shaped wood in the forms of dowels, building components such as interior paneling and jamb parts, and door components such as rails, stiles, interior and exterior door frames or jambs (including split, flat, stop applied, single- or double-rabbeted), frame or jamb kits, and packaged door frame

trim or casing sets, whether or not the door components are imported as part of a door kit or set.

The covered products may be solid wood, laminated, finger-jointed, edge-glued, face-glued, or otherwise joined in the production or remanufacturing process and are covered by the scope whether imported raw, coated (e.g., gesso, polymer, or plastic), primed, painted, stained, wrapped (paper or vinyl overlay), any combination of the aforementioned surface coatings, treated, or which incorporate rot-resistant elements (whether wood or composite). The covered products are covered by the scope whether or not any surface coating(s) or covers obscure the grain, textures, or markings of the wood, whether or not they are ready for use or require final machining (e.g., endwork/dado, hinge/strike machining, weather strip or application thereof, mitre) or packaging.

All wood mouldings and millwork products are included within the scope even if they are trimmed; cut-to-size; notched; punched; drilled; or have undergone other forms of minor processing.

. . .

Excluded from the scope of the Orders are countertop/butcher blocks imported as a full countertop/butcher block panel, exterior fencing, exterior decking and exterior siding products (including solid wood siding, non-wood siding (e.g., composite or cement), and shingles) that are not LVL or finger jointed; finished and unfinished doors; flooring; parts of stair steps (including newel posts, balusters, easing, gooseneck, risers, treads, rail fittings and stair stringers); picture frame components three feet and under in individual lengths; and lumber whether solid, finger-jointed, or edge-glued. To be excluded from the scope, finger-jointed or edge-glued lumber must have a nominal thickness of 1.5 inches or greater and a certification stamp from an American Lumber Standard Committee-certified grading agency. The exclusion for lumber whether solid, finger-jointed, or edge-glued does not apply to screen/"surfaced on 4 sides" (S4S) and/or "surface 1 side, 2 edges" (SlS2E) stock (also called boards) that are finger-jointed and/or edge-glued, or to finger-jointed and/or edge-glued moulding or millwork blanks (whether or not resawn). Accordingly, S4S and S1S2E stock/boards that are not finger-jointed or edge glued are excluded from the scope of the Orders.

Final Scope Ruling at 2–3; *AD Order*, 86 Fed. Reg. at 9,488–89; *CVD Order*, 86 Fed. Reg. 9,485–86.

II. Scope Inquiry Proceedings

Hardware Resources filed a scope ruling application on March 9, 2023, requesting that Commerce find that its edge-glued boards are outside the scope of the Orders. *Scope Ruling Application*, C.R. 1, P.R. 1 (Mar. 9, 2023). On April 10, 2020, Commerce initiated the scope inquiry. *Initiation of Scope Inquiry*, P.R. 13 (Apr. 10, 2023). Drawing from Hardware Resources' Scope Ruling Application, Commerce described the merchandise subject to the inquiry as:

> [E]dge-glued boards which are made of solid white birch that is finger-jointed and edge-glued, measuring eight feet in length and 5/8- inches in thickness and with a width ranging from 2.5 to 12 inches. An ultraviolet (UV) coating is applied to the boards except the bottom edge that is left as natural material. The corners of the boards are lightly sanded to smooth the corners. Hardware Resources states that the edge-glued boards will be further processed into cabinet parts after importation into the United States, although they could be used in other applications.
>
> In their condition as imported, the boards have a mark of approximately one mm that was added using a straight saw along the length of one side of the board. This mark is used by Hardware Resources (or its customer) as a guide which indicates which side of the board is to be used to place the groove that is added after import. Hardware Resources states the marking has no function other than as a visual guide for where a groove will be cut after importation. The marking is removed once the groove is added after importation. The edge-glued boards also require dovetailing as well as additional machine processing such as notching and drilling after importation in order to be suitable for use as a drawer side.

Final Scope Ruling at 4 (internal citations omitted).

On August 2, 2023, Commerce issued its final scope ruling, determining that the edge-glued boards imported by Hardware Resources are within the scope of the Orders. *Final Scope Ruling* at 11. This action followed.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2020) and 19 U.S.C. § 1516a(a)(2)(B)(vi) (2020). Section 1581(c) provides for

exclusive jurisdiction over any civil action commenced under section 1516a. 28 U.S.C. § 1581(c). Section 1516a(a)(2)(B)(vi) provides for judicial review of a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." 19 U.S.C. § 1516a(a)(2)(B)(vi). In conducting its review, the court must set aside any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

DISCUSSION

I. Parties' Contentions

Hardware Resources argues that Commerce's determination that Hardware Resources' edge-glued boards are covered by the scope of the Orders on "wood mouldings and millwork products" is unsupported by substantial evidence and contrary to law. Compl. at 9, ECF No. 10 (Sept. 1, 2023). Specifically, Hardware Resources contends that (1) Commerce failed to consider whether, as a threshold question, Hardware Resources' edge-glued boards are "wood mouldings or millwork products" as specified by the plain language of the scope description; (2) Commerce erred in determining that the plain language of the scope description does not incorporate an end-use limitation; (3) Commerce erred in finding that Hardware Resources' edge-glued boards are "continuously shaped;" (4) Commerce improperly disregarded evidence from various primary interpretive sources listed under paragraph (k)(1) of 19 C.F.R. § 351.225 (2024) (the "(k)(1) sources") that serve to help clarify ambiguous scope language, including prior determinations of the U.S. International Trade Commission (the "Commission" or "ITC") and a prior scope ruling issued to Loveday Lumber; and (5) to the extent that the court regards the scope language ambiguous and analysis of the (k)(1) sources not dispositive, Commerce failed to consider the factors set forth under paragraph (k)(2) of section 351.225 (the "(k)(2) factors"). Pl. Hardware Br. in Supp. of Mot. for J. on Agency R. at 16, ECF No. 30 (Jan. 26, 2024) ("Hardware Br.") at 10–12.

In response, the Government argues that "Commerce's practice is to not make scope inclusion or exclusion decisions based on end-use requirements, absent clear scope language indicating otherwise." Def. United States Br. in Supp. of Resp. to Pl. Mot. for J. on Agency R. at 10, ECF No. 32 (Mar. 26, 2024) ("Gov. Br."). The Government explains that when Commerce intends to include an end-use restriction, its practice is to use such express terms as "'only' or 'solely' to indicate restrictions on end uses for certain products." Gov. Br. at 16 (citing

King Supply Co., LLC v. United States, 674 F.3d 1343, 1349 (Fed. Cir. 2012)). Here, the scope language does not include the requisite express terms because "the only scope language identified by Hardware [Resources] . . . was the general term 'wood mouldings or millwork products,'" which "does not reference use at all." Gov. Br. at 18 (citing *Final Scope Ruling* at 6). Therefore, according to the Government, Hardware Resources' argument that its edge-glued boards are excluded from the scope based on downstream production that processes the edge-glued boards into cabinet sides lacks merit. *Id.* at 18.

The Government argues that the scope's plain language, along with (k)(1) interpretive sources, are dispositive, so reference to the (k)(2) factors is unnecessary. *Id.* at 14–15. The Government states that the scope language covers products that are "made of wood," including "continuously shaped wood or finger-jointed or edge-glued moulding or millwork blanks (whether or not resawn)." *Id.* at 13–14 (citing *Final Scope Ruling* at 8–11). Although the scope language does not define "continuously shaped," the Government contends that Commerce considered relevant (k)(1) interpretive sources to reasonably conclude that Hardware Resources' edge-glued boards meet this requirement. *Id.* at 14.

II. Legal Standard

When questions arise as to whether a particular product is covered by the scope of an AD or CVD order, Commerce will conduct a scope inquiry and issue a scope ruling. 19 C.F.R. § 351.225(a) (2024). In determining whether a product falls within the scope of an AD or CVD order, Commerce "consider(s) the language of the scope and may make its determination on this basis alone if the language of the scope, including descriptions of merchandise expressly excluded from the scope, is dispositive." § 351.225(k)(1). "If the scope is unambiguous, it governs." *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017).

"In reviewing the plain language of a duty order," Commerce must consider the (k)(1) sources. § 351.225(k); *see Meridian*, 851 F.3d at 1382. The (k)(1) sources include the description of the merchandise considered by Commerce and the Commission when crafting the scope, as well as previous determinations made by Commerce and the Commission. § 351.225(k)(1)(i); *see Meridian*, 851 F.3d at 1382.

If Commerce "determines that the sources under paragraph (k)(1) of this section are not dispositive," Commerce will then consider the (k)(2) factors. § 351.225(k)(2)(i). The (k)(2) factors include (A) the physical characteristics of the product; (B) the expectations of the

ultimate user; (C) the ultimate use of the product; (D) the channels of trade in which the product is sold; and (E) the manner in which the product is advertised and displayed. *Id.* "In the event of a conflict between the factors under paragraph (k)(2)(i) of this section, paragraph (k)(2)(i)(A) will normally be allotted greater weight than the other factors." § 351.225(k)(2)(ii). "In conducting this analysis, it is well settled that Commerce has discretion in how to balance these factors." *Meridian*, 851 F.3d at 1382.

III. Commerce did not consider whether Hardwood Resources' edge-glued boards were "wood mouldings and millwork products"

Hardware Resources argues that the opening phrase of the scope description — "[t]he merchandise subject to the Orders consists of wood mouldings and millwork products that are made of wood. . ." — requires Commerce to first consider whether a product is a wood moulding or millwork product, "[t]hen if, and only if, that initial requirement is met, the other limiting factors apply," including the physical descriptions of the subject merchandise set forth in the subsequent lines of the Orders (i.e., "made of wood . . ."). Hardware Br. at 16 (citing *AD Order*, 86 Fed. Reg. at 9,488). Hardware Resources explains that a plain language analysis of the phrase "mouldings and millwork products" implies an end-use requirement that a product subject to the Orders must be intended for use as a moulding or millwork product, and that Hardware Resources' product does not satisfy this requirement. Hardware Br. at 22–23 (citing *King Supply*, 674 F.3d at 1345–48).

According to Hardwood Resources, because Commerce did not give meaning to the phrase "wood mouldings and millwork products" and instead exclusively based its determination on the physical characteristics specified in the scope description, Commerce's "cursory discussion" of the plain language of the scope was erroneous, constituted an improper application of the "three-part scope analysis set forth in its own regulations and established by court precedent, and a remand is warranted on that basis alone." Hardware Br. 16–17.

Moreover, had Commerce not skipped the threshold question and instead turned to (k)(1) sources to help define the plain language of the phrase "wood mouldings and millwork product," Hardware Resources explains, Commerce would have concluded that Hardware Resources' edge-glued boards, which are manufactured into cabinet parts upon importation, are not wood mouldings or millwork products and do not fall within the scope of the Orders. *Id.*

The Government disagrees with Hardware Resources, arguing that Hardware Resources' edge-glued boards "meet all physical characteristics required by the scope" and are "indistinguishable" from a millwork product. Gov. Br. at 13, 26 (citing *Final Scope Ruling* at 8–11). Furthermore, the Government contends that Commerce properly explained in its scope ruling that "the scope covers mouldings and millwork products that are 'made of wood,' and 'continuously shaped wood or finger-jointed or edge-glued moulding or millwork blanks.'" Gov Br. at 14 (citing *Final Scope Ruling* at 8–9). The Government explains that the only ambiguity in the scope language is the phrase "continuously shaped," which can be clarified using (k)(1) sources. *Id.* The Government contends that "Hardware [Resources] is wrong in arguing that 'the definition of 'wood mouldings {or} millwork products' is inherently end-use based because Commerce does not make scope decisions based on end-use requirements unless the scope language is clearly exclusionary; and here, there is no clear scope language." Gov. Br. at 15 (citing Hardware Br. at 23 (citing *Final Scope Ruling* at 10)). The Government also argues that because the scope language includes specific merchandise to be excluded from the scope of the Orders but does not specify that merchandise should be excluded based on end-use, "Hardware [Resources'] claim that its merchandise was 'further manufactur{ed} into cabinets' was 'inconsequential.'" Gov. Br. at 19 (citing *Final Scope Ruling* at 10).

Commerce must follow the procedures set forth in its regulations as informed by Federal Circuit precedent in conducting its scope analysis.[1] This includes assessing the plain language of the scope description and, where appropriate, referring to the (k)(1) sources to interpret the plain language of the scope description in order to reach its determination. *See* § 351.225(k)(1)(i); *Meridian*, 851 F.3d at 1382.

In this, as in any, scope inquiry, the starting point for Commerce's analysis must be the language of the scope description itself. Here, the opening paragraph of the scope description contained in the Orders is as follows:

> The merchandise subject to the Orders consists of wood mouldings and millwork products that are made of wood (regardless of wood species), bamboo, laminated veneer lumber (LVL), or of wood and composite materials (where the composite materials

[1] Since the amendment of 19 C.F.R. § 351.225(k)(1) in September 2021, this court has interpreted Commerce's revised regulation to reflect the approach in *Meridian Products*. *See SMA Surfaces, Inc. v. United States*, 617 F. Supp. 3d 1263, 1272–73 (CIT 2023); *id.* at 1272 n.2 ("In September 2021, Commerce promulgated a final rulethat amended the text of 19 C.F.R. § 351.225(k)(1) to reflect the three-step inquiry [in *Meridian Products*] that had been fashioned by the Federal Circuit's combining of case law and the prior code provision.").

> make up less than 50 percent of the total merchandise), and which are continuously shaped wood or finger-jointed or edge-glued moulding or millwork blanks (whether or not resawn).

Final Scope Ruling at 2. In its analysis, Commerce begins by noting, correctly, that the scope description covers "items 'made of wood,' 'continuously shaped wood or finger-jointed or edge-glued moulding or millwork blanks (whether or not resawn),' and 'the merchandise subject to this investigation can be continuously shaped along any of its edges, ends, or faces.'" *Id.* at 8. In so doing and in the analysis that follows, however, it appears Commerce ignores the initial requirement set forth in the first phrase of this paragraph. Only "wood mouldings and millwork products that" are made of wood (or the other listed materials) and are "continuously shaped or finger-jointed or edge-glued moulding or millwork blanks" are subject to the Orders. *Id.* (emphasis added). The phrase "wood mouldings and millwork products that" must be given meaning in the context of the scope description, and, consequently, Commerce must determine whether Hardware Resources' product is a wood moulding or millwork product. *See Final Scope Ruling* at 2.

Notwithstanding the Government's extensive briefing arguing that Hardware Resources' product is a wood moulding or millwork product as proscribed by the scope description, *see* Gov. Br. at 20–26, Commerce, in its ruling, draws no such conclusion. *Final Scope Ruling* at 8–10. Commerce once indicates that the process by which Hardware Resources' boards are sawed to make a groove results in a product that is "indistinguishable" from a millwork product. *Id.* at 9. However, this statement and the accompanying discussion relates to its analysis of whether Hardware Resources' product is "continuously shaped" and not a conclusion that Hardware Resources' product is millwork product. *Id.* Similarly, Commerce once makes reference to the Commission's definition of "wood mouldings," but only to dismiss Hardware Resources' arguments regarding the existence of an end-use limitation in the scope description. *Id.* at 10.

Commerce's scope ruling, with respect to Hardware Resources' product, stands in contrast to prior Commerce determinations regarding the scope of these Orders. For example, in Commerce's scope determination regarding Loveday Lumber's lengthwise sawn ("LWS") scarf-jointed wood reveal strips and wood squares, Commerce draws a clear conclusion with regard to this question: "Loveday's LWS wood products . . . are also not millwork products made of wood that are

continuously shape, finger-jointed, or edge-glued." *Final Scope Ruling on the Antidumping and Countervailing Duty Orders on Wood Mouldings and Millwork Products from China: Request by Loveday Lumber Company, Inc.*, P.R. 3, Ex. 10 at 10 (May 16, 2022) ("*Loveday Scope Ruling*") (emphasis added). Similarly, in the original investigations, Commerce begins its preliminary scope decision memorandum with consideration of the definition of "wood mouldings and millwork products," *Wood Mouldings and Millwork Products from China: Preliminary Scope Decision Memorandum* at 8, A-351–853, A-570–117, C-570–118 (Aug. 5, 2020), and then proceeds to consider whether a number of products, including wood shutter components and components of unassembled kitchen cabinets, fall within the scope of the Orders.[2] *Id.* at 37–38, 43–44.

Whether Hardware Resources' boards are mouldings or millwork products under the plain language of the Orders was central to Hardware Resources' request for a scope ruling. The phrase "wood mouldings and millwork products that are" imposes an explicit requirement within the scope description, the meaning and import of which the parties dispute. Under 19 C.F.R. § 351.225(k)(1), Commerce was not free to ignore this phrase in its scope analysis.

CONCLUSION AND ORDER

Commerce's regulation contemplates that it give thorough and fair consideration to "language of the scope," 19 C.F.R. § 351.225(k)(1), in deciding whether certain merchandise is within the scope of an order. Commerce failed to do so here. It ignored the threshold question of whether the product at issue is a wood moulding or millwork product. The court does not hold that Hardwood Resources' boards are, or are not, wood mouldings or millwork products or that the boards are within the scope of the Orders. That is a determination for Commerce to make upon remand. The court holds instead that Commerce must reconsider its decision in light of the deficiencies the court has identified.

Because the court is ordering reconsideration of the Final Scope Ruling, it does not reach, at this stage of the litigation, Hardware Resources' claims regarding Commerce's determination with respect to an inherent end-use limitation contained in the scope description, Commerce's interpretation of the term "continuously shaped," or

[2] In this determination, Commerce also considers and ultimately declines to modify the definition of mouldings and millwork products to specify that such products "are used as a covering for floors, walls, doors, and other areas, primarily in residential and nonresidential construction, and for decorative, exposed applications . . . ." *Id.* at 16–18. This discussion bears directly on the issue raised by Hardware Resources regarding the inherent existence of an end-use limitation in the term "wood mouldings and millwork products." For the reasons stated in this Opinion and Order, the court does not reach this issue.

Commerce's consideration of various interpretive sources and factors under 19 C.F.R. § 351.225(k). Therefore, upon consideration of all papers and proceedings herein, it is hereby

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

ORDERED that defendant shall supplement the administrative record with documents, or portions thereof, considered by Commerce in reaching the decision in the Remand Redetermination within 14 days of the Remand Determination; it is further

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

ORDERED that the parties shall file the joint appendix within 14 days after the filing of replies to the comments on the Remand Redetermination.

Dated: December 16, 2024
New York, New York

/*s*/ *Joseph A. Laroski, Jr.*
JOSEPH A. LAROSKI, JR., JUDGE

Slip Op. 24–141

THE AD HOC COALITION OF AMERICAN SAP PRODUCERS, Plaintiff, v. UNITED STATES, Defendant, and LG CHEM, LTD., Intervenor-Defendant.

Senior Judge Aquilino
Court No. 23–00010

[Results of remand sustained.]

Dated: December 17, 2024

Stephen J. Orava, *Jamieson L. Greer*, *Daniel L. Schneiderman*, and *Lucas A. Pires*, King & Spaulding LLP, Washington, D.C., for the plaintiff.

Kyle S. Beckrich, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for the defendant. With him on the brief *Brian M. Boynton*, Principal Deputy Assistant Attorney General, Civil Division, *Patricia M. McCarthy*, Director, and *L. Misha Prehiem*, Assistant Director. Of counsel on the brief *Rachel Bogdan*, Senior Attorney, Office of Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce, Washington, D.C.

J. David Park, *Henry D. Almond*, *Kang Woo Lee*, *Gina M. Colarusso*, and *Archana Rao P. Vasa*, Arnold & Porter Kaye Scholer LLP, Washington, D.C., for the intervenor-defendant, with *Eric Johnson*, Consultant.

Opinion

AQUILINO, Senior Judge:

The Coalition's[1] successful challenge to the model matching methodology utilized by the International Trade Administration ("ITA"[2]) of the U.S. Department of Commerce in the less than fair value investigation of superabsorbent polymers ("SAP") from Korea[3] necessitated remand in the prior opinion of the court, with which familiarity is presumed herein. *See Ad Hoc Coalition of American SAP Producers v. United States*, Slip Op. 24–26 (March 1, 2024). ITA's *Final Results of Redetermination Pursuant to Court Remand* ("*Remand Results*" or "*Redetermination*"), on which the Court retains jurisdiction under 28 U.S.C. §1581(c), are considered in this opinion.

A remand determination will be set aside if it is found to be "unsupported by substantial evidence on the record, or otherwise not in

[1] This opinion adheres to the abbreviations of Slip Op. 2426 as well as treatment of the collective noun describing the plaintiff Ad Hoc Coalition of American SAP Producers ("Coalition") as a plural for ease of clarification among party references.

[2] Herein also "Commerce".

[3] *Certain Superabsorbent Polymers from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 87 Fed.Reg. 65035 (Dep't Commerce Oct. 27, 2022), as explained in its accompanying issues and decision memorandum (Dep't Commerce Oct. 20, 2022) ("*Final Determination*").

accordance with law". *See* 19 U.S.C. §1516a(b)(1)(B)(i); *e.g.*, *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 39 CIT ___, ___, 121 F.Supp.3d 1263, 1268 (2015). It is also reviewed for compliance with the order of remand. *See*, *e.g.*, *Olympia Indus., Inc. v. United States*, 23 CIT 80, 82, 36 F.Supp.2d 414, 416 (1999).

The *Remand Results* are supported by the Coalition and opposed by LG Chem (herein also "LGC"). They can be sustained as follows.

I

A

Recall that when ITA solicited comments on the commercially significant qualities of superabsorbent polymers ("SAP"), in order to develop an appropriate model matching methodology, all parties agreed that the criteria should include a characteristic for the ability of SAP products to hold liquid, which the industry recognized as "centrifugal retention capacity" ("CRC") measured in grams of saline solution retained per gram of SAP ("g/g"). Interested parties argued for different CRC ranges. After considering comments, ITA decided on low, intermediate, and high grades of CRC based on 6 g/g divisions, as argued by the Coalition[4]. Fact-finding including verification proceeded along those lines.

In its responses to ITA's questionnaires, LG Chem provided the information requested; it also submitted information for its five preferred groupings of CRC utilizing 4 g/g increments[5] as well as information for the two additional proposed product characteristics for SAP — (1) absorbency under pressure ("AUP") or load ("AUL"), and (2) permeability ("PERM")[6] — all of which ITA had initially declined to use but later adopted for its *Final* Determination. This litigation ensued.

B

After considering the parties' briefs, the court remanded ITA's model match methodology for reconsideration. *See generally* Slip Op. 24–26. In particular, the court held that ITA is not required to adhere

[4] To wit, (1) less than 30 g/g; (2) greater than 30 g/g but less than 36 g/g; and (3) greater than 36 g/g.

[5] To wit, (1) minimum or no guaranteed CRC of less than 26 g/g; (2) minimum guaranteed CRC of 26 g/g or more and less than 30 g/g; (3) minimum guaranteed CRC of 30 g/g or more and less than 34 g/g; (4) minimum guaranteed CRC of 34 g/g or more and less than 38 g/g; (5) minimum guaranteed CRC equal to or more than 38 g/g.

[6] LG Chem claimed that AUP indicates how well SAP responds to stress, while the proposed model match codes for AUP and AUL depended on the type of test performed, with a proposed cut-off threshold of 15 g/g for each test-based division. LG Chem also claimed that PERM indicates the ability to pass liquid between SAP particles.

to the model match hierarchy it constructs in the early stages of a proceeding but it had not pointed to substantial evidence on the record to support its findings on the commercial significance of the AUP and PERM characteristics as well as LG Chem's proposed 4 g/g increments for the CRC characteristic, as compared to the increments initially adopted. The court also held that ITA did not appear to have verified the new physical characteristic information relied upon in the *Final Determination* to calculate LG Chem's margin because ITA explicitly verified only data fitting the original model match hierarchy, not data for the "new" hierarchy it used in the *Final Determination*. Lastly, the court held that ITA had not adequately addressed the petitioner's concern that the way LGC defined the characteristics was distortive and unusable and remanded the issue for further consideration.

C

On remand, ITA reconsidered its model match hierarchy, and determined that, "because record evidence supports a model match hierarchy consisting of CRC in 6 g/g increments, and because there is no additional evidence on the record to bolster support for the model match hierarchy adopted in the *Final Determination*, it has adopted the product characteristics used in the *Preliminary* Determination." Remand Results at 2. ITA also explained that because it revised the model match hierarchy, the concerns expressed in the prior opinion on whether the physical characteristics of AUP, PERM, and CRC at 4 g/g increments were sufficiently verified, and the issue of potential manipulation using a model match hierarchy with AUP, PERM, and CRC at 4 g/g increments, need not be further addressed or considered. *Id*. at 4. ITA recalculated LG Chem's weighted average margin accordingly. *Id*.

II

LG Chem's "Opposition to Remand Determination" ("Opposition") claims that, "[i]n its comments, LGC explained in detail that [ITA]'s simple rev[er]sion to the *Preliminary Determination* model match was unsupported by evidence or rationale on the record of the underlying investigation, and that [ITA] did not sufficiently revisit, review, and reweigh record evidence in support of its remand model match." Opposition at 7. That filing characterizes ITA's *Remand Results* as merely agreeing with the court's prior opinion that the *Final Determination* model match lacked substantial evidentiary support but lack a "full" explanation of why the *Preliminary Determination* model

match in fact is supported by substantial evidence. *See id*. LG Chem claims that, as compared to two "conclusory" statements[7] that ITA relied upon, allegedly as "sole" support for the *Preliminary Determination* model match, LG Chem submitted "significant" factual information and analysis which directly contradict" ITA"s *Preliminary Determination*. *Id*. at 9. Thus, an order for a second remand should ensue asking that ITA "provide a full explanation as to how all the entirety of the record evidence before (all of which was submitted by LGC) supports or detracts from its revised model match."[8] *Id*. at 9–10.

In addition, LG Chem contends the *Remand Results* do not comply with the remand order and that a second remand is required because ITA failed to further consider the Coalition's arguments as to why the *Final Determination* model match hierarchy was subject to distortion and manipulation, as "ordered." *See id*. at 10.

The Coalition in response argues three points:

> First, all parties agree the model match hierarchy consisting of CRC in 6 g/g increments is commercially significant, and this finding was supported by substantial evidence. Second, in contrast, this Court ruled that LGC's proposal of categorizing CRC in narrower 4g/g increments, and capturing permeability ("PERM") and absorbency under pressure ("AUP") characteristics, was not supported by substantial evidence. Finally, there was no need to address the distortion and potential manipulation posed by LGC's preferred methodology, consistent this Court's remand order.

Coalition Comments in Support at 1.

Elaborating, the Coalition argue ITA's reversion to the original model match capturing CRC in 6 g/g is supported by substantial evidence, including "certified comments and product brochures, provided by the Petitioner, by Sumitomo Sika ("SSPK") (another Korean producer), and by LGC itself." *Id*.:

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[7] Specifically, LG Chem states that in order to address the court's remand, ITA simply stated that "the Court held that evidence demonstrates that AUP and PERM have no commercial significance or utility that is not already captured by the CRC product characteristic." Opposition at 10, quoting *Remand Results* at 6. ITA also claimed to have "reexamined the record and determined that there is no information that would additionally support a finding that the characteristics of AUP and PERM are commercially significant such that they should be included in the model match hierarchy." *Id*. quoting *Remand Results* at 6. Similarly, ITA found "no additional evidence on the record to support a finding that categorizing CRC in 4 g/g increments results in commercially significant price or cost differences." *Id*. quoting *Remand Results* at 7. As a result, LG Chem claims ITA simply "adopted the model match hierarchy used in the Preliminary Determination." *Id*. quoting *Remand Results* at 7.

[8] LG Chem goes even further, arguing for "a second remand encouraging or directing ITA to seek additional information from parties on this issue." Opposition at 9.

. . . In particular, the cited supporting evidence includes (1) petitioner's certified comments that CRC is "typically" measured using 6 g/g ranges, *see* Petitioner's Model Match Comments (Dec. 13, 2021) (P.R. 42) at 1; Petitioner's Model Match Rebuttal Comments (Dec. 23, 2021) (P.R. 49) at 6; and Petitioner's Pre-Preliminary Comments (May 11, 2022) (P.R. 139) at 1–3; (2) LGC's product brochure showing that CRC is simply described as "high capacity" or "low capacity," LGC's Initial Section A Questionnaire Response, (Jan. 19, 2022) (P.R. 77, 78), at Exhibit A-25; and (3) SSPK's statements that differences in CRC were broadly categorized into low, intermediate, and high capacity grades, SSPK's Rebuttal Comments on Model Match (Dec. 23, 2021) (P.R. 53) at 2–3. This represents substantial evidence supporting the model match used in the Redetermination.

LGC contends that such evidence was insufficient. LGC's Comments at 10–15. LGC is incorrect, and its argument is internally inconsistent. LGC is not suggesting that 6 g/g differences in CRC are not commercially significant and thus should not be captured in the model match. To the contrary, LGC's position is that "categorizing CRC by increments of 6 g/g is overly broad and would result in products with commercially significant differences falling into the same category." *Redetermination* at 7.

This leads to the Coalition's second point. In particular, LGC argues that CRC should be defined with more granularity, so that even smaller differences of 4 g/g increments would be reflected in the model match. *Id*. If LGC's position is that even small (4 g/g) differences in CRC are commercially significant, such that they should be reflected in the model match, LGC cannot reasonably contend, as a logical matter, that larger (6 g/g) differences in CRC are not commercially significant.

In reality, LGC is arguing that its proposed alternative proposed model match — based on CRC in 4 g/g increments, and also capturing permeability ("PERM") and absorbency under pressure ("AUP") — would be preferable to a model match based solely on CRC in 6 g/g increments, because it would capture additional commercially significant characteristics. This Court, however, has found that the data and record materials cited by LGC as supposedly supporting its position "do not represent substantial evidence of the commercial significance of AUP, permeability, and 4 g/g CRC increments." Remand Order at 27. *See also id*. at 20–37 (evaluating the insufficiency of that evidence in

detail). Commerce is now in agreement with the Court's analysis. On remand, Commerce considered all the evidence cited by LGC and explained in detail why it did not show commercially significant differences among products based on PERM, AUP, and CRC in 4 g/g increments. Redetermination at 10–14. Contrary to LGC's assertion, Commerce did not ignore any evidence. Given Commerce's analysis and its "considerable discretion" in selecting an appropriate model match, Redetermination at 7, citing *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001), there is no reason to remand the matter for further consideration.

Finally, LGC contends that a remand is nonetheless required, because Commerce failed to comply with this Court's instructions at pages 41–43 of the Remand Order. LGC's Comments at 21–22. In particular, the Court instructed Commerce to address the Coalition's argument that LGC's proposed alternative model match created "a significant risk of manipulation," because it would have enabled a respondent to report the identical product into different CONNUMs based on the "type of testing" the respondent elected to perform. Remand Order at 41–43. Because Commerce did not employ LGC's proposed alternative model match, however, there was no reason for Commerce to address this flaw — just as there was no reason for Commerce to address the failure to conduct the required verification of the alternative model match. *See* Remand Order at 41. The "susceptibility to manipulation" and "lack of verification" flaws in LGC's proposal would become relevant only if there were a second remand for Commerce to reconsider using the alternative model match. In this case, however, the Redetermination is supported by substantial evidence, and it should be affirmed.

Id. at 1–4.

III

LG Chem argues that the evidence of record to support the Coalition's 6 g/g divisions is not substantial. The implication is that the evidence cited in the *Remand Results* as support for reverting to the *Preliminary Determination* model match divisions suffers from a similar lack of evidentiary robustness as LG Chem's preferred 4 g/g divisions. However, the court is inclined to agree with the Coalition's interpretation of LG Chem's comments and argument on the *Remand Results*.

To be clear, LG Chem is correct that the prior opinion did not preclude ITA from evaluating the record in support of its preferred 4 g/g divisions as well as its proposed AUP and PERM characteristics; the opinion only held that the record information cited as support for the *Final Determination* did not justify upending the original model match methodology based on ITA's own "compelling reason" standard. *See* Slip Op. 24–26 at 36:

> To summarize, the agency apparently relied for the most part on a few pieces of anecdotal information as the sole factors weighing in favor of finding commercial significance among LG Chem's preferred product characteristics. That is hardly a "robust" evidentiary basis for replacing the model match hierarchy.

See also, *e.g.*, *Fagersta Stainless AB v. United States*, 32 CIT 889, 894, 577 F.Supp.2d, 1270, 1277 (2008) ("compelling reasons" for altering model match criteria must be proven by "compelling and convincing evidence"). At this stage, however, and as LG Chem also acknowledges (Opposition at 11), it is not the function of the court to re-weigh one set against the other, to determine which model match is "better": it was ITA's task to choose "between two fairly conflicting views," and the court may not substitute its judgment even if its view would have been different "had the matter been before it de novo." *Diversified Prod. Corp. v. United States*, 6 CIT 155, 161, 572 F.Supp. 883, 888 (1983)(quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

LG Chem contends this situation

> does not relieve Commerce of its obligations under the substantial evidence standard. While Commerce may view the situation as a matter of choosing among two imperfect options, as it stands, Commerce has not presented the Court with a position that is supported by substantial record evidence. Commerce must either further address these issues, or, if it views the record as inadequate to support any determination, Commerce should add information to the record or solicit additional information from parties so that Commerce has a developed record that can support a decision. This is not a situation where the agency is left with a binary choice between two flawed alternatives, Commerce has the means to gather additional information, and it should do so if necessary to support a decision with substantial record evidence.

Opposition at 21.

But, considering ITA's analysis on remand, the administrative record, and the parties' arguments with respect thereto, the court cannot conclude the *Remand Results* unsupported by substantial evidence, nor can it find noncompliance with its order of remand. As the Coalition argue, all the parties agreed that CRC is the primary physical characteristic of SAP; both the Coalition and Seika Polymers Korea Co., Ltd. also argued for "low," "intermediate," and "high" CRC groupings. The 6 g/g divisions apparently correspond to those groupings. "If LGC's position is that even small (4 g/g) differences in CRC are commercially significant, such that they should be reflected in the model match, LGC cannot reasonably contend, as a logical matter, that larger (6 g/g) differences in CRC are not commercially significant." Comments In Support at 2. ITA has "considerable" discretion in developing the methodology used for identifying a foreign like product. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed.Cir. 2001). Under the circumstances at bar, the evidence cited in support of ITA's reverting to its preliminary model match hierarchy is to be "consider[ed]" substantial, to wit:

> (1) petitioner's certified comments that CRC is "typically" measured using 6 g/g ranges, *see* Petitioner's Model Match Comments (Dec. 13, 2021) (P.R. 42) at 1; Petitioner's Model Match Rebuttal Comments (Dec. 23, 2021) (P.R. 49) at 6; and Petitioner's Pre-Preliminary Comments (May 11, 2022) (P.R. 139) at 1–3; (2) LGC's product brochure showing that CRC is simply described as "high capacity" or "low capacity," LGC's Initial Section A Questionnaire Response, (Jan. 19, 2022) (P.R. 77, 78), at Exhibit A-25; and (3) SSPK's statements that differences in CRC were broadly categorized into low, intermediate, and high capacity grades, SSPK's Rebuttal Comments on Model Match (Dec. 23, 2021) (P.R. 53) at 2–3.

Comments In Support at 2.

IV

In view of the foregoing, ITA's *Remand Results* will be sustained. Judgment to that effect will enter accordingly.

Dated: New York, New York
December 17, 2024

/*s*/ *Thomas J. Aquilino, Jr.*
SENIOR JUDGE

Slip Op. 24–142

SHANGHAI TAINAI BEARING CO., LTD. and C&U AMERICAS, LLC, Plaintiffs, and PRECISION COMPONENTS, INC., XINCHANG NEWSUN XINTIANLONG PRECISION BEARING MANUFACTURING CO., LTD, and HEBEI XINTAI BEARING FORGING CO., LTD, Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Stephen Alexander Vaden, Judge
Consol. Court No. 1:22-cv-00038

[Sustaining Commerce's Remand Determination.]

Dated: December 18, 2024

David J. Craven, Craven Trade Law LLC, of Chicago, IL, for Plaintiffs and Consolidated Plaintiffs.

Geoffrey M. Long, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Kara M. Westercamp*, Senior Trial Counsel, *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, Commercial Litigation Branch, *L. Misha Preheim*, Assistant Director, Commercial Litigation Branch, and *Jesus N. Saenz*, Of Counsel, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement & Compliance.

OPINION

Vaden, Judge:

Before the Court is the U.S. Department of Commerce's (Commerce) remand determination in the thirty-third administrative review of the antidumping order on tapered roller bearings from China, filed pursuant to the Court's opinion in *Shanghai Tainai Bearing Co. v. United States* (*Tainai I*), 47 CIT __, 658 F. Supp. 3d 1269 (2023). In *Tainai I*, the Court ordered Commerce to further explain or reconsider its use of partial facts available with an adverse inference. Specifically, the Court asked about the level of control Shanghai Tainai Bearing Co., Ltd. (Tainai) could exert over its unaffiliated suppliers and whether it is fair to apply a deterrence rationale against Tainai when it was a cooperating party. The Court also ordered Commerce to further explain its decision to exclude from U.S. price additional revenue Tainai collected in addition to the amount collected for Section 301 duties. For the following reasons, Commerce's remand determination is **SUSTAINED**.

BACKGROUND

The Court presumes familiarity with this case's facts as described in its previous opinion. *See Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1273–81. This opinion recounts the facts relevant to review of the

Remand Results. On September 14, 2023, the Court issued its decision granting in part and denying in part Tainai's Motion for Judgment on the Agency Record. *Id.* at 1273. Two issues from the prior opinion remain relevant in this remand determination.

First, the Court held that Commerce improperly applied facts available with an adverse inference against Tainai based on the noncooperation of its unaffiliated third-party suppliers. *Id.* at 1289. Under Federal Circuit precedent, Commerce may apply facts available with an adverse inference against a cooperating party under limited circumstances. *See Mueller Comercial De Mexico v. United States*, 753 F.3d 1227, 1233–36 (Fed. Cir. 2014). Namely, Commerce must (1) determine that application of a deterrence-based rationale is reasonable based on the "particular facts" of the review and (2) take into account "the predominant interest in accuracy." *Id.* at 1233. The first factor requires Commerce to consider whether a respondent can influence its suppliers' decision to cooperate. *Id.* at 1234–35.

Tainai manufactures tapered rolling bearings and purchases inputs for its merchandise from numerous suppliers. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 47,731, 47,736 (Dep't of Com. Aug. 6, 2020); *see* Tainai Resp. to Section D of the Dep't.'s Initial Questionnaire (Section D Questionnaire Resp.), Ex. D-7, J.A. at 81,309–12, ECF No. 44. Tapered roller bearings are comprised of four basic components: rollers, cages, cups, and cones. Section D Questionnaire Resp. at D-8, J.A. at 81,163, ECF No. 44. In the administrative review, Tainai reported these components as "factors of production." *Id.* at D-15, J.A. at 81,170. "Factors of production" is a statutory term that refers to the direct material inputs that go into a final product. 19 U.S.C. § 1677b(c)(3) ("[F]actors of production ... include ... quantities of raw materials employed ...."); *CP Kelco U.S., Inc. v. United States*, 949 F.3d 1348, 1357–58 (Fed. Cir. 2020) ("Commerce evaluates whether something is a factor of production by determining whether it is a direct material input."). In a non-market economy like China, Commerce uses data detailing prices and descriptions of these inputs to determine the home (Chinese) market price of the subject merchandise, which it ultimately compares to the company's export (U.S.) price to calculate the dumping margin. 19 U.S.C. § 1677b(c)(1)(A)–(B); 19 U.S.C. § 1673.

During the administrative review, Commerce asked Tainai to submit data to substantiate the factors of production it reported. Initial Questionnaire at D-4, J.A. at 1,474, ECF No. 43. After sending supplemental questionnaires to Tainai and its suppliers, Commerce obtained the requested data for all factors of production that were used in Tainai's in-house production and its affiliated suppliers' pro-

duction. Tainai Suppl. Questionnaire Resp. at 27, J.A. at 82,201, ECF No. 44. But Tainai's unaffiliated suppliers did not respond to the requests. Tainai Second Suppl. Questionnaire Resp. at 6, J.A. at 84,320, ECF No. 44. Tainai explained that it requested the data from its unaffiliated suppliers, but the suppliers either did not reply or refused to send the data. *Id.* Commerce found that, although Tainai cooperated to the best of its ability, the company's unaffiliated suppliers did not, which left a gap in the record regarding factors of production data. Decision Mem. for the Final Results of the 2019–2020 Admin. Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China (Decision Mem.) at 7–8, J.A. at 1,009–10, ECF No. 43. Based on the unaffiliated suppliers' noncooperation, Commerce applied facts available with an adverse inference to fill that gap, and it assigned Tainai an eye-popping dumping margin of 538.79 percent. *Id.* at 10, J.A. at 1,012, ECF No. 43 (applying adverse inference); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results and Partial Rescission of Review; 2019–2020*, 87 Fed. Reg. 1120, 1121 (Dep't of Com. Jan. 10, 2022) (assigning dumping margin).

Tainai explained that, even though it is a large supplier of tapered roller bearings for the American market, it has a diverse supply chain. *See* Pls.' Mot. for J. on Agency R. (Pls.' Mot.) at 21, ECF No. 32. The company purchases comparatively small percentages of its inputs from numerous suppliers. *Id.* Tainai argued that it does not buy enough from any one supplier to influence that supplier to cooperate with Commerce's requests for information. *Id.* ("Tainai was not a significant enough customer of any of these entities to assert any market power over [them]."). The Court agreed and found that Commerce's decision to apply partial facts available with an adverse inference against the otherwise-cooperative Tainai, based on its unaffiliated suppliers' noncooperation, was unsupported by substantial evidence. *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1284–85. Commerce had not addressed this argument or the data Tainai submitted to demonstrate its lack of influence over its suppliers. *Id.* at 1285. Thus, the agency failed to "carry out a case-specific analysis of the applicability of deterrence and similar policies." *Id.* at 1288 (quoting *Mueller*, 753 F. 3d at 1234). Accordingly, the Court remanded the issue for further explanation or reconsideration.

Second, the Court held that Commerce failed to explain its decision to "cap" additional revenue Tainai received from its customers related to its Section 301 duties. *Id.* at 1296. Section 301 duties are duties imposed to combat unfair trade practices in foreign countries. 19

U.S.C. § 2411. Under 19 U.S.C. § 1677a(c)(2)(A), Commerce must deduct "United States import duties" from a respondent's U.S. price. This Court has applied the Federal Circuit's analysis in *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 63 F.4th 25 (Fed. Cir. 2023), to hold that Section 301 duties are "United States import duties" for the purposes of § 1677a(c)(2)(A) and must be deducted from a respondent's U.S. price. *See, e.g.*, *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1293–94; *Jinko Solar Imp. & Exp. Co. v. United States*, 48 CIT __, 701 F. Supp. 3d 1367, 1390–92 (2024). Tainai's practice of charging more than the amount of actual Section 301 duty charges to its customers raises the question of whether Commerce should also deduct those extra amounts from Tainai's U.S. price.

Tainai billed its customers for the actual amount of Section 301 duties it owed to the U.S. Government. Tainai Suppl. Questionnaire Resp. at 11–12, J.A. at 82,185–86, ECF No. 44. It also tacked an additional charge for the duties onto its customers' invoices. Decision Mem. at 23, J.A. at 1,025, ECF No. 43. This billing practice raised the amount paid by U.S. purchasers. In the administrative review, Commerce excluded both the actual amount of Section 301 duties and Tainai's additional revenue charges from the U.S. price, which resulted in a lower U.S price. *Id.* at 24–25, J.A. at 1,026–27. Because dumping margins are determined by comparing the sales price in the United States to the sales price in the home market, *see* 19 U.S.C. § 1673, anything that reduces U.S. price makes the dumping margin rise. Therefore, Commerce's decision to deduct the additional Section 301 duty charges increased Tainai's dumping margin by reducing the U.S. price. Tainai argued that Commerce improperly excluded the additional revenue from the U.S. price. Pls.' Mot. at 46, ECF No. 32. Commerce responded that, "consistent with its practice," it would not attribute Tainai's revenue from related expenses to the price of subject merchandise "because it 'represents profit on the sale of *services*, not profit on the sale of the *merchandise*.'" Def.'s Br. at 36–37, ECF No. 37 (citing Decision Mem. at 24, J.A. at 1,026, ECF No. 43). The Court ordered Commerce to (1) explain how the additional revenue is related to profits on the sale of services and not on the sale of subject merchandise and (2) consider "whether there is any basis to exclude such amounts from the 'price adjustments' described by [19 C.F.R.] § 351.401(c) and [19 C.F.R.] § 351.102(b)(38)." *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1296; *see also* Remand Results at 3, ECF No. 57.

Commerce published its Remand Results on January 12, 2024. Remand Results, ECF No. 57. It reduced the dumping margins for both Tainai and the non-examined companies under review from

538.79 percent to 76.58 percent. *Id.* at 29. The agency set forth a new determination explaining its reconsideration of the application of facts available with an adverse inference and its decision to continue excluding the additional revenue Tainai collected in connection with Section 301 duties from Tainai's U.S. price. *See id.* at 8–29.

On the issue of whether drawing an adverse inference was appropriate, Commerce changed positions under protest. It found, "Upon a reexamination of record evidence, we are unable to determine, based on this record, whether Tainai has sufficient control over its suppliers to induce their cooperation in the underlying administrative review." *Id.* at 10. Commerce modified its calculations to use partial neutral facts available to fill the gap in the record created by the missing factors of production information. *Id.* at 3–4, 10. In the original proceedings, "[W]here Tainai's unaffiliated ... suppliers provided 100 percent of the [factors of production] for turned cups and cones, rollers, or cages, Commerce valued the unreported [tapered roller bearing] component [factors of production] using Tainai's highest [factors of production] consumption rates for [tapered roller bearings] sold in the United States." *Id.* at 5; *see also* Decision Mem. at 12, J.A. at 1,014, ECF No. 43. On remand, Commerce instead "rel[ied] on Tainai's allocation methodology for its direct input materials [factors of production]." Remand Results at 24, ECF No 57.

Commerce also stated in its Remand Results that it is "troubled by the implications of the Court's opinion." *Id.* at 13. It raised concerns that it would need to obtain information exclusively in the noncooperative suppliers' possession to comply with the Court's instructions to examine Tainai's control over its suppliers. *Id.* at 13–14. In essence, Commerce alleges that the Court's opinion creates an unworkable standard. To apply facts available with an adverse inference, Commerce must find that Tainai had sufficient control over its suppliers to induce cooperation. Such a finding requires Commerce to consider what percentage of a supplier's total production of a given product Tainai is purchasing. The larger the percentage, the likelier it is that Tainai could induce a supplier's cooperation. Non-party, noncooperative suppliers may decline to respond to Commerce's requests for information; and Commerce cannot force the suppliers to comply because it lacks subpoena power. *Id.* at 9, 13–14. Commerce therefore claims it is "limited" in its ability to collect the required information. *Id.* at 14. *But see infra* n.2 (noting Commerce obtained the information it complains here is impossible to receive in the following year's review).

Commerce chose to further explain its decision to exclude the additional revenue Tainai collected in connection with its Section 301

duties. Remand Results at 4, ECF No. 57. In its Remand Results, Commerce explained that Tainai reported in its initial questionnaire "an amount that Tainai charged its customers related to section 301 duties imposed on certain sales." *Id.* at 6. In a supplemental questionnaire response during the underlying review, Tainai identified three different situations where it billed customers this additional amount: (1) an all-inclusive price approach, where Tainai sent its customers a single invoice with a single price that included the actual Section 301 duties and the additional revenue; (2) an itemized invoice approach, where Tainai issued its customers one itemized invoice that listed Tainai's charge for the merchandise and Tainai's Section 301 duties charge as separate line items — the duties line item including the Section 301 duties Tainai actually owed and the additional revenue; and (3) a separate invoice approach, where Tainai issued two invoices — one invoice billing for the cost of the merchandise and one invoice billing for the Section 301 duties and the additional revenue. *Id.* (citing Tainai Suppl. Questionnaire at 11–12, J.A. at 82,185–86, ECF No. 44); Oral Arg. Tr. at 67:16–71:9, ECF No. 72 (Tainai's counsel identifying the three types of invoices). Commerce continued to find on remand that "Tainai's additional tariff charge revenue relates directly to the section 301 duty expense and, therefore, is considered a movement-related revenue attributable to movement services incidental to transporting the subject merchandise to the United States." Remand Results at 21, ECF No. 57. But Commerce treated the excess revenue differently depending on how Tainai categorized the revenue on its invoices. *Id.* at 28–29.

In situations where Tainai billed customers for a single price, inclusive of Section 301 duties and the additional revenue, Commerce only deducted the actual Section 301 duties Tainai owed from Tainai's U.S. price. *Id.* at 29; *see also* Oral Arg. Tr. at 69:19–70:2, ECF No. 72 (THE COURT: "So what you're saying is ... where it was an [all-inclusive] price — the federal Government of course knows what the duty amount is. It charges the duty; it receives the duty." MR. CRAVEN: "And we reported the duty." THE COURT: "Correct. All [the Government] did, in that case, is deduct the amount of the duty and nothing else with regard to any profit you may have made on the duty." MR. CRAVEN: "Correct."); Oral Arg. Tr. at 73:9–23, ECF No. 72 (Defendant's counsel agreeing with this characterization of Commerce's approach). Commerce did not attempt to discern how much of the all-inclusive price listed on Tainai's invoice was attributable to the additional revenue Tainai pocketed by charging its customer more for Section 301 duties. Oral Arg. Tr. at 69:19–70:2, ECF No. 72.

Commerce included that additional revenue in Tainai's U.S price, which increased Tainai's U.S. price and decreased Tainai's dumping margin.

In situations where Tainai used an itemized invoice, Commerce deducted both the actual Section 301 duties Tainai owed and the additional revenue from Tainai's U.S. price. Remand Results at 4, ECF No. 57. The agency explained that it considered the additional revenue to be a movement-related expense because it was premised on the payment of Section 301 duties and thus was incidental to shipping the merchandise into the United States. *Id.* Commerce deducts such movement-related expenses from U.S. price. 19 U.S.C. § 1677a(c)(2)(A) ("The price used to establish ... constructed export price shall be ... reduced by ... the amount ... attributable to any additional costs, charges, or expenses ... which are incident to bringing the subject merchandise from ... the exporting country to ... the United States[.]") In other words, when Tainai used an itemized invoice approach, the additional revenue was not included in U.S. price thereby increasing Tainai's dumping margin.

Finally, where Tainai used a separate invoice approach, Commerce also deducted the actual section 301 duties and the additional revenue from Tainai's U.S. price. Remand Results at 22, ECF No. 57; *see also* Draft Remand Calculation Mem. at 3, J.A. at 84,922, ECF No. 64 ("Commerce modified its calculation so that in instances where Tainai reported that it issued a separate invoice to the customer for additional tariff revenue, we are not making any adjustments to U.S. price with respect to Section 301 duties."); Final Draft Remand Calculation Mem. at 2, J.A. at 85,273, ECF No. 64 (noting Commerce made no additional changes). Once again, Commerce declined to include the excess Section 301 charges as part of Tainai's U.S. price, thereby increasing Tainai's dumping margin.

Tainai supports Commerce's decision to not use facts available with an adverse inference. *See* Pls.' Comments on Remand Determination (Pls.' Remand Br.) at 2–3, ECF No. 61 (accepting Commerce's decision to use partial neutral facts available). However, Tainai disagrees with the facts Commerce used to fill in the missing factors of production information. *Id.* ("[I]n calculating the [new] margin, [Commerce] selected ... facts which were still adverse to Tainai and which were not neutral facts."). Tainai claims that Commerce "double count[ed] the financial ratios by valuing certain inputs using surrogate values for completed articles and then appl[ied] financial ratios to these surrogate values." *Id.* at 3. Tainai requests the Court again remand the case for Commerce to reconsider its selection of neutral facts. *Id.* at 4.

Tainai also opposes Commerce's continued decision to exclude some of the additional revenue the company received in connection with its Section 301 duties. *See id.* at 3–4. It maintains that this "tariff charge" is part of the unit price, akin to a material surcharge, and not a "charge for movement or other similar expenses." *Id.* For support, Tainai highlights that its invoices directly tied the tariff charge to the "quantity and part number on a 'unit price' basis." *Id.* at 3 (citing *e.g.*, Ex. SC-5(a) (separate invoices), SC-5(b) (itemized invoice), SC-5(c) (separate invoice), J.A. at 82,686–93, ECF No. 44). Tainai requests that the Court remand the case again for Commerce to reconsider both issues. *Id.* at 4.

The Court held oral argument on April 26, 2024, combining argument in this case with argument concerning the separate thirty-fourth administrative review of the same order.[1] *See* ECF No. 69. The Court ordered the parties to file supplemental briefs identifying an all-inclusive invoice — where Tainai billed its customer a single price — to assist with the review of the extra revenue issue. ECF No. 68.

JURISDICTION AND STANDARD OF REVIEW

As in *Tainai I*, the Court has jurisdiction over Tainai's challenge under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting final determinations in antidumping reviews. The Court must sustain Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B)(i). "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *New Am. Keg v. United States*, 45 CIT __, No. 20–00008, 2021 Ct. Intl. Trade LEXIS 34, at *15 (Mar. 23, 2021). Furthermore, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)).

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*

[1] The Court issued its opinion sustaining Commerce's Final Results in the thirty-fourth administrative review concurrently with this opinion. *See Shanghai Tainai Bearing Co. v. United States*, 48 CIT __, Slip Op. 24–143 (Dec. 18, 2024).

States, 458 F.3d 1345, 1351 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described "substantial evidence" 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)). Additionally, "results of a redetermination pursuant to court remand are ... reviewed for compliance with the ... remand order." *Ellwood City Forge Co. v. United States*, No. 1:21–00077, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 113, at *7 (July 24, 2023) (internal quotation marks omitted).

DISCUSSION

I. Summary

The Court remanded the issue of whether Commerce could use facts available with an adverse inference against a cooperating respondent based on the noncooperation of unaffiliated third-party suppliers. Under protest, Commerce determined that it could not do so on this record. It opted to apply neutral facts to fill the entirety of the gap in the record created by the absence of factors of production data. Commerce could have analyzed Tainai's suppliers individually to determine if Tainai could induce their cooperation. Commerce also could have found that Tainai was uncooperative, which would obviate the need to analyze the company's control over its suppliers. The agency chose to do neither. Despite this, the Court finds that Commerce complied with its Order in *Tainai I*; and its determination to use neutral facts is supported by substantial evidence.

The Court also remanded the issue of whether Commerce properly excluded additional revenue Tainai collected in connection with its Section 301 duties. On remand, Commerce further explained its legal analysis and treatment of Tainai's sales information based on the company's invoice practices. Commerce determined that Tainai's excess revenue is profit from a service, akin to a shipping and movement fee, and is related to the Section 301 duties themselves — not the sale price for subject merchandise. The Court holds that Commerce's practice of excluding the additional revenue from U.S. price is supported by substantial evidence. Because the remand determination complies with the Court's Order in *Tainai I* and is supported by substantial evidence, Commerce's Remand Results will be **SUSTAINED**.

I. Application of Partial Facts Available with an Adverse Inference

The first issue is whether Commerce followed Federal Circuit precedent when reconsidering its application of facts available with an adverse inference against a cooperating respondent on the theory that it will incentivize unaffiliated third-party suppliers to cooperate. *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1281; *see also Mueller*, 753 F.3d at 1234–36. Tainai supports Commerce's determination to use neutral facts available, but it objects to the facts Commerce chose. Pls.' Remand Br. at 1–3, ECF No. 61. The Court first addresses whether Commerce complied with *Mueller* and then turns to Tainai's remaining objection.

A.

In *Tainai I*, the Court followed the Federal Circuit's instructions in *Mueller*, which allows Commerce to apply facts available with an adverse inference against a cooperating respondent based on the noncooperation of its suppliers. *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1283 (citing *Mueller*, 753 F.3d at 1232–33). However, the Federal Circuit did not grant Commerce carte blanche to do so in every situation. Each decision to apply an adverse inference to a cooperating party must be based on that case's specific record; there is no formulaic incantation that works in every case. *See Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1387 (Fed. Cir. 2014) ("[E]ach administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record."). *Mueller* requires Commerce to (1) determine that application of a deterrence-based rationale is reasonable based on the "particular facts" of the review and (2) take into account the predominant interest in accuracy. *Mueller*, 753 F.3d at 1233.

Commerce found that Tainai cooperated, but its suppliers did not. Decision Mem. at 7–8, J.A. at 1,009–10, ECF No. 43. Although Tainai produces a large number of bearings, it sources the components of those bearings from a multitude of suppliers. Section D Questionnaire Resp., Ex. D-7, J.A. at 81,310–12, ECF No. 44. Consequently, Tainai maintained that it lacks the requisite market power to induce cooperation from its suppliers. Pls.' Mot. at 21, ECF No. 32. To support its argument, Tainai provided a chart showing a list of its suppliers and the percentage of Tainai's total input quantity it purchased from each supplier. Section D Questionnaire Resp., Ex. D-7, J.A. at 81,310–12, ECF No. 44. Most of the suppliers listed did not appear to provide a notable percentage of Tainai's total inputs. Instead, the chart depicted a company that has an incredibly diversified supplier

portfolio. *See id.* Commerce maintained Tainai did have the ability to pressure its suppliers to cooperate but did not address the data Tainai provided. Def.'s Resp. to Pls.' Mot. for J. on Agency R. (Def.'s Br.) at 19, 21, ECF No. 37. Therefore, the Court remanded the issue for further explanation or reconsideration. *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1297.

On remand, Commerce reversed course and determined under protest to apply neutral facts across the board to fill in the missing data. Remand Results at 3–4, ECF No. 57. *Tainai I* did not require Commerce to use an "all-or-nothing" approach to how it treats the absence of supplier data. Following *Mueller*, the Court ordered Commerce to address Tainai's argument and data "suggesting that [Tainai] was not a large enough customer of *any one* supplier to induce compliance with Commerce's information requests." *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1285 (citing Pls.' Mot. at 21, ECF No. 32) (emphasis added). Commerce could have analyzed the data for each supplier individually and determined which suppliers Tainai could control and which suppliers it could not.[2] *Compare id.*, *with* Def.'s Resp. to Pls.' Comments on Com.'s Remand Redetermination (Def.'s Remand Br.) at 3, ECF No. 62 (quoting Remand Results at 14–15, ECF No. 57) ("[T]he original dumping margin of 538.79 percent [was] based on 'the fact that Tainai's uncooperative suppliers, *as a whole*, provided a significant portion of the total inputs in question, thereby creating a substantial gap in the record.'") (emphasis added). Such an approach would be consistent with *Mueller's* requirement that Commerce make a case-specific determination. *Mueller*, 753 F.3d at 1233. But instead of examining the data Tainai provided about its relationships with individual suppliers, Commerce threw up its hands. It opted to apply neutral facts across the board — foregoing an approach that might also serve its deterrence interest and follow Federal Circuit precedent.

[2] Indeed, Commerce did so in the following year's review when it used the factors of production data provided by a single cooperating supplier but used facts available with an adverse inference to fill in gaps in the record created by noncooperative suppliers. Issues and Decision Mem. (IDM) at 10–11, Case No. 23–20, J.A. at 1,012–13, ECF No. 42. Although each supplier's sales to Tainai as a percentage of the supplier's total sales were comparatively small, those percentages were not uniform. *See* Tainai Section A, C and D Questionnaire Additional Resp. (May 11, 2022), Ex. SD-5.2, Case No. 23–20, J.A. at 84,865–902, ECF No. 43. The supplier whose sales to Tainai made up the largest percentage of its total sales was also the only supplier that provided complete data in response to Tainai's requests. *Id.* at 84,885–86; IDM at 10, Case No. 23–20, J.A. at 1,012, ECF No. 42. In other words, the very information Commerce here claims it was impossible for it to receive Commerce both received and considered the following year. *Compare* Remand Results at 13–14, ECF No. 57 (claiming that Commerce could not possibly obtain such information), *with* Tainai Section A, C and D Questionnaire Additional Resp. (May 11, 2022), Ex. SD-5.2, Case No. 23–20, J.A. at 84,865– 902, ECF No. 43 (obtaining exactly that information in the following year's review).

Commerce also tied its hands by determining that Tainai cooperated in this review. Decision Mem. at 7–8, J.A. at 1,009–10, ECF No. 43. The record here raises questions about how aggressively Tainai sought to gain the cooperation of its unaffiliated suppliers. In the subsequent year's administrative review, Commerce found that Tainai failed to cooperate to the best of its ability by waiting until the end of the information gathering period to seek its affiliates' cooperation. IDM at 10–11, Case No. 23–20, J.A. at 1,012–13, ECF No. 42. The Court today affirms — by separate opinion — Commerce's decision there that Tainai's lackluster attempt to gain information from its affiliates in that review fails to represent its "maximum effort to provide Commerce with full and complete answers." *Shanghai Tainai*, 48 CIT __, Slip Op. 24–143 at 18–19, 22 (Dec. 18, 2024) (quoting *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003)). Commerce has elsewhere found that a respondent was uncooperative when the respondent provided evidence of its efforts comparable to what Tainai did here. *See Haixing Jingmei Chem. Prods. Sales Co. v. United States*, 42 CIT __, 335 F. Supp. 3d 1330, 1341 (2018) ("[Respondent's] ... failure to demonstrate any effort to obtain th[e] necessary information beyond a single email communication to one of the two downstream customers adequately supports Commerce's decision to use adverse inferences when filling the gaps in the record."). However, the Court may not find facts for Commerce. Commerce has determined in this case that Tainai was cooperative, and no one challenges that determination.

Commerce believes that it cannot justify its application of facts available with an adverse inference on this record. Remand Results at 10, ECF No. 57 ("Upon a reexamination of record evidence, we are unable to determine, based on this record, whether Tainai has sufficient control over its suppliers to induce their cooperation in the underlying administrative review."). The Court's role is to determine whether Commerce's determination is supported by substantial evidence — not whether it is the best possible result. It "may not substitute its judgment for that of the [agency] when the choice is between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *China Custom Mfg. v. United States*, No. 1:20-cv-00121, 45 CIT __, 2021 Ct. Int'l Trade LEXIS 165, at *17 (Dec. 6. 2021), *aff'd*, 61 F.4th 956 (Fed. Cir. 2023) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 618 (2006)). Commerce could have conducted a supplier-by-supplier analysis and perhaps found that Tainai has the requisite level of influence to induce cooperation for some of its suppliers. Commerce could also reasonably conclude that Tainai could

not induce cooperation from *any* of its suppliers. Both conclusions can find evidentiary support. The Court's limited role in reviewing the remand determination leads it to conclude that Commerce has properly applied the Federal Circuit's test for when it may draw an adverse inference against a cooperating party. *See Mueller*, 753 F.3d at 1233–34. Commerce's determination to use neutral facts available is supported by substantial evidence. *See Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1344 (Fed. Cir. 2021) ("Even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce's determination from being supported by substantial evidence.") (quoting *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001)).

B.

Tainai objects to Commerce's choice of neutral facts to fill the gap in the record, maintaining that these facts are "still adverse to Tainai" and are not "neutral." Pls.' Remand Br. at 3, ECF No. 61. It challenges how Commerce valued certain completed components — rollers, cups, and cages — that Tainai uses to manufacture tapered rolling bearings. Tainai purchased these components from its unaffiliated suppliers, as opposed to making the components itself. Oral Arg. Tr. at 36:13–19, ECF No. 72. Tainai argues that Commerce "double count[ed] the financial ratios by valuing [these components] using surrogate values for complete articles and then applying financial ratios to these surrogate values." Pls.' Remand Br. at 3, ECF No. 61. Rather than accepting the price Tainai paid its suppliers for the components, Commerce calculated a surrogate value for each component by valuing the materials used to make the component and adding amounts to those values for processing and profit. Decision Mem. at 20, J.A. at 1,022, ECF No. 43; *see also Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1275 (explaining Commerce's calculation method). Tainai's proposed solution would see Commerce accept the prices it paid its suppliers and apply any necessary ratios to the prices it actually paid. Pls.' Comments on Draft Remand Determination, J.A. at 13,543, ECF No. 63 (arguing that Commerce should "calculat[e] the [normal value] without the [components'] values, and then add[] them in after the application of the financial ratios to produce a calculation that does not double count such factors"); *see also* Oral Arg. Tr. at 39:2–7, ECF No. 72.

When dealing with nonmarket economies like China, Commerce does not typically accept the prices producers pay for inputs as representing fair market value. Instead, Commerce must determine the value of the subject merchandise "on the basis of the value of the

factors of production utilized in producing the merchandise" and then add "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1) (flush language). It does this by using the costs for a producer of similar merchandise located in a market economy country of comparable development. 19 C.F.R. § 351.408(a) ("[Commerce] normally will calculate normal value by valuing the nonmarket economy producers' factors of production in a market economy country."). In other words, rather than accepting that the price the non-market economy manufacturer paid represents the fair value of the sum of (1) the cost of the product's components; (2) general expenses and profit; and (3) the cost of containers, coverings, and other expenses, Commerce constructs this amount itself by determining a value for each individual input. *See* 19 U.S.C. § 1677b(c)(1) (flush language). "Commerce values certain factors of production, such as selling, general, and administrative expenses, factory overhead, and profit, by using financial ratios derived from financial statements of producers of comparable merchandise in [a] surrogate country." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1319–20 (Fed. Cir. 2010) (citing *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010)). Ultimately, Commerce's task is to "attempt to construct a hypothetical market value" of the subject merchandise. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999).

In *Tainai I*, the Court sustained Commerce's use of Romania as a surrogate market economy country and Commerce's use of a Romanian company's financial statements to calculate surrogate values. *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1291. On remand, Commerce continued to apply surrogate financial ratios to calculate Tainai's factors of production regardless of whether Tainai manufactured the tapered roller bearing component or purchased the components from its suppliers. Remand Results at 23–25, ECF No. 57. Commerce stated that Tainai "fails to demonstrate our position was contrary to law or unsupported by substantial evidence" and "does not provide sufficient reasoning for [its] surrogate value argument." *Id.* at 25.

Tainai cites no authority for why Commerce's determination is impermissible. It instead generally argues that Commerce should adjust its methodology to reflect Tainai's business model, which involves purchasing some components for use in further assembly. However, the Federal Circuit has held, "When Congress directs the agency to measure pricing behavior and otherwise execute its duties in a particular manner, Commerce need not examine the economic or commercial reality of the parties specifically, or of the industry more

generally, in some broader sense." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344 (Fed. Cir. 2016). "Commerce's determination 'reflects "commercial reality" if it is consistent with the method provided in the statute, [and] thus in accordance with the law.'" *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1288 (quoting *Nan Ya Plastics*, 810 F.3d at 1344). Commerce followed the statute to calculate normal value based on "the value of the factors of production utilized in producing the [subject] merchandise." 19 U.S.C. § 1677b(c)(1) (flush language). Commerce has determined that, because Tainai and its suppliers are in a non-market economy, it should apply surrogate financial ratios — regardless of whether Tainai manufactured the component or purchased it. Def.'s Remand Br. at 4, ECF No. 62 (citing Decision Mem. at 20–21, J.A. at 1,022–23, ECF No. 43). Tainai has given the Court no reason to question that decision. Commerce's choice of neutral facts available will be **SUSTAINED**.

II. Capping of Amounts Denominated as "Additional Revenue for 301"

The Court next turns to Commerce's decision to "cap" additional revenue Tainai collected from its customers in connection with its Section 301 duties. In *Tainai I*, the Court explained that Tainai claimed to increase its prices for some customers under the guise of collecting Section 301 duties. *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1294. Commerce excluded this additional revenue from Tainai's U.S. price, which increased Tainai's dumping margin. Decision Mem. at 23–25, J.A. at 1,025–27, ECF No. 43. In doing so, Commerce rejected Tainai's argument that the revenue should be included in U.S. price as a "price adjustment" because it was attributable to the price of the merchandise. *Id.* at 23–24, J.A. at 1,025–26; 19 C.F.R. § 351.401(c). The Court took issue with Commerce's reasoning that the revenue was attributable to the sale of services, rather than merchandise. *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1295–97. This distinction is relevant because revenue attributable to the sale of services should not be treated as a price adjustment to Tainai's U.S. price, but revenue attributable to the sale of merchandise should be included. *See* 19 C.F.R. § 351.401(c); 19 C.F.R. § 351.102(b)(38). The Court found that Commerce's interpretation of 19 C.F.R. § 351.102(b)(38), the regulation defining price adjustments, was "unacceptably narrow." *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1282. On remand, Commerce offered a more fulsome explanation for its finding that this extra revenue is attributable to services related to Tainai's collection of Section 301 duties rather than the price of the tapered roller bearings. Remand Results at 25–29, ECF No. 57. Because Commerce

complied with the Court's Order and its determination is supported by substantial evidence, the Court will sustain its determination.

When determining whether subject merchandise is being sold at less than fair value, Commerce must make a "fair comparison" between the export price or constructed export price and normal value. *See* 19 U.S.C. § 1677b(a). Export price and constructed export price are further defined as "the price at which the subject merchandise is first sold" — in other words, the U.S. price. 19 U.S.C. § 1677a(a)–(b). Normal value is the price for which the goods are sold in the manufacturer's home country. 19 U.S.C. § 1677b(a)(1)(B)(i). At issue is whether the additional revenue Tainai received from customers in connection with Section 301 duties should be included in the U.S. price as a price adjustment — thereby narrowing the gap between the constructed export price and normal value and reducing Tainai's dumping margin. Remand Results at 7, ECF No. 57 ("Tainai requests that the U.S. price include the price paid for the good and the price charged for the section 301 duties."). The relevant question is whether the additional revenue Tainai received is truly part of the price of the subject merchandise.[3]

Commerce must reduce the U.S. price by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." 19 U.S.C. § 1677a(c)(2)(A). These adjustments "help[] ensure an 'apples [to] apples' comparison between merchandise sold in the home market and the U.S. market by deducting costs associated with transporting merchandise to the United States." *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1291 (quoting *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983)).

The Court already sustained Commerce's decision to reduce U.S. price by Tainai's actual Section 301 duties, following the reasoning of

[3] At oral argument, the parties discussed whether the capping issue should be characterized as Commerce *reducing* Tainai's U.S. sales price or *refusing to add* the additional revenue to the U.S. sales price. *Compare* Oral Arg. Tr. at 59:13–15, ECF No. 72 (MR. CRAVEN: "The problem [is] that the additional [revenue is] being deducted from our price on the basis that those monies were not related to the sale."), *with id.* at 61:5–11, 61:23–24 (THE COURT: "[F]rom [Commerce's] perspective, [Commerce] wouldn't be deducting anything from U.S. price because [Tainai] took in that extra revenue. But [Commerce] also wouldn't be adding anything to [Tainai's] U.S. price because [it] wouldn't be agreeing with you that the [additional revenue] was a profit on the merchandise as opposed to a profit on the duty." MR. LONG: "I understand Your Honor's articulation of the practice to be correct[.]"). Government counsel further noted that "we sometimes flip our conversation between sides [of the] ledger. Ultimately, ... if there's profit from 301 duties, that is not being built into an increase in U.S. price." *Id.* at 63:1–4. For the sake of consistency, the Court will refer to Commerce's practice as refusing to include the additional revenue in U.S. sales price.

the Federal Circuit's decision in *Borusan*. *See Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1294 (sustaining Commerce's finding that Section 301 duties are "United States import duties" within the meaning of 19 U.S.C. § 1677a(c)(2)(A)). Aside from the issue of whether the duties should be deducted, the statute also contemplates that not all expenses paid for by the purchaser will be included in the U.S. price. *See* 19 U.S.C. § 1677a(c)(2)(A) (excluding from U.S. price the "amount ... attributable to any additional costs, charges, or expenses and United States import duties, which are incident to bringing the subject merchandise" into the United States). Commerce believes Tainai's additional Section 301 revenue should be excluded from U.S. price on this basis. Commerce analogizes the additional revenue to other excludable services an exporter might provide and charge to its U.S. customer, such as arranging freight, brokerage, or handling. *See* Remand Results at 26, ECF No. 57 (identifying services Commerce acknowledges as "related to the subject merchandise" but are not "part of the subject merchandise"). On remand, Commerce reasoned that, because Section 301 duties are incidental to bringing subject merchandise from the exporting country into the U.S. and the statute requires adjusting U.S. price by United States import duties, charges related to Section 301 duties should similarly not be included in U.S. price. "[A]ny additional revenue related to section 301 duties should not adjust the calculation of U.S. price; otherwise, it would 'contravene Commerce's ability to achieve a fair, 'apples-to-apples' comparison between U.S. price and foreign market value in accordance with the statute.'" Def.'s Remand Br. at 7, ECF No. 62 (quoting Remand Results at 20, ECF No. 57).

Conversely, when calculating U.S. price, Commerce will account for "price adjustments ... that are reasonably attributable to the subject merchandise ...." 19 C.F.R. § 351.401(c). A "price adjustment" is "a change in the price charged for subject merchandise or the foreign like product, *such as* a discount, rebate, or other adjustment." 19 C.F.R. § 351.102(b)(38) (emphasis added). The use of "such as" in the regulation indicates that the regulation's list of price adjustments is not exhaustive, and a change in price need not be enumerated to qualify as a "price adjustment." *See, e.g.*, *Vicentin S.A.I.C. v. United States*, 42 F.4th 1372, 1378 (Fed. Cir. 2022) ("The two phrases 'such as' and 'or other adjustment' convey that the definition is not limited to discounts and rebates."); *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013) (interpreting a list in another regulation as "non-exhaustive" where the list was preceded by "such as"). But a change in price must be directly attributable to the merchandise at issue, meaning Commerce will not include in U.S. price related ex-

penses like freight charges. *See Dongguan Sunrise Furniture Co. v. United States*, 36 CIT 860, 896 (2012) ("[I]t was reasonable for Commerce to interpret the definition of price adjustment to not include the related freight expense.").

From Tainai's perspective, the additional revenue is "attributable to the subject merchandise," 19 C.F.R. § 351.401(c), and therefore should be treated as a price adjustment. Pls.' Remand Br. at 3–4, ECF No. 61. Tainai claims the revenue is "similar to that of a material surcharge." *Id.* It contrasts the revenue with "'freight' or 'insurance' expenses[,] which are set based on matters other than the goods and the price for such goods." *Id.* Tainai points to its invoices, which show the "tariff charge [being] directly tied to the quantity and part number [for a given product] on a 'unit price' basis." *Id.* at 3 (citing *e.g.*, Ex. SC-5(a) (separate invoices), SC-5(b) (itemized invoice), SC-5(c) (separate invoice), J.A. at 82,686–93, ECF No. 44).

Commerce claims that Tainai's additional revenue is not attributable to the subject merchandise and therefore should not be treated as a price adjustment. Remand Results at 22, ECF No. 57. The agency acknowledges the regulation's "such as" language renders the listed changes "illustrative" as opposed to finite. *Id.* at 17 n.56, ECF No. 57 (quoting *Dongguan*, 36 CIT at 896). However, Commerce claims that reading the illustrative list to include tariff-based charges like Tainai's additional revenue would contradict the regulation's purpose, which is to "account for any changes to the *actual* starting price of the subject merchandise." *Id.* (quoting *Dongguan*, 36 CIT at 896) (emphasis added). Commerce views Tainai's additional revenue as incidental to importing the subject merchandise because it is premised on the payment of Section 301 duties, meaning the revenue is attributable to Tainai's "service" of moving the goods through Customs as opposed to the sale of the goods themselves. *Id.* at 21–22.

This Court agrees with Commerce that Tainai's additional revenue is incidental to transporting the merchandise into the United States. When calculating the constructed export price, Commerce will adjust the price to reflect any changes "that are reasonably attributable to the subject merchandise." 19 C.F.R. § 351.401(c). Tainai's additional revenue relates directly to its payment of Section 301 duties. Commerce therefore properly considered it "a movement-related revenue attributable to movement services incidental to transporting the subject merchandise to the United States." Remand Results at 21, ECF No. 57. It is, in essence, a handling fee. *See* Oral Arg. Tr. at 62:19–23, ECF No. 72 (THE COURT: "According to you, [the additional revenue is] attributable to a service or perhaps better categorized as the

frustration and expense of serving as a tax collection agent for the federal Government." MR. LONG: "Yes, Your Honor.").

Tainai took three different approaches in charging its customers the additional revenue. In some instances, it sent its customers one, "all-inclusive" invoice listing a single price that comingled the price of the merchandise, the value of Tainai's actual Section 301 duties, and the additional revenue. Ex. SC-4(b)(iv), J.A. at 82,662, ECF No. 44; *see also* Oral Arg. Tr. at 67:20–68:4, ECF No. 72. In other instances, Tainai issued one itemized invoice that separately listed Tainai's charge for the merchandise and Tainai's Section 301 duties charge. Ex. SC-5(b), J.A. at 82,690, ECF No. 44; *see also* Oral Arg. Tr. at 68:8–12, ECF No. 72. The duties line item lumped together the Section 301 duties Tainai actually owed and the additional revenue. Finally, Tainai sent some customers two separate invoices: one invoice billing for the cost of the merchandise and one invoice billing for the 301 duties and the additional revenue. Ex. SC-5(a), J.A. at 82,687–88, ECF No. 44; *see also* Oral Arg. Tr. at 68:13–18, ECF No. 72.

On remand, Commerce tailored its approach based on how Tainai charged its customers. When Tainai issued an "all-inclusive" invoice, Commerce did not exclude from Tainai's U.S. price the additional revenue. *See* Remand Results at 29, ECF No. 57. Because the "all-inclusive" invoice did not feature line items, Commerce had no way of determining how much of the total billed cost was attributable to the "additional revenue" and how much was attributable to the merchandise. In contrast, Commerce did exclude the additional revenue from Tainai's U.S. price in the other two situations. *Id.* at 28–29. Where Tainai listed the additional revenue under a tariff line item on an invoice, Commerce could determine the amount of additional revenue being charged by subtracting the amount of actual Section 301 duties paid from the line item's total. The same is true for instances where Tainai sent a separate Section 301 duties invoice; Commerce could subtract the amount of Section 301 duties Tainai owed from the total charge listed on the invoice and determine how much additional revenue Tainai had billed it customers.

The practical effect of Commerce's approach is that the agency treats Tainai's additional revenue vis-à-vis U.S. price based on how Tainai characterizes the additional revenue charged. Commerce took Tainai at its word by following the company's own records and adjusting its treatment of the costs according to how Tainai represents them to its customers. *Cf.* 19 U.S.C. § 1677b(f)(1)(A) (requiring Commerce to calculate constructed value "based on the records of the exporter or producer of the merchandise, if such records are kept in

accordance with the generally accepted accounting principles of the exporting country ....”). Where Tainai treated the additional revenue as part of the product’s price, Commerce did as well. Where Tainai treated it as a charge related to the Section 301 duties akin to a handling fee, Commerce did the same and declined to include the revenue in U.S. price. Oral Arg. Tr. at 62:19–23, ECF No. 72. On this record, the Court finds that Commerce has made a proper comparison between the U.S. price for the subject merchandise and normal value by not artificially inflating the U.S. price with charges Tainai itself characterizes as related to Section 301 duties. Because Commerce’s determination to exclude the additional revenue associated with Section 301 duties is supported by substantial evidence, the Remand Results will be sustained.

CONCLUSION

Although Commerce could have chosen to individually examine the data of each uncooperative supplier or found Tainai to be uncooperative, its decision to do neither and apply neutral facts to fill the resulting gap is supported by substantial evidence. The agency’s decision to continue to use surrogate ratios when evaluating Tainai’s input costs accords with the statute, case law, and Commerce’s prior practice. Likewise, Commerce has adequately explained its decision to refuse to include some of the additional revenue Tainai earned related to Section 301 duties in its calculation of U.S. price. The Remand Determination complies with the Court’s prior Order and is supported by substantial evidence. It is therefore **SUSTAINED**.

SO ORDERED.

Dated: December 18, 2024
New York, New York

Stephen Alexander Vaden

STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 24–143

SHANGHAI TAINAI BEARING CO., LTD. and C&U AMERICAS, LLC, Plaintiffs, and ZHEJIANG JINGLI BEARING TECHNOLOGY CO., LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant.

Before: Stephen Alexander Vaden, Judge
Court No. 1:23-cv-00020 (SAV)

[Sustaining the Department of Commerce's Final Results and Denying Plaintiffs' Motion for Judgment on the Agency Record.]

Dated: December 18, 2024

David J. Craven, Craven Trade Law LLC, of Chicago, IL, for Plaintiffs Shanghai Tainai Bearing Co., Ltd. and C&U Americas, LLC.

John J. Kenkel, International Trade Law Counselors, PLLC, of Alexandria, VA, for Plaintiff-Intervenor Zhejiang Jingli Bearing Technology Co., Ltd.

Geoffrey M. Long, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director, Commercial Litigation Branch; *L. Misha Preheim*, Assistant Director, Commercial Litigation Branch; *Jesus N. Saenz*, and *Benjamin Juvelier*, Of Counsel, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement & Compliance.

OPINION

Vaden, Judge:

Plaintiffs Shanghai Tainai Bearing Co., Ltd. and C&U Americas, LLC (collectively Tainai) filed suit objecting to the Department of Commerce's (Commerce) resolution of the thirty-fourth administrative review of the antidumping order on tapered roller bearings from China. Joined by Plaintiff-Intervenor Zhejiang Jingli Bearing Technology Co., Ltd. (Jingli), Tainai brings multiple claims of error against Commerce's final determination. The Court finds these claims unavailing. Commerce's determination to apply a partial adverse inference based on Tainai's failure to cooperate to the best of its ability is supported by substantial evidence. Its determination to exclude from U.S. price additional revenue that Tainai invoiced as Section 301 duty payments is also supported by substantial evidence. Tainai's remaining claims raise similar legal issues to those advanced in its challenge to the thirty-third administrative review so that the Court's legal reasoning in *Shanghai Tainai Bearing Co. v. United States* (*Tainai I*), 47 CIT __, 658 F. Supp. 3d 1269 (2023), as applied to the facts of this case, leads the Court to reject them as well. The Motion for Judgment on the Agency Record is **DENIED**, and Commerce's Final Results are **SUSTAINED**.

BACKGROUND

Tainai is a Chinese manufacturer of tapered roller bearings.[1] It purchases components used in manufacturing tapered roller bearings from a network of unaffiliated suppliers. *See Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1284–85. Tapered roller bearings are made from rollers, cages, cups, and cones. Rollers are steel cylinders held together in a housing called a cage. Caged rollers are inserted between two steel rings, allowing movement. The inner ring is the cone, and the outer ring is the cup. The antidumping order on tapered roller bearings from China (the Order) has been in place since June 15, 1987, and covers:

> [T]apered roller bearings and parts thereof, finished and unfinished, from China; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use.

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Review; 2020–2021, 88 Fed. Reg. 1,359, 1,360 (Dep't of Com. Jan. 10, 2023) (Final Results), and accompanying Issues and Decisions Mem. (IDM) at 2, J.A. at 1,004, ECF No. 42. Tainai's Motion for Judgment on the Agency Record challenges the Final Results of the thirty-fourth administrative review of the Order, covering imports from China from June 1, 2020 through May 31, 2021 (the Period of Review). *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. 41,821, 41,825 (Dep't of Com. Aug. 3, 2021).

I. The Disputed Administrative Review

On August 3, 2021, Commerce initiated a review of the Order. *Id.* at 41,821. Commerce selected Tainai as a mandatory respondent. Issues and Decisions Mem. accompanying the Preliminary Results (PDM) at 2, J.A. at 4,154 n.4, ECF No. 42. Plaintiff-Intervenor Jingli was not selected for individual examination. Second Resp't Selection Mem. at 3, J.A. at 1,350, ECF No. 42. Commerce issued its initial questionnaire to Tainai. Initial Questionnaire, J.A. at 1,353, ECF No. 42. It asked Tainai to obtain factors of production information from its

[1] Shanghai Tainai Bearing Co., Ltd. brought its Motion together with another entity, C&U Americas, LLC. Compl. ¶3, ECF No. 8. In earlier proceedings before this Court, Tainai failed to explain the relationship between itself and C&U Americas. *See Shanghai Tainai Bearing Co. v. United States*, 46 CIT __, 582 F. Supp. 3d 1299, 1308 (2022) (referring to the "recurring mystery" of the relationship between Shanghai Tainai Bearing Co. and C&U Americas and noting that Plaintiffs' counsel declined the Court's request to shed light on it). The Court therefore refers generally to Plaintiffs as Tainai.

unaffiliated suppliers. *Id.* at 1,406–11. Tainai submitted its response, but Commerce later found that "it does not appear that Tainai made any attempt to request [factors of production] information from its unaffiliated suppliers in response to the initial questionnaire, nor did Tainai alert Commerce of any difficulties in obtaining accurate [factors of production] information." IDM at 8, J.A. at 1,010, ECF No. 42.

To calculate a proper dumping margin, Commerce needed complete factors of production information from Tainai. When dealing with nonmarket economies like China, Commerce does not typically accept the prices producers pay for inputs as representing fair market value. Instead, Commerce must determine the value of the subject merchandise "on the basis of the value of the factors of production utilized in producing the subject merchandise" and then add "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1) (flush language). Commerce does this by using the costs for a producer of similar merchandise located in a market economy country of comparable development to the country being examined. 19 C.F.R. § 351.408(a)–(b) ("[Commerce] normally will calculate normal value by valuing the nonmarket economy producers' factors of production in a market economy country."). In other words, rather than accepting that the price the nonmarket economy manufacturer paid represents the fair value of the sum of (1) the cost of the product's components; (2) general expenses and profit; and (3) the cost of containers, coverings, and other expenses, Commerce constructs this amount itself by determining a value for each individual input. 19 U.S.C. § 1677b(c)(1) (flush language). "Commerce values certain factors of production, such as selling, general and administrative expenses, factory overhead, and profit, by using financial ratios derived from financial statements of producers of comparable merchandise in [a] surrogate country." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1319–20 (Fed. Cir. 2010) (citing *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010)). Ultimately, Commerce's task is to "attempt to construct a hypothetical market value" of the subject merchandise. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999).

On March 29, 2022, Commerce issued Tainai a supplemental questionnaire and directed it to forward to its unaffiliated suppliers a letter and questionnaire requesting factors of production information. Letter Regarding Req. for Information, J.A. at 2,619, ECF No. 42. Commerce set the response deadline for April 12, 2022. *Id.* at 2,623. Tainai sought two extensions, explaining that it was impacted by a COVID-19 outbreak in Shanghai, which limited its ability to comply

with Commerce's requests. Suppl. Questionnaire Extension Req. (Apr. 4, 2022), J.A. at 2,693–94, ECF No. 42; Suppl. Questionnaire Extension Req. (Apr. 21, 2022), J.A. at 2,705–06, ECF No. 42. Commerce granted both extension requests and ultimately required the supplier responses no later than May 10, 2022. *See* Suppl. Questionnaire Extension Grant (Apr. 4, 2022), J.A. at 2,701, ECF No. 42; Suppl. Questionnaire Extension Grant, (Apr. 22, 2022), J.A. at 2,710, ECF No. 42.

On May 10, Tainai submitted its supplemental questionnaire responses. Tainai stated that it had forwarded Commerce's request for information to its suppliers, "but [Tainai had] been unable to obtain full responses." Suppl. Questionnaire Resp. at 2, J.A. at 2,911, ECF No. 42. Only one of Tainai's roller suppliers provided its production data to Tainai — thereby cooperating with Commerce's request. *Id.* Tainai also provided an example of a letter — dated May 5, 2022, five days before the deadline — that it sent to its unaffiliated suppliers. Letter of Assistance, J.A. at 84,732, ECF No. 43.

In its Preliminary Results, Commerce identified deficiencies in Tainai's reported factors of production information in both the initial and supplemental questionnaire responses. PDM at 13–15, J.A. at 4,165–67, ECF No. 42. Commerce concluded that Tainai "did not act to the best of its ability to comply with Commerce's requests for [factors of production] information and has demonstrated a pattern of not providing complete [factors of production] data." *Id.* at 15, J.A. at 4,167. Commerce also concluded that Tainai's unaffiliated suppliers "failed to cooperate by not providing their [factors of production] data, either through Tainai or directly to Commerce." *Id.* Accordingly, Commerce found it appropriate to use partial facts available with an adverse inference with respect to cages supplied by uncooperative suppliers. *Id.* Where Tainai's unaffiliated, uncooperative suppliers provided all of the cages for certain control numbers[2] during the Period of Review, "[Commerce] valued the unreported cage [factors of production] using Tainai's highest [factors of production] consumption rates for cages for all other [control numbers] based on product description." *Id.*

[2] "Control number," often referred to by the contraction "CONNUM," denotes a unique product based on relevant physical characteristics. To ensure that Commerce is comparing like products in the home and U.S. markets, it asks respondents to sort merchandise according to key differentiating categories with each number in the product's control number corresponding to physical characteristic groupings particular to the merchandise under review. *Xi'an Metals & Minerals Imp. & Exp. Co. v. United States*, 45 CIT __, 520 F. Supp. 3d 1314, 1321 n.4 (2021). As a simple shorthand, a reader may substitute "product" any time he reads "control number" or "CONNUM."

Commerce also denied Tainai's request for a by-product offset because "Tainai was unable to provide either the quantity of scrap actually generated during the [Period of Review] pursuant to its own production process, or that of its suppliers...." *Id.* at 22. Commerce's "established practice" is to grant an offset to normal value for the sale of by-products generated during the production of subject merchandise *if* the respondent can demonstrate that the by-product is "either resold or has commercial value and re-enters the respondent's production process." *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1296 (quoting *Arch Chem., Inc. v. United States*, 33 CIT 954, 956 (2009)); *see also NTSF Seafoods Joint Stock Co. v. United States*, 44 CIT __, 487 F. Supp. 3d 1310, 1322 (2020) (explaining by-products eligible for an offset are those "generated during the production process" of subject merchandise). The burden is on the respondent to provide Commerce with sufficient information to support a by-product offset claim. *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1296 (citing *Arch Chem.*, 33 CIT at 956). To qualify for a by-product offset, a firm must provide detailed documentation linking the amount of scrap sold or reused during the period of review with the amount of scrap generated from the production of subject merchandise during the period of review. *See Am. Tubular Prods., LLC v. United States*, 847 F.3d 1354, 1361–62 (Fed. Cir. 2017).

In the Final Results, Commerce continued to find that Tainai and its suppliers failed to act to the best of their abilities to provide complete responses. IDM at 6, J.A. at 1,008, ECF No. 42. Commerce also explained its treatment of two issues related to Section 301 duties, which are a type of duty imposed to combat unfair trade practices in foreign countries. 19 U.S.C. § 2411. First, Commerce determined that Section 301 duties are not "special duties" under *Wheatland Tube Co. v. United States*, 495 F.3d 1355 (Fed. Cir. 2007), and it accordingly reduced the U.S. price of subject merchandise by the amount of Section 301 duties paid pursuant to 19 U.S.C. § 1677a(c)(2)(A). IDM at 16–17, J.A. at 1,018–19, ECF No. 42. Second, when calculating U.S. price, Commerce excluded — or "capped" — additional revenue Tainai billed as "additional revenue for 301." *Id.* at 17. This additional revenue exceeded the amount of Section 301 duties Tainai owed. *Id.* at 17–19. Both actions had the effect of increasing Tainai's dumping margin. Third, Commerce continued to decline to grant Tainai a by-product offset. *Id.* at 20.

II. The Present Dispute

On February 21, 2023, Tainai filed its Complaint. Compl., ECF No. 8. The Court allowed Jingli to intervene as Plaintiff-Intervenor. Order

Granting Intervention, ECF No. 20. In its Motion for Judgment on the Agency Record, Tainai argues that: (1) Commerce should not have applied facts available with an adverse inference against Tainai; (2) Commerce improperly selected distortive factors of production as partial adverse facts; (3) Commerce should not have deducted Section 301 duties from the U.S. price; (4) Commerce should not have excluded from U.S. price additional revenue Tainai charged its customers for Section 301 duties; and (5) Commerce should have granted a by-product offset. Pls.' Mem. in Supp. of Mot. for J. on Agency R. (Pls.' Br.) at 12, 26, 27, 29, 32, 37, ECF No. 30.[3]

On September 14, 2023, the Court issued an opinion in a separate case involving Tainai, addressing several of these issues as applied to the thirty-third administrative review of the Order. *See Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1282–89, 1291–96 (discussing the application of facts available with an adverse inference to a cooperating respondent, the deduction of Section 301 duties, the exclusion of additional revenue from U.S. price, and whether Commerce should grant a by-product offset). In *Tainai I*, the Court remanded two issues for further explanation (1) Commerce's use of facts available with an adverse inference against a cooperating respondent based on the noncooperation of unaffiliated suppliers and (2) Commerce's exclusion of additional revenue that Tainai invoiced as Section 301 duty payments.[4] *Id.* at 1296–97. The Court held that Commerce failed to address Tainai's argument that it lacked the requisite market power to compel its suppliers to cooperate with Commerce's investigation and failed to "carry out a case-specific analysis of the applicability of deterrence and similar policies." *Id.* at 1288 (quoting *Mueller Comercial De Mexico v. United States*, 753 F.3d 1227, 1234 (Fed. Cir. 2014)). The Court also ordered Commerce to further explain its decision to exclude the additional revenue from U.S. price. Specifically, Commerce was to explain how the additional revenue is related to profits on the sale of services — and not the sale of merchandise — and to consider "whether there is any basis to exclude such amounts from the 'price adjustments' described by [19 C.F.R.] § 351.401(c) and [19 C.F.R.] § 351.102(b)(38)." *Id. at 1296.*

The Defendant filed its Response in this case, Def.'s Resp., ECF No. 33, rejecting Tainai's arguments. The Government argued that (1) it lawfully applied partial facts available with an adverse inference based on Tainai and its unaffiliated suppliers' failure to cooperate; (2)

[3] Jingli filed a letter in lieu of a brief fully supporting Tainai's Motion. Pl.-Int.'s Letter Br., ECF No. 32.

[4] The Court issued its opinion sustaining Commerce's remand redetermination for *Tainai I* concurrently with this opinion. *See Shanghai Tainai Bearing Co. v. United States*, 48 CIT __, Slip Op. 24–142 (Dec. 18, 2024).

it appropriately deducted Section 301 duties as part of its margin calculations; (3) it properly excluded from U.S. price additional revenue Tainai received in relation to Section 301 duties; and (4) it correctly denied Tainai a by-product offset. Def.'s Resp. at 7–8, ECF No. 33.

The Government distinguished the situation here from *Tainai I*. It explained that, in this case, Commerce applied facts available with an adverse inference based on both Tainai *and* its suppliers' failure to cooperate. *Compare id.* at 11 ("Both Tainai and its unaffiliated suppliers failed to cooperate to the best of their ability.") (capitalization altered), *with id.* at 19 ("[U]nlike in *Tainai* [*I*], here, ... Commerce based its decision on Tainai's failure to cooperate – not simply on its suppliers' failure."). 19 U.S.C. § 1677e(b)(1) provides for the application of facts available with an adverse inference when an "interested party" fails to cooperate to the best of its ability with a request for information. Commerce determined that Tainai and its unaffiliated suppliers are interested parties because they both are "producers of subject merchandise." Def.'s Resp. at 11, ECF No. 33 (citing IDM at 6, J.A. at 1,008, ECF No. 42); *see also* 19 U.S.C. § 1677(9)(A) (defining "interested party" as "a foreign ... producer ... of subject merchandise"). It justified its determination on three grounds: (1) Commerce used a partial adverse inference to remedy Tainai's noncooperation; (2) Tainai's resulting dumping margin in this case is more appropriate than the triple-digit margin Commerce assigned in *Tainai I*; and (3) Commerce based its partial adverse facts on Tainai's own data. Def.'s Resp. at 21–23, ECF No. 33.

In its reply brief, Tainai acknowledged that the Court had ruled against it in *Tainai I* with respect to the deduction of Section 301 duties from U.S. price and whether to grant a by-product offset. Pls.' Reply at 10, ECF No. 36. Thus, "absent a reversal on appeal, plaintiffs have no further argument."[5] *Id.*; *see also Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1291–94. Tainai reiterated that Commerce's determinations to apply partial facts available with an adverse inference and to exclude the additional Section 301 duty revenue from U.S. price are not supported by substantial evidence. Pls.' Reply at 2–10, ECF No. 36.

[5] Tainai mistakenly stated that the capping issue "was provisionally resolved in favor of Tainai" in *Tainai I*, "and, absent a reversal on appeal, plaintiffs have no further argument." Pls.' Reply at 10, ECF No. 36. In *Tainai I* the Court remanded the issue for further explanation but ultimately sustained Commerce's remand determination that continues to exclude Tainai's additional revenue. *Shanghai Tainai Bearing Co. v. United States*, 48 CIT __, Slip Op. 24–142 at 24–31 (Dec. 18, 2024). At oral argument for both cases, Tainai's counsel stated that the legal analysis for the capping issue is the same in this case as in *Tainai I*. Oral Arg. Tr. at 57:6–16, ECF No. 55. The Court will accordingly sustain Commerce's capping practice in this case as well.

The Court held oral argument simultaneously for this case and the remand determination in *Tainai I*. *See* ECF No. 47. To clarify the record, the Court ordered supplemental briefing on (1) Commerce's treatment of the data provided by the sole cooperating unaffiliated supplier and (2) what the record shows is the earliest date Tainai notified its unaffiliated suppliers about Commerce's need for the factors of production information. *See* ECF No. 46. The Court also invited the parties to direct the Court to any invoices on the record that reflect one set price for the bearings with no separate line item for Section 301 duties. *Id.* In its supplemental letter, Commerce clarified that it used the cooperating supplier's information in its calculations. Def.'s Suppl. Letter at 1–2, ECF No. 49. It did not draw an adverse inference, as it had with the noncooperating suppliers. *Id.* (citing Prelim. Calculation Mem. at 2, J.A. at 85,959, ECF No. 43). In response to the Court's second question, Tainai submitted copies of its extension requests, which "document the challenges facing [Tainai's] discussions with third country suppliers" because of COVID-19-related lockdowns in China. Pls.' Suppl. Letter at 1, ECF No. 48; *id.*, Ex. 1 at 3–4. Commerce notes "there is no record evidence to support Tainai's suggestion that it contacted its unaffiliated suppliers to solicit factors of production data prior to May 5, 2022." Def.'s Suppl. Letter at 3, ECF No 49. With the record now complete, the Court decides the parties' claims.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over Plaintiffs' challenge to the Final Results under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting final determinations in antidumping reviews. The Court must sustain Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B)(i). "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *New Am. Keg v. United States*, 45 CIT __, No. 20–00008, 2021 Ct. Intl. Trade LEXIS 34, at *15 (Mar. 23, 2021). Furthermore, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)).

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, 1351 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described "substantial evidence" 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)).

DISCUSSION

I. Summary

This case involves a straightforward application of an adverse inference against a non-cooperating respondent. Tainai was aware of its unaffiliated suppliers' prior non-cooperation and was obligated to attempt to secure their cooperation through its best efforts. Instead, Tainai delayed reaching out to its suppliers until well after Commerce requested it do so. Tainai has not directed the Court to other evidence on the record to show earlier communications with its unaffiliated suppliers. Therefore, Commerce's decision to apply adverse inferences based on Tainai's noncooperation is supported by substantial evidence. The Court need not reach the question of whether Commerce could properly apply an adverse inference based on the unaffiliated suppliers' noncooperation.

Other aspects of Commerce's decision are also in line with the Department's legal obligations. Commerce correctly deducted Section 301 duties from U.S. price in accordance with the Federal Circuit's decision in *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 63 F.4th 25 (Fed. Cir. 2023), and this Court's opinion in *Tainai I*, 47 CIT __, 658 F. Supp. 3d 1269. The agency's decision to exclude from U.S. price additional revenue that Tainai earned by invoicing its customers for Section 301 duty payments is supported by substantial evidence. Finally, Commerce properly rejected Tainai's request for a by-product offset. For these reasons, Commerce's Final Results will be **SUSTAINED**.

II. Application of Partial Facts Available with an Adverse Inference

A.

The first issue is whether Commerce's decision to apply facts available with an adverse inference against Tainai is supported by substantial evidence. When foreign merchandise is sold in the United States at less than fair value, thereby injuring a domestic industry, Commerce may impose antidumping duties on the merchandise. 19 U.S.C. § 1673 (flush language). Antidumping duties equal the amount that the foreign market value, known as the "normal value," of the merchandise exceeds the U.S. price of the merchandise. *Id.* When Commerce is missing data needed to calculate the normal value of subject merchandise, the antidumping statute provides a two-part process to fill in the gap. 19 U.S.C. § 1677e(a). Under 19 U.S.C. § 1677e(a), Commerce may use "facts otherwise available" for missing information if:

> (1) [N]ecessary information is not available on the record, or
>
> (2) [A]n interested party or any other person —
>
> (A) [W]ithholds information that has been requested by [Commerce]
>
> (B) [F]ails to provide such information by the deadlines for submission of the information or in the form and manner requested, ...
>
> (C) [S]ignificantly impedes a proceeding ..., or
>
> (D) [P]rovides such information but the information cannot be verified ....

Those facts otherwise available may be chosen with an adverse inference if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]...." 19 U.S.C. § 1677e(b)(1). Section 1677e(a) and 1677e(b) require two distinct analyses.[6] First, "Commerce ... must determine that it is missing necessary information[.]" *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1282 (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011)). Second, if

[6] Sections 1677e(a) and 1677e(b) are often collapsed into "adverse facts available" or "AFA," but "the two statutory processes require distinct analyses rather than the single analysis implied by the term 'AFA.'" *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1282; *cf. Jiangsu Alcha Aluminum Co. v. United States*, 48 CIT __, 712 F. Supp. 3d 1376, 1389–91 (2024) (applying both analyses in a countervailing duty context).

Commerce wishes to fill this gap with "facts that reflect an adverse inference against an interested party," it "must ... determine that the party has failed to cooperate by not acting to the best of its ability." *Id.* (citing *Zhejiang*, 652 F.3d at 1346). For these determinations, Tainai and its suppliers are considered "interested parties." *See* 19 U.S.C. § 1677(9)(A) (defining interested party to include any "foreign manufacturer, producer, or exporter ... of subject merchandise").

In *Tainai I*, Commerce sought to apply facts available with an adverse inference against Tainai based on the noncooperation of its suppliers. *See Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1282–89. But there Commerce had found that Tainai cooperated to the best of its ability. *Id.* at 1276. The Federal Circuit has elucidated additional requirements to apply an adverse inference against a cooperating party based on the noncooperation of third-parties. *See Mueller*, 753 F.3d at 1233 ("Commerce may rely on such policies as part of a margin determination for a cooperating party ... as long as the application of those policies is reasonable on the particular facts and the predominant interest of accuracy is properly taken into account as well."). In other words, to draw an adverse inference against the cooperating Tainai based on its suppliers' noncooperation, Commerce needed to: (1) "make a case-specific determination that the respondent can influence its suppliers' decision to cooperate," and (2) "take into account the predominant interest in accuracy and explain any deterrence-based rationale that is used against the cooperating party." *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1281.

The situation here is different. *See Shenzhen Xinboda Indus. Co. v. United States*, 44 CIT __, 456 F. Supp. 3d 1272, 1285 n.22 (2020) (citing *e.g.*, *Jiaxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2016)) ("[E]ach administrative review is a separate segment of an antidumping proceeding ... with its own, unique administrative record[.]"). In this review, Commerce found that Tainai *and* its suppliers failed to cooperate to the best of their abilities. *Compare Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1276 ("Commerce did not find that [Tainai] ... failed to cooperate to the best of its ability. Instead, it based its decision to apply an adverse inference on the lack of cooperation from [its] suppliers."), *with* IDM at 7, J.A. at 1,009, ECF No. 42 ("Tainai failed to put forth its maximum efforts to investigate and obtain the requested [factors of production] information."), *and* IDM at 9–10, J.A. at 1,011–12 ("Tainai did not attempt to avoid non-cooperation by selecting other suppliers or by providing adequate time for its suppliers to respond to Commerce's requests for information."). Because Commerce's determination that Tainai did

not cooperate to the best of its ability is supported by substantial evidence, the Court will sustain Commerce's use of facts available with an adverse inference.

In its Final Results, Commerce identified a gap in the record — factors of production information from Tainai's unaffiliated suppliers. IDM at 9, J.A. at 1,011, ECF No. 42. Commerce explained that it:

> requests [factors of production] to approximate the manufacturing process for producing subject merchandise and to determine the normal value ... of the imported goods in question. Without this information, Commerce is unable to accurately approximate the manufacturing process of the respondent or its suppliers and must rely on a suitable alternative through the application of facts available or [adverse facts available].

Id. It is undisputed that all but one of Tainai's suppliers failed to provide the information Commerce requested. Thus, there was a gap requiring Commerce to resort to facts available in the record. 19 U.S.C. § 1677e(a); *see* Pls.' Reply at 4, ECF No. 36 ("[W]hile a gap [in the record] may exist, it should have been [filled] with facts available without adverse inferences.")

The next question is whether Tainai failed to cooperate to the best of its ability.[7] "Compliance with the 'best of its ability' standard is determined by assessing whether [the] respondent has put forth its maximum effort to provide Commerce with full and complete answers ...." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce faults Tainai for not taking additional actions in response to its suppliers' previous noncooperation and for failing to give its suppliers adequate time to respond to the questionnaires. IDM at 8–10, J.A. at 1,010–12, ECF No. 42. Tainai responds that it lacks the "market power" to compel its unaffiliated suppliers to cooperate. Pls.' Br. at 20, ECF No. 30. But that argument is relevant to the question of whether Commerce can apply an adverse inference against a cooperating party based on the noncooperation of its unaf-

[7] Tainai asserts that, because it was eligible for a separate rate from the China-wide rate, Commerce "necessarily found that Tainai was cooperative." Pls.' Br. at 20, ECF No. 30. This is incorrect. As Commerce explained, Tainai was entitled to a separate rate based on "Tainai's demonstration of the absence of *de jure* and *de facto* governmental control over its export activities." Def.'s Resp. at 12, ECF No. 33 (citing PDM at 10, J.A. at 4,162, ECF No. 42); *see also Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1353 (Fed. Cir. 2015) (setting the same standard). Meanwhile, Commerce's determination of the normal value of Tainai's goods was based on "the value of the factors of production utilized in producing the subject merchandise" plus other related production expenses. 19 U.S.C. § 1677b(c)(1) (flush language). These are logically distinct inquiries. A company could comply with the former without having complied with the latter.

filiated suppliers. *See, e.g.*, *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1284–85. It does not excuse Tainai from its independent obligation to "put forth its maximum effort" to comply with Commerce's investigation — especially given the preexisting history of noncooperation from its suppliers. *See id.* at 1276–77; *see also Nippon Steel*, 337 F.3d at 1382 (finding a party failed to cooperate to the best of its ability because it did not "do the maximum it [was] able to do"). Commerce discussed that history in its decision:

> [E]ven if Tainai does not control its suppliers, given its history as a respondent in this proceeding and its past inability to secure [factors of production] information from its suppliers of TRBs after the fact, or when the administrative review is underway, we believe that taking steps to preemptively avoid noncooperation of producers is within the realm of actions Tainai should have taken to demonstrate that it put forth its maximum effort to comply with its reporting responsibility. However, Tainai did not attempt to avoid non-cooperation by selecting other suppliers or by providing adequate time for its suppliers to respond to Commerce's requests for information.

IDM at 9, J.A. at 1,011, ECF No. 42; *see also* Pls.' Br. at 19, ECF No. 30 ("Tainai was aware of the potential consequences of failing to obtain this cooperation.").

Tainai knew the consequences of failing to cooperate, but the record shows it did not act accordingly. Commerce issued a supplemental questionnaire to Tainai for it to forward to its unaffiliated suppliers on March 29, 2022. Letter Regarding Req. for Information, J.A. at 2,619, ECF No. 42. It granted Tainai two extensions on that questionnaire. Suppl. Questionnaire Extension Grant (Apr. 4, 2022), J.A. at 2,701, ECF No. 42; Suppl. Questionnaire Extension Grant (Apr. 22, 2022), J.A. at 2,710, ECF No. 42. Commerce found that Tainai delayed sending Commerce's requests to its suppliers for more than a month. IDM at 8, J.A. at 1,010, ECF No. 42. When Tainai did transmit the request, its suppliers had only three business days to respond before the May 10 deadline. *Id.* ("Tainai failed to request the information from its unaffiliated suppliers until nine days after the second extension, thereby only providing three business days for its unaffiliated suppliers to complete the response before the extended response deadline."). This delay falls well short of Tainai's "put[ting] forth its maximum effort" to provide Commerce with full and complete answers. *Nippon Steel*, 337 F.3d at 1382.

Tainai claims that there are other communications with its suppliers that show May 5 was not the earliest date it transmitted the

questionnaires to its suppliers. But when asked to file supplemental briefing detailing when Tainai first contacted its suppliers to request the data, Tainai only directed the Court to its extension requests. *See generally* Pls.' Suppl. Letter, ECF No. 48 (citing Suppl. Questionnaire Extension Req. (Apr. 4, 2022), J.A. at 2,693, ECF No. 42 and Suppl. Questionnaire Extension Req. (Apr. 21, 2022), J.A. at 2,705, ECF No. 42). Those requests went to Commerce and do not include any prior communications with its suppliers. Thus, Commerce is correct that "there is no record evidence to support Tainai's suggestion that it contacted its unaffiliated suppliers ... prior to May 5, 2022." Def.'s Suppl. Letter at 3, ECF No. 49; *see also id.* (noting that Tainai "requested an extension ... and stated [in its supplemental questionnaire response] that it had 'forwarded this information ... to its suppliers,'" yet "Tainai's letters to its unaffiliated suppliers are all dated May 5, 2022") (citing Letter of Assistance, J.A. at 2,920, ECF No. 42).

Moreover, "The burden of creating an adequate record lies with the interested parties, not with Commerce." *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014). If Tainai made prior communications with its unaffiliated suppliers to induce, cajole, or otherwise encourage cooperation, it bore the burden of placing those communications on the record. *Cf. Nippon Steel Corp. v. United States*, 48 CIT __, Nos. 1:21-cv-00533, 1:22-cv-00183, 1:23-cv-00112 (SAV), 2024 Ct. Intl. Trade LEXIS 114, at *27–30 (Oct. 10, 2024) (remanding Commerce's determination to use facts available with an adverse inference when a respondent provided e-mail and call logs documenting its multiple attempts to secure cooperation from a reseller). Instead, the record supports Commerce's finding that Tainai delayed sending Commerce's request for information until May 5, 2022. *See* IDM at 8, J.A. at 1,010, ECF No. 42. And where one of Tainai's suppliers did submit factors of production information, Commerce used that data instead of drawing an adverse inference. Prelim. Calculation Mem. at 2, J.A. at 85,959, ECF No. 43; *see also* Def.'s Suppl. Letter at 1–2, ECF No. 49. The Court will not entertain Tainai's unsupported argument that the cooperation of one supplier indicates that Tainai must have made earlier attempts to secure the cooperation of its other suppliers. The Court may only base its review on the record Tainai created. Because that record supports Commerce's determination that Tainai failed to act to the best of its ability, the Court will sustain Commerce's use of facts available with an adverse inference on that basis.

B.

Tainai separately argues that, even if Commerce properly drew an adverse inference, the facts Commerce used to do so produce an inaccurate result that yields an "unduly punitive" rate. Pls.' Reply at 9, ECF No. 36; *see also* Pls.' Br. at 28, ECF No. 30 ("This important goal [of] calculating the dumping margins as accurately as possibly was not met in the case."). According to Tainai, "the primary flaw with [Commerce's] selection of adverse facts, is that [it] selected data without considering the relative sizes of the components, finding articles of diverse sizes were comparable." Pls.' Reply at 9, ECF No. 36. In Tainai's account, Commerce "ignored all of the physical properties, dimensional measures[,] and [control number] factors in assigning substitute factors of production" and "defie[d] commercial reality." Pls.' Br. at 28–29, ECF No. 30.

Commerce needed to fill gaps in the record because some of Tainai's suppliers did not provide factors of production information. To fill these gaps, Commerce used Tainai's submitted factors of production data to determine the normal value for each control number of the cage components used to produce tapered roller bearings. IDM at 10–11, J.A. at 1,012–13, ECF No. 42. Commerce based its gap-filling calculations on the more general "product descriptions" that Tainai submitted as part of its factors of production data, ignoring other data Tainai submitted about the size, dimensions, and weight of individual components. *Id.*; Oral Arg. Tr. at 46:14–19, ECF No. 55 (THE COURT: "[Y]ou kind of looked at a little higher level of drawing your differences based on product groupings, as I recall, rather than individual product characteristics, which I took to mean the individual components of the control number." MR. LONG: "Right."). Product descriptions are "one of [the] four fields that Commerce use[s] to create" control numbers. *See Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1288 n.8. The three other, more specific fields are "outer diameter, inner diameter, and weight." *Id.* at 1277 n.6. Generally, all four fields help Commerce understand the components described by each control number, which in turn produces a more accurate calculation of each control number's normal value.

The Federal Circuit has clarified that there is no independent economic or commercial reality test. *See Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344 (Fed. Cir. 2016). "When Congress directs the agency to measure pricing behavior and otherwise execute its duties in a particular manner, Commerce need not examine the economic or commercial reality of the parties specifically, or of the

industry more generally, in some broader sense." *Id.* Commerce's determination "reflects 'commercial reality' if it is consistent with the method provided in the statute" and thus is "in accordance with the law." *Id.*

Commerce found Tainai did not cooperate, and that finding was supported by substantial evidence. Therefore, it was statutorily authorized to fill the gap created by the missing factors of production information by drawing an adverse inference. *See* 19 U.S.C. § 1677e(b)(1) (permitting facts otherwise available to be chosen with an adverse inference if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]"). Unlike in *Tainai I*, where Tainai received an "eye-popping" margin of 538.79 percent, Commerce here assigned Tainai a margin of 36.03 percent — well below the margin in *Tainai I* or the China-wide margin of 92.84 percent from this administrative review. *Compare Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1286, *with* Final Results, 88 Fed. Reg. at 1,360, J.A. at 1,001, ECF No. 42. Commerce adequately explained its rationale for how it applied partially adverse facts:

> [W]e relied on the product description (*i.e.*, PRODUCTU) to determine the partial [adverse facts available] rate because using all of the product characteristics would have amounted to an application of neutral facts available ... [B]ecause Tainai and its unaffiliated suppliers failed to act to the best of their abilities to provide the missing [factors of production] information, we find that the application of neutral facts available is not appropriate. Therefore, we relied on the product description to apply partial [adverse facts available] to the missing cage [factors of production] because it is accurate to group each of the products by their description and functions to induce cooperation while limiting the breadth of the application of [adverse facts available].

IDM at 10–11, J.A. at 1,012–13, ECF No. 42; *see also* Def.'s Resp. at 23, ECF No. 33 (stating that Commerce's approach "served to avoid rewarding the noncooperation of both Tainai and its suppliers").

Commerce explained that it sought to balance accuracy with an incentive for future cooperation. IDM at 11, J.A. at 1,013, ECF No. 42. In doing so, it used Tainai's own data. *Id.* at 10, J.A. at 1,012 ("Indeed, the cage [factors of production] data we are using as partial [adverse facts available] are Tainai's own extrapolation that we relied on in the *Preliminary Results*."); *see also* Pls.' Reply at 9, ECF No. 36 ("While it is true that the data in question is that of Tainai, such data is for a range of bearings of a specific size and weight."). Although Tainai

wishes Commerce would draw a more "favorable" adverse inference, Commerce explained that doing so would amount to applying neutral facts available and not provide a sufficient incentive for Tainai to cooperate in future reviews. IDM at 10, J.A. at 1,012, ECF No. 42; *see also F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (describing "an adverse facts available rate" as "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance"); *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1286 ("Commerce must appropriately balance the competing goals of accuracy and deterrence when it selects facts otherwise available with an adverse inference."). Commerce's decision reasonably balances the statutory factors required to draw an adverse inference. Because Commerce's application of partial adverse facts available is consistent with the statute and supported by substantial evidence, the Court will sustain its determination.[8]

III. Section 301 Duties

A. Deduction of Section 301 Duties from U.S. Price

When calculating Tainai's dumping margin, Commerce deducted Section 301 duty payments from the U.S. price of the subject merchandise. IDM at 17, J.A. at 1,019, ECF No. 42; *see also* 19 U.S.C. § 1677a(c)(2) ("[U.S. price shall] be reduced by the amount, if any, included in such price, attributable to any ... United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States[.]"). This deduction "helps ensure an 'apples [to] apples' comparison between the merchandise sold in the home market and the U.S. market by deducting costs associated with transporting merchandise to the United States." *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1291.

In determining whether a specific duty is intended to qualify as a "United States import duty," the Federal Circuit requires this Court to use a "proclamation-specific approach" that focuses "on the character" of the "authorized governmental action that actually prescribed the duty on imports at issue." *Borusan*, 63 F.4th at 33–34. In

[8] Tainai also challenged Commerce's decision to value certain inputs with surrogate values for finished components. *See* Pls.' Br. at 26–27, ECF No. 30. In the remand opinion for *Tainai I*, the Court sustained Commerce's use of surrogate values for completed components as supported by substantial evidence based on Tainai and its suppliers' operation in a nonmarket economy. *Shanghai Tainai Bearing Co. v. United States*, 48 CIT __, Slip Op. 24142 at 23–24 (Dec. 18, 2024). Tainai cites no additional authority for why Commerce's practice is improper here.

Tainai I, the Court examined *Borusan*'s analysis of Proclamation 9705, which enacted the Section 232 duties at issue in the Federal Circuit case, and compared the language in that proclamation to the proclamation that enacted the Section 301 duties here. *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1291–94. *Compare Borusan*, 63 F.4th at 34 ("This rate of duty, which is in addition to any other duties, fees, exactions, and charges ....") (emphasis omitted), *with Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1293 (applying the rate of the Section 301 duty "in addition to all other applicable duties, fees, exactions, and charges") (emphasis omitted). The Court concluded that "'the particular exercise of the authority' to enact the Section 301 duties at issue intended for these duties to be additional to antidumping duties." *Tainai I*, 47 CIT __, 658 F. Supp. at 1294. Therefore, it sustained Commerce's determination to deduct Section 301 duties from U.S. price. *Id.*; *see also Jinko Solar Imp. and Exp. Co. v. United States*, 48 CIT __, 701 F. Supp. 3d 1367, 1391 (CIT 2024) (applying the reasoning in *Tainai I* to sustain Commerce's deduction of Section 301 duties). Tainai acknowledges "[t]his issue was provisionally resolved against Tainai ... and absent a reversal on appeal, plaintiffs have no further argument." Pls.' Reply at 10, ECF No. 36. For the same reasons stated in *Tainai I*, the Court sustains Commerce's decision to deduct the Section 301 duties from U.S. price here.

B. Capping of Amounts Denominated as "Additional Revenue for 301"

As it had in the previous administrative review, Commerce also excluded, or "capped," from U.S. price any other revenue Tainai received in connection with Section 301 duties.[9] According to Tainai, "for certain sales[,] an additional amount was reported as additional compensation intended to off-set the additional expense, including the duty, incurred for the [Section] 301 duties." Pls.' Br. at 32, ECF No. 30. In other words, for some of its U.S. sales, Tainai charged its

[9] At oral argument, the parties discussed whether the issue should be characterized as Commerce *reducing* Tainai's U.S. price by the additional revenue amount or *refusing to add* it to the U.S. sales price. *Compare* Oral Arg. Tr. at 59:13–15, ECF No. 55 (MR. CRAVEN: "The problem [is] that the additional [revenue is] being deducted from our price on the basis that those monies were not related to the sale."), *with id.* at 61:5–11, 61:23–24 (THE COURT: "[F]rom [Commerce's] perspective[,] [Commerce] wouldn't be deducting anything from U.S. price because [Tainai] took in that extra revenue. But [Commerce] also wouldn't be adding anything to [Tainai's] U.S. price because [it] wouldn't be agreeing with you that the [additional revenue] was a profit on the merchandise as opposed to a profit on the duty." ... MR. LONG: "I understand Your Honor's articulation of the practice to be correct[.]"). Government counsel noted, "[W]e sometimes flip our conversation between sides [of the] ledger. But ultimately, ... if there's profit from 301 duties, that is not being built into an increase in U.S. price." *Id.* at 62:24–63:4. For the sake of consistency, the Court will refer to Commerce's practice as refusing to include the additional revenue in the U.S. sales price.

customers for the applicable Section 301 duties *plus* an amount of "additional compensation" for Tainai related to those Section 301 duties. *Id.* Commerce refused to include this additional compensation in Tainai's U.S. price, which increased Tainai's dumping margin. At oral argument, Tainai's counsel stated that the legal analysis of this issue is the same for this case as *Tainai I*. Oral Arg. Tr. at 57:6–16, ECF No. 55 (THE COURT: "It's my understanding ... that essentially for the remand case and the new case, different transactions but the basic legal analysis is the same for both?" MR. CRAVEN: "Yes, Your Honor ... there's no ... distinction. It's the same company. It's the same pricing practices."). Accordingly, the Court applies its analysis in *Tainai I* and the remand opinion for that case to hold that Commerce's determination to exclude Tainai's excess revenue from U.S. price is supported by substantial evidence. *See Shanghai Tainai Bearing Co. v. United States*, 48 CIT __, Slip Op. 24–142 at 24–31 (Dec. 18, 2024) (holding that Commerce properly excluded the additional Section 301-related revenue that Tainai charged some of its customers from U.S. price).

When determining whether subject merchandise is being sold at less than fair value, Commerce must make a "fair comparison" between a good's export price or constructed export price and its normal value. *See* 19 U.S.C. § 1677b(a). Export price and constructed export price reflect the price of the good when it is sold "in the United States." 19 U.S.C. § 1677a(a)–(b). To determine this U.S. price, Commerce must reduce the price that U.S. customers paid for the subject merchandise by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States[.]" 19 U.S.C. § 1677a(c)(2)(A). These adjustments "help[] ensure an 'apples [to] apples' comparison between merchandise sold in the home market and the U.S. market by deducting costs associated with transporting merchandise to the United States." *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1291 (quoting *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983)).

Like in the prior administrative review, Commerce analyzed Tainai's billing practices to make these statutorily mandated adjustments. IDM at 17–19, J.A. at 1,019–21, ECF No. 42. Tainai explained to Commerce that it used one of three kinds of invoices to charge its U.S. clients. Tainai's Resp. to Suppl. Section A, C, and D, Questionnaire (May 3, 2022), J.A. at 82,056–57, ECF No. 43. First, for some U.S. customers, Tainai charged a "gross unit price" that included both

the price of the subject merchandise and a "[t]ariff charge." *Id.* at 82,057. Second, for other U.S. customers, Tainai charged a "gross unit price" that only included the price of the subject merchandise and then – on the same invoice – included a "separate line item only for the tariff charge." *Id.* Third, for yet other U.S. customers, Tainai provided one invoice for the cost of the subject merchandise and another "separate monthly invoice only for the tariff charge." *Id.* at 82,056.

When Tainai's invoices separated out the tariff charge from the "unit price," Tainai "bifurcated" the price it charged its customers "into a unit price [for the subject merchandise] and *an additional charge representing additional revenue to offset the added cost of the seller resulting from the imposition of the Section 301 duties*." Pls.' Br. at 32, ECF No. 30 (emphasis added). This additional Section 301-related charge exceeded the actual amount of Section 301 duties paid when importing the subject merchandise. *See* IDM at 18, J.A. at 1,020, ECF No. 42 (noting these tariff charges included "excess [S]ection 301 duty revenue"). The parties disputed whether this additional revenue should be excluded from or included in the U.S. price. *Id.* at 17, J.A. at 1,019.

As before, Commerce decided that this additional revenue should not be included in U.S. price when Tainai bifurcated its invoices. It explained this additional revenue should not be included because "these additional revenues directly relate to U.S. import duties (*i.e.*, [S]ection 301 duties) and not the [tapered roller bearings] themselves." IDM at 19, J.A. at 1,021, ECF No. 42; *see also* 19 U.S.C. § 1677a(c)(2)(A) (requiring Commerce to make deductions to U.S. price for certain expenses). Commerce believes that excluding the additional revenue is analogous to its practice of excluding other services an exporter might provide and charge to its U.S. customer, such as arranging freight. Def.'s Resp. at 34, ECF No. 33 (citing IDM at 18–19, J.A. at 1,020–21, ECF No. 42); *Shanghai Tainai Bearing Co. v. United States*, 48 CIT __, Slip Op. 24–142 at 29 (Dec. 18, 2024). At oral argument, the Government characterized the "service" as being akin to a handling fee for collecting Section 301 duties. Oral Arg. Tr. at 62:19–23, ECF No. 55 (THE COURT: "According to you, [the additional revenue is] attributable to a service or perhaps better categorized as the frustration and expense of serving as a tax collection agent for the federal Government." MR. LONG: "Yes, Your Honor.").

Tainai has given the Court no reason to question its prior analysis. Tainai's own characterization of its business practice reinforces the Court's understanding that the additional revenue is attributable to

Tainai's Section 301 duty obligations and not a change in the sale price for subject merchandise. Tainai explained, "[F]or certain sales[,] an additional amount was reported as additional compensation *intended to off-set the additional expense, including the duty incurred for the 301 duties*. It was not a pass-through, it was a fixed amount." Pls.' Br. at 32, ECF No. 30 (emphasis added). This characterization bolsters Commerce's determination that this kind of additional revenue is not attributable to an increase in price for the good itself. *Compare id.*, *with* Oral Arg. Tr. at 62:19–23, ECF No. 55. Consistent with the analysis of the remand results in *Tainai I*, the Court sustains Commerce's decision to exclude the additional revenue Tainai received in connection with its Section 301 duties.

IV. By-Product Offset

Commerce's "established practice is to 'grant an offset to normal value, for sales of by-products generated during the production of subject merchandise, if the respondent can demonstrate that the by-product is either resold or has commercial value and re-enters the respondent's production process.'" *Tainai I*, 47 CIT __, 658 F. Supp. 3d at 1296 (quoting *Arch Chem.*, 33 CIT at 956). Tainai bears the burden to provide Commerce with sufficient information to support a by-product offset claim. *Id.* A respondent will not carry its burden if "it fails to 'document the quantity of scrap produced during the [Period of Review]' and merely 'equate[s] total scrap sold during the [Period of Review] with total scrap produced during the [Period of Review].'" *Id.* (quoting *Am. Tubular Prods.*, 847 F.3d at 1361). Tainai concedes that "the quantity of scrap produced is not directly recorded[,]" but it argues "the quantity of scrap produced is the same as the quantity of scrap sold ...." Pls.' Br. at 37, ECF No. 30. As in *Tainai I*, the Court continues to follow Federal Circuit precedent and finds that Tainai's argument is insufficient as a matter of law. Commerce's decision to deny Tainai a by-product offset is **SUSTAINED**.

CONCLUSION

Every case turns on its own record. Tainai had an independent obligation to cooperate to the best of its ability with Commerce's request for information. The evidence shows that it did not do so in this case. Commerce appropriately applied facts available with an adverse inference against Tainai based on its failure to cooperate to the best of its ability. The agency's decision to exclude from U.S. price the additional revenue Tainai charged for its Section 301 duties is also supported by substantial evidence. Tainai's remaining claims fail under this Court's reasoning in *Tainai I.* Therefore, Tainai's Motion for Judgment on the Agency Record is **DENIED** and Commerce's

Final Results are **SUSTAINED.**
Dated: December 18, 2024
New York, New York

Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 24–144

RISEN ENERGY CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN ALLIANCE FOR SOLAR MANUFACTURING, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 23–00153

JUDGMENT

This matter is before the Court after remand to reconsider and, if necessary, recalculate the portion of the countervailing duty ("CVD") rate attributable to the Export Buyer's Credit Program ("EBCP"). The Court's opinion ordering remand permitted the United States Department of Commerce ("Commerce") to choose among several avenues to resolve the matter. It chose to delete the entire amount attributable to EBCP from the CVD rate. This was consistent with the Court's remand opinion. As no party has submitted comments on the remand determination, it is

ORDERED, **ADJUDGED**, and **DECREED** that the remand results by Commerce are **SUSTAINED**.

Dated: December 18, 2024
New York, New York

/*s*/ *Jane A. Restani*
JANE A. RESTANI, JUDGE

Slip Op. 24–145

G&H DIVERSIFIED MANUFACTURING LP, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 22–00130

[Denying plaintiff's motion for judgment on the pleadings.]

Dated: December 19, 2024

Lewis E. Leibowitz, The Law Office of Lewis E. Leibowitz, of Washington, D.C., for plaintiff G&H Diversified Manufacturing LP.

Guy R. Eddon, Trial Attorney, International Trade Field Office, Civil Division, U.S. Department of Justice, of New York, N.Y., for defendant United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director and *Aimee Lee*, Assistant Director, International Trade Field Office. Of counsel on the brief was *Valerie Sorensen-Clark*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

OPINION AND ORDER

* * *

Reif, Judge:

Before the court is the motion for judgment on the pleadings of G&H Diversified Manufacturing LP ("plaintiff"). Plaintiff brings the instant action to contest the denial of administrative protest 5301–21–107212 (the "Protest") seeking to apply approved Exclusion No. 85773 (the "Exclusion") to Entry No. BDG-0053169–2 (the "Entry"). *See* Pl.'s Mot. J. Pleadings, ECF No. 17; Mem. Supp. Pl.'s Mot. J. Pleadings ("Pl. Br."), ECF No. 17–2.

Plaintiff argues that U.S. Customs and Border Protection ("Customs") denied unlawfully plaintiff's protest because "the purported change in HTSUS classification was made long after [Customs] had already concluded on at least three separate occasions that the classification of the imported goods was correct." Am. Compl. ¶ 3, ECF No. 9. Plaintiff also contests Customs' classification of the Entry. *Id.* ¶ 5.

In response, the United States ("defendant") argues that "there are facts in dispute and judgment cannot be rendered on the pleadings." Def.'s Mem. Law Opp'n Pl.'s Mot. J. Pleadings as to Counts I, III, and IV of the Corrected Compl. ("Def. Br.") at 7, ECF No. 22.

For the reasons discussed below, the court denies plaintiff's motion for judgment on the pleadings.

BACKGROUND

Plaintiff was the importer of record for certain steel tubes (the "subject merchandise") entered on May 2, 2020. Am. Compl. ¶ 19; Answer to Compl. ("Answer") ¶ 19, ECF No. 14. Plaintiff made the Entry of the subject merchandise at the Port of Houston. Am. Compl. ¶ 40; Answer ¶ 40. Line Item 001 of the Entry is at issue in this case. Am. Compl. ¶ 41; Answer ¶ 41.

Plaintiff classified Line Item 001 under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 7304.29.6115.[1] Am. Compl. ¶ 41; Answer ¶ 41.

On May 2, 2020, plaintiff submitted a steel product exclusion request to the Bureau of Industry and Security ("BIS") within the U.S. Department of Commerce ("Commerce") to secure the refund of duties imposed by Proclamation 9705 pursuant to section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862 ("Section 232"). Am. Compl. ¶ 1–2, 19; Answer ¶ 1–2, 19.

On May 13, 2020, BIS posted plaintiff's exclusion request to the BIS "Section 232 Exclusions Portal." Am. Compl. ¶ 42; Answer ¶ 42.

On December 4, 2020, BIS granted plaintiff's requested exclusion and issued a decision memorandum. Am. Compl. ¶ 19; Answer ¶ 19; BIS Decision Document – Steel Section 232 Remedy Exclusion Request (Dec. 4, 2020) ("BIS Dec. Mem."), ECF No. 22–1. BIS granted the Exclusion under HTSUS subheading 7304.29.6115, as requested. BIS Dec. Mem. at 1.

On March 26, 2021, Customs liquidated the Entry and assessed Section 232 duties. Am. Compl. ¶ 29; Answer ¶ 29.

On April 19, 2021, plaintiff filed the Protest seeking a refund of Section 232 duties. Am. Compl. ¶ 30–31; Answer ¶ 30–31.

On November 22, 2021, Customs denied the Protest and concluded that the subject merchandise was classified properly under HTSUS subheading 7304.59.8020 rather than subheading 7304.29.6115, as entered.[2] Am. Compl. ¶ 53; Answer ¶ 53.

On January 12, 2022, plaintiff submitted a request to void the denial of the Protest. Am. Compl. ¶ 56.[3]

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[1] HTSUS subheading 7304.29.6115 covers "[c]asing, tubing and drill pipe, of a kind used in drilling for oil or gas" that have "an outside diameter not exceeding 114.3 mm" and that have "a wall thickness not exceeding 9.5 mm."

[2] HTSUS subheading 7304.59.8020 covers "Tubes, pipes and hollow profiles, seamless, of iron (other than cast iron) or steel: Other, of circular cross section, of other alloy steel: Other: Other: Other: Other: Having an outside diameter of 38.1 mm or more but not exceeding 114.3 mm: Having a wall thickness of 6.4 mm or more but not exceeding 12.7 mm."

[3] Defendant in its answer "denies [that] the request was submitted on January 12, 2022." Answer ¶ 56. However, defendant appears to abandon this objection in its briefing. *See* Def. Br. at 6 ("On January 12, 2022, G&H submitted 'a request to void the denial of the Protest.'").

On April 22, 2022, plaintiff filed its summons. *Id.* ¶ 58; Answer ¶ 58; *see* Summons, ECF No. 1.

On May 24, 2022, Customs denied plaintiff's request to void the Protest denial. Am. Compl. ¶ 57; Answer ¶ 57.

On November 21, 2023, plaintiff filed its complaint in this case. *See* Compl., ECF No. 7. On November 29, 2023, plaintiff amended its complaint. *See* Am. Compl.

On February 29, 2024, defendant filed its answer to plaintiff's amended complaint. *See* Answer.

On June 21, 2024, plaintiff filed the instant motion for judgment on the pleadings as to Counts I, III and IV of the amended complaint. *See* Pl.'s Mot. J. Pleadings; *see also* Am. Compl. ¶¶ 60–69, 74–78. Plaintiff also filed a memorandum of law in support of its motion. *See* Pl. Br.

On September 24, 2024, defendant filed a memorandum of law in opposition to plaintiff's motion for judgment on the pleadings. *See* Def. Br.

On October 15, 2024, plaintiff filed its reply brief. *See* Mot. J. Pleadings—Reply Br. of Pl. ("Pl. Reply Br."), ECF No. 23.

On November 5, 2024, the Court denied plaintiff's motion for oral argument. Ct.'s Order Den. Mot. Oral Arg., ECF No. 25.

JURISDICTION AND STANDARD OF REVIEW

The Court exercises exclusive jurisdiction over all civil actions commenced under section 515 of the Tariff Act of 1930, 19 U.S.C. § 1515, to contest protests denied by Customs, 28 U.S.C. § 1581(a),[4] and reviews such actions de novo. 28 U.S.C. § 2640(a)(1) ("The Court of International Trade shall make its determinations upon the basis of the record made before the court ..... ").

Pursuant to USCIT Rule 12(c), "[a]fter the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings."

"Judgment on the pleadings for a plaintiff is appropriate where there are no material facts in dispute and the plaintiff is entitled to judgment as a matter of law." *N.Z. Lamb Co. v. United States*, 40 F.3d 377, 380 (Fed. Cir. 1994); *Forest Lab'ys., Inc. v. United States*, 476 F.3d 877, 881 (Fed. Cir. 2007); *Universal Steel Prods., Inc. v. United States*, 45 CIT ___, ___, 495 F. Supp. 3d 1336, 1342 (2021).

The motion is reviewed under the same standard as a motion to dismiss under USCIT Rule 12(b)(6) for failure to state a claim. *Forest Lab'ys, Inc. v. United States*, 29 CIT 1401, 1402–03, 403 F. Supp. 2d 1348, 1349 (2005), *aff'd*, 476 F.3d 877 (Fed. Cir. 2007).

[4] 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.

In reviewing a motion for judgment on the pleadings, "the court accepts all well-pleaded facts as true and views them in the light most favorable to the non-moving party." *Keirton USA, Inc. v. United States*, 46 CIT ___, ___, 600 F. Supp. 3d 1270, 1272 (2022); *see also C.J. Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct. 377, 379, 343 F. Supp. 1387, 1390 (1972) ("[W]hen a motion is directed solely to the pleadings, the movant admits the truth of his adversary's well-pleaded factual allegations but denies their sufficiency as a matter of law.").

Finally, "[t]he court may not rely on matters outside the pleadings unless it also treats the motion as one for summary judgment under USCIT Rule 56." *Quaker Pet Grp., LLC v. United States*, 42 CIT ___, ___, 287 F. Supp. 3d 1348, 1354 (2018); *see also* 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367 (3d ed. 2004) ("[J]udgment on the merits can be achieved by focusing on the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the district court will take judicial notice.")

LEGAL FRAMEWORK

Section 232 "authoriz[es] the President to adjust imports that pose a threat to the national security of the United States." *Universal Steel Prods.*, 45 CIT at ___, 495 F. Supp. 3d at 1339. Pursuant to Section 232, the President issued Proclamation 9705, which established a 25 percent tariff on imports of steel articles from all countries except for Canada and Mexico. *Proclamation No. 9705 of March 8, 2018* ("Proclamation 9705"), 83 Fed. Reg. 11,625 (Mar. 15, 2018); *see also Universal Steel Prods.*, 45 CIT at ___, 495 F. Supp. 3d at 1340.

Proclamation 9705 "authorized [Commerce] to provide relief from the additional duties set forth in clause 2 of [the] proclamation for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality and . . . to provide such relief based upon specific national security considerations." 83 Fed. Reg. at 11,627.

DISCUSSION

I. Counts I and IV

The court will rule on Counts I and IV together because the former is inclusive of the latter. *See* Am. Compl. ¶ 68, 78.

Plaintiff alleges that "[t]he Protest denial failed to consider that [Customs] had previously determined, in reviewing the Exclusion

request and participating in the final approval of the Exclusion, as well as through liquidation, that the HTSUS classification asserted in the Entry was correct and matched the Exclusion." *Id.* ¶ 67.

Plaintiff also alleges that "[t]he Protest denial was issued without notice to Plaintiff or an opportunity for Plaintiff to be heard regarding the reversal of [Customs'] earlier determinations of the proper HTSUS classification of the imported merchandise." *Id.* ¶ 68.

A. Whether Customs determined previously that the HTSUS classification asserted in the Entry was correct and matched the Exclusion

1. The posting of the exclusion request (May 13, 2020)

The court concludes that plaintiff is not entitled to judgment as a matter of law as to whether the posting of the exclusion request constituted a determination of the correct classification by Customs.

The following facts are not in dispute. On May 13, 2020, BIS posted the exclusion request on the "Section 232 Exclusions Portal." Am. Compl. ¶ 42; Answer ¶ 42. The posting opened a 30-day window for public comments on the exclusion request. Am. Compl. ¶ 42; Answer ¶ 42.

Plaintiff argues that "[w]hen the exclusion request was posted, the classification was confirmed by [Customs]." Pl. Br. at 4. Plaintiff explains that "the HTSUS classification [is] to be determined as a prerequisite to posting the exclusion request online to seek public comment." *Id.* at 6.

Plaintiff explains further that Customs "had the obligation under the BIS regulations . . . to review the HTSUS classification [in the exclusion request] and notify BIS, preventing publication of the exclusion request if [Customs] determined that the HTSUS classification in the request was incorrect." *Id.*

Defendant responds that "[t]he fact that BIS posted the contents of G&H's exclusion request does not constitute a 'decision' on any aspect of that request." Def. Br. at 14. Defendant explains that "[i]t is not clear how G&H associates an administrative action by another agency with a substantive and conclusive classification determination made by [Customs]." *Id.*

In reply, plaintiff argues that "BIS guidance requir[es] [Customs] to verify the accuracy of the HTSUS classification in an exclusion request prior to it being posted for public comment." Pl. Reply Br. at 7. Plaintiff insists that "[i]f the HTSUS classification is correct in the Exclusion Request, then it must be correct for the conforming Entry, because the specifications and end use of the steel in the two documents are identical." *Id.* at 8.

Parties fail to cite statutes or regulations that would allow the court to determine this question of law.

Plaintiff cites BIS regulations in support of its assertions that "the HTSUS classification was to be determined as a prerequisite to posting the exclusion request online to seek public comment" and that the "correct HTSUS classification, along with precise product specifications, 'is essential' to permit potential objectors to determine whether 'the requested product is or readily can be made in sufficient quantity and quality by domestic manufacturers.'" Pl. Br. at 6 (quoting *Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum* ("*Submissions of Exclusion Requests*"), 83 Fed. Reg. 46,026, 46,035 (Dep't of Commerce Sept. 11, 2018)).

Setting aside the question of whether BIS regulations would even bind Customs, the court notes that the section that plaintiff quotes concerns BIS' decision to prohibit trade associations from filing exclusion requests. *See Submissions of Exclusion Requests*, 83 Fed. Reg at 46,035. It has nothing to do with Customs' responsibilities during the review of exclusion requests. *See id.* Moreover, defendant does not cite anything to support its arguments. *See* Def. Br. at 14.

For these reasons, the court is unable to rule on the legal question of whether the posting of an exclusion request by BIS constitutes a determination by Customs of the proper HTSUS classification. *See Quaker Pet*, 42 CIT at ___, 287 F. Supp. 3d at 1354 (stating that "[t]he court may not rely on matters outside the pleadings unless it also treats the motion as one for summary judgment under USCIT Rule 56").

Plaintiff is not entitled to judgment as a matter of law.

2. The approval of the Exclusion by BIS (December 4, 2020)

The court concludes that there is a genuine dispute of material fact with respect to Customs' role in the exclusion approval process.

The following facts are not in dispute. On December 4, 2020, BIS approved the Exclusion. Am. Compl. ¶ 32, 47; Answer ¶ 32, 47. The accompanying decision memorandum named plaintiff and listed the HTSUS classification as 7304.29.6115. *See* BIS Dec. Mem.

Plaintiff argues that "at the time an exclusion request is up for approval, [Customs] again is expected to affirm the correct HTSUS classification." Pl. Br. at 6–7. Further, plaintiff asserts that under the principle of "presumption of regularity," it may be assumed that Customs "fulfilled its obligation to ensure the HTSUS classification was correct in in [sic] connection with . . . the approval of the Exclusion." *Id.* at 7–8 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

In response, defendant argues that plaintiff "is simply incorrect that the limited, automated-review [sic] of the exclusion request in this case constituted a determination as to these facts." Def. Br. at 16. Defendant explains that Section 232 exclusion requests are reviewed using "an automated program that is designed to check that certain basic, quantitative information, such as chemical or dimensional facts submitted by the exclusion requester satisfies the preconditions required to fall within the requester's claimed tariff provision." *Id.* at 15.

Defendant insists that an exclusion request meeting the "automated conditions" is not "sufficient to guarantee that the HTSUS subheading identified by the requester is correct as it relates to a particular product – *i.e.*, meeting the necessary conditions for a subheading does not guarantee that the merchandise is correctly classified under that subheading." *Id.* Moreover, defendant argues that "BIS's approval of the requested exclusion expressly noted that the approval was not to be construed as a ruling or official confirmation of the correct HTSUS provision." *Id.* at 17; *see* BIS Dec. Mem. at 2.

In reply, plaintiff argues that "[t]he tariff classification listed in the Exclusion is an integral and inseparable part of the approved Exclusion." Pl. Reply Br. at 8. Plaintiff asserts that "[i]f the HTSUS classification is correct in the Exclusion Request, then it must be correct for the conforming Entry, because the specifications and end use of the steel in the two documents are identical." *Id.*

The undisputed facts contained in the pleadings do not provide sufficient information for the court to determine the role of Customs in the exclusion approval process. There are material facts in dispute, namely whether Customs' review of Section 232 exclusion requests is "automated." Def. Br. at 15–17. Defendant's explanation of the "automated check," while thorough, is unaccompanied by citations to factual support of any kind. *See id.* at 3, 15.

Plaintiff cites to BIS documents and regulations that mention that Customs "reviews" the HTSUS code in the exclusion request and "consults as needed with Commerce." Pl. Reply Br. at 6–7 (quoting U.S. Dep't of Commerce, Bureau of Industry and Security, *232 Exclusion Process Frequently Asked Questions (FAQs)*, https://www.bis.doc.gov/index.php/documents/section-232-investigations/2409-section-232-faq/file (last updated June 19, 2019); *Section 232 Steel and Aluminum Tariff Exclusions Process*, 85 Fed. Reg. 81,060, 81,064 (Dep't of Commerce Dec. 14, 2020); U.S. Dep't of Commerce, Bureau of Industry and Security, *Section 232 National Security Investigation of Steel Imports - Information on the Exclusion Process*, https://www.bis.doc.gov/index.php/232-steel (last updated July 11, 2024)).

None of plaintiff's citations provide elucidation as to the character of Customs' review and consultation with BIS.[5] Such questions are factual in nature.

Accordingly, the court is unable to determine whether the Dec. 4, 2020 exclusion approval constituted a determination by Customs of the proper HTSUS classification. *See* Pl. Br. at 6–8; *see also C.J. Tower & Sons*, 68 Cust. Ct. at 379, 343 F. Supp. at 1390 ("[T]he motion [for judgment on the pleadings] must be denied if, as against the moving party, the pleadings raise any factual issues, . . . but must be granted if there are no disputed facts and the movant is clearly entitled to judgment as a matter of law."). The court concludes that there is a genuine dispute of material fact such that plaintiff is not entitled to judgment as a matter of law. *See N.Z. Lamb*, 40 F.3d at 380.

3. The notice of liquidation posted by Customs (March 26, 2021)

The court concludes that plaintiff is not entitled to judgment as a matter of law on the question of whether the notice of liquidation constituted a determination by Customs of the proper classification.

It is undisputed that on March 26, 2021, Customs liquidated the Entry as entered under HTSUS subheading 7304.29.6115. Am. Compl. ¶ 29; Answer ¶ 29.

Plaintiff argues that "[a] third opportunity for [Customs] to get the classification right was at liquidation." Pl. Br. at 7. Plaintiff explains that "[i]n this case, [Customs] liquidated the Entry with the HTSUS classification asserted at the time of entry." *Id.* Plaintiff insists that at liquidation, Customs "had the responsibility to review all the material specifications, including the HTSUS statistical reporting number (the 10-digit classification) in the Exclusion and the Entry." *Id.* at 11.

In response, defendant argues that "[a]uto-liquidation or bypass liquidation entries 'are made without examination or Customs officer review and do not reflect "treatment" by Customs' that determines classification." Def. Br. at 17 (quoting *Kent Int'l, Inc. v. United States*, 17 F.4th 1104, 1109 (Fed. Cir. 2021)).

Defendant buttresses its argument with citations to a series of cases. *See id.* at 17–18; *Kent Int'l*, 17 F.4th at 1109 ("[B]ypass entries . . . are made without examination or Customs officer review and do not reflect 'treatment' by Customs."); *Motorola, Inc. v. United States,* 436 F.3d 1357, 1390 (Fed. Cir. 2006) ("[T]he admission of entries

[5] Moreover, *Section 232 Steel and Aluminum Tariff Exclusions Process* post-dates by 10 days the exclusion approval at issue here. *See Section 232 Steel and Aluminum Tariff Exclusions Process*; *see also* BIS Dec. Mem.

'expeditiously and without examination or Customs officer review' does not constitute 'treatment' within the meaning of [19 U.S.C. § 1625(c)(2)]."); *Under the Weather, LLC v. United States*, 48 CIT ___, ___, 728 F. Supp. 3d 1337, 1357 (2024). Defendant explains that the March 26, 2021 "notice of automatic liquidation" did not "demonstrate[] that [Customs] made an affirmative determination as to the classification of the product covered by the exclusion." Def. Br. at 18.

Plaintiff asserts that "[t]he cases cited by Defendant . . . are inapposite here because they deal with whether [bypass entries] can be used to support an 'established and uniform practice' under 19 U.S.C. § 1625(c)." Pl. Reply Br. at 10 (quoting *Kent Int'l*, 17 F.4th at 1106). Plaintiff explains that it is "not asserting that [Customs] had an 'established and uniform practice,' only that [Customs] acted consistently throughout the exclusion process in this case, assenting to the tariff classification prior to the exclusion request being posted as well as the liquidation of the entry." *Id.*

This reading is misguided. The Court in *Kent International* did discuss whether Customs violated a de facto "established and uniform practice," *see* 17 F.4th at 1106, but the Court also considered expressly whether bypass entries reflect "treatment previously accorded." *See id.* at 1109; *see also Motorola*, 436 F.3d at 1366–67. Moreover, the phrase 'established and uniform practice' does not appear once in *Under the Weather*. *See Under the Weather*, 48 CIT ___, 728 F. Supp. 3d 1337. Whether bypass entries constitute "treatment previously accorded" bears directly on this case because under 19 C.F.R. § 177.12(c)(1)(i), "a treatment was previously accorded by Customs" if there was "an *actual determination* by a Customs officer." *Id.* at 1357 (emphasis supplied).

In response, plaintiff states flatly, without legal support, that "liquidation of an entry has legal significance, whether the liquidation of the Entry in this case was 'brainless' or a 'bypass entry' is irrelevant." Pl. Reply Br. at 10.

Viewing the factual allegations in the light most favorable to defendant, the court concludes that plaintiff is not entitled to judgment as a matter of law as to whether the auto-liquidation of the Entry constituted a determination by Customs of the proper HTSUS classification. *Keirton USA*, 46 CIT at ___, 600 F. Supp. 3d at 1272.

Based on the foregoing, the court denies plaintiff's motion as to the more general question of whether Customs determined previously that the HTSUS classification asserted in the Entry was correct and matched the Exclusion. *See* Am. Compl. ¶ 67.

B. Whether the Protest denial was issued without notice or an opportunity to be heard

The court concludes that plaintiff is not entitled to judgment as a matter of law on the question of whether the Protest denial was issued without notice or an opportunity to be heard.

The following facts are not in dispute. On April 19, 2021, plaintiff filed the Protest with Customs. Am. Compl. ¶ 30, 51; Answer ¶ 30, 51.

On November 22, 2021, Customs denied the Protest. Am. Compl. ¶ 53; Answer ¶ 53. Customs concluded that the subject merchandise was classified properly under HTSUS subheading 7304.59.8020 rather than under subheading 7304.29.6115, as entered. Am. Compl. ¶ 53; Answer ¶ 53.

On January 12, 2022, plaintiff submitted a request to Customs to void denial of the Protest. Am. Compl. ¶ 56.[6]

On May 24, 2022, plaintiff received notification that Customs denied plaintiff's request to void denial of the Protest. Am. Compl. ¶ 57; Answer ¶ 57.

After the November 22, 2021 protest denial, Customs did not reliquidate the Entry. Am. Compl. ¶ 55; Answer ¶ 55.

Plaintiff argues that Customs "has improperly attempted to frustrate the exclusion process by materially changing the Entry by adopting a new HTSUS classification without proper notice or opportunity to protest said change." Pl. Br. at 12. Plaintiff gives two reasons.

1. Administrative options

Plaintiff's first reason is that "[w]hen the Entry was liquidated in March 2021, Plaintiff determined . . . that a protest was the only means available to obtain refund of duties on the Entry that had already been paid." *Id.* at 9. Plaintiff does not cite anything to support its assertion. *See id.*

In response, defendant argues that plaintiff had "options" to ensure that the Exclusion could be applied to the Entry. Def. Br. at 19. Defendant lists several of these administrative options. *See id.* at 19–20.

Defendant argues first that plaintiff should have "sought a ruling from [Customs] to confirm the correct tariff classification for its merchandise before submitting its exclusion request to BIS." *Id.* at 19 (citing 19 C.F.R. Part 177). Defendant explains that "[a] ruling from [Customs] would have alerted G&H that [Customs] did not agree with its entered classification, and G&H could then have submitted the correct classification with its exclusion request." *Id.*

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[6] *See supra* n.3.

Defendant argues second that plaintiff "could have filed a Post Summary Correction (PSC) to amend the subject entry after receiving BIS's Decision Memorandum granting [the Exclusion]." *Id.* at 20 (citing U.S. Customs and Border Prot., *CSMS #42566154 - Section 232 and Section 301 – Extensions Requests, PSCs, and Protests* ("CSMS #42566154") (May 1, 2020, 5:05 PM), https://content.govdelivery.com/accounts/USDHSCBP/bulletins/289820a). Defendant explains that "[h]ad G&H filed a PSC to request that the exclusion be applied to the subject merchandise, it may have learned from [Customs] prior to liquidation that the subject merchandise is properly classified under a different tariff provision than reported in the granted exclusion." *Id.*

Defendant argues third that "[a]lthough not required, G&H also had the option of filing an administrative request to extend liquidation for the subject entry while it was awaiting BIS's decision on the exclusion request." *Id.* (citing CSMS #42566154). Defendant explains that "[i]f G&H had extended liquidation, that extension would also have extended the time that G&H had to file a PSC." *Id.*

In sum, defendant insists that "G&H had alternative options to resolve this matter administratively but failed to avail itself of those options." *Id.* at 21.

Plaintiff does not address any of these administrative options in its reply brief. *See* Pl. Reply Br. Accordingly, plaintiff has failed to demonstrate that it lacked the opportunity to challenge the substance of Customs' determination.

Viewing the factual allegations in the light most favorable to defendant, the court concludes that plaintiff is not entitled to judgment as a matter of law as to this point. *See Keirton USA*, 46 CIT at ___, 600 F. Supp. 3d at 1272.

2. Whether Customs may change the classification in a protest that did not raise the issue of classification

Plaintiff's second reason for challenging Customs' decision on the grounds that plaintiff did not have notice or an opportunity to be heard is that "belatedly changing the classification, after having affirmed it three times, frustrated and undermined the exclusion process." Pl. Br. at 8.

Plaintiff explains that "even if the tariff classification asserted at the time of entry was incorrect (it was not incorrect in this case) Customs may not second-guess itself in a protest that only raised the issue of the application of an approved exclusion when a valid exclusion permits retroactive refunds." *Id.* at 11.

In response, defendant argues that to determine whether a granted exclusion applies to the subject merchandise, Customs "must verify that the merchandise as described in the entry documentation exactly matches the merchandise as described in the exclusion requests that Commerce granted." Def. Br. at 18. Defendant explains that "these classifications are fact-specific and must be verified before an exclusion can be applied to a particular entry." *Id.* at 19. However, defendant does not provide any citations to support these assertions. *See id.* at 18–19.

In reply, plaintiff argues that "[b]ecause the physical characteristics and use of the entered merchandise matched exactly those same attributes in the Exclusion, it is impossible, legally and logically, for the HTSUS classifications to differ." Pl. Reply Br. at 4. Notably, plaintiff does not cite anything to demonstrate this purported legal and logical impossibility. *See id.*

Nor does plaintiff cite anything to buttress its assertion that "[t]he mere fact that [Customs] purported to change its mind about the tariff classification in the approved Exclusion, and thereby negate the Exclusion's effect, is flatly inconsistent with the regulatory framework that BIS created under its delegated authority from the President." *See id.* at 8–9. The same lack of legal support characterizes plaintiff's contention that "[w]hile [Customs] may examine an exclusion and reject its application to an entry because the entry and the exclusion describe *different products*, in this case the tariff classification in the Entry and the Exclusion matched, and there was no discrepancy between the merchandise described in the Exclusion and the relevant portion of the Entry." *See id.*

The court is unable to rule on the legal question of whether Customs was permitted to change the classification of an entry in a protest that did not raise the issue of classification. Accordingly, plaintiff is not entitled to judgment as to this point.

In sum, the court denies plaintiff's motion for judgment on the pleadings as to Counts I and IV of the amended complaint.

II. Count III

Plaintiff alleges that the "HTSUS classification of an entered article is material" and that Customs "changed a material term of the Entry without reliquidation." Am. Compl. ¶ 75.

Plaintiff also argues that "[u]nder the circumstances, [Customs'] late and unjustified change of the tariff classification in direct conflict with previous determinations regarding tariff classification of the same article was unlawful." *Id.* ¶ 76.

Plaintiff does not pursue this allegation in its briefing. *See* Pl. Br.; *see also* Pl. Reply Br. The most that plaintiff argues is that "a liquidation is a 'determination' by [Customs] of the material elements of an entry, which is binding." Pl. Reply Br. at 10. Plaintiff does not support this assertion with citations to legal authority of any kind. *See id.*

Moreover, the court has already discussed the questions of whether the auto- liquidation of the Entry constituted a determination and whether Customs' change of the tariff classification was "late and unjustified." *See supra* Sections I.A.3, I.B.2.; Am. Compl. ¶ 76.

For these reasons, the court denies plaintiff's motion for judgment on the pleadings as to Count III.

CONCLUSION

For the reasons discussed above, it is hereby

ORDERED that plaintiff's motion for judgment on the pleadings is **DENIED.**

Dated: December 19, 2024
New York, New York

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

Slip Op. 24–146

DEXTER DISTRIBUTION GROUP LLC F/K/A TEXTRAIL, INC., Plaintiff, and LIONSHEAD SPECIALTY TIRE AND WHEEL LLC and TRAILSTAR LLC, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and DEXSTAR WHEEL DIVISION OF AMERICANA DEVELOPMENT, INC., Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Consol. Court No. 24–00019

[The court denies Lionshead's motion to amend the preliminary injunction.]

Dated: December 19, 2024

Nancy A. Noonan, *Leah N. Scarpelli*, *Yun Gao*, ArentFox Schiff LLP, of Washington, D.C., for Plaintiff Dexter Distribution Group LLC F/K/A Textrail, Inc.

Robert K. Williams, *Mark R. Ludwikowski*, *Kelsey Christensen*, and *Sally Alghazali*, Clark Hill PLC, of Chicago, IL, for Consolidated Plaintiff Lionshead Specialty Tire & Wheel LLC.

Jordan C. Kahn, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., for Consolidated Plaintiff Trailstar LLC.

Monica Triana, Senior Trial Counsel, and *Mathias Rabinovitch*, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, International Trade Field Office, New York, N.Y., for Defendant United States. With them on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Aimee Lee*, Assistant Director.

Nicholas J. Birch, and *Roger B. Schagrin*, Schagrin Associates, of Washington, D.C., for Defendant Intervenor Dexstar Wheel.

OPINION AND ORDER

Katzmann, Judge:

Before the court is a motion by Consolidated Plaintiff Lionshead Specialty Tire & Wheel LLC ("Lionshead") to amend a statutory preliminary injunction that currently suspends liquidation of entries of certain trailer wheels pending the outcome of litigation in this consolidated case. *See* Order Granting Consent Mot. for Prelim. Inj., Feb. 20, 2024, ECF No. 16 ("Prelim. Inj."). The court denies Lionshead's motion for the reasons explained below.

This case arises from antidumping and countervailing duty orders on certain steel trailer wheels imported from China, *see Certain Steel Trailer Wheels 12 to 16.5 Inches from the People's Republic of China: Antidumping Duty and Countervailing Duty Orders*, 84 Fed. Reg. 45952 (Dep't Com. Sept. 3, 2019) ("*Orders*"), and the U.S. Department of Commerce's ("Commerce") subsequent determinations that two types of trailer wheels ("Method A" and "Method C") are within the scope of the orders while another type ("Method B") is not. *See* Mem. from E. Begnal to J. Maeder, re: Final Scope Ruling at 2, 54, Case No.

A-570–090, Bar Code: 4345353–01 (Dep't Com. Apr. 11, 2023); Mem. from E. Begnal to J. Maeder, re: Final Scope Ruling at 2, 54, Case No. C-570–091, Bar Code: 4364600–01 (Dep't Com. Apr. 11, 2023) (collectively "Final Scope Rulings"). In this consolidated case, Plaintiff Dexter Distribution Group LLC f/k/a TexTrail, Inc. ("Dexter") and Consolidated Plaintiffs Lionshead and Trailstar LLC (collectively "Plaintiffs") challenge CBP's final affirmative determination of evasion pursuant to the Enforce and Protect Act ("EAPA") related to Commerce's Final Scope Ruling determinations that the Method A and Method C wheels are within the scope of the *Orders*. *See* Compl., Jan. 30, 2024, ECF No. 4; Lionshead's Mot. to Amend Prelim. Inj. at 5, Sept. 26, 2024, ECF No. 40 ("Mot. to Amend"). Dexter, with the consent of all parties, subsequently moved for a preliminary injunction enjoining the United States from liquidating entries of steel trailer wheels that are subject to U.S. Customs and Border Protection's ("CBP") challenged determination of evasion under the EAPA determination. *See* Pl.'s Consent Mot. for Prelim. Inj., Feb. 14, 2024, ECF No. 13; 19 U.S.C. § 1517. The court granted this motion and issued the requested preliminary injunction on February 20, 2024. *See* Prelim. Inj.

Lionshead now asks the court to amend the preliminary injunction "to not enjoin the liquidation of entries of steel trailer wheels . . . determined by [Commerce] to fall outside the scope of the antidumping and countervailing duty orders . . . ." Mot. to Amend at 1. Defendant-Intervenor Dexstar Wheel Division of Americana Development, Inc. ("Dexstar") opposes Lionshead's motion, arguing that "CBP specifically and repeatedly found that *none* of the wheels in the entries subject to the EAPA investigation were Method B wheels," and that any amendment that would have the effect that Lionshead seeks would "effectively overturn the agency's finding," that "no wheels that were subject to the EAPA determination were Method B wheels." Def.-Inter.'s Resp. in Opp'n to Mot. to Amend at 3, 6, Oct. 15, 2024, ECF No. 41 ("Def.-Inter.'s Resp."). Defendant the United States ("the Government") initially consented to Lionshead's motion. *See* Mot. to Amend at 3. However, the Government has since revoked its consent stating that it "did not appreciate that CBP had already determined in the EAPA proceeding that no entries that were subject to the investigation contained Method B wheels." Def.'s Resp. to Ct. Order at 5, Nov. 15, 2024, ECF No. 46 ("Def.'s Resp."); *see also id.* at 1–2. Lionshead's motion is denied because Lionshead fails to demonstrate changed circumstances that warrant the modification of the preliminary injunction.

BACKGROUND

On September 3, 2019, Commerce issued antidumping and countervailing duty orders on imports of certain steel trailer wheels from China and indicated that it would direct CBP to assess duties on subject merchandise at a published rate. *See Orders*. The scope of the *Orders* includes "rims, discs, and wheels that have been further processed in a third country, including, but not limited to, the painting of wheels from China and the welding and painting of rims and discs from China to form a steel wheel, or any other processing that would not otherwise remove the merchandise from the scope of the orders if performed in China." *Id.* at 45954. After providing notice of opportunity for interested parties to request and participate in administrative review of the final orders, "Commerce issues liquidation instructions, directing [CBP] to assess entries subject to the orders at the final published respective rates." *Rimco Inc. v. United States*, 98 F.4th 1046, 1050 (Fed. Cir. 2024).

On March 11, 2020, Dexstar, a domestic producer of steel trailer wheels, filed an EAPA allegation alleging that imports by TexTrail LLC, Trailstar LLC, and Lionshead were from the Chinese wheel producer Zhejiang Jingu Company Limited ("Jingu") and transshipped through Asia Wheel Co., Ltd. ("Asia Wheel"), Jingu's affiliate in Thailand.[1] *See* Mem. from A. Cipolla, re: Deemed Initiation of Scope Inquiry at 1, Case No. A-570–090, Bar Code: 4413501–01 (Dep't Com. Aug 7, 2023). The EAPA statute directs Customs to investigate allegations that "reasonably suggest[] that covered merchandise has been entered into the customs territory of the United States through evasion." 19 U.S.C. § 1517(b)(1); *see also Diamond Tools Tech. LLC v. United States*, 45 CIT __, __, 545 F. Supp. 3d 1324, 1331–32 (2021). During the investigation, Customs must determine whether there is "reasonable suspicion" of evasion, at which point Customs can impose interim measures, including suspension of liquidation. *Id.* at § 1517(e). If Customs cannot make a final determination of evasion, the matter can be sent to Commerce through a covered merchandise referral. *See id.* at § 1517(b)(4)(A). Upon receiving the referral, Commerce "shall determine whether the merchandise is covered merchandise and promptly transmit that determination to the Commissioner." *Id.* at § 1517(b)(4)(B).

On December 17, 2020, CBP, unable to determine whether the wheels were subject to the *Orders*, referred the matter to Commerce

[1] Asia Wheel moved to intervene as Plaintiff-Intervenor. *See* Mot. to Intervene, Feb. 29, 2024, ECF No. 20. Defendant-Intervenor Dexstar opposes this motion to intervene. *See* Resp. in Opp'n to Mot. to Intervene, Mar. 19, 2024, ECF No. 28. Asia Wheel's motion to intervene has been stayed along with all proceedings in the present matter. *See* Order Granting Mot. to Stay, May 15, 2024, ECF No. 39.

in accordance with 19 U.S.C. § 1517(b)(4)(A). *See Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People's Republic of China: Notice of Covered Merchandise Referral*, 86 Fed. Reg. 10245 (Dep't Com. Feb. 19, 2021). On March 22, 2021, Commerce initiated a formal scope inquiry pursuant to 19 C.F.R. § 351.225(e). *See* Letter from B. Quinn to All Interested Parties, re: Initiation of Asia Wheel Scope Inquiry, Case No. A-570–090, Bar Code 4102055–01 (Dep't Com. Mar. 22, 2021).

Commerce issued final scope rulings on April 11, 2023, finding that trailer wheels manufactured by Asia Wheel in Thailand using discs produced in Thailand from circular steel plates from China or a third country, and rims produced in Thailand from rectangular steel plates from China or a third country, identified as Method B wheels, are not within the scope of the *Orders*. *See* Final Scope Rulings at 2, 54. Additionally, Commerce found that trailer wheels manufactured using other production methods identified as Method A and Method C are within the scope of the *Orders*. *See id.* Commerce implemented a certification requirement for importers to certify that their trailer wheels were Method B wheels, and thus out-of-scope. *See id.* at 53. On May 18, 2023, Commerce issued liquidation instructions directing CBP to terminate the suspension of liquidation and liquidate entries of products not within scope. *See* Message No. 3138405 from Dep't Com. to CBP, re: Antidumping Duty Liquidation Instructions, Case No. A-570–090, Bar Code: 4389884–01 (Dep't Com. May 18, 2023); Message No. 3138402 from Dep't Com. to CBP, re: Countervailing Duty Liquidation Instructions, Case No. C-570–091, Bar Code: 4389886–01 (Dep't Com. May 18, 2023).

In the present case, Plaintiffs challenge CBP's final affirmative determination of evasion pursuant to EAPA only related to Commerce's determinations that the Method A and Method C wheels are within the scope of the *Orders*. *See* Compl., Jan. 30, 2024, ECF No. 4; Lionshead's Mot. to Amend Prelim. Inj. at 5, Sept. 26, 2024, ECF No. 40 ("Mot. to Amend"); Final Administrative Determination at 14, EAPA Consol. Case No. 7459 (Dec. 15, 2023) ("Final Admin. Decision"); Notice of Determination as to Evasion at 11, EAPA Consol. Case No. 7459 (Aug. 7, 2020) ("Determination of Evasion"). Dexter moved for, and the court granted, a consented-to preliminary injunction enjoining the United States from liquidating entries of steel trailer wheels that were subject to CBP's Enforce and Protect Act ("EAPA") determination that is challenged in these consolidated cases. *See* Pl.'s Consent Mot. for Prelim. Inj., Feb. 14, 2024, ECF No. 13; Prelim. Inj. On February 15, 2024, Lionshead requested liquidation of wheels it asserted were manufactured using Method B, and

are therefore, it claims, outside the scope of the *Orders*. *See* Mot. to Amend at 6. CBP denied Lionshead's request and found that none of the wheels in the entries were Method B wheels. *See id.*; Def.-Inter.'s Resp. at 3. Lionshead now moves to amend the consented-to preliminary injunction to allow liquidation of trailer wheels that fall outside the scope of the *Orders*. *See* Mot. to Amend at 1.

DISCUSSION

The "party moving for modification bears the burden of showing that changed circumstances, legal or factual, make the continuation of the injunction inequitable." *AIMCOR Ala. Silicon, Inc. v. United States*, 23 CIT 932, 938, 83 F. Supp. 2d 1293, 1299 (1999) (citing *Sys. Fed'n No. 91, Ry. Emps.' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961)); *see also Sea Shepherd N.Z. v. United States*, 47 CIT __, __, 611 F. Supp. 3d 1406, 1409–10 ("Such a 'change in circumstances' may be established 'by showing either a significant change in factual conditions or law.'" (quoting 11A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2961 (3d ed. 2022)).

Lionshead fails to show any changed circumstances that justify modification of the preliminary injunction. Lionshead argues that "[t]he inequity in continuing the suspension or extension of liquidation of Lionshead's entries of Method B wheels . . . arises from the impact of the unliquidated entries on Lionshead's Customs bond." Mot. to Amend at 7. Lionshead also notes that "[t]he potential liability under these bonds and the collateralization required by the surety is significant." *Id.* at 8. This perhaps suggests that these impacts represent the relevant "changed circumstance[]" that warrants Lionshead's suggested amendment. AIMCOR, 23 CIT at 938, 83 F. Supp. 2d at 1299. But Lionshead does not explain how this (actual or potential) liability represents a changed circumstance. Each of the debt instruments to which Lionshead refers was in place before the court issued the preliminary injunction. *See* Mot. to Amend at 8. If the existence of this debt is the circumstance to which Lionshead ascribes inequity, it is a continued circumstance—not a changed one. To the extent that Lionshead suggests that the mere continuation of the preliminary injunction constitutes changed circumstances, this argument fails because such a conclusion "would nullify the changed circumstances factor, as such conditions would exist in every case." *Sea Shepherd N.Z.*, 47 CIT at __, 611 F. Supp. 3d at 1409–10 (internal quotation marks and citation omitted). Lionshead has failed to sustain its burden to show any changed circumstances that justify modification of the preliminary injunction.

Though Lionshead's failure to show any changed circumstances is enough to deny its motion to amend, the court further observes that Lionshead also fails to demonstrate that its suggested amendment would prevent inequity. While Lionshead claims that the suspension of liquidation of its Method B wheels is inequitable, *see* Mot. to Amend at 6–8, it fails to demonstrate that the suggested amendment would prevent that inequity. This is because the preliminary injunction already does not enjoin the liquidation of entries of Method B wheels. The preliminary injunction instead enjoins CBP from "liquidating, ordering liquidation of, or causing liquidation of unliquidated entries of steel trailer wheels thereof from Thailand that were subject to" CBP's final decision in the evasion proceeding underlying this case. Prelim. Inj. at 1–2, Feb. 20, 2024, ECF No. 16. CBP's final decision in the evasion proceeding underlying this case, in turn, explicitly states that "the steel trailer wheels are covered merchandise if they are processed via Production Methods A and C, but not Production Method B." Final Admin. Decision at 14. Therefore, while the preliminary injunction does not explicitly "*not enjoin*" the liquidation of out-of-scope wheels, as Lionshead requests it now be amended to say, the preliminary injunction also does not enjoin the liquidation of out-of-scope wheels. Mot. to Amend at 1. If Lionshead has indeed made entries of Method B wheels, no amendment is needed to secure their liquidation.

Lionshead concedes that its suggested amendment would not "introduce a material change," instead maintaining that it is seeking "only to clarify the meaning of the injunction[]." Pl.'s Reply at 4. Such a clarification would not prevent Lionshead's suggested inequity, as a plain reading of the existing preliminary injunction already shows that "Method B wheels imported by Plaintiffs are not, and have never been, enjoined in the [p]reliminary [i]njunction because the Method B wheels were *not* 'covered merchandise' subject to [EAPA] as a matter of law." Pl.'s Reply at 4; *see also* Def.'s Response at 5; Def.-Inter.'s Response at 2–3. Lionshead argues that the Government has interpreted the preliminary injunction differently, such that "the agency is preventing liquidation of entries that do not conform to the language of the preliminary injunction itself," but it is unclear what difference, if any, exists between the Government's and Lionshead's interpretations of the preliminary injunction. Pl.'s Reply at 5. The Government originally consented to Lionshead's Motion to Amend, agreeing with Lionshead's plain reading that the preliminary injunction "does not enjoin liquidation of entries of steel trailer wheels . . . that were determined by [Commerce] to fall outside the scope of the [antidumping and countervailing duty] orders . . . , the so-called Method B

wheels[.]" Def.'s Resp. at 4 (quoting Mot. to Amend at 1–2). The Government's revocation of consent does not suggest a different interpretation of the preliminary injunction, but instead reflects the Government's new appreciation that CBP had already determined that no entries contained Method B wheels. *See id.* at 1–2, 5. Therefore Lionshead's suggested amendment would not prevent any inequity caused by the suspension of liquidation of Method B wheels, as the existing preliminary injunction does not enjoin the liquidation of Method B wheels.

Finally, even if Lionshead met its burden of showing changed circumstances that make continuation of the preliminary injunction inequitable, any amendment that would achieve the result that Lionshead seems to be seeking—that is, to achieve the liquidation of some wheels—would also have the practical effect of reversing CBP's determination that none of Lionshead's wheels are Method B wheels. CBP noted in the Final Administrative Decision that "Commerce stated that it was implementing certification requirements for out-of-scope merchandise, and if such requirements were not met, Commerce intended to instruct CBP to suspend all unliquidated entries for which the requirements were not met and require that the importer post the requisite [antidumping and countervailing duty] cash deposits." Final Admin. Decision at 5 (citing Final Scope Rulings); *see also* Determination of Evasion at 11. However, according to the Final Administrative Decision, "the Importers did not submit certifications or other evidence to TRLED or assert in their requests for review to RR that the merchandise they imported was manufactured via Production Method B and therefore, was not within scope of the Orders." *Id.* Therefore, CBP determined that "the merchandise falls within the scope of the Orders," and that "the steel trailer wheels that Lionshead . . . imported are 'covered merchandise' under the EAPA." *Id.* Lionshead states that it "provided a list of entries and certifications from Asia Wheel and Lionshead. . . even though the entries are not subject to the certification requirement." Mot. to Amend at 6. However, as Dexstar states, CBP "specifically and repeatedly found that *none* of the wheels in the entries subject to the EAPA investigation were Method B wheels." Def.-Inter.'s Resp. at 3. Lionshead does not make any showing that their entries were Method B wheels and therefore not covered by CBP's investigations. Nor has it shown that its certifications were sufficient. Even if Lionshead did provide such information at this time, the court cannot reverse CBP's past determination that the wheels at issue were not Method B wheels through the amendment of a preliminary injunction as that determination has not

been properly challenged in this case. *See Pirelli Tyre Co. v. United States*, 45 CIT __, __, 539 F. Supp. 3d 1257, 1262 (2021) ("The scope of any litigation is confined to the issues raised in a plaintiff's complaint." (citing *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944))).[2]

CONCLUSION

Because Lionshead fails to demonstrate changed circumstances such that continuation of the preliminary injunction is inequitable, Lionshead's Motion to Amend the Preliminary Injunction is **DENIED**.

SO ORDERED.

Dated: December 19, 2024
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE

[2] The Government suggests that Lionshead is not foreclosed from submitting a protest and demonstrating that the entries at issue include Method B wheels should CBP liquidate any entries pursuant a decision by the USCIT and any instruction from Commerce at the conclusion of this litigation. *See* Gov.'s Br. at 7 (citing 19 U.S.C. § 1514).

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