U.S. Court of International Trade

Slip Op. 19–157

The Diamond Sawblades Manufacturers' Coalition, Plaintiff, v. United States, Defendant, and Bosun Tools Co., Ltd., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 17–00167

[Sustaining the U.S. Department of Commerce's remand redetermination in the sixth administrative review of the antidumping duty order covering diamond sawblades and parts thereof from the People's Republic of China.]

Dated: December 16, 2019

Daniel B. Pickard, Wiley Rein, LLP, of Washington, DC, argued for plaintiff Diamond Sawblades Manufacturers' Coalition. With him on the brief were *Maureen E. Thorson* and *Stephanie M. Bell*.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Paul Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Alexandra H. Salzman, deKieffer & Horgan, PLLC, of Washington, DC, argued for defendant-intervenor Bosun Tools Co., Ltd. With her on the brief were *Gregory S. Menegaz* and *J. Kevin Horgan*.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Department" or "Commerce") remand redetermination filed pursuant to the court's order in *Diamond Sawblades Mfrs. Coalition v. United States*, 42 CIT __, Slip Op. 18–146 (Oct. 23, 2018) ("*DSBs I*"). *See* Remand Redetermination Pursuant to Ct. Remand Order in [*DSBs I*], Apr. 17, 2019, ECF No. 43–1 ("*Remand Results*").

In *DSBs I*, the court remanded for further explanation and consideration Commerce's conclusion that Bosun Tools. Co., Ltd. ("Bosun" or "Defendant-Intervenor") had acted to the best of its ability in responding to Commerce's requests for information in the sixth administrative review of the antidumping duty ("ADD") order covering diamond sawblades and parts thereof ("DSBs") from the People's

Republic of China ("PRC").[1] *DSBs I*, Slip Op. 18–146 at 18, 25–26; *see also [DSBs] and Parts Thereof From the [PRC]*, 82 Fed. Reg. 26,912 (Dep't of Commerce June 12, 2017) (final results of ADD admin. review; 2014–2015) ("*Final Results*"), and accompanying Issues and Decision Memo. for the Admin. Rev. of [ADD] Order on [DSBs] from the [PRC], A-570–900, June 6, 2017, ECF No. 18–4 ("Final Decision Memo.").

Bosun challenges Commerce's remand redetermination as arbitrary and capricious and as unsupported by substantial evidence, and requests the court to remand the case. *See* Def.-Intervenor [Bosun] Cmts. Remand Redetermination at 3–24, June 3, 2019, ECF No. 47 ("Bosun's Br."). Defendant and Plaintiff Diamond Sawblades Manufacturers' Coalition ("DSMC") request the court to uphold the *Remand Results* in its entirety. *See* Def.'s Resp. [Bosun Br.] at 1, 8–18, July 25, 2019, ECF No. 51 ("Def.'s Resp. Br."); *see also* Pls.' Resp. [Bosun Br.] at 3–18, July 25, 2019, ECF No. 52 ("Pls.' Resp. Br."). For the following reasons, the court sustains Commerce's *Remand Results*.

BACKGROUND

The court assumes familiarity with the facts as discussed in the prior opinion, *see DSBs I*, Slip. Op. 18–146 at 2–7, 18–21, and here recounts those facts relevant to the court's review of the *Remand Results*. In this sixth administrative review ("POR") of the ADD order on DSBs,[2] Commerce selected Bosun as a mandatory respondent following the withdrawal of certain petitioners' requests for review.[3] *See Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 736 (Dep't Commerce Jan. 7, 2016) (initiation); Selection of Respondents for Individual Examination at 5, PD 29, bar code 3438973–01 (Feb. 5, 2016) ("Respondent Selection Memo."); Selection of an Additional Respondent for Individual Examination at 1–2, PD 166, bar code 3463908–01 (Apr. 27, 2016).[4]

Throughout the POR, Bosun sold DSBs manufactured in Thailand and the PRC through its U.S. affiliates Bosun Tools, Inc. ("Bosun

[1] The court also remanded for further consideration Commerce's selection of surrogate values for copper powder and copper iron slab. *See DSBs I*, Slip Op. 18–146 at 25–26.

[2] The sixth administrative review covers the period November 1, 2014 to October 31, 2015.

[3] Initially, Commerce selected Husqvarna and Jiangsu Fengtai as mandatory respondents, which had "the largest volume of imports of subject merchandise during the POR[.]" Respondent Selection Memo. at 3.

[4] On May 1, 2019, Defendant filed indices to the public and confidential administrative records underlying Commerce's remand redetermination on the docket at ECF No. 46–1–2. Citations to the administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices.

USA") and Pioneer Tools, Inc. ("Pioneer"). *See* Final Decision Memo. at 21. Bosun's U.S. affiliates did not record the country of origin of DSBs when selling to U.S. customers. *Id.* at 26–27. As a result, Bosun reconstructed the country of origin for its affiliates' sales through a three-step procedure ("sales identification methodology"), including the application of a first-in, first-out ("FIFO") methodology.[5] *See id.* at 27–28. Commerce verified Bosun's sales identification methodology and did not determine it "to be inaccurate." *Id.* at 27. Commerce also did not find that "Bosun was inattentive, careless, or inadequate in keeping the country of origin record[.]" *Id.* at 28. Although Commerce found that Bosun could not replicate the reported result of the FIFO methodology to one pre-selected sale at verification, Commerce considered this deficiency a "minor error" that was "limited to this sale[] . . . only" and accepted Bosun's sales identification procedure. *Id.* Commerce also found Bosun complied with the "best of its ability standard" because "Bosun was able to segregate the sales of subject merchandise using its sales identification methodology[.]" *Id.* at 27–28. Therefore, Commerce declined to apply facts otherwise available with an adverse inference, as urged by petitioner DSMC.[6] *Id.* Commerce calculated a weighted-average dumping margin of 6.19% for Bosun. *See Final Results*, 82 Fed. Reg. at 26,912.

In *DSBs I*, the court faulted Commerce for failing to explain how Bosun acted to the "best of its ability" when Bosun had failed to record the country of origin of its sales. *See DSBs I*, Slip Op. 18–146 at 14. As an interested party, Bosun is required to anticipate the information needed for administrative proceedings, yet it did not record country of origin data. *Id.*; *see also Peer Bearing Corp. v. United States*, 766 F.3d 1396, 1400 (Fed. Cir. 2014); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). The court

[5] First, Bosun identified the models of DSBs that Bosun USA and Pioneer purchased through product codes assigned to each affiliate; second, Bosun identified the country of origin by matching the product codes to unit purchase prices; and, third, Bosun applied a FIFO methodology to assign country or origin to each sale. *See* Bosun Questionnaire Response at C-2–3, PD 207–10, bar code 3483626–01 (July 1, 2016); Supp. Questionnaire Resp. at 2–3, PD 258–72, bar code 3504652–01 (Sept. 7, 2016); Bosun Second Supp. Resp. at 1–3, PD 332–33, bar code 3521778–01 (Nov. 10, 2016).

[6] Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and, second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b). The phrase "total adverse inferences" or "total AFA" encompasses a series of steps that Commerce takes to reach the conclusion that all of a party's reported information is unreliable or unusable and that as a result of a party's failure to cooperate to the best of its ability Commerce must use an adverse inference in selecting among the facts otherwise available.

therefore remanded Commerce's *Final Results* for further clarification or reconsideration.[7] *See DSBs I*, Slip Op. 18–146 at 18, 26.

On remand, Commerce found that Bosun failed to act to the best of its ability, because Bosun could have maintained country of origin information for its sales of subject merchandise but did not, and, therefore, Bosun failed to provide information in the manner and form requested and impeded the proceeding. *See Remand Results* at 1–2, 9–14, 21–26. Moreover, Commerce found that the information that Bosun did submit could not be verified. *See id.* at 9, 24. Commerce therefore determined Bosun's ADD rate based entirely on facts otherwise available and applied an adverse inference. *See id.* at 13, 25.[8] Commerce determined Bosun's ADD rate to be 82.05 percent, the PRC-wide rate. *See Remand Results* at 13.[9]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[10] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an investigation of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

Bosun argues that no "necessary information" regarding Bosun's U.S. sales was missing from the record that requires Commerce to rely on facts otherwise available, because Bosun identified country of

[7] DSMC also challenged Commerce's the selection of surrogate values for copper powder and copper iron slab. *See DSBs I*, Slip Op. 18–146 at 21–26. The court also remanded this issue. *See id.* at 25–26.

[8] Given that Commerce determined Bosun's dumping margin entirely on facts otherwise available with an adverse inference, Commerce considered the surrogate value issue to be moot. *See Remand Results* at 1–2. No party challenges this latter determination.

[9] The rate for non-selected respondents eligible for a separate rate was consequently also increased to 82.05 percent. *See Remand Results* at 13–14.

[10] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1677e, however, are to the unofficial U.S. Code Annotated 2018 edition, which reflects the amendments made to 19 U.S.C. § 1677e by the Trade Preferences Extension Act of 2015. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015).

origin through its sales identification methodology. *See* Bosun's Br. at 5–10. Bosun avers that it acted to the "best of its ability" and contends that Commerce's determination to apply AFA is arbitrary and capricious and unsupported by substantial evidence. *See id.* at 17–24. Defendant and DSMC respond that Bosun's failure to maintain direct country of origin records does not satisfy the "best of its ability standard" and warrants the application of AFA to Bosun. *See* Def.'s Resp. Br. at 1–2, 8–18; *see also* Pls.' Resp. Br. at 3–18. For the reasons that follow, Commerce's decision to apply AFA to Bosun is not arbitrary or capricious, is supported by substantial evidence, and complies with the court's remand order.

To calculate a dumping margin for merchandise from a non-market economy ("NME") such as the PRC, Commerce compares a product's U.S. price with a normal value, calculated with information placed on the record by the parties. 19 U.S.C. § 1677b(b)–(c). Commerce is required to rely on "facts otherwise available" where, inter alia, "necessary information is not available on the record" or where a party fails to provide information "in the form and manner requested[,]" "significantly impedes a proceeding[,]" or provides information that "cannot be verified[.]" *See* 19 U.S.C. § 1677e(a)(1)–(2). However, should a party submit information that does not fully comply with all requirements, Commerce must consider that information, if, inter alia, the party demonstrates that it has acted to the "best of its ability" and that information "can be verified[.]" *See* 19 U.S.C. § 1677m(e).[11] Should a party fail to meet the "best of its ability" standard, Commerce may use inferences adverse to that party to select from among the facts otherwise available. *Id.* § 1677e(b); *see also Nippon Steel Corp.*, 337 F.3d at 1382.

Commerce reasonably applied facts otherwise available because it found information necessary to its determination was missing from the record. Bosun did not provide Commerce the requested direct country of origin information, which "is unquestionably necessary to distinguishing U.S. sales of subject merchandise and to determining accurate duty margins" and "among the most basic data necessary for [that] calculation[.]" *DSBs I*, Slip Op. 18–146 at 9, 11; Final Decision Memo. at 26, 28; *see also Remand Results* at 9–10. Instead, Bosun furnished indirect country of origin information, constructed through its sales identification methodology, and submitted this substitute information for Commerce to consider, pursuant to section 1677m(e).

[11] In addition, Section 1677m(e) requires that the information is "submitted by the deadline established for its submission," "is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination," and "can be used without undue difficulties[.]" 19 U.S.C. § 1677m(e).

See Final Decision Memo. at 26–28; *Remand Results* at 2–3, 10. Commerce, however, discovered reporting errors at verification, namely in spot-checking the accuracy of the FIFO methodology to sample sales traces.[12] *See* Final Decision Memo. at 28; *Remand Results* at 9, 24; *see also* Verification of the U.S. Sales Response of [Bosun] at 10–11, PD 383, bar code 3573591–01 (May 17, 2017) ("Bosun Verification Report"). Given, that by statute, verification is a requirement to submit information under section 1677m(e) and that Commerce identified errors at verification, Commerce reasonably found it "inappropriate to rely on Bosun's sales identification methodology[.]" *See Remand Results* at 12; *see also* 19 U.S.C. § 1677m(e).[13] Therefore, without any "reliable information on the country of origin" to calculate Bosun's margin, Commerce reasonably selected among facts otherwise available to fill this informational gap.[14] *Remand Results* at 12.

Further, Commerce's application of an adverse inference in selecting among facts otherwise available is reasonable because Bosun did not act to the "best of its ability" when it failed to maintain direct country of origin records.[15] The "best of its ability" standard compels

[12] Although Bosun concedes that it misreported CONNUMs in two of the sixteen sales traces at verification, Bosun argues that Commerce erred in declining to rely on Bosun's indirect country of origin information, because the mistakes were "isolated in nature, small in quantity, and had no effect on the margin calculation." *See* Bosun's Br. at 12–17. Bosun faults Commerce for claiming, in the *Remand Results*, that "the errors with CONNUM reporting are pervasive." *Id.* at 17. Commerce, however, merely referred to the reporting error to "further support[]" why Bosun's information could not be verified and did not comment on whether the CONNUM errors were "pervasive." *See Remand Results* at 12 n.37.

[13] Although Commerce initially accepted Bosun's sales identification methodology and the indirect identification of country of origin, pursuant to U.S.C. § 1677m(e), *see* Final Decision Memo. at 26–28, the court in *DSBs I* remanded, for further clarification or reconsideration, Commerce's finding that Bosun's "nonstandard data" complied with section 1677m(e) despite verification errors. *See DSBs I*, Slip Op. 18–146 at 15–18. Thereafter, Commerce, on remand, reconsidered Bosun's sales identification methodology. *See Remand Results* at 12.

[14] Bosun contends that verification revealed discrepancies in only 2.5% of Bosun's sales, and, therefore, Commerce cannot lawfully apply AFA or facts available to the remaining 97.5% of sales. *See* Bosun's Br. at 7–8. In making this argument, Bosun implies that the error must necessarily be isolated; however, the record does not establish the error was isolated. Commerce, here, spot-checked the reliability of Bosun's sales identification methodology using a sample of sales. Therefore, its finding of error in that sample, however allegedly small, says nothing of whether the error permeates the remaining sales. Therefore, Commerce, as it reasonably concluded, "[could not] be confident" in Bosun's indirect country of origin information. *See Remand Results* at 12 & n.37 (citing *DSBs I*, Slip Op. 18–146 at 17).

[15] Bosun further argues that Commerce's determination is arbitrary and capricious because it relies on the same underlying facts as in the original review but reaches the opposite conclusion. *See* Bosun's Br. at 4–5. According to Bosun, Commerce also "has made no real attempt to explain how its initial detailed findings now compel the opposite conclusion." *Id.* at 4. However, Commerce was directed to reconsider those facts in light of this court's previous opinion. *See DSBs I*, Slip Op. 18–146 at 9, 26 (remanding for "clarification, or

respondents to take reasonable steps to keep and maintain complete records that they would reasonably be called upon to produce in an antidumping investigation. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382–84 (Fed. Cir. 2003) (holding that a producer failed to meet the "best of its ability" standard when it failed to respond to Commerce's request for conversion data factors). Bosun had the opportunity to record country of origin information. It marked merchandise with country of origin at the time it was shipped to its inventory warehouse, yet Bosun did not subsequently "identify or record the county of origin for the products being prepared for sale to unaffiliated U.S. customers." *See* Bosun Verification Report at 4.[16] Although the "best of its ability" standard does not require perfection, Commerce's finding that Bosun should have kept direct country of origin records is reasonable here. *See Nippon Steel*, 337 F.3d at 1382.[17] Compliance with the best of its ability standard is determined by whether a respondent "has put forth its maximum effort[.]" *Id.* Given that Bosun had the apparent ability to maintain country of origin information, Commerce reasonably determined that Bosun did not act to the best of its ability in failing to maintain country of origin records.

Moreover, as a mandatory respondent in previous proceedings, Bosun should have been aware of the necessity to maintain country of origin records. *Remand Results* at 10. Bosun cannot rely on a belief that it would not be selected for individual examination to justify its failure to maintain records. Bosun's Br. at 17–19; *see Nippon Steel*, 373 F.3d at 1383 ("The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of

reconsideration if Commerce deems that appropriate"). Moreover, Commerce is not compelled to reach the same conclusions on remand. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the [same] evidence does not prevent an administrative agency's finding from being supported by substantial evidence.").

[16] Commerce "asked why Bosun did not record the country of origin[,]" and Bosun explained that it "was not necessary information which needed to be recorded[.]" Bosun Verification Report at 4. As the Federal Circuit held in *Nippon Steel*, "[t]he mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it make its determination." *Nippon Steel*, 337 F.3d at 1381.

[17] Bosun contends that "[t]he assessment of whether a respondent complied with its best ability should take into account the respondent's efforts throughout the process, and not disproportionally focus on what the respondent could have done better before the administrative review." Bosun's Br. at 22; *see also id.* at 19 ("The *Nippon Steel* Court never created an artificial construct that attentiveness to recordkeeping and efforts in the course of the review were two unrelated pass/fail tests for a respondent."). However, *Nippon Steel* did not holistically evaluate how well the plaintiff producer cooperated during the investigation, in assessing whether that producer complied with the "best of its ability" standard. Rather, in *Nippon Steel*, the Court of Appeals more narrowly scrutinized the producer's actions, preceding the investigation, such as taking reasonable steps to keep and maintain records. *See Nippon Steel*, 337 F.3d at 1382.

a respondent's ability, regardless of motivation or intent."). As a reasonable producer, Bosun should have taken steps to maintain direct country of origin information. *See Nippon Steel*, 373 F.3d at 1382–83; *see, e.g.*, *Peer Bearing Corp.*, 766 F.3d at 1400 ("The obligation to maintain . . . data does not cease at the conclusion of the review[.]"). It was therefore reasonable for Commerce to "expect that more forthcoming responses should have been made" by Bosun, a respondent experienced with Commerce's investigations. *See Nippon Steel*, 373 F.3d at 1383.

Bosun's argument that Commerce's determination treats the "AFA statute . . . as a hammer to . . . punish" Bosun, contrary to the intended purpose of that provision, is unavailing. Bosun's Br. at 20.[18] As Commerce noted, use of AFA was suitable because Bosun's failure to maintain records left Commerce with no reliable information to calculate Bosun's margin. *See Remand Results* at 25; *see also F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (The objective of the AFA regime is "to provide respondents with an incentive to cooperate, not to impose punitive . . . margins.").

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's *Remand Results* is sustained. Judgment will enter accordingly.

Dated: December 16, 2019
New York, New York

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

[18] Bosun also contends that the 82.05 percent ADD rate assigned to Bosun, following the *Remand Results*, "departs so severely from Bosun's historical rates [that it] cannot be said to be accurate." Bosun's Br. at 24. Further, Bosun argues that Commerce's remand redetermination "inappropriately aligns the margin of experience of a State-run company with a private company." *Id.* Both arguments fail, because the statute confers upon Commerce discretion to apply any antidumping margin from any segment of the proceeding as an adverse inference. *See* 19 U.S.C. § 1677e(d)(2); *see also Hubbell Power Systems, Inc. v. United States*, Slip Op. 19–145 at 7–8, 43 CIT __, __ (2019).

Slip Op. 19–158

S.C. JOHNSON & SON, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 14–00184

[At the conclusion of a bench trial, holding that Ziploc® brand reclosable sandwich bags are classified under HTSUS Heading 3923.]

Dated: December 16, 2019

Michael E. Roll, Pisani & Roll, LLP, of Los Angeles, CA, argued for Plaintiff S.C. Johnson & Son, Inc. With him on the brief was *Brett Ian Harris*.

Monica P. Triana, Trial Attorney, International Trade Field Office, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. On the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Amy M. Rubin*, Assistant Director, and *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office. Of counsel was *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, New York, N.Y. *Jamie L. Shookman*, U.S. Department of Justice, of New York, N.Y., also appeared.

OPINION

Choe-Groves, Judge:

The court held a bench trial to determine the classification under the Harmonized Tariff Schedule of the United States ("HTSUS") (2013) of "Ziploc®" brand reclosable plastic bags marketed by S.C. Johnson & Son, Inc. ("Plaintiff" or "S.C. Johnson"). The court denied summary judgment previously based on the existence of genuine issues of material fact. The parties requested that the court hold a bench trial "on the papers" after mutually agreeing to admit all documents, deposition transcripts, and reports into evidence. Pretrial Conference, 2:02:48–2:06:33, Nov. 30, 2018; ECF No. 98 ("Pretrial Conf."); *see* Pl.'s Post-Trial Mem. of Law, Mar. 8, 2019, ECF No. 111 ("Pl.'s Br."); Def.'s Written Closing Statement, Mar. 8, 2019, ECF No. 109 ("Def.'s Br."); USCIT R. 52(a)(1). Based on the following findings of fact and conclusions of law, the court concludes that the subject merchandise are properly classified under HTSUS Heading 3923.

BACKGROUND

S.C. Johnson entered 1,512 cases of Ziploc® brand reclosable sandwich bags on May 15, 2013. Entry Summary, Entry No. 231–6143028–9, Packing List, Case File. At the time of entry, the subject merchandise were classified under HTSUS Heading 3923. *See* Pl.'s Rule 56.3 Statement of Material Facts Not in Dispute, Oct. 31, 2017, ECF No. 63–3 ("Pl.'s Facts") ¶¶ 1–2; Def.'s Resps. to Pl. S.C. Johnson's Rule 56.3 Statement of Material Facts, Dec. 23, 2017, ECF

No. 73–3 ("Def. Facts Resp.") ¶¶ 1–2; Entry Summary, Entry No. 231–6143028–9, Packing List, Case File. Customs liquidated the entry on March 28, 2014. *See* Pl.'s Facts ¶ 3; Def. Facts Resp. ¶ 3; Summons, Aug. 1, 2014, ECF No. 1 ("Summons"). S.C. Johnson filed a protest and requested accelerated disposition on June 26, 2014. *See* Protest No. 2704–14.10192, Case File. The protest was deemed denied. 19 U.S.C. § 1515(b); *see* Protest No. 2704–14.10192, Case File; *see also* Summons 1.[1]

Plaintiff initiated this action on August 1, 2014. Summons 1; Compl. ¶ 1. Defendant answered on August 7, 2015. Answer, Aug. 7, 2015, ECF No. 15. The court granted test case designation on October 5, 2015. Order, Oct. 5, 2015, ECF No. 19; *see* USCIT R. 84 (2015); USCIT R. 83(e) (2019). This action was reassigned. Order of Reassignment, Jul. 19, 2016, ECF No. 33.

Plaintiff and Defendant filed cross-motions for summary judgment. Pl.'s Mot. for Summ. J., Nov. 11, 2017, ECF No. 63; Def.'s Cross-Mot. for Summary J., Dec. 22, 2017, ECF No. 71; *S.C. Johnson & Son, Inc. v. United States*, 42 CIT __ , 355 F. Supp. 3d 1294 (2018) ("*S.C. Johnson I*"). In *S.C. Johnson I*, the court determined that HTSUS Heading 3923 was a principle use provision and HTSUS Heading 3924 was an *eo nomine* provision. *Id.* at 1300–01. Because there were genuine issues of material fact as to whether the subject merchandise fell within the terms of the HTSUS headings at issue, the court denied both motions for summary judgment and deferred classification of the subject merchandise until the conclusion of trial. *Id.* at 1301.

Pretrial conferences were held on September 25, 2018, November 14, 2018, and November 30, 2018. Pre-Trial Telephone Conference, Sept. 25, 2018, ECF No. 88; Pre-Trial Teleconference, Nov. 14, 2018, ECF No. 94; Telephone Conference, Nov. 30, 2018; ECF No. 98. The parties agreed to hold a bench trial on the papers, stipulating to the admission of all documents, deposition transcripts, and reports into evidence. Pretrial Conf. at 2:02:48–2:06:33. The court directed the Parties to file written closing arguments and a joint appendix. Order, Nov. 30, 2018, ECF No. 98. The Parties filed a joint appendix. Confidential J.A., Jan. 11, 2019, ECF No. 100.

Defendant filed a consent motion to stay this case following the lapse in appropriations for the U.S. Department of Justice. Consent Mot. to Stay, Jan. 16, 2019, ECF No. 101. The court granted the motion to stay. Order, Jan. 18, 2019, ECF No. 102. The court entered a scheduling order following restoration of appropriations for the U.S.

[1] Customs denied the protest on August 15, 2014. *Id.*; *but see* 19 U.S.C. § 1515(c).

Department of Justice. Scheduling Order, Feb. 4, 2019, ECF No. 104. The Parties filed written closing arguments. Pl.'s Br.; Def.'s Br. The Parties filed supplemental briefing. Pl.'s Br. Regarding Effect of *Ford Motor Co. v. United States*, Ct. No. 2018–1018, 2019 WL 2399346 (Fed. Cir. June 7, 2019), Jun. 18, 2019, ECF No. 117 ("Pl.'s Suppl. Br."); Def.'s Resp. to the Ct.'s June 11, 2019 Ltr., Jun. 20, 2019, ECF No. 119.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012). The court reviews classification cases on the basis of the record made before the court. 28 U.S.C. § 2640(a).

FINDINGS OF FACT

After holding a bench trial, the court makes the following findings of fact:

1. The subject merchandise are plastic bags that measure six and one-half inches by five and seven-eighths inches and are approximately one millimeter thick. Pl.'s Facts ¶ 10; Def.'s Facts Resp. ¶ 10; Product Specifications, Ex. 3, Dec. 23, 2017, ECF No. 73–1.
2. The subject merchandise have an interior space that can accommodate relatively small items. *See* Def.'s Facts ¶ 5; Pl.'s Facts ¶¶ 48–51; Price Dep. 56:9–58:10, Feb. 2, 2017, J.A. 4 ("Price Dep.").
3. Each bag has a single zipper closure. *See* Def.'s Facts ¶ 7; Price Dep. 56:9–58:10, 78:17–24; Horn Dep. 40:3–7, Feb. 2, 2017, J.A. 6 ("Horn Dep.").
4. The zipper closure seals the bag using the inner locking of the two profiles. *See* Def.'s Facts ¶ 8, Price Dep. 11:9–17.
5. S.C. Johnson refers to the reclosable plastic bags of the size, shape, and thickness in this action as "sandwich" bags. *See* Pl.'s Facts ¶ 1; Def.'s Facts ¶ 10; Entry Summary, Entry No. 231–6143028–9, Waybill, Case File.
6. The subject merchandise are manufactured from polyethylene resin pellets that are used in an extrusion process to form both the film and plastic "zipper" seals on the bags. Pl.'s Facts ¶¶ 10, 42; Def.'s Facts Resp. ¶¶, 10, 42; Price Dep. 15:21–16:2, 31:17–32:6.
7. The subject merchandise are manufactured in Thailand. *See* Pl.'s Facts ¶ 11; Def.'s Facts Resp. ¶ 11; Patvibul Dep. 26:5–11, Jul. 19, 2017, J.A. 1.
8. The subject merchandise are imported into the United States in bulk boxes, containing 40 individual groups of 125 bags

secured with a rubber band. *See* Pl.'s Facts ¶ 11; Def.'s Facts Resp. ¶ 11.

9. The groups of 125 bags are packaged for retail sale in the United States following importation. *See* Pl.'s Facts ¶ 11; Def.'s Facts Resp. ¶ 11.
10. The rubber bands used to secure the bundles of bags are required to be tested and approved for food contact. *See* Pl.'s Facts ¶ 20; Def.'s Facts Resp. ¶ 20; Price Dep. 36:12–18.
11. The bags are tested to confirm the absence of the chemical Bisphenol A ("BPA"). *See* Pl.'s Facts ¶ 14; Def.'s Facts Resp. ¶ 14; Price Dep. 14:16–20; 59:21–60:9.
12. S.C. Johnson requires its manufacturers to obtain Kosher certification. *See* Pl. Facts ¶ 19; Def. Facts Resp. ¶ 19; Price Dep. 58:25–59:20.
13. S.C. Johnson tests Ziploc® sandwich bags to be compatible with food contact. Price Dep., Ex. 13, Appx001437, J.A. 68.
14. Ziploc® brand reclosable plastic bags are sold in retail outlets, including warehouse stores, grocery stores, drug stores, discount stores, and via e-commerce. *See* Def.'s Facts ¶ 11, Pl.'s Facts Resp. ¶ 11; Horn Dep. 18:20–19:12, 22:23–24:24.
15. Retailers determine the location in the store where Ziploc® bags are sold. *See* Horn Dep. 40:24–41:20.
16. Consumers use sandwich bags to pack and store food items. Bigna Dep. 10:2–12, Feb. 3, 2017, J.A. 15 ("Bigna Dep.").
17. Consumers use sandwich bags to take food items out of the home. Bigna Dep. 10:13–15.
18. Consumers use sandwich bags to store food items inside of the home. Bigna Dep. 10:15–20.
19. S.C. Johnson refers to "snack" and "sandwich" bags as "transport" bags. Bigna Dep., 35:1–9.
20. Consumer expectations for a sandwich bag and a freezer bag are different. Bigna Dep. 46:3–4.
21. The functions of a plastic sandwich bag include: (a) to protect contents from spoilage (to keep food fresh), from drying out or from getting wet, (b) to contain messy things, (c) to transport things, (d) to organize things and keep multiples together, and (e) to facilitate portion control. *See* Project Andy, 000742, J.A. 16.
22. Storage locations for sandwich bags include: lunchboxes, purses, and backpacks. *See* Bag/Type Profiling, Appx000788, J.A. 18.
23. Sandwich bags are used to pack a snack or lunch. *See* Bag/Type Profiling, Appx000789, J.A. 18.

24. The majority of sandwich bag users keep sandwich bags in the kitchen. Bag/Type Profiling, Appx000795, J.A. 18.
25. A study finds that "[s]andwich bags tend to be used to store food consumed away from home, which aligns with the commonly stored items in these bags." Bag/Type Profiling, Appx000799, J.A. 18.
26. A study finds that sandwich bags are stored in the refrigerator or freezer in many measured occasions for use. *See* Bag/Type Profiling, Appx000797, J.A. 18.
27. A study finds that packing for a meal is the main reason for storing food in snack and sandwich bags. *See*, *e.g.*, Bag/Type Profiling, Appx000801, J.A. 18.
28. The packaging materials for the subject merchandise state: "[p]ack your bottles in Ziploc® Sandwich bags to help prevent any surprise leaks" and "[p]ut [g]oodies like candy, cookies, or desserts in a Ziploc® Sandwich bag, add a bow, and give it as a small gift." Sample Packaging Material, Appx000577, J.A. 7.

CONCLUSIONS OF LAW

I. Legal Framework

Classification of goods under the HTSUS is a two-step process that involves:
(1) determining the proper meaning of terms in the tariff provisions, and (2) determining whether the goods fall within those terms. *Kalle USA, Inc. v. United States*, 923 F.3d 991, 995 (Fed. Cir. 2019). The proper meaning of terms of the tariff provisions is a question of law. *Rubies Costume Co. v. United States*, 922 F.3d 1337, 1342 (Fed. Cir. 2019). Whether the subject merchandise fall within the description of a tariff provision is a question of fact. *Id.* When there is no dispute as to the nature of the merchandise, the two-step classification analysis collapses entirely into a question of law. *Gerson Co. v. United States*, 898 F.3d 1232, 1235 (Fed. Cir. 2018).

Customs is afforded a statutory presumption of correctness in classifying merchandise under the HTSUS, but this presumption does not apply to pure questions of law. 28 U.S.C. § 2639(a)(1); *see Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). The court has an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms. *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005). It is the "court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (emphasis in original).

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation ("GRI") and, if applicable, the Additional U.S. Rules of Interpretation ("ARI"), which are applied in numerical order. *Rubies Costume Co.*, 922 F.3d at 1342. Under GRI 1, "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1. Absent contrary legislative intent, HTSUS terms are to be construed according to their common and popular meaning. *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (internal quotations omitted).

In construing the terms of the headings, the court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). The court may also consult the World Customs Organization's Harmonized Commodity Description and Coding System Explanatory Notes ("Explanatory Notes"), which are not legally binding or dispositive, but provide a commentary on the scope of each heading of the Harmonized System and are generally indicative of proper interpretation of the various provisions. *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013); H.R. Rep. No. 100–576, 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582; *see also E.T. Horn Co. v. United States,* 367 F.3d 1326, 1329 (Fed. Cir. 2004). Tariff terms are defined according to the language of the headings, the relevant section and chapter notes, the Explanatory Notes, available lexicographic sources, and other reliable sources of information. *See Kahrs Int'l, Inc.*, 713 F.3d at 644–45.

II. Competing Tariff Provisions

The Government maintains that Customs classified the imported Ziploc plastic bags properly under HTSUS subheading 3923.21.00. *See* Def.'s Br. 10–11. The tariff provision reads as follows:

3923	Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics:
	Sacks and bags (including cones):
3923.21.00	Of polymers of ethylene

HTSUS subheading 3923.21.00.

Plaintiff contends that the subject merchandise are classifiable under HTSUS subheading 3924.90.56. Pl.'s Br. 2, 7. The tariff provision covers:

3924	Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics:
3924.90	Other:
3924.90.56	Other

HTSUS subheading 3924.90.56. Plaintiff claims further that the subject merchandise is eligible for duty-free treatment under the Generalized System of Preferences ("GSP") if classified under HTSUS subheading 3924.90.56. *See* Pl.'s Br. 2, 16–24.

III. Analysis of the Tariff Terms

In *S.C. Johnson I*, the court assessed whether HTSUS Headings 3923 and 3924 are *eo nomine* or use provisions. 42 CIT at __, 335 F. Supp. 3d at 1299–1301; *see Schlumberger Tech. Corp.*, 845 F.3d at 1164. An *eo nomine* provision describes articles by specific names. *See id.* A use provision, by contrast, classifies articles based on their principal or actual use. *See id.*; *see also R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1354–55 (Fed. Cir. 2014). ARI 1(a), which governs use provisions, provides that:

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

ARI 1(a). In this context, principal use has been defined as the use that exceeds any other single use. *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012).

The court first considered the meaning and scope of HTSUS Heading 3923, "articles for the conveyance or packing of goods." HTSUS Heading 3923. "Conveyance" is defined as "a means of carrying or transporting something." Webster's Third New International Dictionary 499 (unabr. 1993). "Convey" is defined as "to bear from one place to another." *Id.* "Packing" is defined as "to process and put into containers in order to preserve, transport, or sell." The American Heritage Dictionary of the English Language 1261 (4th ed. 2000); *see also* Webster's Third New International Dictionary 1618 (unabr. 1993) ("[T]he act or process of preparing goods for shipment or storage."). Because the terms of the heading contemplate a specific use (*i.e.*, "conveyance or packing of goods"), this court concluded that HTSUS Heading 3923 is a principal use provision encompassing goods of plastic used to carry or to transport other goods of any kind. 42 CIT at __, 335 F. Supp. 3d at 1299–1300.

Eo nomine tariff headings describe "the subject merchandise by name, not by use." *Kahrs Int'l, Inc.*, 713 F.3d at 645–46 (citing *Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998)). In *S.C. Johnson I*, the court's inquiry focused on the meaning of "household articles . . . of plastics." HTSUS Heading 3924. The phrase did not suggest a type of use, and therefore the court declined to read one into it. *See id.* at 646 (stating that the court "should not read a use limitation into an *eo nomine* provision unless the name itself inherently suggests a type of use") (citing *Carl Zeiss, Inc.*, 195 F.3d at 1379). The court continues to conclude that HTSUS Heading 3924 is an *eo nomine* provision, not a principal use provision.

In *S.C. Johnson I*, the court examined the tariff terms "household articles." 42 CIT at __, 335 F. Supp. 3d at 1300–02; HTSUS Heading 3924. "Household" was defined as "the maintaining of a house," "household goods and chattels," "a domestic establishment," or "of or relating to a household." 42 CIT at __, 335 F. Supp. 3d at 1300–02 (citing Webster's Third New International Dictionary 1096 (unabr. 1993). "Article" was defined as an "individual thing or element of a class; a particular object or item." 42 CIT at __, 335 F. Supp. 3d at 1300–02 (citing The American Heritage Dictionary of the English Language 101 (4th ed. 2000)).

The Explanatory Note to HTSUS Heading 3924 provided further guidance for the court's analysis. The Explanatory Note provided, in relevant part: "[t]his heading covers the following articles of plastics: . . . (C) Other household articles such as ash trays, hot water bottles, matchbox holders, dustbins, buckets, watering cans, food storage containers, curtains, drapes, table covers and fitted furniture dustcovers (slipovers)." Explanatory Note 39.24. The court found the reference in the Explanatory Note to "other household articles" helpful in defining the broad scope of the tariff terms, as the listed articles are all goods commonly found in the home. 42 CIT at __, 335 F. Supp. 3d at 1300–02. The court concluded that the plain meaning of the tariff terms in HTSUS Heading 3924 was plastic goods of or relating to the house or household. *Id.*

S.C. Johnson contends that HTSUS Heading 3924 includes, but is not limited to, "household containers for foodstuffs." Pl.'s Br. at 4, n.3. In *S.C. Johnson I*, the court discussed *SGI, Inc. v. United States*, which held that the portable soft-sided vinyl insulated coolers at issue were properly classifiable under HTSUS subheading 3924.10.50. *S.C. Johnson I*, 42 CIT at __, 335 F. Supp. 3d at 1301; *SGI, Inc.*, 122 F.3d 1468, 1472–73 (Fed. Cir. 1997). In *SGI, Inc.*, the U.S. Court of Appeals for the Federal Circuit analyzed the listed exemplars for HTSUS subheading 3924.10. 122 F.3d at 1472–73. Subheading 3924.10 in-

cluded "[t]ableware and kitchenware: Salt, pepper, mustard and ketchup dispensers and similar dispensers," which the court read as encompassing "various household containers for foodstuffs." *Id.* at 1473. The *SGI, Inc.* court's reasoning concentrated on the terms "tableware and kitchenware" at the six-digit level of the tariff heading, whereas here, the court's inquiry concerned the four-digit level of the tariff heading and focuses on the terms "household articles." HTSUS Heading 3924. While the court recognized that household articles may include food containers, the court determined that HTSUS Heading 3924 was not so constrained. *S.C. Johnson I*, 42 CIT at __, 335 F. Supp. 3d at 1301.

The court continues to conclude that based on the plain language of the provision, HTSUS Heading 3924 is an *eo nomine* provision that encompasses plastic goods of or relating to the house or household.

IV. Classification

A. *Prima Facie* Classification Under HTSUS Heading 3923

The court previously found that HTSUS Heading 3923 is a principal use provision. *S.C. Johnson I*, 42 CIT __, 335 F. Supp. 3d at 1299. In assessing classification under a principal use provision, the court determines whether the group of goods are commercially fungible with the imported goods in order to identify the use that exceeds any other single use. *Dependable Packaging Sols., Inc. v. United States*, 757 F.3d 1374, 1379–80 (Fed. Cir. 2014); *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012). The group of goods at issue under HTSUS Heading 3923 is goods of plastic used to carry or to transport other goods of any kind.

When analyzing whether the subject merchandise are commercially fungible, the court considers the *Carborundum* factors, which are:

> [1] use in the same manner as merchandise which defines the class; [2] the general physical characteristics of the merchandise; [3] the economic practicality of so using the import; [4] the expectation of the ultimate purchasers; [5] the channels of trade in which the merchandise moves; [6] the environment of the sale, such as accompanying accessories and the manner in which the merchandise is advertised and displayed; and [7] the recognition in the trade of this use.

Aromont USA, Inc., 671 F.3d at 1313 (citing *United States v. Carborundum*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (1976)).

1. General Physical Characteristics

The subject merchandise consist of plastic bags that measure six and one-half inches by five and seven-eighths inches. *See* Pl.'s Facts ¶ 10; Def. Facts Resp. ¶ 10; Product Specifications, Ex. 3, Dec. 23, 2017, ECF No. 73–1. Each bag has a plastic zipper and an interior space that can accommodate relatively small items. Def. Facts ¶ 5; Pl.'s Facts ¶¶ 48–51; Price Dep. 56:9–58:10. The subject merchandise are manufactured from polyethylene resin pellets. *See* Price Dep. 15:21–16:2, 31:17–32:6.

The Government contends that the physical characteristics of the subject merchandise, such as the interior space and reclosable seal, indicate that the bags share the same physical characteristics as merchandise that defines the class of articles under HTSUS Heading 3923. Def.'s Br. 12. Plaintiff counters that the subject merchandise do not share the general physical characteristics of other bags or containers used for the packaging or conveyance of bulk or commercial goods, and that the subject merchandise are more similar to household articles. *See* Pl.'s Br. at 6–7 (incorporating by reference Pl.'s Mem. Law in Support of Pl.'s Mot. for Summ. J., Oct. 31, 2017, ECF Nos. 63–1 & 66–2 ("Pl.'s Mem. Mot. Summ. J.")); *see also* Pl.'s Mem. Mot. Summ. J. 25–26; 39.

Plaintiff's argument is unavailing. The Explanatory Notes correlating to Heading 3923 state that: "[t]he articles covered include: . . . [c]ontainers such as boxes, cases, crates, *sacks and bags* (including cones and refuse sacks), casks, cans, carboys, bottles and flasks," and "[s]toppers, lids, caps and other closures." Explanatory Notes 39.23(a), (c) (emphasis added).[2] There is no dispute that the subject merchandise are bags. *See* Def.'s Facts ¶ 10, Pl.'s Resp. Facts ¶ 10. Similar to the articles in the Explanatory Notes, sections 39.23(a) and (c), the subject merchandise are a form of bag that includes a resealable seal. *See* Pl.'s Facts ¶ 10; Def. Facts Resp. ¶ 10. The physical characteristics of the subject merchandise with an interior space and reclosable seal are similar to the group of goods of plastic used to carry or to transport other goods of any kind. The court concludes that the physical characteristics of the subject merchandise support *prima facie* classification under HTSUS Heading 3923.

2. Use in the Same Manner as Merchandise Which Defines the Class

The Government contends that the subject merchandise are used for the packing and transportation of goods, which is consistent with articles that define the class. Plaintiff argues that the subject mer-

[2] All citations to the Explanatory Notes in this opinion are to the 2012 edition.

chandise are not actually used for packaging or conveyance of bulk or commercial items. Pl.'s Mem. Mot. Summ. J. 38.

Plaintiff's argument is flawed. S.C. Johnson's argument relies heavily on the addition of the terms "bulk or commercial items." Pl.'s Mem. Mot. Summ. J. 38. In support of its argument, Plaintiff cites two administrative rulings by Customs. Pl.'s Br. at 10 (citing NY N293539 (Feb. 1, 2018) and N301247 (Nov. 7, 2018)). Plaintiffs' cited Customs rulings address proposed classification of goods under HTSUS subheading 3923.90.00, which is a tariff subheading that is not at issue in this case. NY N293539 (Feb. 1, 2018); NY N301247 (Nov. 7, 2018), modified, HQ H296920 (May 22, 2019). The court also notes that Customs rulings are not binding on the court. *Skaraborg Invest USA, Inc. v. United States*, 22 C.I.T. 413, 417 (1998). The court concludes that these administrative rulings are unpersuasive as to the issue of whether the subject merchandise are classifiable under HTSUS subheading 3923.21.00.

Despite Plaintiff's arguments, the court notes that the terms "bulk or commercial items" do not appear in HTSUS Heading 3923, HTSUS subheadings 3923.21 or 3923.21.00, or the corollary Explanatory Notes. Rather, HTSUS Heading 3923 broadly refers to "[a]rticles for the conveyance or packing of goods, of plastics." HTSUS Heading 3923. The Explanatory Notes do not support Plaintiff's proposed reading, as the Explanatory Notes state that "[t]his heading covers all articles of plastics commonly used for the packing or conveyance of all kinds of products." Explanatory Notes 39.23. The court declines to read a requirement of "bulk or commercial items" into its analysis of HTSUS Heading 3923.

The evidence indicates that the subject merchandise are used to pack and convey other items. *See* Bag/Type Profiling, Appx000799, J.A. 18; User Tracking Study, J.A. 57, Appx001092.[3] The packaging materials list several uses, including that consumers may "[p]ack [their] bottles in Ziploc® Sandwich bags to help prevent any surprise leaks" and "[p]ut [g]oodies like candy, cookies, or desserts in a Ziploc® Sandwich bag, add a bow, and give it as a small gift." Sample Packaging Material, Appx000577, J.A. 7. The use of the subject merchandise for packing and conveying items is similar to the use of the group of goods of plastic used to carry or to transport other goods of any kind. This factor supports *prima facie* classification under HTSUS Heading 3923.

[3] *See also* User Tracking Study, J.A. 57, Appx001093 (Indicating that "Ziploc Sandwich Bags are used most commonly for packing snacks and lunches *to take on the go*.")(emphasis added).

3. Economic Practicality

The Government contends that it is economically practical to use the subject merchandise to transport, carry, or store any items that fit inside the bag. Def.'s Br. 13. In support, Defendant argues that the subject merchandise may be purchased for 3.4 cents per bag, which is comparable to the price of a 1.25 gauge, single zipper reclosable polyethylene bag sold for 1.6 cents per bag. *See id.* Plaintiff does not respond directly, but when Plaintiff addresses the factor of economic practicality in favor of classification under HTSUS Heading 3924, Plaintiff argues that the pricing of the subject merchandise sandwich bags are comparable to and less than the pricing of other more durable plastic storage containers. Pl.'s Mem. Mot. Summ. J. 27–28; *see also* Horn Dep. 31:7–13. The products compared are the subject merchandise sandwich bags against the comparison group of goods of plastic used to carry or to transport other goods of any kind. The court finds that there is insufficient record evidence to establish cross-elasticity of any of the comparison products, identified by either Plaintiff or Defendant, to determine whether economic practicality supports *prima facie* classification under HTSUS Heading 3923. The court concludes that this factor is neutral.

4. Expectations of the Ultimate Purchaser

The Government argues that the ultimate purchasers expect to use reclosable plastic bags for transporting, carrying, or packing food, personal items, merchandise, materials, or other items that fit within the interior space. Def.'s Br. 14–15. Plaintiff counters that ultimate purchasers do not expect to use S.C. Johnson's sandwich bags for the packaging or conveyance of bulk or commercial items, but instead, ultimate purchasers expect to use the sandwich bags in their homes. Pl.'s Mem. Mot. Summ. J. 39–40; *see* Pl.'s Br. 6. The evidence supports an inference that ultimate purchasers expect to use the subject merchandise to convey or pack goods. *See* Bag/Type Profiling, Appx000781–Appx000781, J.A. 18.[4] The expectations of the ultimate purchasers to carry or transport items in the sandwich bags are similar to the consumer expectations for the group of goods of plastic used to carry or to transport other goods of any kind. The court concludes that the expectations of the ultimate purchasers support *prima facie* classification of the subject merchandise under HTSUS Heading 3923.

[4] An S.C. Johnson home storage study finds that sandwich bags are used to store items in a lunchbox, purse, or backpack, that the place where the contents of the bag are consumed are "[a]way from home," and that sandwich bags are used "[a]way from home" in a number of use occasions. Bag/Type Profiling, Appx000788, J.A. 18. In the same study, individuals report using sandwich bags to "[t]o pack/transport . . . for a meal" in many use occasions.

5. Channels of Trade

Defendant argues that sandwich bags are sold in the same channels of trade as goods identified in the subheadings of HTSUS Heading 3923 and goods identified in the Explanatory Notes. Def.'s Br. 15–16; *see also* Explanatory Notes 39.23. By contrast, when Plaintiff addresses the factor of economic practicality in favor of classification under HTSUS Heading 3924, Plaintiff argues that sandwich bags are sold in the same channels of trade as other household articles.

Defendant proffers that the sandwich bags are sold at "mass merchants (Walmart, Target, etc.), warehouse stores (Costco, etc.), grocery stores, drug stores, discount stores, and by certain e-commerce merchants." Def.'s Br. 15; *see also* Horn Dep. 18:13–27:4. Plaintiff proffers that the sandwich bags are sold by retailers, including Walmart, Sam's Club, and Costco, for food storage use and in areas where other food storage containers are sold. Pl.'s Mem. Mot. Summ. J. 30–31; *see also* Hollomon Aff. ¶ 8; Appx001156, J.A. 58; Canales Aff. ¶ 8, Jul. 25, 2016, Appx00160, J.A. 59 ("Canales Aff."); Herrera Aff. ¶ 8, Jul. 25, 2016, Appx00160, J.A. 60 ("Herrera Aff."). Plaintiff contends that certain retailers, such as Costco and Sam's Club, sell more general types of merchandise. Pl.'s Mem. Mot. Summ. J. 31.

The subject merchandise sandwich bags are sold in similar channels of trade as the group of goods of plastic used to carry or to transport other goods of any kind, such as Walmart, Target, Costco, and other retailers. The court concludes that the evidence supports a determination that the subject merchandise are sold in channels of trade relating to articles for the conveyance or packing of goods. The court concludes that the channels of trade factor supports a *prima facie* classification of the subject merchandise under HTSUS Heading 3923.

6. Environment of the Sale

In considering the environment of the sale, the court may look to accompanying accessories and the manner in which the merchandise is advertised and displayed. *Aromont USA Inc.*, 671 F.3d at 1312. Defendant argues that reclosable plastic bags of similar sizes and shapes are marketed as a means of containing or conveying various goods. Def.'s Br. 17. Plaintiff counters that the subject merchandise are not advertised in the same manner or in the same publications as articles used for the packaging or conveyance of bulk or commercial items. Pl.'s Mem. Mot. Summ. J. 40.

Plaintiff's arguments are unavailing. The record evidence indicates that sandwich bags are advertised for the packing and transportation of goods. S.C. Johnson states on the packaging materials for the

sandwich bags that the bags may be used as a "[t]ravel [c]ompanion" and for "[g]ift [g]iving." Sample Packaging Material, Appx000577, J.A. 7. In a commercial website printout cited by Plaintiff, the bags are advertised for consumers to "[k]eep after school snacks good to go in backpack-ready bags" and to "[p]rep for your camping trip before you hit the road with pre-portioned treats."[5] Office Depot/Ziploc Printout, Ziploc Sandwich Bags - 5.88" Width x 6.50" Length - Clear - 1Box – 90 Per Box - Sandwich, Food Item # 725466, Appx000595, J.A. 10, Dec. 20, 2017. As to the physical location of the sales, S.C. Johnson's Sales Director of the West Division testified that retailers may display the subject merchandise co-located with different types of products. *See* Horn Dep. 30:20–31:2. The subject merchandise sandwich bags are sold in similar environments as the group of goods of plastic used to carry or to transport other goods of any kind. The court concludes that the subject merchandise environment of the sale supports *prima facie* classification under HTSUS Heading 3923.

7. Recognition in the Trade of This Use

The Government argues that the marketing materials for the subject merchandise indicate that the sandwich bags are recognized in the trade for the conveyance or packing of goods. Def.'s Br. 17. Plaintiff counters that the subject merchandise are not recognized in the marketplace as items that are commercially fungible with articles for the packing or conveyance of bulk or commercial items. Pl.'s Mem. Mot. Summ. J. 41.

The court considers whether the subject merchandise are recognized in the trade as having that particular use or whether the subject merchandise meet certain specifications recognized in the trade for that particular class of products. *See Aromont USA, Inc.*, 671 F.3d at 1316. Defendant does not offer industry specific standards for articles for the conveyance or packing of goods. Def.'s Br. 17. Plaintiff proffers, *inter alia*, three affidavits of S.C. Johnson employees who state that the subject sandwich bags are not sold to intermediate sellers for the packaging or conveyance of bulk or commercial items by the intermediate sellers' customers. *See*, *e.g.,* Hollomon Aff. ¶ 8; Appx001156, J.A. 58; Canales Aff. ¶ 8; Herrera Aff. ¶ 8. As the court has previously addressed, HTSUS Heading 3923 does not limit the terms "[a]rticles for the conveyance or packing of goods" with the

[5] Plaintiff challenges the relevancy of Exhibit 10. *See* Pl.'s Br. 12. The court notes that Plaintiff cites to Exhibit 10 in support of its own arguments, and that the Parties agreed that the court should consider all of the evidence submitted with the summary judgment motions in classifying the subject merchandise. *See id.* at 5 (citing Appx000595); Order, Nov. 30, 2018, ECF No. 99.

phrase "of bulk or commercial items." *See* HTSUS Heading 3923. The court concludes that the evidence pertaining to this factor is insufficient to determine how sandwich bags are recognized in the trade. The court determines that this factor is neutral as to the *prima facie* classification of the subject merchandise.

8. Conclusion

Because the majority of the *Carborundum* factors support classification under HTSUS Heading 3923, the court concludes that the subject merchandise are *prima facie* classifiable under HTSUS Heading 3923.

B. *Prima Facie* Classification Under HTSUS Heading 3924

In *S.C. Johnson I*, the court determined that HTSUS Heading 3924 is an *eo nomine* provision.[6] Plaintiff argues that the subject merchandise are classifiable as other household articles of HTSUS Heading 3294 because the sandwich bags relate to the house or household. 42 CIT __, 335 F.Supp.3d at 1301. Plaintiff cites for support, *inter alia*, an Office Depot website printout for Ziploc sandwich bags, the deposition of Amy Bigna, and an S.C. Johnson-commissioned study that examined how individuals use Ziploc® bags. Office Depot/Ziploc Printout, Ziploc Sandwich Bags - 5.88" Width x 6.50" Length - Clear - 1Box – 90 Per Box - Sandwich, Food Item # 725466, Appx000595, J.A. 10, Dec. 20, 2017; Bigna Dep. 53:1–25 (citing Ex. 24, New Product User Tracking Study, July 2012 Launch Bundle & Base Ziploc Sandwich Bag); User Tracking Study, Appx001143, J.A. 57.

The Government counters that the sandwich bags are not classifiable as other household articles of HTSUS Heading 3924 because the subject merchandise do not fall within the terms "household articles" and the bags are disposable, in contrast to curtains, drapes, and ashtrays, which are three durable articles enumerated in section 39.24 of the Explanatory Notes. Def.'s Br. 17–19.

An *eo nomine* provision includes all forms of the named article. *Kahrs Int'l, Inc.*, 713 F.3d at 646. As the court has previously

[6] Plaintiff requests that the court reconsider the determination that HTSUS Heading 3924 is an *eo nomine* provision. Pl.'s Br. 2. The court considered this argument in the motions for summary judgment. *See* Pl.'s Mem. Mot. Summ. J. 30; *see generally* Pl.'s Suppl. Br. As previously noted by the court, *eo nomine* tariff headings describe "the subject merchandise by name, not by use." *Kahrs Int'l, Inc.*, 713 F.3d at 646. The court's inquiry focuses on the meaning of "household articles . . . , of plastics." The phrase does not suggest a type of use, but rather a location in which an article may be found. *See id.* (citing *Carl Zeiss*, 195 F.3d at 1379) (stating that the court "should not read a use limitation into an *eo nomine* provision unless the name itself inherently suggests a type of use"). The court continues to conclude that HTSUS Heading 3924 is an *eo nomine* provision.

discussed, "[h]ousehold" was defined as "the maintaining of a house," "household goods and chattels," "a domestic establishment," or "of or relating to a household." *S.C. Johnson I*, 42 CIT at __, 335 F. Supp. 3d at 1300–02 (citing Webster's Third New International Dictionary 1096 (unabr. 1993). "Article" was defined as an "individual thing or element of a class; a particular object or item." *S.C. Johnson I*, 42 CIT at __, 335 F. Supp. 3d at 1300–02 (citing The American Heritage Dictionary of the English Language 101 (4th ed. 2000)).

S.C. Johnson's internal study indicates that the sandwich bags can be found in a household.[7] The sandwich bags are designed in a manner consistent with household food storage. Mr. William Price, an engineer and Development Lead at S.C. Johnson, testified that S.C. Johnson seeks Kosher certification for the sandwich bags and S.C. Johnson tests for the absence of Bisphenol A in the sandwich bags. Price Dep. 12:14–13:6, 59:2–60:5. The packaging materials state that consumers may "[s]tore mid-day snacks like fresh cut fruits, veggies, chips or pretzels in Ziploc Sandwich bags." Sample Packaging Material, Appx000577, J.A. 10. Mr. Emiliano Canales, S.C. Johnson's director responsible for the Home Storage Division, stated that S.C. Johnson's "Home Storage category includes Ziploc® brand sandwich and snack bags," and that "[t]hese products are sold . . . specifically for household food storage use by its customers." Canales Aff. ¶¶ 3, 7. Cynthia Herrera, the Global Brand Manager for S.C. Johnson's Home Cleaning Business, also stated that "[t]hese products are sold in the areas of . . . stores where other household food storage containers are sold." Herrera Aff. ¶ 7.[8] The record supports a finding that the subject merchandise are "of or relating to a household." *See S.C. Johnson I*, 42 CIT at __, 335 F. Supp. 3d at 1300–02. Because the evidence indicates that the subject merchandise can be found in the household, the court concludes that the subject merchandise are *prima facie* classifiable under HTSUS Heading 3924.

C. Application of GRI 3

Having concluded that the subject merchandise are *prima facie* classifiable under both HTSUS Headings 3923 and 3924, the court applies GRI 3, which provides, in relevant part, that: "[w]hen . . . goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: . . . [t]he heading which provides

[7] User Tracking Study, J.A. 57, Appx001093 (Ziploc Sandwich Bags are used most commonly for storing leftovers in the refrigerator). An S.C. Johnson study found that a majority of sandwich bag users kept sandwich bags in the kitchen. Bag/Type Profiling, Appx000789, J.A. 18.

[8] *See also* Bag/Type Profiling, Appx000797, J.A. 18 (Identifying that consumers stored sandwich bags in refrigerators or freezers on a number of measured occasions.).

the most specific description shall be preferred to headings providing a more general description." GRI 3(a).

In determining which tariff provision is more specific, the court compares only the language of the headings, and looks to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440–41 (Fed. Cir. 1998).

HTSUS Heading 3923 is a use provision that specifies "the conveyance or packing" of goods. The subject merchandise must be used in a specific way to satisfy HTSUS Heading 3923, while the *eo nomine* provision of HTSUS Heading 3924 merely describes the article regardless of its use, and therefore HTSUS Heading 3923 has requirements that are more difficult to satisfy and describe the article with a greater degree of accuracy and certainty.[9]

In addition, HTSUS Heading 3923 pertains to "[a]rticles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics," whereas HTSUS Heading 3924 encompasses "[t]ableware, kitchenware, other household articles and hygienic or toilet articles, of plastics." HTSUS Headings 3923, 3924. The articles described in HTSUS Heading 3924 include a more diverse range of products with a wider range of characteristics than the articles described in HTSUS Heading 3923.

The Explanatory Notes support this reading, as section 39.23 of the Explanatory Notes indicate that the articles covered by HTSUS Heading 3923 include:

> (a) Containers such as boxes, cases, crates, sacks and bags (including cones and refuse sacks), casks, cans, carboys, bottles and flasks. . .
>
> (i) Cups without handles having the character of containers used for the packing or conveyance of certain foodstuffs, whether or not they have a secondary use as tableware or toilet articles;
>
> (ii) Bottle preforms of plastics. . .
>
> (b) Spools, cops, bobbins and similar supports, including video or audio cassettes without magnetic tape.
>
> (c) Stoppers, lids, caps and other closures.

[9] Even if HTSUS Heading 3924 were to be construed as a use provision, the court would arrive at the same conclusion. The "conveyance or packing of goods" remains more specific than "[t]ableware, kitchenware, other household articles and hygienic or toilet articles." HTSUS Headings 3923, 3924.

Explanatory Notes 39.23. By contrast, the corollary Explanatory Notes to HTSUS Heading 3924 include articles such as:

> Tableware such as tea or coffee services, plates, soup tureens, salad bowls, dishes and trays of all kinds, coffee-pots, teapots, sugar bowls, beer mugs, cups, sauce-boats, fruit bowls, cruets, salt cellars, mustard pots, egg-cups, teapot stands, table mats, knife rests, serviette rings, knives, forks and spoons. . . . Kitchenware such as basins, jelly moulds, kitchen jugs, storage jars, bins and boxes (tea caddies, bread bins, etc.), funnels, ladles, kitchen-type capacity measures and rolling-pins. . . . Other household articles such as ash trays, hot water bottles, matchbox holders, dustbins, buckets, watering cans, food storage containers, curtains, drapes, table covers, and fitted furniture dustcovers (slipovers). . . . [and] Hygienic and toilet articles.

Explanatory Notes 39.24 (A)–(D). The Explanatory Notes indicate that the range of products intended to be included in HTSUS Heading 3923, such as containers and cassettes, is narrower than the range of products intended to be included in HTSUS Heading 3924, which vary from tableware to toilet articles. Explanatory Notes 39.23 (a)–(c); Explanatory Notes 39.24 (A)–(D). The court concludes that HTSUS Heading 3923 provides a more specific description than HTSUS Heading 3924. In accordance with GRI 3, the court concludes that the subject merchandise are classified under HTSUS Heading 3923.

V. Generalized System of Preferences Treatment

Because the court concludes that the subject merchandise are classified properly under HTSUS Heading 3923, the court does not reach the issue of whether S.C. Johnson's sandwich bags are eligible for duty-free treatment under the Generalized System of Preferences.

CONCLUSION

For the foregoing reasons, the court concludes that Plaintiff's plastic bags are classified under HTSUS subheading 3923.21.00. Judgment to be entered accordingly.

Dated: December 16, 2019
New York, New York

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

Slip Op. 19–159

JACOBI CARBONS AB and JACOBI CARBONS, INC., Plaintiffs, and, NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and, CALGON CARBON CORPORATION and CABOT NORIT AMERICAS, INC., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 15–00286

[The U.S. Department of Commerce's third remand results are sustained.]

Dated: December 17, 2019

Daniel L. Porter and *Tung A. Nguyen*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc.

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, DeKieffer & Horgan, PLLC, of Washington, DC, for Plaintiff-Intervenors Carbon Activated Tianjin Co., Ltd., Jilin Bright Future Chemicals Co., Ltd., Ningxia Mineral and Chemical Ltd., Shanxi DMD Corp., Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tancarb Activated Carbon Co., Ltd., and Tianjin Maijin Industries Co., Ltd.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

David A. Hartquist, *R. Alan Luberda*, *John M. Herrmann*, and *Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors Calgon Carbon Corp. and Cabot Norit Americas, Inc.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") third redetermination upon remand in this case. *See* Final Results of Redetermination Pursuant to Court Remand ("Third Remand Redetermination"), ECF No. 147–1. Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc. (together, "Jacobi") and Plaintiff-Intervenors[1] (collectively, with Ja-

[1] Plaintiff-Intervenors include: Ningxia Huahui Activated Carbon Co., Ltd. ("Huahui"); Carbon Activated Tianjin Co., Ltd., Jilin Bright Future Chemicals Company, Ltd., Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tancarb Activated Co., Ltd., and Tianjin Maijin Industries Co., Ltd. (collectively, "CATC"); and Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Beijing Pacific Activated Carbon Products Co., Ltd., Cherishmet Inc., and Datong Municipal Yunguang Activated Carbon Co., Ltd., (collectively, "Cherishmet"). The court consolidated cases filed by Huahui, CATC, and Cherishmet under lead Court No. 15–00286, filed by Jacobi. *See* Order (Dec. 16, 2015), ECF No. 39. Those parties had also intervened in this case. *See* Order (Oct. 26, 2015), ECF No. 22; Order (Nov. 17, 2015), ECF No. 28; Order (Nov. 20, 2015), ECF No.33. Accordingly, the court refers to those parties as "Plaintiff-Intervenors."

cobi, "Plaintiffs") initiated this case challenging Commerce's final results in the seventh administrative review ("AR 7") of the antidumping duty order on certain activated carbon from the People's Republic of China ("PRC" or "China"). *See Certain Activated Carbon From the People's Republic of China*, 80 Fed. Reg. 61,172 (Dep't Commerce Oct. 9, 2015) (final results of antidumping duty admin. review; 2013–2014) ("*Final Results*"), ECF No. 37–3, and accompanying Issues and Decision Mem., A-570–904 (Oct. 2, 2015) ("I&D Mem."), ECF No. 37–4.[2]

On April 7, 2017, the court remanded Commerce's original determination. *See Jacobi Carbons AB v. United States* ("*Jacobi (AR7) I*"), 41 CIT ___, 222 F. Supp. 3d 1159 (2017). On August 10, 2017, Commerce filed its first remand redetermination. *See* Final Results of Redetermination Pursuant to Court Remand, ECF No. 105–1. On April 19, 2018, the court sustained the first remand redetermination, in part, but remanded the agency's surrogate country selection, surrogate value selections, and value added tax adjustment. *See Jacobi Carbons AB v. United States* ("*Jacobi (AR7) II*"), 42 CIT ___, 313 F. Supp. 3d 1308 (2018).

On October 24, 2018, Commerce filed its second remand redetermination. *See* Final Results of Redetermination Pursuant to Court Remand ("Second Remand Redetermination"), ECF No. 133–1. On March 4, 2019, the court sustained the Second Remand Redetermination, in part, and remanded the agency's selection of Thailand as the primary surrogate country, holding that substantial evidence did not support Commerce's determination that Thailand is a significant producer of comparable merchandise. *See Jacobi Carbons AB v. United States* ("*Jacobi (AR7) III*"), 43 CIT ___, ___, 365 F. Supp. 3d 1323, 1331–34, 1342–44 (2019).[3]

On June 17, 2019, Commerce filed the Third Remand Redetermination. Therein, under protest,[4] Commerce changed its primary sur-

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[2] The administrative record filed in connection with the *Final Results* is divided into a Public Administrative Record ("PR"), ECF No. 37–1, and a Confidential Administrative Record ("CR"), ECF No. 37–2. The administrative record associated with the Third Remand Results is contained in a Public Remand Record, ECF No. 148–2, and a Confidential Remand Record, ECF No. 148–8. Parties submitted public and confidential joint appendices containing record documents cited in their briefs on the Third Remand Redetermination. *See* Public J.A. to Parties' Comments on Third Remand Redetermination ("PJA"), ECF No. 154; Confidential J.A. to Parties' Comments on Third Remand Redetermination ("CJA"), ECF No. 155.

[3] The court's opinions in *Jacobi (AR7) I*, *Jacobi (AR7) II*, and *Jacobi (AR7) III* present background information on this case, familiarity with which is presumed.

[4] By making the determination under protest, Third Remand Redetermination at 2 & n.6, Commerce preserves its right to appeal, *see Meridian Prods. v. United States*, 890 F.3d 1272, 1276 n.3 (Fed. Cir. 2018) (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)).

rogate country selection from Thailand to Indonesia. Third Remand Redetermination 5–12. Commerce used Indonesian data for all surrogate values with the exception of the surrogate financial ratios. *Id.* at 11–12. For the financial ratios, Commerce used the financial statements of a company in the Philippines, Premium AC Corporation. *See Id*. at 12, 20–21.

Before the court, no Party challenges Commerce's selection of Indonesia as the primary surrogate country or its selection of Premium AC Corporation's financial statements for the financial ratios. *Id*. at 11–12, 20–21. However, Plaintiffs do challenge Commerce's selection of Indonesian Global Trade Atlas ("GTA") data from Harmonized Tariff Schedule ("HTS") heading 2701.11, "Anthracite Coal, Whether Or Not Pulverized, But Not Agglomerated," as the surrogate value for anthracite coal. *See* Jacobi's Comment on Commerce's *Third* Remand Redetermination ("Jacobi's Opp'n Cmts."), ECF No. 149; [CATC's] Comments in Opp'n to U.S. Dep't of Commerce's Third Remand Redetermination ("CATC's Opp'n Cmts."), ECF No. 150. Defendant United States ("the Government") and Defendant-Intervenors Calgon Carbon Corporation and Cabot Norit Americas, Inc. (collectively "Defendant-Intervenors") filed comments in support of the Third Remand Redetermination. Def.'s Reply to Pls.' and Consol. Pls.' Respective Comments on the Third Remand Redetermination ("Gov't's Resp."), ECF No. 153; Def.-Ints.' Comments in Supp. of the Dep't of Commerce's Third Remand Redetermination ("Def.-Ints.' Resp."), ECF No. 152.

As discussed below, the court finds that Commerce's selection of the Indonesian GTA data as the surrogate value for anthracite coal is supported by substantial evidence and, accordingly, sustains the Third Remand Redetermination.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii)(2012),[5] and 28 U.S.C. § 1581(c)(2012).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). Additionally, "[t]he results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (internal quotation marks and citation omitted).

[5] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the United States Code are to the 2012 edition, unless otherwise stated.

DISCUSSION

I. Legal Framework

An antidumping duty is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. When an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production[6] in a surrogate country, *see id.* § 1677b(c)(1), and those values are referred to as "surrogate values." In selecting surrogate values, Commerce must use "the best available information" that is, "to the extent possible," from a market economy country or countries that are economically comparable to the nonmarket economy country and "significant producers of comparable merchandise." *Id.* § 1677b(c)(1), (4); *see also* 19 C.F.R. § 351.408(c) (governing the information Commerce will use to value factors of production).

The phrase "best available information" is not defined in the statute; consequently, Commerce has broad discretion to determine what value(s) satisfy that requirement. *See, e.g.*, *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (citations omitted). In making its selection, Commerce is not required to duplicate the precise experience of the manufacturer in the non-market economy ("NME") country, but instead must identify the surrogate value that "most accurately represents the fair market value" of the relevant factor of production. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (citation and internal quotation marks omitted). In selecting among available surrogate values, Commerce's practice is to reject a proposed surrogate value if it determines that the value is aberrational compared to other market values on the record. *Canadian Solar Int'l Ltd. v. United States*, 43 CIT ___, ___, 378 F. Supp. 3d 1292, 1306 n.14 (2019); *see also* Third Remand Redetermination at 15 (explaining Commerce's practice in determining whether a value is aberrational).

II. The Specificity of The Indonesian GTA Data Under HTS 2701.11

A. Commerce's Determination

In the Third Remand Redetermination, Commerce selected Indonesian GTA data for HTS 2701.11 to value anthracite coal, the main

[6] The factors of production include but are not limited to: "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

input in activated carbon. Third Remand Redetermination at 5, 14–20. Commerce selected HTS 2701.11 data because the agency used data for this HTS number in previous segments of this review to value anthracite coal. *Id.* at 18. Commerce explained that there was no evidence to suggest that Indonesian GTA data for HS 2701.11 was "not specific to the anthracite coal used by Jacobi's suppliers." *Id.* at 19. Commerce considered whether to use inflated Philippine GTA data from the fifth administrative review ("AR 5") to value the anthracite coal but declined to do so because contemporaneous data was available. *Id.* at 18–19 & n.84 (citing, *inter alia*, *Calgon Carbon Corp. v. United States*, Slip Op. 17–6, 2017 WL 384685 (CIT Jan. 27, 2017)). Commerce also declined to rely on the U.S. Energy Information Administration ("EIA") data to value anthracite coal because Commerce had "usable data from countries with" gross national income ("GNI") "more comparable to that of China with which to value the anthracite coal." *Id*. at 17–18.

B. Parties' Contentions

Jacobi argues that Commerce's decision to value anthracite coal using Indonesian GTA data for HTS 2701.11 is not supported by substantial evidence because: (1) U.S. EIA data is more specific to Jacobi's anthracite coal input; (2) alternatively, the Philippine GTA data from AR 5 is more specific than the Indonesian surrogate value; and (3) HTS 2701.11 is a "broad basket" category of anthracite coal that may not reflect Jacobi's production experience. *See* Jacobi's Opp'n Cmts. at 4–8, 12–14.

In response, the Government and Defendant-Intervenors contend that Commerce has a "statutory directive" to select data from a country that is economically comparable to the NME country before considering data from non-economically comparable countries. Gov't's Resp. at 18 (quoting *Calgon Carbon Corp. v. United States*, 40 CIT ___, ___, 190 F. Supp. 3d 1224, 1233 (2016)); Def.-Ints.' Resp. at 14. They argue that the record demonstrates that the United States is not economically comparable to China. Gov't's Resp. at 17 (citing Third Remand Redetermination at 17); Def.-Ints.' Resp. at 13 (same).

The Government also avers that the inflated Philippine AR 5 data would not be an appropriate surrogate value because Commerce had viable contemporaneous data from the primary surrogate country. Gov't's Resp. at 19–20; *see also* Def.-Ints.' Resp. at 13. The Government further argues that there is no evidence that the data include imports of anthracite coal different from that inputs used for Jacobi's production. Gov't's Resp. at 10–12, 17–20 (citing, *inter alia*, Third Remand Redetermination at 19); *see also* Def.-Ints.' Resp. at 11–12.

C. Commerce Reasonably Found the Indonesian Surrogate Value to be Specific

Before Commerce will consider values from countries that are not on its list of potential surrogate countries (*e.g.*, the U.S. EIA data), or non-contemporaneous data (*e.g.*, the Philippine AR 5 data), a respondent must demonstrate that no country on Commerce's list "provides the scope of quality data that [Commerce] requires." *Calgon Carbon*, 190 F. Supp. 3d at 1234 (internal quotation marks and citation omitted). Thus, the burden is on Jacobi to demonstrate that Commerce's surrogate value is not specific to the factor of production in question. *See Blue Field (Sichuan) Food Indus. Co., Ltd. v. United States*, 37 CIT ___, ___, 949 F. Supp. 2d 1311, 1328 (2013). Jacobi failed to meet this burden.

While HTS 2701.11 is a basket category such that the data reported thereunder could include products distinct from the type of anthracite coal consumed for Jacobi's production, that hypothetical possibility, alone, is insufficient to indicate that the Indonesian data are not specific to Jacobi's anthracite coal. *See Calgon Carbon*, 190 F. Supp. 3d at 1235 ("The mere fact that the Thai data are derived from a basket category, i.e., HTS code 2701.11 'Anthracite Coal, Not Agglomerated,' on its own does not demonstrate that the Thai data are not specific."). Indeed, Jacobi has offered no evidence to support its claim that the Indonesian data actually included distinct types of anthracite coal.

Having rejected Jacobi's argument that the Indonesian GTA data was not sufficiently specific to the type of anthracite coal at issue, Commerce appropriately declined to rely on the U.S. EIA data because it came from a country that was not economically comparable to China (i.e., the United States). Third Remand Redetermination at 17–18. Commerce is statutorily obligated to "use, to the extent possible, information from countries 'at a level of economic development comparable to that of the nonmarket economy country.'" *Peer Bearing Co.-Changshan v. United States*, 36 CIT 1700, 1724, 884 F. Supp. 2d 1313, 1335 (2012) (quoting 19 U.S.C. § 1677b(c)(4)).

Commerce also properly declined to rely on the Philippine AR 5 data. *See* Third Remand Redetermination at 18–19. Commerce gives "considerable weight to contemporaneity . . . when comparing contemporaneous surrogate values with non-contemporaneous market economy purchases." *Home Meridian Int'l, Inc. v. United States*, 772 F.3d 1289, 1296 (Fed. Cir. 2014). Commerce rejected the Philippine data because it had contemporaneous data for HTS 2701.11 from Indonesia and there was no evidence that the data was not represen-

tative of the type of anthracite coal Commerce sought to value.[7] *See* Third Remand Redetermination at 18–19; *Calgon Carbon*, 190 F. Supp. 3d at 1231–32 (explaining that Commerce did not abuse its discretion in declining to rely on non-contemporaneous data).

III. Quantity and Value of the Indonesian Anthracite Coal

A. Commercially Significant Quantity

1. Commerce's Determination

As indicated, Commerce valued anthracite coal using the Indonesian GTA data for HTS 2701.11. That value was based on 1,523 metric tons ("MT") of imported coal. Third Remand Redetermination at 18. Jacobi had argued that because the Indonesian GTA data are based on an amount that is "far less" than the amount of anthracite coal consumed by Jacobi's suppliers during the POR, the import quantity underlying the Indonesian surrogate value was not commercially significant. *Id.* at 12–13. Commerce rejected Jacobi's argument, explaining that "Jacobi has not provided any information which suggests that the anthracite import quantity is a sample of anthracite coal or otherwise not a commercial quantity purchased, sold or entered for consumption in the Indonesian economy."[8] *Id.* at 18.

2. Parties' Contentions

Before the court, Jacobi renews its argument that the Indonesian surrogate value is derived from a quantity of anthracite coal that is not "commercially significant" because its suppliers consumed more than 66,000 MT during the POR, which is over 44 times the Indonesian quantity. Jacobi's Opp'n Cmts. at 3 (citing *Jacobi Carbons AB v. United States* ("*Jacobi (AR8) I*"), 42 CIT ___, ___, 313 F. Supp. 3d 1344, 1361–62 (2018)).

The Government responds that whether the Indonesian surrogate value is based on a "commercially significant" amount cannot be established solely by comparing the quantity imported by Indonesia and the quantity consumed by Jacobi's suppliers. Gov't's Resp. at 8–9;

[7] Plaintiffs also argue that Commerce should have relied on the Philippine AR 5 or the U.S. EIA because the Indonesian surrogate value is aberrant. *See* Jacobi's Opp'n Cmts. at 11–12; CATC's Opp'n Cmts. at 4–5. As discussed *infra*, the court is not persuaded that the Indonesian surrogate value is aberrant, and thus, Commerce was not obligated to rely data from a non-comparable country, 19 U.S.C. § 1677b(c)(4), or non-contemporaneous data, *Home Meridian*, 772 F.3d at 1296.

[8] In addressing whether the Indonesian surrogate value is aberrant, Commerce noted that the Philippines (196 kilograms) and Samoa (12 MT) import volumes were not "commercially significant." *See* Third Remand Redetermination at 16 & nn. 66, 67.

see also Def.-Ints.' Resp. at 10–11. Defendant-Intervenors assert that the quantitative difference is due to the "size and capability of China's activated carbon industry" but does not otherwise indicate that the value Commerce selected was commercially insignificant. Def.-Ints.' Resp. at 10. Defendant-Intervenors also point out that the standard shipment volume used to allocate inland freight and brokerage surrogate values is 10 MT and suggest that because the Indonesian import quantity could fill more than 150 such containers, it should be regarded as a commercially significant quantity. *Id*. at 11.

3. Commerce Reasonably Found that the Indonesian Surrogate Value is Based on a Commercially Significant Quantity

Substantial evidence supports Commerce's decision to rely on the Indonesian import quantity to determine the surrogate value for anthracite coal. Commerce provided a reasoned explanation for relying on the Indonesian import quantity, explaining that Jacobi provided no evidence that the Indonesian imports consisted of samples or otherwise were not commercial entries for consumption. Third Remand Redetermination at 18.

Before the court, Jacobi does not assert that Commerce overlooked its suppliers' production experience; rather, Jacobi argues that the disparity between the two amounts is sufficiently large as to render the Indonesian data unrepresentative. However, the Indonesian data need not replicate Jacobi's production experience to be considered the best information available.[9] *See Nation Ford*, 166 F.3d at 1377.

In the absence of any record basis to question the commercial significance of the Indonesian import quantity, the court finds that Jacobi's identification of the disparity between those imports and its suppliers' production experience, standing alone, is insufficient to disturb the agency's finding. "[I]t is not the court's place to re-weigh the evidence or to suggest that another alterative was the only appropriate choice." *JMC Steel Grp. v. United States*, 38 CIT ___, ___, 24 F. Supp. 3d 1290, 1313 (2014) (citation omitted).

[9] The court notes that the Government argues that 1,523 MT of anthracite coal is a commercially significant amount because it is more than 10 times the amount of carbonized material the court questioned as commercially significant in *Jacobi (AR8) I*, 313 F. Supp. 3d at 1362. Gov't's Resp. at 10; *see also* Def.-Ints.' Resp. at 10. The court declines to give any weight to this argument, however, because (a) the court came to no conclusion regarding the commercial significance of the Thai quantity of carbonized material (instead noting that Commerce failed to provide an adequate explanation for its finding that this quantity was commercially significant, *Jacobi (AR8) I*, 313 F. Supp. 3d at 1361–62); (b) the Government pointed to no record evidence of a relationship in terms of commercial significance between carbonized material and anthracite coal; and (c) the Government's argument is entirely *post hoc*.

B. Non-Aberrational

1. Commerce's Determination

In the Third Remand Redetermination, Commerce used the average unit value for Indonesian imports of anthracite coal from the Indonesian GTA data for HTS 2701.11. Third Remand Redetermination at 14. Commerce also examined average unit values for anthracite coal imports into other countries at the same or a comparable level of economic development as China and, for benchmarking purposes, discussed historical data and data from non-economically comparable countries. *Id.* at 14–17. In addition, Commerce averaged all of the anthracite coal values on the record (excluding Indonesia, the Philippines, and Samoa, but including the U.S. EIA data), for comparison purposes. *Id.* at 17.

Commerce concluded that the Indonesian GTA data are not aberrational because: (1) the fact that the Indonesian value is higher than other values "alone does not necessarily indicate that the [data] are distorted or misrepresentative," *Id.* at 14; *see also id.* at 17; and (2) although data shows that the Indonesian surrogate value is higher than the anthracite coal surrogate value in previous reviews, each administrative review "is a separate exercise of Commerce's authority and allows for different conclusions based on different facts in the record," *Id.* at 15 & n.64 (citation omitted).

2. Parties' Contentions

Plaintiffs argue that the Indonesian surrogate value for anthracite coal is aberrant in light of export price data from the top exporters of anthracite coal (Russia, the United States, South Africa, and Ukraine) in 2013 and 2014.[10] *See* Jacobi's Opp'n Cmts. at 9–10 (citing DJAC Second SV Submission at Exs. 3B, 3C); CATC's Opp'n Cmts. at 4 (same). Plaintiffs also argue that in the past six administrative reviews of this order, Commerce has determined the surrogate value for anthracite coal to be between $48.65/MT and $239.07/MT. *See* Jacobi's Opp'n Cmts. at 9; CATC Opp'n Cmts. at 3–4. Plaintiffs claim there is no evidence that the market price for anthracite coal has

[10] Jacobi derived the price-per-metric-ton for anthracite coal from the export data by dividing total price paid for anthracite coal by the total import quantity for a given year in a particular country. Those prices are as follow: (a) for 2013—South Africa: $119.79/MT; Ukraine $95.15/MT; United States: $113.535/MT; and (b) for 2014—South Africa: $102.26/MT; Ukraine $84.24/MT; United States $130.93/MT. Second Surrogate Value Submission by Datong Juqiang Activated Carbon Co., Ltd. (Mar. 31, 2015) ("DJAC Second SV Submission") at Exs. 3B, ECF No. 154 pp. 80, 82, 84–85, 88–90, PR 322, PJA Tab 15. The Russian export price for 2014, $119.56/MT, is derived from the total monthly prices for anthracite coal from July 2013 to March 2014, divided by the number of months in which prices are recorded. *See id*. at Ex. 3C, ECF No. 154 p. 103.

suddenly increased so as to explain the Indonesian import value, which is significantly higher than the surrogate values in the past six reviews. Jacobi's Opp'n Cmts. at 10.

The Government responds that the Indonesian import value is not aberrant as evidenced by Commerce's consideration of a wide range of benchmark values, including some from countries that are not at a level of economic development comparable to China. Gov't's Resp. at 15–16; *see also* Def.-Ints.' Resp. at 7–9. The Government contends that Commerce did not disregard the historical values from previous segments of this review; rather, Commerce determined that those values did not establish that the current Indonesian value was aberrant. Gov't's Resp. at 16; *see also* Def.-Ints.' Resp. at 7–8. Thus, the Government contends that Plaintiffs invite the court to reweigh the evidence. Gov't's Resp. at 15.

3. Commerce's Selection of the Indonesian Import Value is Supported by Substantial Evidence

Substantial evidence supports Commerce's reliance on the Indonesian import value for anthracite coal as non-aberrant. While the Indonesian value may be the highest potential surrogate value on the record,[11] this fact alone does not compel the conclusion that the Indonesian value is aberrational. *See Baoding Mantong Fine Chemistry Co. v. United States*, 41 CIT ___, ___, 222 F. Supp. 3d 1231, 1248 (2017) ("Still, while the AUV for the imports in Indonesia was the highest for the countries with the largest, non-insignificant volumes, the court cannot conclude that Commerce was required to find on this record that the data for Indonesia . . . were aberrational."). At most, the higher Indonesian value requires Commerce to "examine the data and provide a reasoned explanation as to why the data it chooses is reliable and non-distortive." *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1135, 502 F. Supp. 2d 1295, 1308 (2007).

Commerce addressed this consideration by comparing the Indonesian import value to average unit values from other potential surrogate countries both at the same level of economic development and at a comparable level of economic development to China. Third Remand Redetermination at 15–17. While Commerce recognized that the Indonesian import values were higher, citing determinations in other administrative reviews, Commerce explained that it had previously accepted much larger differences from a benchmark figure as non-aberrant. *Id.* at 16 & nn.68, 69 (citations omitted).

[11] Commerce did not consider the higher values in the Philippine data to be reliable because it was based on a commercially insignificant quantity. Third Remand Redetermination at 16 & n.67.

The court acknowledges that Commerce likely could have come out either way on this—finding the figure to be non-aberrant, as it did, or determining that it was too high to utilize in this review. Nevertheless, the court cannot conclude that, on this record, substantial evidence did not support Commerce's decision that this contemporaneous import value available from its primary surrogate country was not too high to be utilized. This would appear to be precisely the type of judgment call in which the court should not reweigh the evidence, particularly in light of the agency's expertise and consideration of that evidence, including that which fairly detracted from its decision. *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015) (explaining that the court's task is not to reweigh the evidence); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (that a plaintiff can point to evidence that detracts from the agency's conclusion or that there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence). That a reasonable mind could disagree with the agency also does not detract from the validity of Commerce's determination. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) ("This court's duty is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information." (citation and internal quotation marks omitted)).

Finally, Commerce's failure to address directly the export data cited by Jacobi does not fairly detract from the agency's conclusion. The export prices cited by Jacobi were precisely within the range of values that Commerce considered in its aberrancy discussion. *See* Third Remand Redetermination at 16–17 (for benchmarking purposes, considering the U.S. EIA data ($87.22/MT) and the South African value ($145.57/MT)). Thus, the absence of an explicit discussion of the export prices as such does not detract from Commerce's conclusion. *See Hitachi Metals, Ltd. v. United States*, 42 CIT ___, ___, 350 F. Supp. 3d 1325, 1340 (2018) (finding that the International Trade Commission's failure to explicitly respond to an argument did not require a remand).

For the reasons stated above, the court finds that substantial evidence supports Commerce's determination that the Indonesian data are reliable as the surrogate value for anthracite coal.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Third Remand Results are sustained. Judgment will enter accordingly.

Dated: December 17, 2019
New York, New York

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

Slip Op. 19–160

JACOBI CARBONS AB and JACOBI CARBONS, INC., Plaintiffs, and, NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and, CALGON CARBON CORPORATION and CABOT NORIT AMERICAS, INC., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 16–00185

[The U.S. Department of Commerce's third remand results are remanded with respect to the agency's surrogate value selection for the value of carbonized material.]

Dated: December 17, 2019

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

David A. Hartquist, R. Alan Luberda, John M. Herrmann, and *Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors Calgon Carbon Corporation and Cabot Norit Americas, Inc.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") third redetermination upon remand in this case. *See* Final Results of Redetermination Pursuant to Court Remand ("Third Remand Redetermination"), ECF No. 139–1.

Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc. (together, "Jacobi") and Plaintiff-Intervenors[1] (collectively, with Jacobi, "Plaintiffs") challenged several aspects of Commerce's final results in the eighth administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China ("PRC" or "China"). *See Certain Activated Carbon From the People's Republic of China,* 81 Fed. Reg. 62,088 (Dep't of Commerce Sept. 8, 2016) (final results of antidumping duty admin. review; 2014–2015) ("*Final Results*"), ECF No. 44–4,[2] and accompanying Issues and Decision Mem., A-570–904 (Aug. 31, 2016), ECF No. 44–5.

On June 20, 2017, the court granted Commerce's request for a remand to clarify or reconsider its findings regarding economic comparability and Thailand's status as a significant producer of comparable merchandise based on its export quantity. *See* Order (June 20, 2017), ECF No. 77. On September 5, 2017, Commerce issued its first remand redetermination wherein the agency elaborated on its methodology for determining which countries are at the same level of economic development as the PRC and made its significant producer determination based on evidence of domestic production rather than exports. *See* Final Results of Redetermination Pursuant to Court Order (Sept. 5, 2017), ECF No. 78–1. On April 19, 2018, the court sustained Commerce's economic comparability determination but remanded the agency's determination that Thailand is a significant producer of comparable merchandise. *See Jacobi Carbons AB v.*

[1] Plaintiff-Intervenors include Carbon Activated Corporation, Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co., Ltd., and Tianjin Maijin Industries Co., Ltd. (collectively, "CAC"); Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Beijing Pacific Activated Carbon Products Co., Ltd., and Datong Municipal Yunguang Activated Carbon Co., Ltd (collectively, "Cherishmet"); Ningxia Huahui Activated Carbon Co., Ltd. ("NXHH"); and M.L. Ball Co., Ltd., and Jilin Bright Future Chemicals Company, Ltd. (together, "M.L. Ball"). The court consolidated cases filed by CAC, Cherishmet, and M.L. Ball under lead Court No. 16–00185, filed by Jacobi. *See* Order (Nov. 3, 2016), ECF No. 42. Those parties, along with NXHH, had also intervened in this action. *See* Order (Oct. 7, 2016), ECF No. 17; Order (Oct. 12, 2016), ECF No. 22; Order (Oct. 20, 2016), ECF No. 36; Order (Oct. 20, 2016), ECF No. 40.

[2] The administrative record filed in connection with the *Final Results* is divided into a Public Administrative Record ("PR"), ECF No. 44–3, and a Confidential Administrative Record ("CR"), ECF No. 44–2. The administrative record associated with the Third Remand Redetermination is contained in a Public Remand Record, ECF No. 140–2, and a Confidential Remand Record, ECF No. 140–3. Parties submitted joint appendices containing record documents cited in their remand briefs. *See* J.A. to Parties' Comments on Third Remand Redetermination ("3rd PJA"), ECF No. 150; Confidential J.A. to Parties' Comments on *Third* Remand Redetermination , ECF No. 151. These appendices supplement the documents previously provided in connection with the agency's previous determinations in this case. *See* J.A. to Parties' Comments on Second Remand Redetermination ("2nd PJA"), ECF No. 133; Confidential Suppl. App. to Comments on Second Remand Redetermination, ECF No. 135; Public J.A. ("1st PJA"), ECF No. 92; Confidential J.A., ECF No. 91.

United States ("*Jacobi (AR8) I*"), 42 CIT ___, 313 F. Supp. 3d 1344 (2018).[3]

On October 24, 2018, Commerce filed the results of its second remand redetermination. *See* Final Results of Redetermination Pursuant to Court Remand, ECF No. 124–1. Therein, relevant to this discussion, Commerce again found that Thailand is a significant producer of comparable merchandise, *see id.* at 4–7; and further explained its selection of Thai surrogate values for carbonized material and hydrochloric acid, *see id.* at 8–15. On March 5, 2019, the court sustained some aspects of Commerce's determination but remanded Commerce's selection of Thailand as the primary surrogate country based on the lack of substantial evidence supporting Commerce's determination that Thailand was a significant producer of comparable merchandise. *See Jacobi (AR8) II*, 365 F. Supp. 3d at 1351–53, 1358–63. The court instructed Commerce to select a country that meets that statutory criteria for a surrogate country (*i.e.*, that is economically comparable to the subject nonmarket economy country and a significant producer of comparable merchandise pursuant to 19 U.S.C. § 1677b(c)(4), and, for those for inputs that Commerce valued using Thai data, to revisit its selection of surrogate values. *Id*. at 1353.

On June 17, 2019, Commerce filed the remand results at issue. *See* Third Remand Redetermination. Therein, under respectful protest,[4] Commerce determined that the Philippines and Malaysia were at a comparable level of economic development as China and significant producers of comparable merchandise. *Id.* at 2, 5–10 & n.7 (citation omitted). Commerce concluded that both countries were potential primary surrogate countries for valuing Jacobi's factors of production ("FOP") for this review. *See id.* at 10. Commerce selected Malaysia as the primary surrogate country and used Malaysian data to value the factors of production with the exceptions of the surrogate values for financial ratios and carbonized material, for which Commerce selected Philippine data. *See id.* at 12, 15–16, 23–24.

Defendant-Intervenors Calgon Carbon Corporation and Cabot Norit Americas, Inc. (together, "Calgon Carbon") filed comments opposing the Third Remand Redetermination with respect to Commerce's selection of the Philippine *Cocommunity* data as the surrogate value for carbonized material. Def.-Ints.' Comments in Opp'n to

[3] *Jacobi (AR8) I* and *Jacobi Carbons AB v. United States* ("*Jacobi (AR8) II*"), 43 CIT ___, 365 F. Supp. 3d 1344 (2019) present background information on this case; familiarity with these cases is presumed.

[4] By making the determination under protest, Commerce preserves its right to appeal. See *Meridian Prods. v. United States*, 890 F.3d 1272, 1276 n.3 (Fed. Cir. 2018) (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)).

Third Remand Redetermination ("Def.-Ints.' Opp'n Cmts."), ECF No. 141. Plaintiffs filed comments opposing Commerce's selection of the Malaysian data as surrogate values for coal tar and bituminous coal. Jacobi's Comments on Commerce's Third Remand Redetermination ("Jacobi's Opp'n Cmts."), ECF No. 142; Consolidated Pls. Carbon Activated Corporation, Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co., Ltd., and Tianjin Maijin Industries Co., Ltd., Comments in Opp'n to U.S. Dep't Of Commerce's Third Remand Redetermination ("CAC's Opp'n Cmts."), ECF No. 143.

Plaintiffs also filed comments in support of Commerce's selection of the *Cocommunity* data to value carbonized material. Jacobi's Comments in Supp. of Certain Aspect of Commerce's Third Remand Determination ("Jacobi's Supp. Cmts."), ECF No. 145; Consolidated Pls. Carbon Activated Corporation, Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co., Ltd., and Tianjin Maijin Industries Co., Ltd., Resp. Comments in Supp. of U.S. Dep't of Commerce's Third Remand Redetermination ("CAC's Supp. Cmts."), ECF No. 146.

Defendant United States ("the Government") filed comments in support of Commerce's decision. Def.'s Resp. to Comments on the Third Remand Redetermination ("Gov't's Resp."), ECF No. 147. Calgon Carbon also filed comments supporting Commerce's reliance on the Malaysian data to value coal tar and bituminous coal. Def.-Ints.' Comments in Supp. of the Dep't of Commerce's Third Remand Redetermination ("Def.-Ints.' Supp. Cmts."), ECF No. 148.

For the following reasons, the court remands Commerce's surrogate value selection with respect to carbonized material. The court sustains Commerce's reliance on Malaysian data to value coal tar and bituminous coal.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii)(2012),[5] and 28 U.S.C. § 1581(c)(2012).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's re-

[5] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the United States Code are to the 2012 edition, unless otherwise stated.

mand order." *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (internal quotation marks and citation omitted).

DISCUSSION

An antidumping duty is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. When an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production[6] in a surrogate country, *see id*. § 1677b(c)(1), and those values are referred to as "surrogate values." In selecting surrogate values, Commerce must use "the best available information" that is, "to the extent possible," from a market economy country or countries that are economically comparable to the nonmarket economy country and "significant producers of comparable merchandise." *Id.* § 1677b(c)(1), (4). In selecting its surrogate values, Commerce generally prefers publicly-available, "non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country." 19 C.F.R. § 351.408(c)(1), (4).

The phrase "best available information" is not defined in the statute, consequently, Commerce has broad discretion to determine what value(s) satisfy that requirement. *See, e.g., QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). In making its selection, Commerce is not required to duplicate the precise experience of the manufacturer in the non-market economy country, but instead must identify the surrogate value that "most accurately represents the fair market value" of the relevant factor of production. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (citation and internal quotation marks omitted).

I. Carbonized Material

A. Commerce's Determination

Initially, Commerce found that "both Malaysia and the Philippines provide equally viable [surrogate values]." Third Remand Redetermination at 11. Commerce chose Malaysia as the primary surrogate country, in part, because it "offers the best available information to value Jacobi's . . . carbonized materials." *Id.* at 12. Commerce then explained that the Malaysian surrogate data for carbonized material are based on an import quantity (11.1 metric tons ("MT")), which is

[6] The factors of production include but are not limited to: "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

not a commercially significant amount. *Id.* at 15. Therefore, Commerce also states that it selected data from the Philippine industry publication *Cocommunity* to value Jacobi's carbonized material. Third Remand Redetermination at 15–16; *see also* Commerce's Final Surrogate Values for Third Remand Redetermination (June 17, 2019) ("Commerce's SV Mem.") at 2, Attach. 1, PR 15–16, 3rd PJA Tab 11.

B. Parties' Contentions

Calgon Carbon contends that Commerce's selection of the Philippine *Cocommunity* data to value carbonized material is not supported by substantial evidence because: (1) the Malaysian data is more representative of the type of carbonized material that Jacobi's suppliers consume (*i.e.* coconut shell charcoal); (2) Commerce did not adequately explain why the Malaysian import quantity is not commercially significant; (3) citing *Luoyang Bearing Corp. (Grp.) v. United States*, 29 CIT 24, 358 F. Supp. 2d 1296 (2005), Commerce failed to consider whether the per-unit value of the Malaysian imports of carbonized material substantially differs from the per-unit values of carbonized material from larger-import-quantity countries; and (4) in selecting the *Cocommunity* data as the surrogate value, Commerce failed to adequately explain its deviation from its regulatory preference of selecting surrogate values from a single country. Def.-Ints.' Opp'n Cmts. at 5–15.

The Government contends that Commerce addressed whether the Malaysian data are based on a commercially significant import quantity, having initially selected Malaysian data in its Draft Third Remand Redetermination and then rejected the data in its final results. Gov't's Resp. at 15 (referencing Draft Results of Redetermination Pursuant to Court Remand (May 7, 2019), PR 2, 3rd PJA Tab 10; Third Remand Redetermination at 13–16).

C. Commerce's Valuation of Carbonized Material Must Be Remanded for Clarification

Commerce's surrogate value selection for carbonized material must be remanded for further explanation by the agency. It is difficult to discern clearly the agency's reasoning as a result of internal inconsistencies evident on the face of the Third Remand Redetermination with respect to the surrogate value selected for carbonized material.

Specifically, in the main discussion regarding surrogate country selection, when evaluating data availability, Commerce explains that for carbonized materials, both Malaysia and the Philippines provide "*equally viable*" surrogate values for carbonized material. Third Remand Redetermination at 11 (emphasis added). After completing its review of data availability, Commerce concludes "that Malaysia offers

the *best available* information to value Jacobi's FOPs, including carbonized material." *Id*. at 12 (emphasis added). Later in the document, when addressing the parties' arguments with respect to the surrogate value for carbonized material, Commerce states that the Malaysian surrogate data *is not reliable* (not "commercially significant"), *id.* at 15, and that it will use the Philippine *Cocommunity* data because it is *superior* ("based on a commercially significant quantity"), *id*. at 16. These statements and conclusions are inconsistent with each other.

While it may well be that these differences are the result of inadequate attention to full implementation of changes made in the final results, it is for Commerce to resolve these issues in the first instance. Moreover, requiring Commerce to reconcile these inconsistencies will allow the agency to address more fully Calgon Carbon's claims that Commerce did not directly or fully analyze the commercial significance of the Malaysian import quantity[7] or account for Commerce's preference for selecting surrogate values from a single surrogate country, and address its argument based on *Luoyang Bearing*. *See* Def.-Ints.' Opp'n Cmts. at 5–15.

In light of the inconsistencies in the Third Remand Redetermination and the agency's limited reasoning, the court cannot adequately trace the path of the agency's reasoning in selecting the surrogate value for carbonized material. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("[T]he path of Commerce's decision must be reasonably discernable to a reviewing court."). Therefore, the court will remand Commerce's determination with respect to its surrogate value selection for carbonized material for further explanation, and, if necessary, reconsideration.

II. Coal Tar

A. Commerce's Determination

As the surrogate value for coal tar, Commerce selected Malaysia data with an average unit value ("AUV") of $749.51 per metric ton ("/MT"). *See* Third Remand Redetermination at 17–20. In making its selection, Commerce evaluated whether the Malaysian coal tar data yielded an aberrational price. Third Remand Redetermination at 18. For benchmarking purposes, Commerce considered data from countries at the same level of economic development, and data from

[7] The court notes that the Commerce determined that 11.1 MT of carbonized material is not a commercially significant amount because it "far less" than the amount of carbonized material the court "questioned" as commercially significant in *Jacobi (AR8) I*, 313 F. Supp. 3d at 1362. *See* Third Remand Redetermination at 15. However, the court came to no conclusion regarding the commercial significance of the Thai quantity of carbonized material, instead noting that Commerce failed to provide an adequate explanation for its finding that this quantity was commercially significant, *Jacobi (AR8) I*, 313 F. Supp. 3d at 1361–62.

comparable and non-comparable countries. *Id.* at 19. Commerce also compared the Malaysian value to the average of historical surrogate values for coal tar in previous reviews and to "export prices of certain countries on the record."[8] *Id*. at 18–19. Commerce explained that the Malaysian value is "less than two times more" than the historical average value for coal tar and "between two to three times more" than the export prices and that these differences do not establish that the Malaysian value is aberrant. *Id*. at 19–20. Commerce declined to rely on South African data for coal tar because South Africa "is not a significant producer of activated carbon," and the Malaysian data were reliable. *Id.* at 19–20.

B. Parties' Contentions

Before the court, Plaintiffs argue that the coal tar value is aberrational because it is significantly higher than (1) the surrogate values for coal tar used in previous segments of this review, and (2) the average coal tar price from the largest exporters of tar coal. Jacobi's Opp'n Cmts. at 2–5 (citing Jacobi's Surrogate Value Comments (Sept. 24, 2015) at Exs. SV-4, PR 164, 174,-188, 3rd PJA Tab 2; Jacobi's Prelim. SV Cmts. at Ex. SV2–1,); CAC Opp'n Cmts. at 2–5 (same). Therefore, Plaintiffs contend, Commerce should have selected the South African data as surrogate value. Jacobi's Opp'n Cmts. at 5; CAC's Opp'n Cmts. at 6.

The Government contends that Commerce sufficiently addressed Plaintiffs' concerns regarding the coal tar value and provided a reasoned analysis for why the Malaysian value is not aberrational. Gov't's Resp. at 5–10; *see also* Def.-Ints.' Supp. Cmts. at 7–9. The Government claims that a value may be aberrant if it is "many times higher" than the average of the surrogate values of record, but that is not the case here. Gov't's Resp. at 6–7; *see also* Def.-Ints.' Supp. Cmts. at 7–8. The Government argues that Commerce appropriately rejected the South African surrogate value because South Africa is not a significant producer of activated carbon and the agency had reliable data from Malaysia. Gov't's Resp. at 10–11; *see also* Def.-Ints.' Supp. Cmts. at 9.

C. Substantial Evidence Supports Commerce's Coal Tar Surrogate Value Selection

The court will affirm Commerce's surrogate value selection for coal tar. In selecting the Malaysian data to value coal tar, Commerce

[8] Those countries and corresponding values are: Austria: $241.41/MT; France: $335.35/MT; Germany: $548.82/MT; Poland: $300.38/MT; and Russia: $336.76/MT. Third Remand Redetermination at 19 & n.88 (citing Jacobi's Pre-Prelim. Surrogate Value Comments (Jan. 4, 2016) ("Jacobi's Prelim. SV Cmts.") at Ex. SV2–19, PR 282, 3rd PJA Tab 12).

provided a reasoned analysis, considering historical values for coal tar used in previous reviews, historical Malaysian values for coal tar, contemporaneous benchmarking data, and contemporaneous prices from coal tar exporters.[9] Third Remand Redetermination at 18–20. Commerce determined that these values, though noticeably lower than the Malaysian value, did not require a finding that the Malaysian value was aberrant. *Id.* And while Plaintiffs argue that Commerce's determination is flawed, they have not identified evidence that Commerce did not consider[10] or an error in Commerce's reasoning. Rather, Plaintiffs merely disagree with the evidentiary weight Commerce assigned to the differences between the Malaysian value and other values in the record. "[I]t is not the court's place to re-weigh the evidence or to suggest that another alternative was the only appropriate choice." *JMC Steel Grp. v. United States*, 38 CIT ___, ___, 24 F. Supp. 3d 1290, 1313 (2014) (citation omitted); *see also Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006) ("[T]his court, reviewing under the substantial evidence standard, must defer to the [Commerce].").

Similarly, the court is not persuaded by Plaintiffs' argument that Commerce should have selected the South African data for the surrogate value. Plaintiffs do not dispute that South Africa is not a significant producer of comparable merchandise. *See* Third Remand Redetermination at 9, 19. All other things being equal, Commerce considers data from countries that are significant producers of comparable merchandise before considering data from a country that is not a significant producer. *See* 19 U.S.C. § 1677b(c)(4)(B). Thus, the court finds no error in Commerce's selection of Malaysian data to value coal tar and will sustain Commerce's determination on this issue.

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[9] Additionally, Jacobi's and CAC's argument that the coal tar value is aberrant based on comparisons with the export prices fails to consider that "economic comparability and, thus, the usefulness of proffered benchmarks, is a matter of degree." *Jacobi (AR7) II*, 313 F. Supp. 3d at 1337 (citations omitted). The GNIs of Germany ($47,640), France ($43,080), Poland ($13,730), and Russia ($13,210) were not at the same or a comparable level of economic development as China ($7,380) during the period of review. *See* Third Remand Redetermination at 6; Jacobi's Comments on Economic Comparability (July 20, 2015) at Attach. C, PR 82, 3rd PJA Tab 1; *see generally* Req. for Economic Development, Surrogate Country and Surrogate Value Comments and Information (Aug. 7, 2015) at Attach. 1, PR 104, 1st PJA Tab 20 (listing countries at the same level of economic development as China, and not including Germany, France, Poland, or Russia).

[10] While Commerce did not explicitly mention the individual historical surrogate values for coal tar in previous reviews, Commerce compared the average of the historical surrogate values to the Malaysian value. Third Remand Redetermination at 19. "[Commerce] need not address every piece of evidence presented by the parties; absent a showing to the contrary, the court presumes that [Commerce] has considered all of the record evidence." *Siemens Energy, Inc. v. United States*, 38 CIT ___, ___, 992 F. Supp. 2d 1315, 1324 (2014), *aff'd*, 806 F.3d 1367 (Fed. Cir. 2015) (citation omitted).

III. Bituminous Coal

A. Commerce's Determination

As the surrogate value for bituminous coal, Commerce selected Malaysian data based on an import quantity of 381 MT.[11] Third Remand Redetermination at 20; *see also* Malaysian SV Submission at Attach. Malaysia-1. Before the agency, Jacobi alleged that the bituminous coal surrogate value was not based on a commercially significant import quantity. Third Remand Redetermination at 20. Commerce rejected this contention, stating that it was not obligated to duplicate Jacobi's exact production experience and that Jacobi had not provided evidence that the Malaysian import quantity is not commercially significant. *Id*. Commerce also declined to rely on Thai surrogate data for bituminous coal because Thailand is not a significant producer of comparable merchandise. *Id*.

B. Parties' Contentions

Plaintiffs contend that the Malaysian value for bituminous coal is based on a commercially insignificant import quantity.[12] Jacobi's Opp'n Cmts. at 5–6; CAC's Opp'n Cmts. at 6 (same). Plaintiffs represent that Jacobi's suppliers purchased over 25,000 MT of bituminous coal during the POR,[13] an amount 63 times higher than the quantity underlying the Malaysia surrogate value. Jacobi's Opp'n Cmts. at 5–6; CAC's Opp'n Cmts. at 7. Plaintiffs assert that Commerce should have valued Jacobi's bituminous coal using Thai data, even though the agency found that Thailand is not a significant producer of comparable merchandise. Jacobi's Opp'n Cmts. at 6–7; CAC's Opp'n at 8.

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[11] Commerce did not identify the import amount of bituminous coal underlying the Malaysian data, *see* Third Remand Redetermination at 20, but the record indicates that this amount is 381 MT, *see* Pet'rs' Submission of Malaysian Surrogate Values (Sept. 24, 2015) ("Malaysian SV Submission") at Attach. Malaysia-1, PR 215–17, 3rd PJA Tab 4 (providing Malaysian Global Trade Atlas data from Harmonized Tariff Schedule heading 270112, excluding imports from non-market economies and economies with widely available export subsidies). The Parties assert, without explanation, that the Malaysian data for bituminous coal are based on an import quantity of 396 MT. *See* Jacobi's Opp'n Cmts. at 5; CAC's Opp'n Cmts. at 6; Gov't's Resp. at 11–12; Def.-Ints.' Supp. Cmts. at 11. The court will utilize the import quantity identified in the record and notes that the difference between the quantities (that is, 396 MT and 381 MT) is immaterial.

[12] Jacobi asserts that the Malaysian surrogate value "is not a representative price in light of Jacobi's consumption." Jacobi's Opp'n Cmts. at 6. To the extent this suggests that the bituminous coal surrogate value is aberrational, Jacobi has not meaningfully developed this argument. "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 New York*, 738 F.3d 1320, 1328 (Fed. Cir. 2013).

[13] The court previously noted that it is unclear to what extent NXHH's consumption of inputs is imputable to Jacobi. *Jacobi (AR8) I*, 313 F. Supp. 3d at 1360 n.28. Plaintiffs have not since clarified this issue.

The Government asserts that substantial evidence supports Commerce's selection of the Malaysian data for bituminous coal. Gov't's Resp. at 12–14; *see also* Def.-Ints.' Supp. Cmts. at 9–10. The Government avers that merely comparing the amount of bituminous coal Jacobi's suppliers consumed to the Malaysian import quantity is insufficient to demonstrate that the quantity is not commercially significant. Gov't's Resp. at 12–13; *see also* Def.-Ints.' Supp. Cmts. at 10–11. The Government argues that because the agency determined that Thailand is not a significant producer of activated carbon, Commerce's rejection of Thai surrogate value of bituminous coal is justified. Gov't's Resp. at 13–14; *see also* Def.-Ints.' Supp. Cmts. at 13.

C. Substantial Evidence Supports Commerce's Selection of the Malaysian Data to Value Jacobi's Bituminous Coal

Commerce's selection of Malaysian data to value bituminous coal is supported by substantial evidence. "[W]hile a surrogate value must be as representative of the situation in the NME country as is feasible, Commerce need not duplicate the exact production experience of the [Chinese] manufacturers at the expense of choosing a surrogate value that most accurately represents the fair market value of [the factor] in a [hypothetical] market-economy [China]." *Nation Ford*, 166 F.3d at 1377 (alterations in original except regarding "the factor") (citation and internal quotation marks omitted).

Plaintiffs are correct that there is a substantial difference between the Malaysian import quantity and the amount of bituminous coal Jacobi consumes. Jacobi's Opp'n Cmts. at 5; CAC's Opp'n Cmts. at 7. But Commerce considered this evidence, acknowledged the quantitative difference, and was not persuaded that the difference rendered the Malaysian value unusable. Third Remand Redetermination at 18–20. Plaintiffs have not identified any evidence that Commerce failed to consider or an error in its reasoning; they merely disagree with Commerce's conclusion. Thus, Plaintiffs' argument amounts to little more than a plea for the court to reweigh the evidence. This the court will not do. *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015) (explaining that the court's task is not to reweigh the evidence).

Because the court finds no error in Commerce's selection of the Malaysian data to value bituminous coal, the court rejects Plaintiffs' argument that Commerce was obligated to rely on data from Thailand, which Commerce determined was not a significant producer of comparable merchandise. Third Remand Redetermination at 6–7, 20; *see also Dorbest Ltd. v. United States, 604 F.3d 1363, 1372* (Fed. Cir. 2010) ("The governing statute requires Commerce to use, to the ex-

tent possible, data from countries that are 'significant producers of comparable merchandise.'" (quoting 19 U.S.C. § 1677b(c)(4)(B)). Therefore, the court will sustain Commerce's selection of Malaysian data as the surrogate value for bituminous coal.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Third Remand Redetermination is remanded to further address or reconsider its selection of the surrogate value for carbonized material in accordance with this opinion; it is further

ORDERED that Commerce's Third Remand Redetermination is otherwise sustained; it is further

ORDERED that Commerce shall file its fourth remand results on or before March 16, 2020; it is further

ORDERED that the deadlines provided in USCIT Rule 56.2(h) shall govern thereafter; and it is further

ORDERED that any opposition or supportive comments must not exceed 4,000 words.

Dated: December 17, 2019
New York, New York

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

Slip Op. 19–161

TRIMIL S.A, Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 16–00025

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

Dated: December 17, 2019

Robert B. Silverman, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, argued for Plaintiff. With him on the brief were *Robert F. Seely* and *Alan R. Klestadt*.

Jamie L. Shookman, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General and *Amy M. Rubin*, Assistant Director. Of Counsel on the brief was *Chi S. Choy*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection.

OPINION

Eaton, Judge:

Plaintiff Trimil S.A. ("Plaintiff" or "Trimil"), an importer of Giorgio Armani S.p.A. ("Armani") apparel, appeals from U.S. Customs and Border Protection's ("Customs") denial of its protest regarding twelve entries of clothing[1] imported from Italy and Hong Kong.

By its motion for summary judgment, Trimil challenges Customs' calculation of the transaction value[2] of the clothing, pursuant to 19 U.S.C. § 1401a. *See* Pl.'s Mem. Supp. Mot. Summ. J., ECF No. 23, 1 ("Pl.'s Br."); Pl.'s Resp. Def.'s Cross-Mot. Summ. J., ECF No. 36 ("Pl.'s Resp."). Specifically, Trimil objects to Customs' inclusion, in transaction value, of the amounts of advertising fees and trademark royalty fees, that Trimil paid to third parties. *See* Compl., ECF No. 2, ¶¶ 19, 20, 22. The addition of these fees to the clothing's transaction value increased the amount of Trimil's duties.

Defendant the United States ("Defendant" or the "Government") cross-moves for summary judgment, contending that the advertising fees and trademark royalty fees paid by Trimil fall under transaction value either as part of "the price actually paid or payable" for the imported merchandise, or as a statutorily authorized addition that was paid as a condition of sale. *See* 19 U.S.C. § 1401a(b)(1), (D) (2012)[3]; Def.'s Mem. Opp'n Pl.'s Mot. Summ. J. & Supp. Def.'s Cross-Mot. Summ. J., ECF No. 28, 1 ("Def.'s Br."); Def.'s Reply, ECF No. 41.

The court has jurisdiction under 28 U.S.C. § 1581(a) (2012). *See* Compl. ¶ 13; Answer, ECF No. 5, ¶ 13. The court finds that (1) Plaintiff properly conceded the design fees as a dutiable assist added to price actually paid or payable; (2) the advertising fees are not dutiable because they are neither part of price actually paid or payable, nor do they fit within a statutory addition to price; and (3) the

[1] This action arose as a test case, under which thirty-one cases are suspended, pending decision. *See Trimil S.A. v. United States*, Ct. No. 10–00378, ECF No. 39. The twelve entries at issue here were severed from *Trimil S.A. v. United States*, Court No. 10–00378. *See* Ct. No. 10–00378, ECF No. 27.

[2] Defendant at no point asserts that transaction value is inappropriate in this case because of the relationships among the parties. To the contrary, the Government insists that transaction value is the appropriate way to value Plaintiff's entries. *See* Def.'s Br. 19 ("The parties agree that 'transaction value' is the appropriate method for valuing the goods at issue.").

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2012 edition. For ease of reference, citations to Customs' regulations are to the 2019 edition. The pertinent parts of both statutes and regulations are identical in substance to the versions in effect at the time of importation.

trademark royalty fees are not dutiable because they are neither part of price actually paid or payable, nor do they fit within a statutory addition to price.

BACKGROUND

I. Customs' Transaction Value Determination

Trimil is an importer of wearable apparel bearing the trademarks of Mani, Armani Collezioni, and Armani Jeans. *See* Pl.'s Br. Ex. 2, ECF No. 23–2, Ballestrazzi Aff. ¶ 5; Pl.'s Stmt. Material Facts, ECF No. 23, ¶¶ 1, 4, 5 ("Pl.'s SMF"). Confezioni di Matelica S.p.A. ("Vendor Matelica") and Deanna S.p.A. ("Vendor Deanna") (collectively, the "seller-manufacturers") manufactured Trimil's orders of Armani-trademarked merchandise.[4] Pl.'s SMF ¶¶ 6, 7.

Trimil imported twelve entries[5] of Armani-trademarked apparel between 2008 and 2009. *See* Pl.'s SMF ¶ 4. The company paid an amount based on its estimation of the duties it would owe Customs at the time of entry based on the invoice price of the clothing together with additional amounts for design fees,[6] advertising fees, and trademark royalty fees that it had paid to Armani and Armani's subsidiary, G.A. Modefine S.A. ("Modefine"). *See* Ballestrazzi Aff. ¶¶ 5, 10, 11, 15, 16; Pl.'s SMF ¶ 51.

Customs determined the dutiable transaction value of Trimil's imported merchandise based on Trimil's declarations as to value and payment of its estimated duties. *See* Pl.'s Br. Ex. 1, ECF No. 23–1, Bassani Aff. ¶¶ 29–33; Def.'s Br., ECF No. 28–3, Ex. 3.

Trimil later paid its duties in full through reconciliation entries.[7] Pl.'s SMF ¶¶ 8, 9, 53. Customs continued to include the advertising fees and trademark royalty fees in its final calculation of transaction value. Pl.'s SMF ¶¶ 47, 50.

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[4] Armani has an ownership interest in Trimil S.A., Vendor Matelica, and Vendor Deanna. Trimil S.A. is a joint venture between Armani and Ermengildo Zegna Corp., an unrelated entity. Pl.'s SMF ¶ 12. Armani wholly owns Vendor Deanna, and has an ownership interest in Vendor Matelica. Vendor Matelica is wholly owned by Trimil S.p.A., a sister company of Trimil S.A. *See* Pl.'s Br. Ex. 3, ECF No. 23–4, Ballestrazzi Dep. at 36:10-:25, 37:16–38:6.

[5] The total number of entries included merchandise purchased from an additional seller-manufacturer, Vendor Moda. No duties were paid on the advertising fees or trademark royalty fees for the Vendor Moda clothing at the time of entry. Therefore, the duties later paid at reconciliation for these entries are not before the court. *See* Pl.'s Resp. 1 n.2 ("[Trimil] acknowledges defendant's claim that the court has no jurisdiction over three of the twelve summonsed entries because the importer deposited no duties for the subject fees on those entries [*at the time of entry*].").

[6] Trimil does not contest the dutiability of the design fees in this action. *See* Pl.'s SMF ¶¶ 53, 54.

[7] Reconciliation refers to the importer-initiated process under which undetermined elements of an entry "are provided to the Customs Service at a later time. A reconciliation is treated as an entry for purposes of liquidation, reliquidation, recordkeeping, and protest." 19 U.S.C. § 1401(s).

On July 22, 2010, Trimil timely filed a protest covering the twelve entries. *See* Def.'s Br., ECF No. 28–3, Ex. 5. Customs denied the protest on September 24, 2010. *See* Def.'s Br. Ex. 5.

On May 12, 2016, Trimil commenced this litigation arguing that the total invoice price paid to the seller-manufacturers, less the advertising fees and trademark royalty fees, represents the total price of the imported merchandise, and therefore also represents the dutiable transaction value. *See* Compl.; Pl.'s SMF ¶ 19.

II. Agreements Governing the Disputed Advertising Fees and Trademark Royalty Fees

Trimil entered into two sets of agreements with Armani and Armani's subsidiary Modefine. Trimil entered into the first set of agreements, consisting of two design and advertising agreements, with Armani. *See* Pl.'s Br. Ex. 2 ("Design & Advertising Agreements"); *see also* Pl.'s SMF ¶ 39. At the same time, Trimil entered into the second set of agreements, consisting of two trademark licensing agreements, with Modefine.[8] *See* Pl.'s Br. Ex. 2 ("Trademark Agreements"); *see also* Pl.'s SMF ¶ 30. By the terms of the four agreements (collectively, the "Agreements"), Trimil was a design, advertising, and trademark licensee of Armani. *See* Pl.'s Br. Ex. 3, ECF No. 23–4, Ballestrazzi Dep. at 35:4–36:4. The Agreements were entered into prior to the manufacture of the imported merchandise. Pl.'s SMF ¶¶ 30, 39.

One of the two Design & Advertising Agreements provided stylistic and advertising assistance for the Mani- and Armani Collezioni-trademarked clothing, and the other provided assistance for the Armani Jeans-trademarked clothing. Pl.'s SMF ¶¶ 39, 40. The purpose of these contracts was to "enhance retail sales of the trademarked merchandise within the United States." Pl.'s SMF ¶ 41. Under each agreement, Trimil paid two separate fees to Armani—a design fee and an advertising fee. These fees were equal to a percentage of the net revenue of Trimil Corp. (Trimil S.A.'s U.S. subsidiary), or, in the alternative, a guaranteed minimum fee for both design and advertising. Pl.'s SMF ¶ 42. The calculation of these payments to Armani was based on Trimil Corp.'s future U.S. sales of the imported clothing. Pl.'s SMF ¶ 46.

As to the Trademark Agreements, one agreement covered the Mani and Armani Collezioni trademarks, and the other covered the Armani

[8] The relevant sections of the two Design & Advertising Agreements are substantially identical, and are treated as such by the parties. *See* Pl.'s SMF ¶¶ 39–46; Def.'s Resp. Pl.'s Stmt. Material Facts, ECF No. 28–1, ¶¶ 39–46 ("Def.'s Resp. Pl.'s SMF"). Likewise, the relevant sections of the two Trademark Agreements are substantially identical. *See* Pl.'s SMF ¶¶ 30–38; Def.'s Resp. Pl.'s SMF ¶¶ 30–38. For ease of reading, the identical sections are referenced collectively as sections of the "Design & Advertising Agreements" and the "Trademark Agreements," respectively.

Jeans trademarks. Pl.'s SMF ¶ 30. The purpose of these agreements was to "provide[] Trimil SA with a license to manufacture, purchase, and to sell the Armani-trademarked merchandise in the United States." Ballestrazzi Aff. ¶ 12. Under these two agreements, Trimil paid Modefine trademark royalty fees. Pl.'s SMF ¶ 31. As with the Design & Advertising Agreements, the calculation of these payments to Modefine was based on Trimil Corp.'s future U.S. sales. Pl.'s SMF ¶¶ 38, 46. The Trademark Agreements also provided "a guaranteed minimum trademark royalty amount." *See* Pl.'s SMF ¶ 31.

Trimil concedes that the design fees it paid pursuant to the Design & Advertising Agreements are properly part of the clothing's transaction value as a dutiable assist under 19 U.S.C. § 1401a(b)(1)(C). *See* Pl.'s SMF ¶¶ 53, 54; Bassani Aff. ¶ 35 (characterizing the design fees as "assists"). Accordingly, Trimil only contests the dutiability of advertising fees and trademark royalty fees.

Failure to comply with the terms of the Design & Advertising Agreements by Trimil would be grounds for Armani to terminate them. *See* Design & Advertising Agreements, § 12(3)(IV). Likewise, Trimil's failure to make royalty payments to Modefine would be grounds for Modefine to terminate the Trademark Agreements. *See* Trademark Agreements, § 16(3). Further, if Trimil failed to maintain its status as a trademark licensee under the Trademark Agreements, Armani could terminate the Design & Advertising Agreements. *See* Design & Advertising Agreements, § 12(3)(VII) ("Armani may also terminate this contract . . . if, for any reason, [Trimil] ceases to be a licensee of the 'Armani' Trademark.").

STANDARD OF REVIEW

Under Rule 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." U.S. CT. INT'L TR. R. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

The court reviews de novo Customs' denial of protests. *See, e.g., LDA Incorporado v. United States*, 39 CIT __, __, 79 F. Supp. 3d 1331, 1338 (2015) (citing 28 U.S.C. § 2640(a)(1)).

LEGAL FRAMEWORK

Whenever possible, Customs appraises imported merchandise on the basis of its "transaction value." *See* 19 U.S.C. § 1401a(a)(1)(A). Transaction value is "the price actually paid or payable for the merchandise when sold for exportation to the United States," plus a

limited number of fact-dependent additions. *Id.* § 1401a(b)(1)(A)-(E) (emphasis added) ("The price actually paid or payable for imported merchandise shall be increased by the amounts attributable to the items (*and no others*) described in subparagraphs (A) through (E) only to the extent that each such amount (i) is not otherwise included within the price actually paid or payable; and (ii) is based on sufficient information.").[9]

> The statute defines the term "price actually paid or payable" as
>
> > the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

Id. § 1401a(b)(4)(A).

One of the statutorily permitted increases to the price actually paid or payable under § 1401a(b) is the inclusion of "the value, apportioned as appropriate, of any assist." *Id.* § 1401a(b)(1)(C); *see also* 19 C.F.R. § 152.103(d) (2019) (regulating valuation of assists).[10] An "assist" may be a particular item or service "supplied directly or indirectly,

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[9] The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to—

> (A) the packing costs incurred by the buyer with respect to the imported merchandise;
> (B) any selling commission incurred by the buyer with respect to the imported merchandise;
> (C) the value, apportioned as appropriate, of any assist;
> (D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and
> (E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.
>
> The price actually paid or payable for imported merchandise shall be increased by the amounts attributable to the items (*and no others*) described in subparagraphs (A) through (E) only to the extent that each such amount (i) is not otherwise included within the price actually paid or payable; and (ii) is based on sufficient information. If sufficient information is not available, for any reason, with respect to any amount referred to in the preceding sentence, the transaction value of the imported merchandise concerned shall be treated, for purposes of this section, as one that cannot be determined.

19 U.S.C. § 1401a(b)(1) (emphasis added).

[10] Customs' regulation on assists provides that, where the assist is "produced by the buyer or a person related to the buyer," and "the assist consist[s] of materials, components, parts, or similar items incorporated in the imported merchandise, or items consumed in the production of the imported merchandise, . . . [or] of tools, dies, molds, or similar items used in the production of the imported merchandise," the value of the assist is "the cost of its production," plus transportation costs. 19 C.F.R. § 152.103(d)(1)-(2). Here, Customs accepted the amount Trimil paid in design fees to Armani as the value of the assists that Armani provided. *See* Pl.'s SMF ¶ 54; Def.'s Br. 17; *see, e.g.*, Customs Ruling Letter, HQ 544088 (Mar. 25, 1988) ("[C]ommissions which will be paid to the other Hong Kong corporation for design work and design consulting services are to be treated as assists and included in the calculation of transaction value.").

and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise." 19 U.S.C. § 1401a(h)(1)(A). The assist itself may take the form of items such as "[m]aterials, components, parts, and similar items" or planning aids such as "[e]ngineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise." *Id.* § 1401a(h)(1)(A)(i), (iv). Importantly, the value of any designs made in the United States is not dutiable. *See* 19 C.F.R. § 152.103(d) ("[D]esign work undertaken in the U.S. may not be added to the price actually paid or payable [as an assist].").

Transaction value may also include, as a statutory addition, "any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States." 19 U.S.C. § 1401a(b)(1)(D). In other words, not all royalties and license fees are dutiable—only those that are *conditions* of the sale for exportation. Under the accompanying regulation,

> [r]oyalties or license fees paid to third parties for use, in the United States, of copyrights and trademarks related to the imported merchandise generally will be considered selling expenses of the buyer and not dutiable. The dutiable status of royalties or license fees paid by the buyer will be determined in each case and will depend on (1) *whether the buyer was required to pay them as a condition of sale of the merchandise for exportation to the United States*, and (2) to whom and under what circumstances they were paid. Payments made by the buyer to a third party for the right to distribute or resell the imported merchandise will not be added to the price actually paid or payable for the imported merchandise *if the payments are not a condition of the sale of the merchandise for exportation to the United States*.

19 C.F.R. § 152.103(f) (emphasis added).

DISCUSSION

Each of the fees paid by Trimil to Armani or Modefine, to be dutiable, must fit within the statute. If a payment is not part of the price actually paid or payable, it will only be part of transaction value if it is one of the five additions in § 1401a(b)(1)(A)-(E), since "*no others*" may be included. *See* 19 U.S.C. § 1401a(b)(1). A clear example of a dutiable addition is an "assist," such as the design fees that Trimil paid to Armani. The dutiability of the design fees is undisputed.

Nonetheless, the court discusses assists as an example of a payment that meets the statute's narrow requirements.

I. Plaintiff Properly Conceded the Dutiability of the Design Fees, Which Are an Assist Added to Transaction Value

Trimil conceded, in its Complaint, that the design fees it paid to Armani under the Design & Advertising Agreements were part of the transaction value of the imported merchandise. *See* Compl. ¶ 15; Pl.'s SMF ¶¶ 53, 54.

As noted, an "assist," for the purposes of transaction value, can be "[m]aterials [or] design work . . . supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise." 19 U.S.C. § 1401a(h)(1)(A)(i), (iv). Trimil (the buyer) entered into agreements with (and paid fees to) Armani to obtain Armani's "stylistic assistance and consulting services." *See, e.g.*, Design & Advertising Agreements § 4(1). For its part, Armani facilitated the production of the clothing by "creating models; . . . seeking out and choosing fabrics and materials to be used in manufacturing the Products; . . . examining the first prototypes . . . and providing instructions for any corrections; . . . [and granting] final approval of the prototypes." Design & Advertising Agreements § 4(1)(a)-(d). Trimil then was able to provide, directly or indirectly, these assists to the seller-manufacturers, Vendor Matelica and Vendor Deanna, which manufactured the clothing to be imported. *See* Pl.'s SMF ¶¶ 6, 7, 40 ("These agreements required Armani SpA to . . . provide apparel designs for the seasonal 'collections' that Trimil SA would have produced for sale within the United States."). Trimil did not charge the seller-manufacturers for the designs it had paid for and obtained from Armani. *See* Pl.'s SMF ¶ 19; Def.'s Resp. Pl.'s SMF ¶ 19.

Thus, Trimil (the buyer) paid for models and design guidance from Armani, whose work was performed in Italy, and then supplied it to the seller-manufacturers at no additional cost beyond the invoice price of its orders. The models, fabric selections, and other design components were used in connection with the production of merchandise later exported to the United States. These activities constituted assists because they were undertaken outside the United States, and were provided by the buyer to the seller at no cost for use in manufacturing the clothing. Therefore, there can be little doubt that the design fees are appropriately included in transaction value as a statutory addition (an assist) under 19 U.S.C. § 1401a(b)(1)(C).

II. The Advertising Fees Paid to Armani Are Not Part of Transaction Value, and Are Therefore Not Dutiable

Pursuant to the same agreements under which it paid the design fees, Trimil paid advertising fees to Armani. Pl.'s SMF ¶ 39. Armani agreed that it would "adequately advertise, or cause to be adequately advertised [in the United States], the Products and/or the Trademark they display," as well as agreeing with Trimil on themes for the advertisements, designating media and places for the advertisements, and carrying out public relations activities. *See* Design & Advertising Agreements, §§ 2(15), 3, 5(1)-(3); *see also* Pl.'s Br. 7 ("The advertising fees related only to post-importation marketing of merchandise within the United States.").

Plaintiff contends that the advertising fees under the Design & Advertising Agreements fall squarely within the context of post-import transactions, and are thus not part of the dutiable transaction value. *See* Pl.'s Br. 12. For Trimil, two facts—that the advertising fees, paid to Armani, were based on the revenue from Trimil's post-importation sales in the United States, and that the advertising services were directed to the U.S. market—show that the advertising fees are not part of the price actually paid or payable for the imported merchandise. Pl.'s Br. 15 ("The advertising fees were paid to increase U.S. consumer recognition and appreciation of the Armani brand and were directly related to U.S. retail sales.").

In support of its argument, Trimil cites Customs' transaction value regulation, and several Customs rulings involving marketing or advertising fees that were found non-dutiable. *See* Pl.'s Br. 12–13 (citations omitted); *see, e.g.*, 19 C.F.R. § 152.103(a)(2) (emphasis added) ("Activities such as advertising, undertaken by the buyer on his own account . . . *will not be considered an indirect payment to the seller though they may benefit the seller*. The costs of those activities will not be added to the price actually paid or payable in determining the customs value of the imported merchandise.").

For Defendant, the advertising fees should be included in transaction value *either* as part of the price actually paid or payable for the imported merchandise, or as a statutory addition to price under one of the enumerated categories in 19 U.S.C. § 1401a(b). *See* Def.'s Br. 13–14. It makes this argument even though the fees were not paid to the seller-manufacturers. Rather, Defendant finds it significant that "Armani negotiated these services along with its design services—and calculated fees for both in an identical manner—as part of an 'overall strategy' to ensure 'brand integrity.'" Def.'s Br. 21; *see* Ballestrazzi Dep. at 75:4-:10 ("[W]e need to ensure that the brand is promoted and advertised in a way which is consistent with the overall

strategy, brand—integrity and strategy of the brand. So typically, the advertising and design are coordinated."). Defendant emphasizes the relationship between the payment of the advertising fees—and thus the continuation of the various agreements in full force and effect—and Trimil's ability to order and import Armani clothing. *See* Def.'s Br. 21 ("[B]y paying the advertising fees at issue, Trimil S.A. ensured that the Design and Advertising Assistance Agreements remained in effect, pursuant to which Trimil S.A. acquired rights to the designs used to produce the imported merchandise.").

Despite Defendant's arguments, the advertising fees are not dutiable because they fall outside the statute. The statutory language is clear. If a payment is neither part of the price actually paid or payable, nor one of the five, specified additions to price, that payment is not part of transaction value. *See* 19 U.S.C. § 1401a(b)(1) (emphasis added) ("The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus . . . the amounts attributable to the items (*and no others*) described in subparagraphs (A) through (E) . . . ").

The statute defines "price actually paid or payable" as "the total payment . . . made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." 19 U.S.C. § 1401a(b)(4)(A). The words "made . . . for imported merchandise by the buyer to, or for the benefit of, the seller," are important. The advertising fees are not part of the price actually paid or payable because they were not paid to, or for the benefit of the seller. *See id.*

The parties agree that the fees were not paid *to* the seller-manufacturers; they disagree as to whether the fees were paid *for the benefit of* the seller-manufacturers. *See* Pl.'s SMF ¶ 19; Def.'s Resp. Pl.'s SMF ¶ 19 ("[T]he price that Trimil S.A. paid the vendor was the only amount paid directly . . . to the vendors, but . . . the vendors also benefited from the . . . advertising fees that Trimil S.A. paid in relation to the subject merchandise."). Defendant contends that the benefit to the seller-manufacturers, Vendor Matelica and Vendor Deanna, occurred because Trimil's payment of the advertising fees to Armani enabled the seller-manufacturers to engage in the production of the goods for exportation. *See* Def.'s Br. 23–24 ("If [the Design & Advertising] agreements were terminated, the [seller-manufacturers] would be prohibited from manufacturing products based on the designs provided by Armani. . . . And, without the ability to manufacture Armani products, the [seller-manufacturers] could not make or sell the subject merchandise."). Put another way, for Defendant, had the

Design & Advertising Agreements not been in place, Trimil could not have placed its order with the seller-manufacturers.

This argument, however, seeks to cast the net of "benefit" too far. The Customs regulation interpreting price actually paid or payable makes clear that "benefit" has a narrow meaning, especially as to "indirect" payments. *See* 19 C.F.R. § 152.103(a)(2) (emphasis added) ("An indirect payment would include the settlement by the buyer, in whole or in part, of a debt owed by the seller, or where the buyer receives a price reduction *on a current importation* as a means of settling a debt owed him by the seller."). The same regulation also explicitly excludes advertising services from dutiable "indirect" payments:

> Activities such as advertising, undertaken by the buyer on his own account, other than those for which an adjustment is provided in § 152.103(b) [and 19 U.S.C. § 1401a(b)(1)(A)-(E)], *will not be considered an indirect payment to the seller though they may benefit the seller*. The costs of those activities will not be added to the price actually paid or payable in determining the customs value of the imported merchandise.

19 C.F.R. § 152.103(a)(2) (emphasis added).

Here, there is no real dispute as to the purpose of the Design & Advertising Agreements, or the entities that were bound to perform the obligations under those agreements. Armani wanted to control the manner in which its products were advertised in the United States, and Trimil wanted to bring Armani's clothing into the United States and sell it. Thus, the obligations and benefits under the Design & Advertising Agreements accrued to Armani (payment, uniform advertising) and Trimil (ability to purchase and resell the clothing). The advertising fees were paid as part of the larger enterprise, but were aimed at resale of the clothing in the U.S. market. Any benefit the seller-manufacturers received from the transaction—*i.e.*, Trimil's ability to place its order with them—is so tangential to the fees paid to Armani for advertising as to be unquantifiable (if it exists at all). Thus, the advertising fees paid by Trimil to third parties are not part of the price actually paid or payable by Trimil as buyer to the seller-manufacturers.

If the advertising payments are not part of the price actually paid or payable, they will only be dutiable if they fall within one of the five statutory additions defined by 19 U.S.C. § 1401a(b)(1)(A)-(E). None of the five statutory additions listed under § 1401a(b)(1)(A)-(E) describe advertising or advertising fees. To the extent that the parties refer to

the advertising fees as *license* fees, there is no reason to follow this characterization when the regulation has explicitly distinguished advertising fees from dutiable license fees associated with intellectual property rights. *See* 19 C.F.R. § 152.103(a)(2), (f). Moreover, the advertising and other promotional services occurred exclusively in the United States, after importation. *See, e.g.*, Pl.'s Br. Ex. 4, ECF No. 23–5 (showing invoices for advertising and other promotional services between Armani and various U.S. entities). The advertising services were associated with Trimil Corp.'s U.S. sales, not the transaction between Trimil and the seller-manufacturers. Thus, the advertising fees are not one of the statutorily permitted additions to transaction value. *See* 19 U.S.C. § 1401a(b)(1) (emphasis added) ("The price actually paid or payable for imported merchandise shall be increased by the amounts attributable to the items (*and no others*) described in subparagraphs (A) through (E) . . .").

Accordingly, because the advertising fees paid by Trimil to Armani are not part of the price actually paid or payable to the seller-manufacturers, and do not fall within one of the limited additions to price defined in the transaction value statute, Customs should have excluded them from its calculation of transaction value.

III. Because the Trademark Royalty Fees Were Not Paid as a Condition of Sale, They Are Not Part of Transaction Value, and Are Therefore Not Dutiable

Defendant next seeks to include in transaction value the trademark royalty fees, paid pursuant to the two Trademark Agreements.

First, Defendant argues that the trademark royalty fees are part of the price actually paid or payable because they were paid by the buyer (Trimil) for the benefit of the seller-manufacturers (Vendor Matelica and Vendor Deanna). Pointing to provisions in the Trademark Agreements similar to those it highlighted in the Design & Advertising Agreements, Defendant contends that, without Trimil's payment of the trademark royalty fees to Modefine, the seller-manufacturers would not have been able to produce the clothing at issue. *See* Def.'s Br. 28–29 (quoting Ballestrazzi Dep. at 77:14–78:2) (explaining that, since the Design & Advertising Agreements also required that Trimil be a trademark licensee of Armani's, both sets of agreements would be terminated if Trimil failed to pay the trademark royalty fees, and "if these agreements were terminated, 'Trimil S.A. would have an obligation to direct its manufacturers to terminate any ongoing production.'"). Defendant concludes that, "[b]ecause the right to make and sell the imported merchandise depended on these agree-

ments, the trademark royalties that Trimil S.A. paid to keep them in effect were made for the benefit of the [seller-manufacturers]." Def.'s Br. 29.

This argument fails, just as it did with respect to the advertising fees. "Benefit" has a narrow meaning within the transaction value statute and the regulation interpreting "price actually paid or payable," and merely because the fees are paid as part of a series of agreements that touch on all parts of the larger transaction resulting in eventual sale of the clothing in the United States does not somehow make the seller-manufacturers beneficiaries of Trimil's payment under the Agreements. As with the advertising fees, Trimil paid the fees to third party Armani, and all of the rights and obligations under the contracts accrued to or were performed by the actual parties to the contracts. Again, Trimil's right to affix Armani trademarks, and resell the clothing in the United States as Armani-trademarked products, provides no quantifiable benefit to the seller-manufacturers from the trademark royalty fees paid. The claimed benefit—placement of an order by Trimil with the seller-manufacturers—is too far removed from the payment of the trademark royalty fees to Modefine to make them part of the price actually paid or payable to the seller-manufacturers. *See* 19 C.F.R. § 152.103(a)(2) ("An indirect payment would include the settlement by the buyer, in whole or in part, of a debt owed by the seller, or where the buyer receives a price reduction on a current importation as a means of settling a debt owed him by the seller.").

Moreover, Defendant has not shown, from the text of the Trademark Agreements, that the fee payments were *for the current shipments of imported merchandise itself*. Rather, the Trademark Agreements provide a fee schedule covering the period of time between Spring/Summer 2007 and Autumn/Winter 2010–2011. *See* Trademark Agreements, § 16(1). This period of time would, presumably, include numerous instances of exportation to the United States, and, for this entire period, Trimil was permitted to use Armani's trademarks. *See* Trademark Agreements, §§ 3, 16(1).

"Price" here must be the "price actually paid or payable *for the merchandise* when sold for exportation to the United States." 19 U.S.C. § 1401a(b)(1) (emphasis added). In other words, the fees Defendant wishes to be added to the transaction value would apply equally to any similar entries, made while the Trademark Agreements were in effect, whose case is suspended under this test case. The "current importation" language leaves no room for fees covering trademark use in the production of merchandise to be exported in

multiple, discrete shipments. *See* 19 C.F.R. § 152.103(a)(2) ("An indirect payment would include . . . where the buyer receives a price reduction on a current importation as a means of settling a debt owed him by the seller.").

Alternatively, Defendant urges the court to find that the trademark royalty fees should be added to price as a statutory addition. Royalty fees such as those at issue here are explicitly listed as one of the possible statutory additions to price in the transaction value statute. *See* 19 U.S.C. § 1401a(b)(1)(D). Such additions may only be included in transaction value, however, if the "amount (i) is not otherwise included within the price actually paid or payable; and (ii) is based on sufficient information." *Id.* § 1401a(b)(1). In its brief, Defendant argues that, if the court finds that the contested fees are not part of the price actually paid or payable, the fees are nonetheless dutiable because they are royalty or license fees paid as a condition of sale of the imported merchandise.

Plaintiff, on the other hand, says that the trademark royalty fees are not dutiable because they were not paid as a condition of sale, but rather were a selling expense associated with the clothing's resale value after importation into the United States. For Plaintiff, "the trademark royalty is by its nature . . . a selling expense of the buyer that has not been made a condition of sale for exportation of the merchandise imported. Therefore, the royalties in question cannot form part of dutiable value." Pl.'s Br. 20 (emphasis omitted).

Under the statute, transaction value may include "any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, *as a condition of the sale of the imported merchandise for exportation to the United States*." 19 U.S.C. § 1401a(b)(1)(D) (emphasis added). The transaction value regulation, 19 C.F.R. § 152.103, states that

> [r]oyalties or license fees paid to third parties for use, in the United States, of copyrights and trademarks related to the imported merchandise generally will be considered selling expenses of the buyer and not dutiable. The dutiable status of royalties or license fees paid by the buyer will be determined in each case and will depend on (1) *whether the buyer was required to pay them as a condition of sale of the merchandise for exportation to the United States*, and (2) to whom and under what circumstances they were paid. Payments made by the buyer to a third party for the right to distribute or resell the imported merchandise will not be added to the price actually paid or

> payable for the imported merchandise if the payments are not a condition of the sale of the merchandise for exportation to the United States.

19 C.F.R. § 152.103(f) (emphasis added).

A central inquiry here, is whether the trademark royalty fees paid by Trimil were a condition of the sale for exportation of the entries at issue to the United States. Defendant points out that "Trimil S.A. provides no authority for its assertion that conditions of sale must be expressly contained in 'terms of the relevant sales contract and licensing agreement.'" Def.'s Br. 40. The transaction value regulation, however, indicates that the question is "whether the buyer was *required to pay* [the trademark royalty fees] *as a condition of sale of the merchandise for exportation to the United States*." 19 C.F.R. § 152.103(f) (emphasis added). Defendant itself provides no evidence of a clear *requirement* that the fees be paid *for* exportation, rather, it infers a condition from its own interpretation of the Trademark Agreements. The Trademark Agreements govern the payment of the trademark royalty fees.

The "Termination" section of these agreements states that Modefine "*may also terminate this Agreement at any time*. . . if [Trimil] violates any of the obligations provided for in any of the following Clauses," including payment of fees. *See* Trademark Agreements, § 16(3)(VIII). Modefine's ability to cancel the agreements and halt production if Trimil did not pay the fees does not make the provision a condition of sale for exportation to the United States. *See* 19 C.F.R. § 152.103(f). The "Subject-matter" section of the Trademark Agreements provides only that Modefine "grants to [Trimil] the license to use the Licensed Trade Mark." *See* Trademark Agreements, § 3. It does not incorporate, by its terms, any requirements for the sale of the clothing for exportation to the United States. Under the transaction value regulation, "[r]oyalties or license fees paid to third parties for use, *in the United States*, of copyrights and trademarks *related to the imported merchandise* generally will be considered selling expenses of the buyer and *not dutiable*." 19 C.F.R. § 152.103(f) (emphasis added). Defendant has pointed to no part of any of the Trademark Agreements indicating that the payment of the trademark royalty fees was a condition for exportation of the clothing to the United States. Nor has it pointed to any other convincing evidence. That production would be halted were the trademark royalty fees not paid does not transform them into conditions of sale for exportation.

Therefore, since the trademark royalty fees are neither part of the price actually paid or payable, nor do they fit within one of the

enumerated statutory additions in 19 U.S.C. § 1401a(b)(1)(A)-(E), Customs erred by including them in transaction value.

CONCLUSION

Based on the foregoing, Plaintiff's motion for summary judgment is granted, and Defendant's cross-motion for summary judgment is denied. Judgment shall be entered accordingly.

Dated: December 17, 2019
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE

Slip Op. 19–162

UNITED STATES, Plaintiff, v. AEGIS SECURITY INSURANCE COMPANY, Defendant, and TRICOTS LIESSE 1983, INC., Third-Party Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 11–00388

[Granting summary judgment for Plaintiff and denying summary judgment for Defendant and Third-Party Defendant.]

Dated: December 17, 2019

Stephen C. Tosini, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Plaintiff. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, of Washington, DC. Of counsel on the brief was *Matthew C. Landreth*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of Buffalo, NY.

T. Randolph Ferguson, Sandler, Travis & Rosenburg, PA, of San Francisco, CA, argued for Defendant.

John B. Brew, Crowell & Moring LLP, of Washington, DC, argued for Third-Party Defendant. With him on the brief was *Frances P. Hadfield*.

OPINION and ORDER

Eaton, Judge:

This matter is before the court on cross-motions for summary judgment filed by Plaintiff the United States ("Plaintiff" or the "Government"), and by Defendant Aegis Security Insurance Company ("Aegis"), a surety company, and Third-Party Defendant Tricots Liesse 1983, Inc. ("Tricots"), an importer of knitted fabric from Canada (collectively, "Defendants").

The Government contends that there is no genuine issue of material fact that would preclude judgment in its favor for unpaid duties

and fees, pursuant to 19 U.S.C. § 1592(d) (2012),[1] because Tricots, in violation of § 1592(a),[2] negligently misrepresented to U.S. Customs and Border Protection ("Customs") that 875 entries of knitted fabric from Canada qualified for the preferential tariff treatment afforded to "originating" goods under the North American Free Trade Agreement ("NAFTA") Rules of Origin.[3] *See* Pl.'s Mem. Supp. Cross-Mot. Partial Summ. J., ECF No. 89 ("Pl.'s Br."); Pl.'s Reply Supp. Mot. Partial Summ. J. & Opp'n Defs.' Mot. Summ. J., ECF No. 112; *see also* Pl.'s R. 56.3 Stmt. Undisputed Facts, ECF No. 89–1 ("Pl.'s R. 56.3 Stmt."); Pl.'s Resp. Defs.' R. 56.3 Stmt., ECF No. 112–1 ("Pl.'s Resp. Defs.' R. 56.3 Stmt."). As a result, no duties or administrative fees, known as "merchandise processing fees," were paid on the entries. That is, all 875 of the entries were finally liquidated free of duties and fees.

After liquidation of the subject entries became final, Tricots sought to make a "prior disclosure" under 19 U.S.C. § 1592(c),[4] to correct its claim that its goods were entitled to duty-free entry because they were NAFTA-originating, and to claim instead that they were entitled to duty-free entry under a quota program for textiles called the Tariff Preference Levels Program. Customs rejected the prior disclosure because Tricots failed to submit the Certificates of Eligibility,[5]

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[1] Unless otherwise noted, further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2012 edition. For ease of reference, citations to Customs' regulations are to the 2019 edition. The pertinent parts of both statutes and regulations are identical in substance to the editions in effect at the time of importation.

[2] Subsection 1592(a) prohibits any person from, among other things, entering merchandise into the United States by negligently providing materially false information to U.S. Customs and Border Protection ("Customs"). *See* 19 U.S.C. § 1592(a). If a person violates § 1592(a), and as a result the United States is deprived of duties, taxes, or fees, § 1592(d) requires Customs to "restore" them, even if the entries of merchandise have been finally liquidated. That is, the finality of liquidation, which attaches by operation of 19 U.S.C. § 1514, does not bar the Government's collection of duties, taxes, and fees according to § 1592(d), which provides that *"[n]otwithstanding section 1514. . .*, if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of [§ 1592(a)], [Customs] shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed." *Id.* § 1592(d) (emphasis added).

[3] NAFTA rules for determining when a good "originates in the territory of a NAFTA country" are codified as part of U.S. law at 19 U.S.C. § 3332(a)(1) and in Customs' regulations at 19 C.F.R. pt. 181 app., pt. II, § 4. Among the criteria for a good to be originating is that "the good is produced entirely in the territory of one or more of the NAFTA countries exclusively from originating materials," which is the rule cited by Tricots in its entry paperwork for the subject entries. *See* 19 U.S.C. § 3332(a)(1)(C); Defs.' Mot. Dismiss, ECF No. 76–1, Ex. A (Certificates of Origin).

[4] If a party discovers it has claimed incorrectly that its entries qualified for preferential tariff treatment as originating goods under the NAFTA Rules of Origin, the party shall not be liable for penalties if it makes a "prior disclosure" of the error, *i.e.*, if it self-reports the error in writing to Customs. 19 U.S.C. § 1592(c)(5); *see also* 19 C.F.R. § 181.82(a).

[5] Pursuant to Customs' regulations, "[i]n connection with a claim for NAFTA preferential tariff treatment involving non-originating textile or apparel products subject to the tariff preference level provisions of [the relevant NAFTA appendix], the importer must submit to [Customs] a Certificate of Eligibility . . . covering the products." 19 C.F.R. § 102.25.

required to establish eligibility under the quota program, before liquidation became final, and failed to tender the duties owed. Plaintiff now seeks to recover the unpaid duties and fees from Tricots, as importer of record, and from Aegis as surety.

By their cross-motion, Defendants argue that the Government's unpaid duties claims must be dismissed for the same reason the court dismissed its penalty claim in *United States v. Aegis Security Insurance Company*, 42 CIT __, 301 F. Supp. 3d 1359 (2018) ("*Aegis I*"). Specifically, Defendants contend that Customs must comply with pre-penalty procedures before it may bring a claim for unpaid duties. *See* Defs.' Cross-Mot. Summ. J. & Resp. Pl.'s Cross-Mot. Partial Summ. J., ECF No. 105 ("Defs.' Br."); Defs.' Reply Pl.'s Resp. Defs.' Cross-Mot. Summ. J., ECF No. 116; *see also* Defs.' R. 56.3 Stmt. Material Facts Supp. Mot. Summ. J., ECF No. 105; Defs.' Resp. Pl.'s R. 56.3 Stmt., ECF No. 105 ("Defs.' Resp. Pl.'s R. 56.3 Stmt.").

Additionally, Defendants argue that they do not owe duties on any of the entries in question because, notwithstanding the timing of its prior disclosure, the subject entries were eligible to enter duty-free under the Tariff Preference Levels Program. Defendants also argue that the Government is not entitled to summary judgment because genuine issues of fact exist as to whether Tricots acted with reasonable care when it made erroneous preference claims in its entry paperwork, and whether its statements were materially false with respect to a subset of unidentified entries. Finally, Defendants contend that they have a valid equitable recoupment counterclaim against the Government.

Jurisdiction is found under 28 U.S.C. § 1582 (2012). Because the dispositive issues in this case may be resolved as a matter of law, and there is no genuine issue of any material fact, the court grants summary judgment in favor of Plaintiff on its claims for unpaid duties and fees under 19 U.S.C. § 1592(d), plus interest, and denies Defendants' cross-motion for summary judgment.

BACKGROUND

I. Overview of Preferential Tariff Treatment Under NAFTA

NAFTA was implemented into U.S. law on December 8, 1993, for the purpose of promoting the free flow of goods among the United States, Canada, and Mexico. *See* North American Free Trade Implementation Act § 202, 19 U.S.C. § 3311 (1994); *Corrpro Companies, Inc. v. United States*, 433 F.3d 1360, 1362 (Fed. Cir. 2006). To accomplish this goal, the agreement provides for the elimination of most

Certificates of Eligibility are issued by authorized government officials—here, the Canadian Department of Foreign Affairs and International Trade.

tariffs collected on goods originating from the three countries. *Corr-pro*, 433 F.3d at 1362; *see also* 19 U.S.C. § 3332(a)(1) (setting out rules for determining when a good "originates in the territory of a NAFTA country"); NAFTA Rules of Origin Regulations, 19 C.F.R. pt. 181 app., pt. II, § 4; General Note 12(b), Harmonized Tariff Schedule of the United States.

A. Claiming Preferential Tariff Treatment Under NAFTA Rules of Origin

Preferential tariff treatment under NAFTA is not automatic—it must be claimed. For originating goods, preferential tariff treatment can mean the elimination of not only duties, but also merchandise processing fees.[6] *See* 19 U.S.C. § 58c(a)(10). Customs' regulations set out the procedure to make a claim that a good is originating:

> § 181.21 Filing of claim for preferential tariff treatment upon importation
>
> (a) *Declaration*. In connection with a claim for preferential tariff treatment, or for the exemption from the merchandise processing fee, for a good under the NAFTA, the U.S. importer must make a formal declaration that the good qualifies for such treatment. The declaration may be made by including on the entry summary, or equivalent documentation, including electronic submissions, the symbol "CA" for a good of Canada, or the symbol "MX" for a good of Mexico, as a prefix to the subheading of the HTSUS under which each qualifying good is classified. *Except . . . in the case of a good to which Appendix 6.B to Annex 300–B of the NAFTA applies*[7] *(see also 19 CFR 102.25), the declaration must be based on a complete and properly executed original Certificate of Origin*,[8] or copy thereof, which is in the possession of the importer and which covers the good being imported.

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[6] Merchandise processing fees are administrative fees owed on most imports into the United States. "[M]erchandise that is formally entered or released is subject to the payment to [Customs] of an ad valorem fee." 19 C.F.R. § 24.23(b)(1)(i)(A). The fee "is due and payable to [Customs] by the importer of record of the merchandise at the time of presentation of the entry summary and is based on the value of the merchandise as determined under 19 U.S.C. 1401a." *Id.* § 24.23(b)(1)(i)(A)-(B). It shall not exceed $485, and must not be less than $25. *Id.*

[7] NAFTA provides for annual quantitative limits, or quotas, on certain textile and apparel products that are made from "non-originating" materials, *i.e.*, from materials (such as yarn) that are produced by non-NAFTA suppliers. *See* NAFTA, Annex 300-B, app. 6.B.4(a). As discussed in Part I.B of this opinion, for such products, importers must submit to Customs a Certificate of Eligibility.

[8] "NAFTA Certificate of Origin" is defined by statute as "the certification, established under article 501 of [NAFTA], that a good qualifies as an originating good under such Agreement." 19 U.S.C. § 1508(b)(1)(B).

19 C.F.R. § 181.21(a) (emphasis added); *see also* 19 C.F.R. § 181.0 ("[Part 181] implements the duty preference and related Customs provisions applicable to imported goods under [NAFTA]," and sets out "procedures and other requirements . . . [that] are in addition to the Customs procedures and requirements of general application.").

Normally, a formal declaration is made "upon importation," as provided in 19 C.F.R. § 181.21(a). Customs' regulations provide, however, that "free entry" documentation may be filed after entry, so long as the filing is made before liquidation[9] becomes final:

> § 10.112 Filing free entry documents or reduced duty documents after entry
>
> Whenever a free entry or a reduced duty document, form, or statement required to be filed in connection with the entry is not filed at the time of the entry or within the period for which a bond was filed for its production, but failure to file it was not due to willful negligence or fraudulent intent, such document, form, or statement may be filed *at any time prior to liquidation of the entry or, if the entry was liquidated, before the liquidation becomes final.*

19 C.F.R. § 10.112 (emphasis added). In other words, once liquidation has become final, Customs' regulations provide that an importer may no longer seek to claim preferential tariff treatment of its entries.

In the event that an importer erroneously claims preferential tariff treatment under the NAFTA Rules of Origin, to avoid penalties, the importer may make a prior disclosure to self-report the error to Customs by filing a corrected declaration and paying any duties owing:

> (5) Prior disclosure regarding NAFTA claims
>
> An importer shall not be subject to penalties under [19 U.S.C. § 1592(a)] for making an incorrect claim for preferential tariff treatment under [19 U.S.C. § 3332 (Rules of Origin)] if the importer—
>
> (A) has reason to believe that the NAFTA Certificate of Origin . . . on which the claim was based contains incorrect information; and
>
> (B) in accordance with regulations issued by the Secretary, voluntarily and promptly makes a corrected declaration and pays any duties owing.

[9] Liquidation is the "final computation or ascertainment of duties on entries for consumption or drawback entries." 19 C.F.R. § 159.1.

19 U.S.C. § 1592(c)(5).[10] Customs' regulations set out procedures for making a "corrected declaration":

> (b) *Corrected declaration*. If, after making the declaration required under paragraph (a) of this section . . . , the U.S. importer has reason to believe that a Certificate of Origin on which a declaration was based contains information that is not correct, the importer shall within 30 calendar days after the date of discovery of the error make a corrected declaration and pay any duties that may be due. A corrected declaration shall be effected by submission of a letter or other written statement to the [Customs] office where the original declaration was filed.

19 C.F.R. § 181.21(b). Thus, perfecting a prior disclosure requires an importer both to inform Customs of the error and to pay any duties owing on its entries with respect to which the erroneous declaration was made.

B. Claiming Preferential Tariff Treatment Under the Tariff Preference Levels Program

NAFTA provides for annual quantitative limits, or quotas, on certain textile and apparel products that are made from "non-originating" materials, *i.e.*, from materials (such as yarn) that are produced by non-NAFTA suppliers. *See* NAFTA, Annex 300-B, app. 6.B.4(a). The Tariff Preference Levels Program is a quota program that applies to these products. *See* Johnson Decl. (Feb. 9, 2017), ECF No. 89–8, Ex. 14 (Customs Directive No. 3550–085) (the "Directive").[11]

"NAFTA [Tariff Preference Level] rules allow duty free treatment on knitted fabrics produced in Canada from non-NAFTA yarns that do not meet the NAFTA [Rules of Origin], up to a certain quantity per

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[10] "With [the NAFTA Implementation Act], Congress approved NAFTA, as well as a 'statement of administrative action' that was submitted with the legislation." *Bestfoods v. United States*, 165 F.3d 1371, 1374 (Fed. Cir. 1999) (citing 19 U.S.C. § 3311(a)). The NAFTA statement of administrative action provides, with respect to prior disclosures:

> Generally, importers who make false declarations of NAFTA origin to the Customs Service, and persons who make false statements in NAFTA certificates of origin, will be liable for penalties under [19 U.S.C. § 1592] for fraud, gross negligence or negligence, as appropriate. . . . [T]he bill amends [19 U.S.C. § 1592] to exempt from penalty U.S. exporters or producers who make false certifications if they voluntarily and promptly notify in writing all persons to whom the person provided the certificate of origin of its falsity.

THE NORTH AMERICAN FREE TRADE AGREEMENT ACT STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103–159, vol. 1, at 507 (1993).

[11] In addition to Customs' regulations, Customs Directive No. 3550–085 provides guidelines for filing and processing claims under the Tariff Preference Levels Program. Customs has also produced a series of informed compliance publications dealing with the trade of textiles under NAFTA. *See, e.g.*, Johnson Decl. (Feb. 9, 2017), ECF 89–8, Ex. 11.

year." *Aegis I*, 42 CIT at __, 301 F. Supp. 3d at 1362 n.6. Although goods entered under the Tariff Preference Levels Program are not subject to duties, "[a]ll [such] goods . . . are subject to merchandise processing fees." Directive ¶ 6.1; *see also Aegis I*, 42 CIT at __, 301 F. Supp. 3d at 1362 n.6 ("[Merchandise processing fees] are owed on NAFTA [Tariff Preference Level] imports . . . .").

The regulations set out the procedure to claim eligibility for Tariff Preference Levels treatment of non-originating textile and apparel products:

> § 102.25 Textile or apparel products under the North American Free Trade Agreement
>
> In connection with a claim for NAFTA preferential tariff treatment involving non-originating textile or apparel products subject to the tariff preference level provisions of appendix 6.B to Annex 300–B of the NAFTA and Additional U.S. Notes 3 through 6 to Section XI, Harmonized Tariff Schedule of the United States, the importer must submit to [Customs] a Certificate of Eligibility . . . covering the products. The Certificate of Eligibility . . . must be properly completed and signed by an authorized official of the Canadian or Mexican government and must be presented to [Customs] at the time the claim for preferential tariff treatment is filed under § 181.21 of this chapter. If the Center director is unable to determine the country of origin of the products, they will not be entitled to preferential tariff treatment or any other benefit under the NAFTA for which they would otherwise be eligible.

19 C.F.R. § 102.25. Thus, in the case of non-originating textiles from Canada, in order to establish eligibility under the Tariff Preference Levels Program, the importer must obtain a Certificate of Eligibility from the Canadian Department of Foreign Affairs and International Trade. *See* Directive ¶ 6.3.2.8 ("A [Certificate of Eligibility] application must be properly completed by an applicant and submitted to the Department of Foreign Affairs and International Trade (DFAIT). If approved, a DFAIT official's signature, on behalf of the Minister of Foreign Affairs, will be embedded onto the bottom left portion of the [Certificate of Eligibility].").

Generally, a Certificate of Eligibility is filed at the time a claim for preferential tariff treatment is made under 19 C.F.R. § 181.21, *i.e.*, "upon importation." *See* 19 C.F.R. § 181.21; *see also id.* § 102.25 ("[A] Certificate of Eligibility . . . must be presented to [Customs] at the time the claim for preferential tariff treatment is filed under § 181.21."). In accordance with § 10.112 of Customs' regulations, how-

ever, post-entry claims for preferential treatment are permitted, but they must be made prior to liquidation of the subject entries becoming final. *See id.* § 10.112 ("[Documentation for duty-free or reduced duty entry] may be filed at any time prior to liquidation of the entry or, if the entry was liquidated, before liquidation becomes final."). Moreover, to be a valid post-entry claim, the regulations require that the Certificates of Eligibility accompany the claim. *See id.* § 102.25 (emphasis added) ("[Certificates of Eligibility] must be presented to [Customs] *at the time the claim for preferential tariff treatment is filed* under [19 C.F.R. § 181.21].").

II. Facts Material to Plaintiff's Unpaid Duties Claims Under 19 U.S.C. § 1592(d)

A. Tricots' Declaration Upon Importation

Between November 17, 2005, and December 23, 2008, Tricots imported 875 entries of fabric into the United States from Canada, declaring to Customs that each entry was eligible for preferential tariff treatment under NAFTA Rules of Origin because the fabric originated in a NAFTA country. Pl.'s R. 56.3 Stmt. ¶ 1; Defs.' Resp. Pl.'s R. 56.3 Stmt ¶ 1. On 874 of its entries, Tricots made its claims by including on the entry summaries (1) the "CA" indicator, denoting that the goods qualified for duty-free treatment under NAFTA; (2) the "01" entry-type code, indicating that the goods were "free" or "dutiable" consumption entries; and (3) a calculation showing that no duties or merchandise processing fees were owed on the goods. For one entry—WFN-80098854, entered May 19, 2006—Tricots included on its entry summary (1) the "CA" indicator, denoting that the goods qualified for duty-free treatment under NAFTA; and (2) a calculation showing that no duties or merchandise processing fees were owed on the goods. *See* Pl.'s R. 56.3 Stmt. ¶ 1; Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 1.

In the Certificates of Origin filed with its entries, Tricots stated that "[t]he good [covered by the Certificate] is produced entirely in the territory of one or more of the NAFTA countries exclusively from originating materials." Defs.' Mot. Dismiss, ECF No. 76–1, Ex. A. In other words, Tricots claimed that all 875 entries were made in Canada exclusively from originating materials.

Six hundred four of the subject entries for which the Government is seeking lost revenue (duties and fees) were covered by a continuous bond, in the amount of $230,000, issued by Aegis. *See* Pl.'s R. 56.3 Stmt. ¶ 2; Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 2. The bond was effective as of November 17, 2002, and remained in force for each succeeding

annual period until it was terminated on November 29, 2007. *See* Johnson Decl. (Feb. 9, 2017), ECF No. 89–8, Ex. 1.

All of Tricots' entries liquidated, pursuant to 19 U.S.C. § 1514, before 2010. *See* Pl.'s R. 56.3 Stmt. ¶ 4; Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 4. Tricots did not file a protest with respect to any of the entries. *See* Pl.'s R. 56.3 Stmt. ¶ 5; Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 5. By May 5, 2010, liquidation of the entries had become final, free of duties and fees, under 19 U.S.C. § 1514. *See* Pl.'s R. 56.3 Stmt. ¶ 5; Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 5.

B. Tricots' Effort to Make a Prior Disclosure and Correct Its Declaration

After liquidation of the subject entries became final, by letter dated May 28, 2010, Tricots sought prior disclosure treatment, under 19 U.S.C. § 1592(c), and notified Customs that its "claim for preferential tariff treatment under [the] NAFTA [Rules of Origin] for some of the [entered] merchandise cannot be supported for exportations from 2005 to April 1, 2010," a period that encompassed the subject entries. *See* Defs.' Mot. Dismiss, ECF No. 76–1, Ex. B at 1. According to the letter, Tricots made this discovery pursuant to an internal review that it undertook "as a result of a number of Requests for Information . . . from the Port of Champlain, New York," where the subject fabric entered the United States. *See* Defs.' Mot. Dismiss, ECF No. 76–1, Ex. B at 1. By way of explanation of its error, Tricots stated:

> [T]here was not sufficient attention paid [by Tricots' former compliance specialist] to whether the goods were [Tariff Preference Level] or NAFTA [originating].

Defs.' Mot. Dismiss, ECF No. 76–1, Ex. B at 2; Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 9.

On December 1, 2010, for the purpose of "complet[ing] the prior disclosure" and "provid[ing] information concerning the amount of [m]erchandise [p]rocessing [f]ee[s] which would have been due had the entry been made correctly," Tricots supplemented its May 28, 2010 letter with a second letter that calculated the fees it claimed were owed on its imports under the Tariff Preference Levels Program. *See* Defs.' Mot. Dismiss, ECF No. 76–1, Ex. D at 2. Although the prior disclosure statute and Customs' regulations required that the disclosing party "pay any duties that may be due," Tricots did not do so, because, it maintained, no duties were owed. *See* 19 C.F.R. § 181.21(b). Rather, Tricots maintained that the entries were eligible for duty-free entry under the Tariff Preference Levels Program. In making this claim, however, Tricots did not submit a Certificate of Eligibility for any of the subject imports.

C. Customs' Rejection of Tricots' Prior Disclosure

Following Tricots' December 1, 2010 letter, Customs notified Tricots' counsel that it had reviewed the company's submission, and although Tricots had accounted for the merchandise processing fees that were due, the company had "not accounted for the [d]uty due," and, moreover, that "[Customs'] policy is *that if a company has failed to present Certificates of Eligibility by the time of final liquidation, this precludes that company from receiving the duty preference under [Tariff Preference Levels Program].*"[12] Defs.' Br., ECF No. 105–1, Ex. T at 2 (emphasis added).

Subsequently, by letter dated May 23, 2011, Customs notified Tricots of the amount of duties and fees owed. It stated that after carefully reviewing Tricots' correspondence, the information Tricots' office provided, and each of the entries at issue, Customs had concluded that Tricots owed $2,249,196.04 in lost revenue, representing $2,206,596.05 in unpaid duties and $42,599.99 in unpaid fees. The letter also notified Tricots that, following its deposit of the full amount owed, the company could seek review of Customs' calculations as provided in the regulations.[13] Tricots was given until June 24, 2011 to tender the amounts owed, which, for Customs, would perfect the prior disclosure. *See Aegis I*, 42 CIT at __, 301 F. Supp. 3d at 1363.

Rather than tender the amounts owed, on June 22, 2011, Tricots submitted an offer in compromise of $85,199.98, representing twice the amount of the unpaid merchandise processing fees it claimed were due on the entries. *See* Defs.' Br., ECF No. 105–1, Ex. T at 8. In response, on December 7, 2011, Customs sent Tricots a letter stating that its entries did not qualify for prior disclosure treatment under 19 U.S.C. § 1592(c) because the company "did not tender the total amount owed by [June 24, 2011]" and therefore did not "perfect its prior disclosure." Defs.' Br., ECF No. 105–1, Ex. F.

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[12] According to Customs Ruling HQ 229504, "an importer ha[s] until liquidation to supply the Certificates of Eligibility, and the opportunity to request delay of liquidation if necessary." Johnson Decl. (Feb. 9, 2017), Ex. 9 at 5. Here, Tricots did not supply Certificates of Eligibility for the subject entries until August 2012—more than two years after final liquidation.

[13] Under Customs' regulations, in order to perfect a prior disclosure, a disclosing party must "tender any actual loss of duties, taxes and fees or actual loss of revenue." 19 C.F.R. § 162.74(c) ("The disclosing party may choose to make the tender either at the time of the claimed prior disclosure, or within 30 days after [Customs] notifies the person in writing of [Customs'] calculation of the actual loss of duties, taxes and fees or actual loss of revenue."). The regulations provide that a disclosing party may ask Customs Headquarters to review the calculations. If, in its discretion, Headquarters grants the review, its decision is final. *Id.*

D. Customs' Demands for Unpaid Duties

On February 16, 2012, Customs demanded payment of unpaid duties from Tricots in the amount of $2,249,196.04. *See* Defs.' Br., ECF No. 105–1, Ex. G. Customs also demanded payment from Aegis of $500,113.32, the amount of duties owed on the 604 entries secured by its bond. *See* Johnson Decl. (Feb. 9, 2017), ECF No. 89–8, Ex. 19. Demands were sent to Aegis on May 18, 2011, May 31, 2011, and June 9, 2011. *See* Compl., ECF No. 2 ¶ 21; Answer, ECF No. 13 ¶ 21. Aegis did not respond to any of the demands. *See* Compl. ¶ 21; Answer ¶ 21. No duties or fees have been paid on any of the 875 entries.

III. CIT Litigation

On September 27, 2011, pursuant to 19 U.S.C. § 1592(d), the Government commenced an action against Aegis for unpaid duties and merchandise processing fees owed on the 604 entries covered by its bond. On January 19, 2012, Aegis filed its Answer and a Third-Party Complaint against Tricots, as Third-Party Defendant, for indemnification of any amount Aegis was ordered to pay on Plaintiff's claim. *See generally* Compl.; Answer; Third-Party Compl., ECF No. 37.

Separately, on April 25, 2016, the Government sued Tricots to recover (1) civil penalties, pursuant to 19 U.S.C. § 1592(b), and (2) unpaid duties and merchandise processing fees on all 875 of the entries, pursuant to 19 U.S.C. § 1592(d).[14] *See* Compl., *United States v. Tricots Liesse 1983, Inc.*, No. 16–00066 (CIT Apr. 24, 2016), ECF No. 2. Tricots filed an Answer in which it asserted a counterclaim for equitable recoupment against the Government. *See* Answer, *United States v. Tricots Liesse 1983, Inc.*, No. 16–00066 (CIT Sept. 2, 2016), ECF No. 14.

On August 4, 2016, the Government's lawsuit against Tricots was consolidated *sub nom United States v. Aegis Security Insurance Company*, Consol. Court No. 11–00388. *See* Order dated Aug. 4, 2016, ECF No. 68.

After consolidation, Defendants moved to dismiss the Government's civil penalty claim and its unpaid duties claims for lack of subject matter jurisdiction on the ground that the Government failed to exhaust its administrative remedies. Plaintiff opposed the motion and cross-moved for partial summary judgment solely as to its claims for unpaid duties and fees. The court stayed briefing on Plaintiff's

[14] Tricots executed a number of waivers that extended the statute of limitations through August 18, 2016. *See* Defs.' Br., ECF No. 105–1, Ex. C.

cross-motion pending its decision on the motion to dismiss. *See* Order dated May 5, 2017, ECF No. 86.

In *Aegis I*, the court converted Defendants' motion to dismiss into a motion for summary judgment. As to the penalty claim, the court agreed with Defendants that the Government had failed to exhaust its administrative remedies because "the facts demonstrate that, despite Tricots' efforts, Customs did not follow the statutory injunction to provide the company with a 'reasonable opportunity' to make oral representations 'seeking remission or mitigation of the monetary penalty' following issuance of the Notice of Penalty, and thus did not provide Tricots with the statutorily required opportunity to be heard" under 19 U.S.C. § 1592(b)(2). *Aegis I*, 42 CIT at __, 301 F. Supp. 3d at 1368. Accordingly, "[b]ecause Customs failed to exhaust its administrative remedies and thus failed to perfect its penalty claim, Tricots' motion for summary judgment [was] granted in part, and the court award[ed] summary judgment in favor of Tricots on [P]laintiff's penalty claim." *Id.*, 42 CIT at __, 301 F. Supp. 3d at 1361.

On May 23, 2018, the court lifted the stay of briefing on the Government's previously-filed cross-motion for summary judgment on its unpaid duties claim. *See* Order dated May 23, 2018, ECF No. 98. Defendants filed a cross-motion for summary judgment, asking the court to dismiss Plaintiff's claims for unpaid duties and fees. *See* Defs.' Br. 47. For its part, Plaintiff asks the court to enter judgment in its favor on its unpaid duties claims (1) against Tricots for $2,249,196.04, representing $2,206,596.05 in duties and $42,599.99 in merchandise processing fees, plus equitable prejudgment interest, and post-judgment interest, and (2) against Aegis for $500,113.32, plus mandatory interest under 19 U.S.C. § 580, equitable prejudgment interest, and post-judgment interest. *See* Pl.'s Br. 28, 32.

STANDARD OF REVIEW

Under Rule 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." U.S. CT. INT'L TR. R. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

LEGAL FRAMEWORK

Under 19 U.S.C. § 1592(a)(1), "no person, by fraud, gross negligence, or negligence . . . may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of" material and false documents, information, acts, or omis-

sions.[15] If a party violates 19 U.S.C. § 1592(a), "[t]he statutory scheme provides the United States with means both (1) to impose a penalty for the improper conduct *and* (2) to recover import duties lost as a result of the improper conduct." *United States v. Blum*, 858 F.2d 1566, 1569 (Fed. Cir. 1988); *see also* 19 U.S.C. § 1592(b) (penalty claims), (d) (unpaid duties claims).

I. Penalty Claims

The Government's penalty claim is no longer at issue because it was dismissed in *Aegis I*. To understand Defendants' argument for dismissal of the Government's unpaid duties claims, however, Customs' regulations on penalties procedures are discussed briefly below.

Subsection (b) of 19 U.S.C. § 1592 sets out the procedures that the United States must follow before it may perfect a penalty claim. *See United States v. Int'l Trading Servs.*, 40 CIT __, __, 190 F. Supp. 3d 1263, 1269 (2016) (citation omitted) ("Section 1592(b) states the procedures by which the United States must exhaust administrative remedies; to wit, 'Customs must perfect its penalty claim in the administrative process . . . by issuing a pre-penalty notice and a notice of penalty.'"). These procedures state that if Customs has reason to believe that a violation of § 1592(a) has occurred, "and determines that further proceedings are warranted," it must first issue a written pre-penalty notice to any person concerned, stating "its intention to issue a claim for a monetary penalty." 19 U.S.C. § 1592(b)(1)(A). The notice must contain several pieces of information provided for in § 1592(b), including "whether the alleged violation occurred as a result of fraud, gross negligence, or negligence," "the estimated loss of lawful duties, . . . the amount of the proposed monetary penalty," and must also "inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated." 19 U.S.C. § 1592(b)(1)(A)(v)-(vii).

The court held in *Aegis I* that "[b]ecause Customs failed to exhaust its administrative remedies and thus failed to perfect its penalty

[15] In full text, subsection 1592(a)(1) reads:

> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
>
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

19 U.S.C. § 1592(a)(1).

claim, Tricots' motion for summary judgment [was] granted in part, and the court award[ed] summary judgment in favor of Tricots on [P]laintiff's penalty claim." *Aegis I*, 42 CIT at __, 301 F. Supp. 3d at 1361. Thus, the sole remaining claims before the court are Plaintiff's claims for unpaid duties and fees, under 19 U.S.C. § 1592(d).

II. Unpaid Duties Claims

Subsection 1592(d) requires Customs to "restore" unpaid duties, taxes, and fees due on entries, even if the entries have been finally liquidated:

> *Notwithstanding [19 U.S.C. § 1514*[16]*]*, if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of [§ 1592(a)], the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed.

19 U.S.C. § 1592(d) (emphasis added). In other words, the finality of liquidation is not a bar to the Government's collection of unpaid duties, taxes, and fees.

Additionally, a claim for lost import duties is judicially enforceable, irrespective of whether the United States pursues a penalty claim, as the plain language of subsection (d) makes clear. *Id.* As the Federal Circuit held in *United States v. Blum*, 858 F.2d 1566 (Fed. Cir. 1988):

> The plain language of subsection (d) provides for recovery of lost import duties resulting from a violation of subsection (a). Under this provision, import duties lost as a result of a violation of subsection (a) are recoverable by the United States "whether or not a monetary penalty [. . .] is assessed." We hold that such a claim is judicially enforceable pursuant to subsection (d).

Blum, 858 F.2d at 1569. The *Blum* Court further stated:

> Subsection (d) is not a penalty provision; rather, subsection (d) allows the United States to recover lawful duties lost as a result of a violation of subsection (a). Lawful duties are those that would have been collected by the United States but for the violation of subsection (a).

Id.

Relying on *Blum*, this Court has ruled that "subsection [(d)] creates an independent cause of action," and the "government's right to recover unpaid duties under section 1592(d) does not depend on its right to obtain penalties . . . ." *United States v. Nitek Elecs., Inc.*, 36 CIT 546, 557, 844 F. Supp. 2d 1298, 1309 (2012), *aff'd on other grounds*,

[16] Section 1514 provides that Customs' decisions are "final and conclusive upon all persons" unless a protest is timely filed. 19 U.S.C. § 1514(a).

806 F.3d 1376 (Fed. Cir. 2015) (first citing *Blum,* 858 F.2d at 1568–69, then quoting *United States v. Jac Natori Co.*, 108 F.3d 295, 299 (Fed. Cir. 1997)); *see also United States v. Aegis Sec. Ins. Co.*, 29 CIT 1263, 1265, 398 F. Supp. 2d 1354, 1356 (2005) (citing *Blum*, 858 F.2d at 1569–70) ("[S]ection 1592(d) 'require[s]' restoration of duties, irrespective of penalty assessment.").

Moreover, unlike with penalty claims, "the government need not exhaust administrative remedies prior to seeking recovery of lost duties"—*i.e.*, "[s]ection 1592 does not provide any administrative process for imposing lost duty claims." *Nitek*, 36 CIT at 557, 844 F. Supp. 2d at 1309 (citing *Aegis*, 29 CIT at 1265, 398 F. Supp. 2d at 1355). This Court has rejected the argument that that "because the statutory provision enabling the United States to collect duties [*i.e.*, subsection (d)] is contained within the same section [*i.e.*, § 1592] that outlines the penalty assessment procedures [*i.e.*, subsection (b)] that those procedures are applicable to a duty claim brought by the United States." *United States v. Ross*, 6 CIT 270, 271, 574 F. Supp. 1067, 1068–69 (1983) (footnote omitted). Examining the relevant statutory language,[17] the *Ross* Court found:

> Section 1592(d), taken at face-value, demonstrates that the United States need not follow the elaborate penalty procedures when pursuing a duty claim. Subsections (b) and (c) of § 1592 are cast in such terms as "monetary penalty" or "penalty claim." Subsection (d) alone deals with "lawful duties" and makes no reference to the preceding matters.

Id., 6 CIT at 271, 574 F. Supp. at 1069.

Subsection (d) does not, by its terms, identify the parties against whom the United States may seek to "restore" unpaid duties. The *Blum* Court held that the United States may seek the unpaid duties not only from the party that violated § 1592(a), but also "from those parties traditionally liable for such duties, *e.g.*, the importer of record and its surety." *Blum*, 858 F.2d at 1570. A surety's liability flows solely from its contractual obligations under its bond. It pays, if the importer does not pay, upon a demand on the bond by the Government. A surety's liability is limited to the face amount of the bond, plus

[17] The *Ross* Court applied the 1982 version of 19 U.S.C. § 1592(d), which is substantially the same as the 2012 version of the law. The difference is that where the 1982 version speaks of the deprivation of solely "lawful duties," the 2012 version speaks of the deprivation of "lawful duties, taxes, and fees." *Compare* 19 U.S.C. § 1592(d) (1982) ("[I]f the United States has been deprived of lawful duties as a result of a violation of subsection (a) of this section, the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed.") *with* 19 U.S.C. § 1592(d) (2012) ("[I]f the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of [§ 1592(a)], the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed.").

statutory interest under 19 U.S.C. § 580. *See* 19 C.F.R. § 113.62(a) ("Agreement to Pay Duties, Taxes, and Charges").

Finally, subsection (e) of the statute provides that, in any proceeding based on negligence, such as the Government's claim here, "the United States shall have the burden of proof to establish the act or omission constituting the violation." 19 U.S.C. § 1592(e)(4). The Government's burden of proof is to establish by a preponderance of the evidence that Tricots committed an act or omission constituting a negligent violation of § 1592(a). *See United States v. Deladiep, Inc.*, 41 CIT __, __, 255 F. Supp. 3d 1326, 1337 (2017).

If the Government meets its burden, "the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence." 19 U.S.C. § 1592(e)(4). The alleged violator satisfies its burden of proof by "affirmatively demonstrat[ing] that it exercised reasonable care under the circumstances." *United States v. Ford Motor Co.*, 463 F.3d 1267, 1279 (Fed. Cir. 2006) ("Customs has the burden merely to show that a materially false statement or omission occurred; once it has done so, the defendant must affirmatively demonstrate that it exercised reasonable care under the circumstances."). Reasonable care may be demonstrated, if, for example, an importer can show that it had "an honest, good faith professional disagreement" with its counsel "as to correct classification of a technical matter." *United States v. Optrex Am., Inc.*, 32 CIT 620, 630–31, 560 F. Supp. 2d 1326, 1336 (2008) (quoting H.R. REP. NO. 103–361 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2670). On the other hand, "the failure to follow a binding [Customs] ruling is a lack of reasonable care." *Id.*, 32 CIT at 631, 560 F. Supp. 2d at 1335–36.

DISCUSSION

I. Plaintiff's Unpaid Duties Claims Are Not Barred

Defendants argue that Plaintiff's claim for unpaid duties and merchandise processing fees under § 1592(d) must be dismissed, as a matter of law, because Customs "failed to perfect a valid determination that Tricots violated [subsection] 1592(a)." Defs.' Br. 10. They argue that "to determine if a violation of [subsection] (a) [has] occurred, Customs must follow the subsection (b) procedures." Defs.' Br. 11. That is, in Defendants' view, Customs must follow the subsection (b) pre-*penalty* procedures not only to perfect a *penalty* claim, but also to perfect a claim for *unpaid duties* under subsection (d). For Defendants, because the court has ruled that Customs failed to follow the pre-penalty procedures set out in subsection (b), and therefore dismissed the Government's penalty claim, the court must also dismiss the subsection (d) claims. *See* Defs.' Br. 47.

Defendants' argument lacks merit. It is an incorrect statement of the law that "to determine if a violation of [subsection] (a) [has] occurred, Customs must follow the subsection (b) procedures" to establish a subsection (d) claim for unpaid duties. Whether Customs has complied with the procedures in subsection (b) bears on whether Customs may pursue a *penalty* claim for an alleged violation of subsection (a). By its terms, subsection (b) pertains to a "pre-*penalty* notice," which, among other things, must "inform [a defendant] that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim *for a monetary penalty* should not be issued in the amount stated." 19 U.S.C. § 1592(b)(1)(A)(vii) (emphasis added). Nowhere does the statute set out a procedure that the United States must follow before it seeks to recover unpaid duties under subsection (d). *See Nitek*, 36 CIT at 577, 844 F. Supp. 2d at 1309 (citation omitted) ("[T]he government need not exhaust administrative remedies prior to seeking recovery of lost duties.").

This Court has long held that "[subs]ection 1592(d), taken at face-value, demonstrates that the United States need not follow the elaborate penalty procedures when pursuing a duty claim." *Ross*, 6 CIT at 271, 574 F. Supp. at 1069. Indeed, the plain language of subsection (d) makes it clear that unpaid duty claims may proceed "whether or not a monetary penalty is assessed." 19 U.S.C. § 1592(d) (emphasis added) ("Customs . . . *shall require* that such lawful duties, taxes, and fees be restored, *whether or not a monetary penalty is assessed*."); *see also Aegis*, 29 CIT at 1265, 398 F. Supp. 2d at 1356 (citation omitted) ("[S]ection 1592(d) 'require[s]' restoration of duties, irrespective of penalty assessment."). Thus, the court holds that Plaintiff's unpaid duties claims are not barred.

II. Plaintiff's Unpaid Duties Claims Have Merit

A. Tricots' Violation of § 1592(a)

As has been discussed, no protest was filed with respect to the liquidation of any of Tricots' 875 entries. By May 5, 2010, liquidation of the subject entries had become final. *See Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995) ("Without a timely protest, liquidations become final and conclusive under 19 U.S.C. § 1514."). The finality of liquidation, however, does not bar the Government's collection of duties, taxes, and fees according § 1592(d), which provides that *"[n]otwithstanding [19 U.S.C. § 1514]*, if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of [§ 1592(a)], the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed." 19 U.S.C. § 1592(d) (emphasis added).

Subsection 1592(a) prohibits (1) negligently (2) entering merchandise into the commerce of the United States (3) by means of any statement, act, or omission (4) that is material (5) and false. *See* 19 U.S.C. § 1592(a)(1) ("[N]o person, by . . . negligence . . . may enter . . . any merchandise into the commerce of the United States by means of" material and false documents, information, acts or omissions). The Government has the burden of proof "to establish the act or omission constituting the violation" of subsection (a) by a preponderance of the evidence. *Id.* § 1592(e)(4); *see also Deladiep*, 41 CIT at __, 255 F. Supp. 3d at 1337. If the Government meets its burden, "the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence," *i.e.*, by "affirmatively demonstrat[ing] that it exercised reasonable care under the circumstances." *See* 19 U.S.C. § 1592(e)(4); *Ford Motor Co.*, 463 F.3d at 1279.

1. Tricots' Negligence

Customs' regulations set out rules for determining the level of an importer's culpability under § 1592:

> A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the recipient. As a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation.

19 C.F.R. pt. 171, app. B(C)(1); *see also* 19 U.S.C. § 1484(a)(1) (importer has a duty of "reasonable care" when preparing entry documentation); *Optrex*, 32 CIT at 631, 560 F. Supp. 2d at 1335–36 ("[T]he failure to follow a binding [Customs] ruling is a lack of reasonable care.").

Plaintiff insists that Tricots was negligent when it represented that its entries were originating goods and therefore qualified for entry free of duties and fees under the NAFTA Rules of Origin. In an attempt to defeat summary judgment, Defendants claim that there is a genuine issue of material fact, and further discovery is warranted, as to whether Tricots acted with reasonable care when it made erroneous preference claims in its entry paperwork:

> [Tricots] knew the fabric it produced in Canada qualified for duty free treatment under the NAFTA, but made incorrect preference claims. As soon as Tricots identified that it claimed one NAFTA provision over another in certain instances, it immediately corrected its claim with Customs. Its actions were not unreasonable and similarly situated companies in the same circumstances would have acted in the same fashion. The question of whether a party is negligent is fact specific and Tricots should be afforded the opportunity after complete discovery to show it was not negligent and acted as others would in the same circumstance.

Defs.' Br. 43. In other words, in Tricots' view, whether it exercised reasonable care to ensure its statements to Customs were complete and accurate is a question that cannot be answered based on the information before the court, but rather requires further discovery from other importers about what they would have done if they had made the subject entries.

The standard to determine whether a party has acted negligently is set out in the regulations. 19 C.F.R. pt. 171, app. B(C)(1). Based on Tricots' admissions, there can be little doubt that it failed to act with "reasonable care and competence" when declaring at the time of importation that each of its 875 entries qualified for preferential tariff treatment under the NAFTA Rules of Origin. In Tricots' words, "the imported fabric at bar was mistakenly entered and liquidated for duty-free entry as NAFTA-originating goods when in fact the fabric qualified for duty-free treatment under the NAFTA Preference Tariff Level . . . quota program for fabrics knitted or woven in a NAFTA country from non-originating materials." Tricots' Answer to Third-Party Compl. ¶ 8.

Tricots has admitted that its mistake was the result of inattention: "[B]ecause [Tricots] was a small manufacturer and importer . . . there was not sufficient attention paid by [its] former compliance specialist as to whether [its] products qualifie[d] for NAFTA [Tariff Preference Level] or NAFTA [Rules of Origin]." Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 9; *see also* Defs.' Mot. Dismiss, ECF No. 76–1, Ex. B at 2. Tricots, then, admits that it made a mistake, but insists that because it acted as other similarly situated importers would have acted, it was not negligent. Even if it could demonstrate that others would have been similarly inattentive, however, Tricots' argument would be no more compelling. The test here is whether the company exercised the degree of reasonable care and competence expected from an importer in the same circumstances. Tricots has admitted that it failed to pay adequate attention to the origin of the materials used to make its

products, which then resulted in the incorrect statement in the entry paperwork that its goods were NAFTA-originating. Tricots' behavior does not stem from, for example, "an honest, good faith professional disagreement as to correct classification of a technical matter"—but rather, from a lack of reasonable care. *See Optrex*, 32 CIT at 630–31, 560 F. Supp. 2d at 1336 (citation omitted).

Because the question of whether Tricots was negligent here requires the application of the reasonable care standard to the facts—*i.e.*, Tricots' conduct and statements to Customs, not what another company might have done—it is difficult to see any real purpose for more discovery. A finding that an act is reasonable or not does not rely on consensus in the community but on the application of reason. Here, the undisputed facts support the conclusion that Tricots—by its inattention—was negligent in its statements to Customs that all of its entries were made from exclusively originating materials.

2. Tricots Entered Merchandise into the United States

No party disputes that "Tricots imported 875 entries of fabric into the United States from Canada between November 17, 2005, and December 23, 2008, declaring to [Customs] that each entry was eligible for preferential tariff treatment under NAFTA because the fabric originated in a NAFTA country." Pl.'s R. 56.3 Stmt. ¶ 1; Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 1.

3. Tricots' Statements to Customs

It is also undisputed that Tricots stated in its entry paperwork that its merchandise was produced in Canada from NAFTA-originating materials:

> On 874 of its entries, Tricots made such claims [for preferential treatment] by including on its entry summaries (1) the "CA" indicator, indicating that the goods qualified for duty-free treatment under NAFTA; (2) the "01" entry-type code, indicating that the goods were "free" or "dutiable" consumption entries; and (3) a calculation indicating that no duties or [merchandise processing fees] were owed on the goods. . . . For one entry—WFN-80098854, entered May 19, 2006— Tricots included on its entry summary (1) the "CA" indicator, indicating that the goods qualified for duty-free treatment under NAFTA; and (2) a calculation indicating that no duties or [merchandise processing fees] were owed on the goods.

Pl.'s R. 56.3 Stmt. ¶ 1; Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 1. In the Certificates of Origin, Tricots stated that "[t]he good [covered by the Certificate] is produced entirely in the territory of one or more of the NAFTA countries exclusively from originating materials." Defs.' Mot. Dismiss, ECF No. 76–1, Ex. A.

4. Tricots' Statements Were Material

Moreover, Tricots' statements were material. Regarding "materiality," the regulations provide:

> A document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing agency action including, but not limited to a Customs action regarding: . . . determination of an importer's liability for duty . . . .

19 C.F.R. pt. 171, app. B(B). Tricots' entries received preferential tariff treatment based on its representations in its entry paperwork that its merchandise was NAFTA-originating. *See* Pl.'s R. 56.3 Stmt. ¶ 1; *see also* Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 1. As a result, Tricots paid neither duties nor merchandise processing fees at the time of entry. *See* Pl.'s R. 56.3 Stmt. ¶ 5; Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 5. Thus, Tricots' statements were "capable of influencing" and, in fact, did influence Customs' action regarding determination of Tricots' liability for duty.

5. Tricots' Statements Were False

Based on Tricots' statements in the entry paperwork, Customs concluded that neither duties nor merchandise processing fees were due on any of Tricots' 875 entries. After liquidation of the subject entries had become final, Tricots attempted to make a prior disclosure under 19 U.S.C. § 1592(c), to correct its claim that all of the entries were NAFTA-originating goods. *See* Defs.' Mot. Dismiss, ECF No. 76–1, Ex. B & D. It stated that its entries were not made from exclusively NAFTA-originating materials, but rather from "a combination of both [Tariff Preference Levels Program-eligible] and [NAFTA-originating]" materials. Defs.' Mot. Dismiss, ECF No. 76–1, Ex. D at 2. In other words, none of the 875 entries were made *exclusively* from NAFTA-originating material, contrary to what Tricots declared in its entry summaries and Certificates of Origin.

Defendants assert that there is a genuine issue of material fact as to whether "all 875 entries contained materially false statements." Defs.' Br. 41. Here, Defendants appear to argue that it is possible, subject to further factual discovery, that their statements were not materially false as to an unidentified subset of the entries. The evidence before the court shows that Tricots, in its attempt to correct its

original declaration, stated to Customs that each of the 875 entries, which were identified as made from exclusively NAFTA-originating materials, should have been identified as eligible for the Tariff Preference Levels Program, or as "a combination of both [Tariff Preference Levels Program-eligible] and [NAFTA-originating]." Defs.' Mot. Dismiss, ECF No. 76–1, Ex. D at 2. It is with respect to the subset that Tricots described as a "combination" of originating and non-originating materials that Defendants appear to argue a genuine issue of fact exists. Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 8 ("[Ninety-seven] entries have products within [them] that qualified for NAFTA [Tariff Preference Levels] and NAFTA [Rules of Origin].").

The argument that a genuine factual issue exists as to whether Tricots' representation that its entries were originating was "materially false" for the combination entries is difficult to credit. First, it ignores that, as the manufacturer and importer of record, Tricots must have in its possession the entry and production documentation that could conclusively resolve the issue. If this documentation established that any of Tricots' entries, or the materials therein, qualified as originating goods, Tricots would have brought it forward in its cross-motion for summary judgment. Rather than doing so, however, Tricots does not even identify the entry numbers of the entries with respect to which it claims a genuine issue of fact exists.

Second, in its dismissal motion, Tricots stated that it sought, and obtained, Certificates of Eligibility from the Canadian Department of Foreign Affairs and International Trade for all of the subject entries, not a subset:

> [I]n May 2012, Tricots requested that [the Canadian Department of Foreign Affairs and International Trade] issue [Tariff Preference Level] certificates for *the subject exports made between 2005 and 2008*. After confirming that *the subject fabrics* qualified for duty free treatment under the NAFTA [Tariff Preference Level] rules, [the Canadian Department of Foreign Affairs and International Trade] issued Tricots the [Tariff Preference Level] certificates in June and July 2012. On or about August 9, 2012, Tricots provided the [Tariff Preference Level] certificates to Customs (and [the U.S. Department of Justice]).

Tricots' Mem. Supp. Mot. Dismiss, ECF No. 76, 5 (emphasis added). In other words, Tricots' position before the Canadian authorities, and before the court in its motion to dismiss, was that the 875 subject entries were eligible for duty-free treatment under the Tariff Preference Levels Program, not as a combination of originating and non-originating goods.

Finally, there has already been discovery in this case. During discovery, Tricots represented to Customs that any amount of originating yarn included in the combination entries was so negligible that it disregarded it when calculating the total amount of revenue Customs lost as a result of Tricots' error. *See* Pl.'s Resp. Defs.' R. 56.3 Stmt. ¶ 7 (citing Letter from Tricots' Counsel to Government (May 23, 2014), ECF No. 80–17). Because Defendants have failed to show that there is a genuine issue of material fact with respect to the subset of entries it now claims were duty-free as a combination of originating materials and materials eligible for Tariff Preference Levels Program treatment, Plaintiff succeeds on summary judgment. In other words, Plaintiff wins because Tricots has not cited to, or even made reference to, any evidence that would support its assertion of a factual dispute, while the record has ample evidence that no genuine dispute exists.

Accordingly, the court finds that Plaintiff has met its burden to establish that Tricots violated 19 U.S.C. § 1592(a).

B. Plaintiff Is Entitled to Collect Unpaid Duties and Fees Under § 1592(d) from Tricots and Aegis

Where the United States has been deprived of lawful duties or fees as a result of a subsection (a) violation, § 1592(d) requires Customs to "restore" such "lawful duties . . . and fees." In full text, the statute provides:

> (d) Deprivation of lawful duties, taxes, or fees
>
> Notwithstanding [19 U.S.C. § 1514], if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of [§ 1592(a)], the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed.

19 U.S.C. § 1592(d). "Lawful duties are those that would have been collected by the United States but for the violation of subsection (a)." *Blum*, 858 F.2d at 1569.

Defendants argue that the United States has not been deprived of any duties it was owed because the subject entries were eligible for duty-free entry under the Tariff Preference Levels Program, as Tricots sought to establish by its prior disclosure. *See* Defs.' Br. 33 ("[B]ecause the correct NAFTA preference claim at the time of entry was duty free under the NAFTA [Tariff Preference Levels Program] rules, Customs was not 'deprived' of any duties and cannot 'recover' duties that would not have been owed.").

Defendants maintain that the law places no time limit on correcting declarations, or claiming eligibility for Tariff Preference Levels treatment. They point to the absence of a time limit in 19 U.S.C. § 1592(c)

(covering NAFTA prior disclosures) and 19 C.F.R. § 181.21(b) (covering corrected declarations). The prior disclosure statute provides that a disclosure must be "voluntarily and promptly" made, and must be accompanied by payment of "any duties owing." 19 U.S.C. § 1592(c)(5). Subsection 181.21(b) of the regulations sets out the correction procedure: "[T]he importer shall within 30 calendar days after the date of discovery of the error make a corrected declaration and pay any duties that may be due." 19 C.F.R. § 181.21(b). Defendants read the statute and the regulation as requiring that the calculation of "any duties owing" be based on the corrected declaration, no matter when it is made. Defendants contend that "to correct" means "to set or make right," and "[t]his definition requires a *nunc pro tunc* application of the law." Defs.' Br. 28 (citation omitted). That is, in Defendants' view, "[t]he plain language of the statute and regulations require[s] that duties owed as a result of any correction be determined according to what duties would have been owed if the 'correct' declaration was made at the time of entry." Defs.' Br. 28 (citations omitted). For Defendants, because Tricots' entries were beneficiaries of the Tariff Preference Levels Program, it only owes merchandise processing fees in the amount of $44,599.99.

For its part, the Government argues that Customs' regulations clearly establish the documentation necessary to claim eligibility under the Tariff Preference Levels Program, and the timing for making such a claim:

> In connection with a claim for duty-free treatment under the [Tariff Preference Levels] Quota Program, importers must (1) make "formal declaration[s]" that their goods qualify under the [Tariff Preference Levels] Quota Program, . . . *and* (2) submit Certificates of Eligibility to [Customs] covering the goods. . . . [Tariff Preference Levels] Certificates of Eligibility are expected to be presented at the time of entry, but [Customs] allows importers to submit them any time before liquidation or, if the entry has liquidated, before final liquidation.

Pl.'s Br. 23–24 (citing 19 C.F.R §§ 181.21(a), 102.25, 10.112); *see also* 19 C.F.R. 10.112 ("[Documentation for duty-free or reduced duty entry] may be filed at any time prior to liquidation of the entry or, if the entry was liquidated, before liquidation becomes final."). Plaintiff argues that, because Tricots failed to submit Certificates of Eligibility before the liquidation of the subject entries became final, it lost the opportunity to claim preferential tariff treatment under the Tariff Preference Levels Program:

> Tricots had numerous opportunities to submit Certificates of Eligibility before final liquidation of its entries. It could have submitted them when it entered the goods between 2005 and 2008 or before final liquidation as late as 2009, but it elected not to do so. Instead, Tricots submitted Certificates of Eligibility in August 2012—almost seven years after it first entered its goods, more than three years after all of its entries had finally liquidated, and more than two years after it admitted to its violations. So even assuming that Tricots has otherwise made a valid claim for duty-free treatment under the [Tariff Preference Levels] Quota Program, its right to duty-free treatment is foreclosed because it did not submit the required Certificates of Eligibility before its entries finally liquidated under 19 U.S.C. § 1514.

Pl.'s Br. 27–28 (citations omitted). Therefore, for Plaintiff, while it might have been possible for Tricots to qualify its merchandise for duty-free treatment under the Tariff Preference Levels Program prior to the date liquidation became final, its failure to do so leaves it liable for regular duties.

Accordingly, Plaintiff asks the court to grant its motion for summary judgment and award it lost duties and merchandise processing fees:

> [B]ecause Tricots'[] goods were ineligible for preferential NAFTA treatment either as originating goods or under the [Tariff Preference Levels] Quota Program, they were dutiable at the general duty rate. . . . Because the majority of Tricots'[] goods were dutiable at the general rate of 12.3 percent *ad valorem*, and the remaining goods were dutiable at the general rate of 10.0 percent *ad valorem*, Tricots'[] material false statements and/or omissions on its 875 subject entries total to be $2,249,196.04, representing $2,206,596.05 in duties and $42,599.99 in [merchandise processing fees], and the lost revenue on the Aegis bonded entries was $1,653,291.07, of which $500,113.32, was covered by Aegis'[] bond.

Pl.'s Br. 28 (citations omitted).

The court finds that the United States has been deprived of lawful duties and fees as a result of Tricots' violation of § 1592(a), and that the unpaid duties and merchandise processing fees are due and owing to the Government from Tricots and from Aegis, as surety.[18] Preferential tariff treatment under NAFTA—whether under the Rules of Origin or the Tariff Preference Levels Program—is not automatic; it

[18] As noted, Aegis' liability for duties is solely contractual and is limited by the face amount of the bond. *See* 19 C.F.R. § 113.62(a). As shall be seen, Aegis is also liable for statutory interest under 19 U.S.C. § 580.

must be claimed in compliance with Customs' regulations. *See* 19 C.F.R. §§ 181.21, 102.25, 10.112; *see also* General Note 12(b), Harmonized Tariff Schedule of the United States. Put another way, unless an importer files the required documentation with Customs *before the liquidation of its entries becomes final*, as provided in the statute and Customs' regulations, it has not established entitlement to duty-free treatment. *See* 19 U.S.C. § 1514; 19 C.F.R. § 10.112. Thus, the general rates of duty as set forth in the Harmonized Tariff Schedule of the United States apply to the subject entries.

Defendants seem to believe that merely by making a prior disclosure they can somehow turn back the clock, but that is not the case. It is undisputed that Tricots, through its negligent misrepresentations, entered the 875 subject entries as originating goods between 2005 and 2008. The entries liquidated free of duties and fees before 2010. No protests were filed, and liquidation of all the subject entries had become final by May 5, 2010. *See* 19 U.S.C. § 1514. Tricots' attempted prior disclosure on May 28, 2010, twenty-three days after the date liquidation became final, did not have the effect of undoing final liquidation and permitting Tricots to demonstrate entitlement to duty-free entry of its merchandise. To the extent that its prior disclosure talked about the Tariff Preference Levels Program, Tricots was mistaken because establishing that its goods were eligible under the program was impossible, as the time to submit any certificates demonstrating eligibility for duty-free treatment had passed. Therefore, the duties owing were the regular duties on its merchandise. That Tricots did not produce the required Certificates of Eligibility for another two years does not help its case. Accordingly, Tricots is liable for $2,249,196.04, representing $2,206,596.05 in duties and $42,599.99 in merchandise processing fees. *See* Johnson Decl. (Feb. 9, 2017), ECF No. 89–8, Ex. 3.

Aegis, as surety, is liable for lawful duties and fees owed on subject entries entered during the period covered by its bond. Six hundred four of the subject entries were covered by the continuous bond issued by Aegis. *See* Pl.'s R. 56.3 Stmt. ¶ 2; Defs.' Resp. Pl.'s R. 56.3 Stmt. ¶ 2. The 604 subject entries were imported during the following time periods, while the bond was in effect: from May 18, 2006, to November 16, 2006; from November 17, 2006, to November 16, 2007; and from November 17, 2007 to November 27, 2007. The face amount of the bond was $230,000 per annual period. Aegis' liability under the bond amounts to $500,113.32, representing $230,000 for duties owed on the entries entered between May 18, 2006 and November 16, 2006; $230,000 for duties owed on entries entered between November 17,

2006 and November 16, 2007; and $40,113.32 for duties owed on entries entered between November 17, 2007 and November 27, 2007. *See* Johnson Decl. (Feb. 9, 2017), ECF No. 89–8, Ex. 20–22.

Finally, Defendants' argument that they have a valid equitable recoupment counterclaim against the Government lacks merit. For Defendants, it is "patently inequitable" that they should be made to pay duties on the subject entries because, ultimately, they obtained Certificates of Eligibility from the Canadian authorities, which showed the goods were eligible for duty-free treatment under the Tariff Preference Levels Program. *See* Def.'s Br. 40. It is settled law, however, that equitable recoupment is unavailable in the case of the recovery of customs duties. *See United States v. Fed. Ins. Co.*, 805 F.2d 1012, 1013, 1014 n.2 (Fed. Cir. 1986). In *Federal Insurance*, the Federal Circuit reversed this Court's holding that the government was equitably estopped from collecting duties owed by an importer and its surety because "no equitable estoppel can arise against the government in connection with an obligation to pay taxes." *Id.* at 1013 & 1014 n.2 (noting that the equitable recoupment counterclaim "fails . . . for the same reason as the defense of estoppel"). Thus, Defendants' equitable recoupment counterclaim presents no hurdle to the Government's collection of the duties owed.

III. Plaintiff Is Entitled to Collect Interest from Aegis and Tricots

A. Aegis' Liability for Statutory Prejudgment Interest Pursuant to 19 U.S.C. § 580

In this collection action, the Government seeks an award of statutory prejudgment interest under 19 U.S.C. § 580, which provides that, "[u]pon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due." 19 U.S.C. § 580; Pl.'s Br. 29. As the Federal Circuit has explained:

> [S]ection 580 expressly requires that, when unpaid import duties upon a bond are awarded, interest be attached at the statutory rate "from the time when said bonds became due." As a matter of law, whenever a court awards unpaid import duties in a suit upon a bond, interest must be attached pursuant to section 580.

United States v. Fed. Ins. Co., 857 F.2d 1457, 1459 (Fed. Cir. 1988). Here, the Government is seeking unpaid import duties from Aegis under a surety bond. Defendants do not dispute the award of § 580 interest, except to point out that Aegis "only owes interest on the 604

entries covered under its bond." Defs.' Br. 47. Accordingly, the Government is entitled to collect interest from Aegis at the rate of six percent per year from May 18, 2011, the date on which Customs demanded payment from Aegis on the 604 entries.

B. Aegis' and Tricots' Liability for Mandatory Post-Judgment Interest Pursuant to 28 U.S.C. § 1961

Next, Plaintiff seeks mandatory post-judgment interest from both Tricots and Aegis, pursuant to 28 U.S.C. § 1961, which provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a); Pl.'s Br. 31. Although § 1961 does not apply directly to the Court of International Trade, the Federal Circuit has confirmed this Court's authority to award post-judgment interest at the rate provided in §1961. *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1325–26 (Fed. Cir. 2013). Specifically, 28 U.S.C. § 1585 provides that the Court of International Trade "posses[es] all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585.

Defendants do not object to Plaintiff's claim that it is entitled to post-judgment interest, nor could they. "Post-judgment interest is not discretionary, but rather is available as a matter of right to prevailing parties." *United States v. Am. Home Assurance Co.*, 39 CIT __, __, 100 F. Supp. 3d 1364, 1374 (2015), *aff'd*, 857 F.3d 1329 (Fed. Cir. 2017) (citation omitted). Therefore, because Plaintiff has prevailed in this matter by means of an award of a money judgment against Defendants, it is entitled to post-judgment interest from Tricots and Aegis at the rate set forth in § 1961, calculated from the date of entry of the judgment. *See* 28 U.S.C. § 1961; *Am. Home Assurance Co.*, 39 CIT at __, 100 F. Supp. 3d at 1374.

C. Plaintiff Is Not Entitled to Equitable Prejudgment Interest

Plaintiff also seeks equitable prejudgment interest, arguing that "Tricots and Aegis should pay equitable pre-judgment interest as compensation for the lost use of funds over time." Pl.'s Br. 29. In determining whether to grant an award of equitable prejudgment interest, full compensation, including the time value of money, should be a court's primary concern. *See United States v. Am. Home Assurance Co.*, 789 F.3d 1313, 1329 (Fed. Cir. 2015); *see also West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987) ("Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby

achieving full compensation for the injury those damages are intended to redress."). "In other words, if the United States has been compensated for the time value of its money by another provision, it is difficult to see why equity should direct that it may collect an amount for this purpose again." *United States v. Am. Home Assurance Co.*, 39 CIT __, __, 113 F. Supp. 3d 1297, 1315 (2015), *aff'd*, 776 F. App'x 712 (Fed. Cir. 2019).

In awarding the United States prejudgment statutory interest under the previously discussed provision, the Federal Circuit, in *United States v. American Home Assurance Co.*, reaffirmed the longstanding principle that "[i]n the absence of a statute governing the award of prejudgment interest, 'the question [of prejudgment interest] is governed by traditional judge-made principles.'" *Am. Home Assurance Co.*, 789 F.3d at 1328 (alterations in original) (quoting *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1367 (Fed. Cir. 2005)). Here, there is a statute, 19 U.S.C. § 580, that has been found to provide prejudgment interest to the United States for interest on bonds securing antidumping duties. Where a statute governs the award of prejudgment interest (*i.e.*, § 580), the Federal Circuit has explained that "the award of prejudgment interest [is] an equitable determination to be exercised at the discretion of the trial judge." *Id.* (citing *United States v. Reul*, 959 F.2d 1572, 1577 (Fed. Cir. 1992); *United States v. Imperial Food Imps.*, 834 F.2d 1013, 1016 (Fed. Cir. 1987)).

The court holds that Plaintiff is not entitled to an award of equitable prejudgment interest. The reasoning in *American Home Assurance Co.* applies equally here:

> [T]he purpose of equitable interest is to ensure that the party be fully compensated for the time during which it was deprived of the use of the funds. Because [the Government] will be fully compensated by the statutory prejudgment interest it will receive by means of 19 U.S.C. § 580, here, the balance of equities tips in favor of [Defendants] and against an award of equitable prejudgment interest. In other words, it would be inequitable to award the United States *both* statutory prejudgment interest under § 580 *and* equitable prejudgment interest under the principles of equity.

Am. Home Assurance Co., 39 CIT at __, 113 F. Supp. 3d at 1315. Accordingly, in view of the court's holding that Plaintiff is entitled to statutory prejudgment interest under 19 U.S.C. § 580, Plaintiff may not also recover equitable prejudgment interest in this case.

CONCLUSION and ORDER

Based on the foregoing, Plaintiff's motion for summary judgment is granted, and Defendants' cross-motion for summary judgment is denied. It is hereby

ORDERED that the parties shall confer and jointly submit a proposed Judgment that sets out the amounts of duties, fees, and interest that Tricots and Aegis owe to Plaintiff, in accordance with this opinion. The proposed Judgment shall be submitted to the court on or before December 31, 2019.

Dated: December 17, 2019
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON, JUDGE

Slip Op. 19–163

UNICATCH INDUSTRIAL CO., LTD. and TC INTERNATIONAL, INC., Plaintiffs, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Court No. 19–00052

[Denying Plaintiffs' Motion for Judgment on the Agency Record.]

Dated: December 17, 2019

Ned H. Marshak, Max F. Schutzman, and *Dharmendra N. Choudhary*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestdadt LLP, of New York, NY, for Plaintiffs.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Adam H. Gordon and *Ping Gong*, The Bristol Group PLLC, of Washington, DC, for Defendant-Intervenor.

OPINION

Barnett, Judge:

Plaintiffs, Unicatch Industrial Co., Ltd. and TC International, Inc. (together, "Unicatch"), challenge the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the second administrative review of the antidumping duty order on certain steel nails from Taiwan. *See* Compl., ECF No. 6; *Certain Steel Nails From Taiwan*, 84 Fed. Reg. 11,506 (Dep't Commerce Mar. 27, 2019) (final results of antidumping duty admin. review and partial rescission of admin.

review; 2016–2017) ("*Final Results*"), ECF No. 22–4, and accompanying Issues and Decision Mem., A-583–854 (Mar. 15, 2019), ECF No. 22–5.[1]

Unicatch challenges Commerce's purported failure to adjust Unicatch's constructed value ("CV") profit ratio, derived in part using the "Net Profit Before Tax" line item in a Taiwanese surrogate company's financial statement, by a separate line item amount reflecting profits earned by the surrogate company's subsidiaries. Pls.' Mot. for J. on the Agency R., ECF No. 25, and Mem. of Law in Supp. of Pls.' Mot. for J. on the Agency R. ("Pls.' Mem."), ECF No. 25; Pls.' Reply Br. ("Pls.' Reply"), ECF No. 28. Defendant United States ("the Government") and Defendant-Intervenor Mid Continent Steel & Wire, Inc. ("Mid Continent") defend the *Final Results* on the basis that Unicatch failed to exhaust its administrative remedies by not arguing for this adjustment before Commerce. Def.'s Resp. to Pls.' Mot. for J. on the Agency R. ("Def.'s Resp."), ECF No. 26; Def.-Int.'s Resp. Br., ECF No. 27.[2]

For the following reasons, the court finds that Unicatch failed to exhaust its administrative remedies with respect to the single argument before the court and no exception applies to excuse this failure. Accordingly, the court denies Unicatch's motion.

BACKGROUND

On September 13, 2017, Commerce initiated the second administrative review of the antidumping duty order on certain steel nails from Taiwan. *Initiation of Antidumping Duty and Countervailing Duty Reviews*, 82 Fed. Reg. 42,974, 42,980 (Dep't Commerce Sept. 13, 2017), PR 6, CJA Tab 4. Unicatch was among the companies Commerce selected for individual examination. Selection of Respondents for the 2016–2017 Admin. Review of the Antidumping Duty Order on Certain Steel Nails from Taiwan (Dec. 6, 2017), PR 24, CJA Tab 5.

Commerce issued its preliminary findings on August 10, 2018. *Certain Steel Nails From Taiwan*, 83 Fed. Reg. 39,675 (Dep't Commerce Aug. 10, 2018) (prelim. results of antidumping duty admin. review and partial rescission of admin. review; 2016–2017) ("*Prelim. Results*"), PR 144, CJA Tab 9; *see also* Decision Mem. for Prelim. Results of Antidumping Duty Admin. Review (Aug. 3, 2018) ("Prelim. Mem."), PR 135, CJA Tab 8. Because Unicatch lacked a viable home market or

[1] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 22–2, and a Confidential Administrative Record ("CR"), ECF No. 22–3. Parties submitted joint appendices containing record documents cited in their briefs. *See* Public J.A. ("PJA"), ECF No. 30; Confidential J.A. ("CJA"), ECF No. 29. The court references the confidential version of the relevant record documents, unless otherwise specified.

[2] Mid Continent adopted and incorporated by reference the Government's arguments and did not present additional arguments. Def.-Int.'s Resp. Br. at 1–2.

third country market to use as the basis for normal value, Commerce calculated normal value based on constructed value. Prelim. Mem. at 12.[3]

In the absence of actual profit information, Commerce may use "any other reasonable method" to calculate CV profit.[4] In this case, Commerce used the simple average of the net profits reflected in surrogate financial statements placed on the administrative record by interested parties. I&D Mem. at 12.

In the underlying proceeding, interested parties submitted financial statements from four Taiwanese producers for Commerce to use to calculate CV profit: Chun Yu Work and Co., Ltd. ("Chun Yu"), OFCO Industrial Corp., Sheh Fung Screws Co. Ltd., and Sumeeko Industries Co. Ltd. Prelim. Mem. at 16; *see also* Unicatch's Letter Pertaining to Factual Information for CV Profit and ISE - part 3 (June 15, 2018) ("Unicatch's 6/15/18 Ltr."), Ex. 11A, PR 98, CJA Tab 6 (Chun Yu's 2016 financial statements). Commerce selected the first three but disregarded the fourth due to the agency's practice of excluding financial statements from companies with sales "predominantly or exclusively to the U.S. market." Prelim. Mem. at 16.[5] Commerce preliminarily calculated a zero percent dumping margin for Unicatch. *Prelim. Results*, 83 Fed. Reg. at 39,676.

On December 3, 2018, Unicatch submitted its administrative case brief, in which it argued that Commerce should incorporate in the final determination certain minor corrections identified in Commerce's verification report. Admin. Case Br. of Unicatch (Dec. 3, 2018) at 2, PR 153, CJA Tab 10. Mid Continent, the petitioner in the underlying proceeding, argued that Commerce should not use Chun Yu's financial statements, Case Br. (Dec. 3, 2018) at 5–7, CR 231, PR

[3] Commerce calculates normal value using sales in the home market or a third country market that are at or above the cost of production. 19 U.S.C. § 1677b(b)(1). When there are no such sales, Commerce calculates normal value "based on the constructed value of the merchandise." *Id.* The cost of production includes "the cost of materials and of fabrication or other processing" used in manufacturing; "selling, general, and administrative expenses"; and the cost of packaging. *Id.* § 1677b(b)(3). Constructed value includes similar expenses and an amount for profit. *Id.* § 1677b(e).

[4] The statute directs Commerce first to use the respondent's actual profit information, 19 U.S.C. § 1677b(e)(2)(B)(i), but when that information is unavailable, Commerce may use the weighted average of the profits realized by other exporters or producers subject to the review, *id.* § 1677b(e)(2)(B)(ii). When neither of those options are available, Commerce may derive the CV profit amount "based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise." *Id.* § 1677b(e)(2)(B)(iii).

[5] Commerce also declined to use financial statements from companies in other countries in light of the availability of suitable financial information from the subject country. Prelim. Mem. at 16.

154, CJA Tab 11, but that, if it did, Commerce should begin the profit calculations for Chun Yu's data with line item 7900, "net profit before tax," and not line item 8200, "[t]otal consolidated profit/loss of the current period," as advocated by Unicatch, *id*. at 7. According to Mid Continent, "[t]he difference between the two lines are various so-called 'comprehensive income items' that do not represent actual reportable costs and expenses under the [agency's] practice." *Id*. Because the amount in line item 8200 is much smaller than the amount in line item 7900 (63,737 as compared to 286,917), Mid Continent argued, beginning with line item 8200 would distort the calculations and greatly understate the CV profit ratio. *Id.* at 8.

In its December 10, 2018 rebuttal brief, Unicatch argued that the agency's "practice of elevating substance over form" requires that certain items listed *after* "net profit before tax" should nevertheless be considered "actual reportable costs and expenses." Admin. Rebuttal Br. of Unicatch and PT (Dec. 10, 2018) ("Unicatch's Rebuttal Br.") at 8–9, CR 234, PR 159, CJA Tab 13. Thus, Unicatch argued, Commerce

> is required to make necessary adjustments in order to include in its ratio calculations all of the income / expense line items that affect the cost of goods sold, even though they were not factored by Chun Yu Group into the computation of its reported "net profit before tax". Not including such line items would result in a distorted ratio.

Id. at 10. To that end, and relevant here, Unicatch urged Commerce to deduct from "net profit before tax" the following two line items representing losses incurred by its subsidiaries: (1) line item 8330: "Consolidated profit/loss amount of the subsidiaries, the related parties and the joint ventures using equity method – items that will not be reclassified to profit/loss," in the amount of -10,643; and (2) line item 8380: "Consolidated profit/loss amount of the subsidiaries, the related parties and the joint ventures using equity method – items that will not be reclassified to profit/loss," in the amount of -2,752. *Id.*

Commerce issued its *Final Results* on March 27, 2019. Commerce calculated a 6.16 percent weighted average dumping margin for Unicatch, *Final Results*, 84 Fed. Reg. at 11,507, based, in part, on its consideration of the interested parties' comments on the proper method of calculating CV profit ratios, I&D Mem. at 12–16. Commerce agreed with Mid Continent that it should begin its CV profit calculation with "net profit before tax" and disagreed with Unicatch's suggested adjustments. *Id.* at 12–13. Commerce explained that "Chun Yu's CV profit ratios reflect that of an otherwise acceptable surrogate producer and to include the consolidated incomes or losses

from Chun Yu's other affiliated company's [*sic*] would introduce the incomes and losses of companies for which we do not have surrogate information (*e.g.*, financial statements)." *Id.* at 13. Commerce declined to make adjustments based on the amounts in line items 8330 and 8380 "because losses incurred by Chun Yu's affiliate do not relate to Chun Yu's total cost of production and total cost of goods sold" and those amounts "are not incorporated into 'Net Profit Before Tax' in Chun Yu's income statements." *Id.* Commerce explained that its practice is "to make adjustments when the adjustments reasonably reflect the costs associated with production of the subject merchandise," and "[b]y not including these line item adjustments, [the agency] can rely on costs that reflect the cost of production of subject merchandise and not the comprehensive costs" of the company. *Id.* Unicatch's appeal followed. Summons, ECF No. 1.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[6] and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Parties' Contentions

Unicatch contends that a remand is required for Commerce to offset "net profit before tax" by the amount of 60,516 reflected in line item 7070 of Chun Yu's financial statements, which is titled "Profit/loss amount of the subsidiaries, the related parties and the joint ventures using equity method." Pls.' Mem. at 7–8. According to Unicatch, Commerce's rationale for declining to offset the negative amounts in line items 8330 and 8380, *i.e.*, that the amounts related to Chun Yu's subsidiaries and were not factored in to the "net profit before tax," requires the agency to offset line item 7070 because it too relates to Chun Yu's subsidiaries but *was* factored into "net profit before tax." *Id.* at 8. Unicatch avers that Commerce "treated two similar situations differently, without proffering any rationale for the different treatment" and imposed "arbitrary new criteria" with respect to line item 7070. *Id.*

[6] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the U.S. Code are to the 2012 edition.

The Government contends that Unicatch failed to exhaust its administrative remedies with respect to line item 7070 because Unicatch limited the adjustments for which it argued before the agency to line items 8330 and 8380. Def.'s Resp. at 8–11. According to the Government, Unicatch's arguments regarding line items 8330 and 8380 do not extend to line item 7070. *Id.* at 10 ("Unicatch's challenge to one part of a financial statement does not incorporate all challenges to every aspect of that financial statement."). The Government further contends that none of the exceptions to the exhaustion doctrine apply. *Id.* at 10–11.

In reply, Unicatch argues that it exhausted its administrative remedies with respect to line item 7070 when it argued to Commerce that, irrespective of contrary accounting practices, "losses incurred by [Chun Yu's] subsidiaries, related parties and joint ventures do affect Chun Yu Group's total cost of production and total cost of goods sold" and, thus, Commerce should offset Chun Yu's "net profit before tax" by the amount of these losses. Pls.' Reply at 5 (quoting Unicatch's Rebuttal Br. at 10); *see also id.* (averring that it explicitly argued that Commerce should offset "net profit before tax" by Chun Yu's subsidiaries' "losses (and, by extension, profit)"). In the event the court finds that Unicatch failed to exhaust its administrative remedies by failing to specifically mention line item 7070 in its rebuttal brief, Unicatch argues that any failure should be excused because Commerce had the opportunity to consider the precise issue when it addressed line items 8330 and 8380. *Id.* at 6; *see also id.* at 7–9 (discussing *Itochu Bldg. Prods. Co. v. United States*, Slip Op. 17–73, 2017 WL 2703810, at *4 n.10 (CIT June 22, 2017); *Zhaoqing Tifo New Fibre Co., Ltd. v. United States*, 39 CIT ___, ___, 60 F. Supp. 3d 1328, 1355–59 (2015); and *Valley Fresh Seafood, Inc. v. United States*, 31 CIT 1989, 1989–98 (2007), all cases in which the court declined to require exhaustion).

II. Legal Standard for Administrative Exhaustion

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

issues before this court. *See Dorbest Ltd v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010); 19 C.F.R. § 351.309(c)–(d). This permits the agency to address the issue in the first instance, prior to judicial review. *See Boomerang*, 856 F.3d at 912–13. The doctrine of administrative exhaustion serves the twin purposes of "protecting administrative agency authority and promoting judicial efficiency." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

III. Unicatch Failed to Exhaust its Administrative Remedies and Commerce Did Not Have the Opportunity to Consider the Precise Argument at Issue

The relationship between the relevant line items is indicated by the following data reproduced (with certain omissions) from information in the administrative record:

Code	Items	Note/ Sch[edule]	Income Statement Amounts
7070	Profit/loss amount of the subsidiaries, the related parties and the joint ventures using equity method	6(7)	60,516
	. . .		
7900	Net profit before tax		286,917
	. . .		
8330	Consolidated profit/loss amount of the subsidiaries, the related parties and the joint ventures using equity method – items that will not be reclassified to profit/loss		-10,643
	. . .		
8380	Consolidated profit/loss amount of the subsidiaries, the related parties and the joint ventures using equity method	6(7)	-2,752
	. . .		
8500	Total consolidated profit/loss of the current period		63,737

Data from U.S. Dep't of Commerce's Analysis Mem. Pertaining to PT - Attach. 3: CV Spreadsheets (Mar. 20, 2019), PR 168, CJA Tab 16 (data files manually filed); *see also* Unicatch's 6/15/18 Ltr, Ex. 11A. As previously noted, Commerce declined to adjust "net profit before tax" for the negative amounts listed in line items 8330 and 8380 because they were not incorporated into the calculation of "net profit before tax" and, as amounts representing losses incurred by Chun Yu's affiliates, did not relate to Chun Yu's cost of production. I&D Mem. at 13.

Unicatch now seeks to use Commerce's rationale for declining to make the foregoing adjustments to advocate for a separate adjustment based on line item 7070. *See* Pls.' Mem. at 7–9. Unicatch further seeks to obfuscate its failure to identify line item 7070 as the basis for a favorable adjustment by accusing the agency of behaving in an arbitrary manner when it failed to make the unrequested adjustment. *Id.* at 8. Unicatch's arguments are unpersuasive.

While Commerce's rationale for declining adjustments based on line items 8330 and 8380 *might* apply in support of an adjustment based on line item 7070, Unicatch did not present any arguments to the agency in support of adjustments based on its subsidiaries' profits or losses that *were* factored into "net profit before tax." Rather, Unicatch focused its arguments on Commerce's ability to essentially reallocate line items listed *after* "net profit before tax" in a manner contrary to Chun Yu's accounting practices based on Unicatch's assertion that those line items nevertheless were related to, and affected, Chun Yu's cost of goods sold. *See* Unicatch's Rebuttal Br. at 9–10.

Before the court, Unicatch seeks to obtain the relief associated with an adjustment that differs from the adjustments for which it argued before the agency. In so doing, Unicatch requests the court to find, as a factual matter, that the amount listed in line item 7070 relates to Chun Yu's subsidiaries *and* does not relate to Chun Yu's total cost of production or total cost of goods sold. It is Commerce's province to weigh the evidence favoring a particular decision in the first instance, however, not the court's. *See POSCO v. United States*, 42 CIT ___, ___, 296 F. Supp. 3d 1320, 1349 (2018) (citing *Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 285–86 (1974)). Moreover, a remand to the agency to consider whether to make the adjustment in the first instance would undermine the interest in judicial efficiency that administrative exhaustion is intended to protect. *See, e.g., Corus Staal BV*, 502 F.3d at 1379. It would also be "wasteful of public resources." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Unicatch had the opportunity to present this adjustment to Commerce; it must bear the consequences of its failure to do so.

The cases on which Unicatch relies are readily distinguished. In *Valley Fresh Seafood*, the court declined to require exhaustion of an argument the plaintiff failed to raise in its case or rebuttal brief when Commerce nevertheless "had the full opportunity to consider the [] issue during the administrative review" and explained its position in

the agency's decision memorandum. 31 CIT at 1994–95.[7] Likewise, in *Itochu Building Products*, the court declined to require exhaustion when the Government conceded that the issue had been "properly raised in a timely manner, fully briefed by all the parties, and considered by Commerce." 2017 WL 2703810, at *4 n.10 (citation omitted). Unlike *Valley Fresh Seafood* and *Itochu Building Products*, here, Commerce did not have the opportunity to consider this precise issue—whether to deduct the amount in line item 7070 from "net profit before tax"—or present relevant explanation in the Issues and Decision Memorandum.

In *Zhaoqing Tifo*, the court provided three reasons for excusing the plaintiff's failure to present its arguments regarding the potential for double counting of energy inputs to the agency. First, the court noted that unanticipated changes between the preliminary and final determinations meant that judicial review constituted the plaintiff's "first meaningful opportunity to challenge Commerce's decision"; thus, the doctrine of administrative exhaustion did not apply. *Zhaoqing Tifo*, 60 F. Supp. 3d at 1350 (quoting *Valley Fresh Seafood*, 31 CIT at 1994). Second, to the extent that the doctrine applied, the court further found that any failure by the plaintiff to raise its argument would be excused because the petitioner "specifically and explicitly" raised the issue in its administrative rebuttal brief. *Id.* at 1353. Finally, the record shows that Commerce had the opportunity to consider the issue of double counting—and did so with respect to electricity and water—but, for reasons that are unclear, did not with respect to other energy inputs, such as coal. *Id.* at 1355–59.

Unicatch points to the fact that, in *Zhaoqing Tifo*, exhaustion was not required when Commerce considered double counting with respect to two items (electricity and water) but not the third (coal), to argue that its failure to expressly address line item 7070 should be excused by virtue of its raising the "identical" issue of adjustments for line items 8330 and 8380. Pls.' Reply at 9. Unicatch suggests that requiring exhaustion under these circumstances would amount to an unnecessarily "rigorous test to precisely exhaust by dotting all 'i's and

[7] The court also based its decision on findings that Commerce did not provide the parties with notice, prior to issuing its final determination, of the way in which it intended to apply a pertinent regulation and that Commerce departed from agency practice in its final determination. *Valley Fresh Seafood*, 31 CIT at 1994, 1996. The court reached this conclusion notwithstanding the petitioner's inclusion of relevant arguments in its case brief, to which the plaintiff could have responded in its rebuttal brief. *See id.* at 1992, 1995–96. The U.S. Court of Appeals for the Federal Circuit's opinion in *Boomerang* calls into question this aspect of the court's opinion. 856 F.3d 912–13 (holding that Commerce is not required to "expressly notify interested parties any time it intends to change its methodology between its preliminary and final determinations" when relevant data is placed on the administrative record and parties advance relevant arguments in their case briefs, to which others may respond in their rebuttal briefs).

crossing all 't's." *Id.* The problem for Unicatch, however, is that its argument with respect to line item 7070 is not—and, thus, would not have been—identical to its arguments respecting line items 8330 and 8380. Further, as indicated above, adjusting for line item 7070 would require distinct findings that Commerce was not called upon to make. This is not simply a matter of dotting "i's" and crossing "t's"; "[a]rguments must be presented *in toto*for this entire judicial review process to work sensibly." *Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 41 CIT ___, ___, 277 F. Supp. 3d 1346, 1353 (2017).

CONCLUSION

For the foregoing reasons, the court sustains Commerce's *Final Results*. Unicatch's motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: December 17, 2019
New York, New York

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

Slip Op. 19–164

TAI-AO ALUMINIUM (TAISHAN) CO., LTD. and TAAL AMERICA LTD., Plaintiffs, and REGAL IDEAS INC., Consolidated Plaintiff, v. UNITED STATES, Defendant, and THE ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Consol. Court No. 17–00216

[The court sustains Commerce's Final Results of Redetermination.]

Dated: December 18, 2019

Ned H. Marshak, Peter W. Klestadt and *Jordan C. Kahn*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, for plaintiffs.

Kristen Smith and *Sarah E. Yuskaitis*, Sandler, Travis & Rosenberg, PA, of Washington, DC, for consolidated plaintiff.

Amie Lee, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director.

Of counsel was *Jessica M. Link*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price and *Robert E. DeFrancesco, III*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor.

OPINION

Katzmann, Judge:

The court returns to a case arising from an anticircumvention investigation centering on extrusions made from aluminum alloys. *Tai-Ao Aluminum (Taishan) Co., Ltd. v. United States*, 43 CIT __, __, 391 F. Supp. 3d 1301 (2019) ("*Tai-Ao*"). The court now addresses whether the United States Department of Commerce's ("Commerce") reformulated liquidation instructions to Customs and Border Protection ("CBP") pursuant to its remand order in *Tai-Ao* should be sustained. The court sustains Commerce's *Final Results of Redetermination Pursuant to Court Remand* (Dep't Commerce June 7, 2019), July 23, 2019, ECF No. 65 ("*Remand Results*").

BACKGROUND

The court presumes familiarity with its previous decision in this case, *Tai Ao*, 391 F. Supp. 3d 1301. Information pertinent to the instant case is set forth below.

On July 26, 2017, Commerce published *Aluminum Extrusions from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping and Countervailing Duty Orders and Rescission of Minor Alterations Anti-Circumvention Inquiry*, 82 Fed. Reg. 34,630 (July 26, 2017) ("*Final Determination*") and accompanying Issues and Decision Memorandum ("IDM"). Plaintiffs Tai-Ao Aluminum (Taishan) Co., Ltd. and TAAL America Ltd. (collectively, "Tai-Ao") and Regal Ideas Inc. ("Regal") challenged the *Final Determination* before the court. In *Tai Ao*, the court affirmed Commerce's initial anti-circumvention investigation and scope interpretation. 391 F. Supp. 3d at 1311–13. However, the court remanded Commerce's liquidation instructions to CBP for reformulation because of inadequate notice to Tai-Ao and Regal that their products were initially subject to an anticircumvention inquiry. *Id*. at 1314–16.

On July 2, 2019, Commerce issued a Draft Remand Redetermination in which, under respectful protest, it proposed reformulated liquidation instructions. Draft Results of Redetermination Pursuant to Court Remand at 71–73, July 2, 2019, P.R. 63. Plaintiffs and Defendant-Intervenor Aluminum Extrusions Fair Trade Committee ("AEFTC") submitted timely comments in response. Tai-Ao's Draft Remand Comments, July 10, 2019, P.R. 78; Regal's Draft Remand Comments, July 10, 2019, P.R. 83; AEFTC's Draft Remand Comments, July 10, 2019, P.R. 89. Commerce issued its *Remand Results* on July 23, 2019 stating that Commerce "intend[s] to issue appropriate instructions to [CBP] regarding entries for Tai-Ao for the period

March 21, 2016 through November 13, 2016." *Remand Results* at 1. Tai Ao, Regal, and AEFTC submitted their comments on the *Remand Results* on September 23, 2019 and August 22, 2019, respectively. Tai-Ao's Comments in Support of Commerce's Remand, Sept. 23, 2019, ECF No. 72 ("Tai-Ao's Br."); Regal's Comments on Commerce's Remand Determination, Aug. 22, 2019, ECF No. 71 ("Regal's Br."); AEFTC's Comments on Final Results of Redetermination Pursuant to Remand, Aug. 22, 2019, ECF No. 70 ("Def-Int.'s Br."). The United States ("Government") and AEFTC submitted their replies to Tai-Ao's and Regal's comments on September 23, 2019. Defendant's Response to Plaintiff's and Defendant-Intervenor's Comments on the Remand Redetermination, Sept. 23, 2019, ECF No. 73 ("Def.'s Br."); AEFTC's Reply to Comments on Final Results of Redetermination Pursuant to Remand, Sept. 23, 2019, ECF No. 74 ("Def-Int.'s Reply").

Tai-Ao requests that the court sustain the *Remand Results*. Tai-Ao's Br. at 2. Regal instead asks the court to remand the case again to Commerce, ordering Commerce to address Regal's date of liability. Regal's Br. at 1. Regal argues that Commerce's refusal to issue instructions to CBP regarding the date of commencement of duty liability for Regal was inconsistent with the court's decision in *Tai-Ao. Id*. AEFTC requests that the court sustain the *Remand Results* only in regard to Regal and otherwise sustain Commerce's *Final Determination* because, contrary to the court's holding in *Tai-Ao*, Tai-Ao and Regal had sufficient notice. Def-Int.'s Br. at 1; Def.-Int.'s Reply at 4. AEFTC thus contends that Commerce's decision to reformulate its liquidation instructions "was in error and is not supported by substantial evidence or otherwise in accordance with law." Def-Int.'s Br. at 1. The Government requests that the court sustain Commerce's *Remand Results*. Def.'s Br. at 2. The court sustains Commerce's antidumping determinations, findings, and conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Failure to Instruct CBP on Regal's Nonexistent Entries is Consistent with the Court's Remand Order.

Commerce's *Remand Results* are consistent with the court's remand order and previous opinion. *See Tai-Ao*, 391 F. Supp. 3d at 1315–16. Nonetheless, Regal contends that Commerce's failure to prepare draft instructions to CBP regarding Regal was counter to *Tai-Ao*, Regal's Br. at 3, which held that there was insufficient notice to Tai-Ao and Regal that they were subject to an anti-circumvention

inquiry between the date of the initiation of the anti-circumvention inquiry and the date of Commerce's publication of its preliminary determination in that inquiry ("Pre-Notice Period"), *Tai-Ao*, 391 F. Supp. 3d at 1315. Further, Regal argues that Commerce's failure to address Regal's liability in its proposed instructions will have negative legal ramifications on two on-going and related cases regarding the scope of Commerce's orders regarding aluminum extrusions. Regal's Br. at 2–3 (citing to *Regal Ideas Inc. v. United States*, Court Nos. 17–00227 and 17–00228 (CIT) (stayed pending disposition of this case)).

The court concludes that Commerce complied with the court's order to "reformulate its liquidation instructions." *See Tai-Ao*, 391 F. Supp. 3d at 1316. As Regal itself concedes, it did not have any entries during the Pre-Notice Period. Regal's Br. at 2; Def.'s Br. at 7–8. For that reason, Commerce did not need to reformulate its instructions to CBP to include nonexistent Regal entries. As the Government notes, prior opinions of this court and the Federal Circuit dictate that when there is no impact on the liquidation of entries, challenges to Commerce's liquidation instructions to CBP are rendered moot. *See* Def.'s Br. at 8 (citing *Perfectus Aluminum, Inc. v. United States*, 391 F. Supp. 3d 1341, 1358 (2019); *Heartland By-Prod., Inc. v. United States*, 568 F.3d 1360, 1368 (Fed. Cir. 2009)). *See also* Def.-Int.'s Reply at 3 ("If there are no unliquidated entries, Regal has no standing in this Court to press this argument.").

Furthermore, Commerce's failure to instruct CBP on Regal's entries during the Pre-Notice Period does not negate the court's holding that "Commerce's decision to suspend liquidation with respect to Plaintiffs from the date of the Initiation Notice was impermissible because Plaintiffs did not receive adequate notice at that time" and that Regal should not have been subjected to suspension of liquidation of entries during the Pre-Notice Period. *Tai-Ao*, 391 F. Supp. 3d at 1313–14. Therefore, there is no plausible negative legal impact on Regal's two pending scope cases. Because the court in *Tai-Ao* stated that Commerce may not assess retroactive duties to Regal and Regal had no entries during that period, Commerce's remand instructions are consistent with the court's remand order.

II. Commerce's Liquidation Instructions to CBP Regarding Tai-Ao are Consistent with the Court's Remand Order.

Finally, AEFTC continues to disagree with the court's decision in *Tai-Ao*. AEFTC thus argues that Commerce's decision to reformulate its liquidation instructions under protest "was in error and is not supported by substantial evidence or otherwise in accordance with

law." Def-Int.'s Br. at 1. The Government responds that "Commerce's right to file a remand under protest is well settled." Def.'s Br. at 13 (citing *Meridian Prods., LLC v. United States*, 890 F.3d 1272, 1276–77 (Fed. Cir. 2018) (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003))). The court agrees and holds that the *Remand Results* are consistent with the remand order. The Federal Circuit has upheld that Commerce may file remand results under protest while still preserving its right to appeal. *Viraj Grp*., 343 F.3d at 1376. Thus, where, as here, Commerce filed reformulated liquidation instructions under protest, that determination is supported by substantial evidence and in accordance with the law.

CONCLUSION

Commerce's *Remand Results* are sustained.

SO ORDERED.

Dated: December 18, 2019
New York, New York

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

Slip Op. 19–165

SAHA THAI STEEL PIPE PUBLIC COMPANY LIMITED, Plaintiff, and THAI PREMIUM PIPE COMPANY, LTD. and PACIFIC PIPE PUBLIC COMPANY LIMITED, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00214

[Remanding the U.S. Department of Commerce's final results in the 2016–2017 administrative review of the antidumping duty order covering circular welded carbon steel pipes and tubes from Thailand.]

Dated: December 18, 2019

Daniel L. Porter, Christopher Dunn, Tung Nguyen, and *Kimberly Reynolds*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Plaintiff Saha Thai Steel Pipe Public Company Limited.

Robert G. Gosselink, Jonathan M. Freed, and *Aqmar Rahman*, Trade Pacific, PLLC, of Washington, DC, for Consolidated Plaintiff Thai Premium Pipe Company, Ltd.

Lizbeth R. Levinson, Ronald M. Wisla, and *Brittney R. Powell*, Fox Rothschild LLP, of Washington, DC, for Consolidated Plaintiff Pacific Pipe Public Company Limited.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Brandon J. Custard*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Roger B. Schagrin, Elizabeth J. Drake, Christopher T. Cloutier, and *Luke A. Meisner*, Schagrin Associates, of Washington, DC, for Defendant-Intervenor Wheatland Tube Company.

OPINION

Choe-Groves, Judge:

Plaintiff Saha Thai Steel Pipe Public Company Limited ("Saha Thai") and Consolidated Plaintiffs Thai Premium Pipe Company, Ltd. ("Thai Premium") and Pacific Pipe Public Company Limited ("Pacific Pipe") (collectively, "Plaintiffs") challenge the U.S. Department of Commerce's ("Commerce") final results in the March 1, 2016 to February 28, 2017 administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand. Before the court are Plaintiffs' motions for judgment on the agency record and Plaintiffs' unopposed motion for oral argument. The court decides the motions on the parties' written submissions without oral argument.[1] For the reasons discussed below, the court remands Commerce's *Final Results* for further consideration.

ISSUES PRESENTED

1. Whether Commerce's particular market situation adjustment is supported by substantial evidence and in accordance with the law;
2. Whether Commerce conducted a fair and impartial administrative review;
3. Whether Saha Thai exhausted its administrative remedies as to its duty drawback adjustment claim; and if so, whether Commerce's failure to apply a duty drawback adjustment to Saha Thai's cost of production for imputed Thai antidumping and safeguard duties on hot-rolled coil was supported by substantial evidence and otherwise in accordance with the law.

BACKGROUND

Over thirty years ago, Commerce entered the antidumping duty order on circular welded carbon steel pipes ("CWP") and tubes from Thailand. *Antidumping Duty Order; Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 51 Fed. Reg. 8,341 (Dep't Commerce Mar. 11, 1986). Based on the petition from Defendant-Intervenor Wheatland Tube Company ("Defendant-Intervenor" or "Wheatland"),

[1] The court has broad discretion to decide dispositive motions on written submissions without oral argument. *See Rates Tech., Inc. v. Mediatrix Telecom, Inc.*, 688 F.3d 742, 749 (Fed. Cir. 2012) (citations omitted).

Commerce initiated an administrative review of the antidumping duty order for the period of March 1, 2016, through February 28, 2017. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 21,513, 21,514 (Dep't Commerce May 9, 2017). Commerce selected three Thai producers of subject merchandise as mandatory respondents: Saha Thai, Pacific Pipe, and Thai Premium. Plaintiffs responded. Pls.' Initial Questionnaire Resps., PR 31, 48–50, 52–54, and 56–57 (Aug. 17, 2017).

After Saha Thai, Pacific Pipe, and Thai Premium submitted questionnaire responses, but before Commerce issued preliminary results, domestic producer Wheatland "allege[d] that a particular market situation existed in Thailand during the period of review ("POR") such that the costs of production of [CWP] are distorted and do not accurately reflect the cost of production in the ordinary course of trade." Wheatland Allegation 1, PR 69–71 (Feb. 5, 2018). Wheatland averred that: (1) the Royal Thai Government subsidized Thai producers of hot-rolled coil, enabling its sale at below-market prices to downstream producers of CWP, and (2) the prices for imports of hot-rolled coil into Thailand were distorted through dumping, subsidization, and global overcapacity. *Id.* at 4–5.

In accepting Wheatland's submission over Saha Thai's objection, Commerce determined that Wheatland had provided new factual information in support of its particular market situation allegation and thus gave interested parties seven days for interested parties to rebut, clarify, or correct the factual information contained in Wheatland's particular market situation allegation. Particular Market Situation Request for Comments Mem. 1–2, PR 81 (Mar. 21, 2018). Saha Thai and Pacific Pipe submitted comments. Saha Thai Rebuttal Factual Information and Comments on Wheatland's Particular Market Situation Allegation, PR 83 (Mar. 28, 2018); Pacific Pipe Comments on Particular Market Situation Allegations, PR 84–85 (Mar. 28, 2018).

Commerce rendered its preliminary decision on April 3, 2018, which was published on April 9, 2018. *Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 83 Fed. Reg. 15,127 (Dep't Commerce Apr. 9, 2018) (preliminary results of antidumping duty administrative review; 2016–2017). Commerce calculated a preliminarily weighted-average dumping margin of 0.00 percent for Saha Thai, 5.34 percent for Thai Premium, and 10.66 percent for Pacific Pipe. *Id.* at 15,128. Commerce noted that it had yet to determine whether a particular market situation existed and would "consider [Wheatland's] allegations" further before issuing the final results. Decision

Mem. for the Preliminary Results of Antidumping Duty Administrative Review; 2016–2017, PR 87 (Apr. 3, 2018).

Commerce issued Plaintiffs' supplemental questionnaires. Pacific Pipe First Suppl. Questionnaire, PR 93 (Apr. 25, 2018); Saha Thai First Suppl. Questionnaire, PR 94 (Apr. 25, 2018); Thai Premium First Suppl. Questionnaire, PR 95 (Apr. 25, 2018). The first supplemental questionnaires did not explicitly reference Wheatland's particular market situation allegation. *See id.* Plaintiffs responded. Pacific Pipe's First Suppl. Resp., PR 101 (May 8, 2018); Saha Thai First Suppl. Questionnaire Resp., PR 103–04 (May 14, 2018); Thai Premium First Suppl. Questionnaire Resp., CR 98 (May 14, 2018). Wheatland also responded and provided additional factual information supporting its particular market situation allegation. Wheatland's Comments on, and Clarifying Factual Info. Regarding Pacific Pipe and Saha Thai Suppl. Questionnaire Resps., PR 107–09 (May 17, 2018).

In the post-preliminary memorandum, Commerce found that sufficient evidence supported Wheatland's particular market situation allegation. Post-Preliminary Decision Mem. on Particular Market Situation Allegation 1, PR 114 (Aug. 31, 2018) ("PPDM"). Specifically, Commerce found that a particular market situation existed in Thailand during the period of review as to the cost of hot-rolled coil as a component of the cost of production. *Id.* at 4. Commerce assessed that a combination of the U.S. CVD rate on Thai producers of hot-rolled coil and the Thai AD and safeguard rates on hot-rolled coil imported into Thailand provided an appropriate basis for an adjustment to Thai CWP producers' input costs. *Id.* at 4, 6. Commerce then applied a particular market situation adjustment, which altered Plaintiffs' costs of production and resulted in a weighted-average antidumping margin calculation of 28.76 percent for Thai Premium, 24.50 percent for Saha Thai, and 10.66 percent for Pacific Pipe. Commerce's Post-Preliminary Decision Mem. on Wheatland's Allegation, PR 114 (Aug. 31, 2018); Analysis Mem. for the Post-Preliminary Results Concerning Saha Thai, PR 113 (Aug. 31, 2018); Pacific Pipe Prelim. Calc. Mem. and Particular Market Situation Adjustment Data, PR 116 (Aug. 31, 2018); Thai Premium Post-Prelim. Calc. Mem. and Particular Market Situation Adjustment Data, PR 117 (Aug. 31, 2018);

Commerce gave interested parties seven days to file case briefs. Briefing Schedule on All Issues Except Particular Market Situation, PR 115 (Aug. 31, 2018). Saha Thai requested a 10-day extension on September 4, 2018. Saha Thai Extension Request, PR 118 (Sept. 4, 2018). Commerce granted Saha Thai's request in part and gave all interested parties an extra three days (one business day) to submit

case briefs. Mem. re Extension of Deadline to File Case and Rebuttal Briefs for All Issues, PR 121 (Sept. 6, 2018). The next day, Pacific Pipe requested a four-day extension of the briefing schedule. Pacific Pipe Briefing Schedule Extension Request, PR 123 (Sept. 7, 2018). Commerce granted the request in part and enlarged the briefing schedule by three days for all parties. Mem. re Pacific Pipe Extension Request, PR 124 (Sept. 10, 2018). Defendant-Intervenor requested a one-day extension to file a rebuttal case brief, which Commerce granted as to all interested parties. Mem. re Extension Request Filing Rebuttal Brs., PR 133, (Sept. 17, 2018). Commerce held a hearing on September 27, 2018. Hr'g Tr., PR 141 (Oct. 4, 2018).

Commerce published the *Final Results* on October 4, 2018. *Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 83 Fed. Reg. 51,927 (Dep't Commerce Oct. 15, 2018) (final results of antidumping duty administrative review; 2016–2017) ("*Final Results*"); *see also* Decision Memorandum for the Final Results of Antidumping Duty Administrative Review; 2016–2017, PR 143 (Oct. 4, 2018) ("Final IDM"); Pls.' Final Calc. Mems., PR 144, 146, 148 (Oct. 4, 2018). In the *Final Results*, Commerce found that a particular market situation distorted the acquisition cost of hot-rolled coil and adjusted Plaintiffs' costs of production. Final IDM at 8–10. Commerce recalculated Plaintiffs' weighted-average antidumping margins to 30.98 percent for Thai Premium, 30.61 percent for Pacific Pipe, and 28.00 percent for Saha Thai. *Final Results* at 51,928.

Saha Thai initiated this action challenging Commerce's *Final Results* on October 18, 2018. Summons, Oct. 18, 2018, ECF No. 1; Compl., Oct. 18, 2018, ECF No. 6. The court entered a statutory injunction on October 22, 2018, granted Wheatland's motion to intervene on November 15, 2018, and consolidated this case with Court Numbers 18–00219 and 18–00231 on January 30, 2019. Order for Statutory Inj. Upon Consent, Oct. 19, 2018, ECF. No. 10; Order, Nov. 15, 2018, ECF No. 15; Order, Jan. 30, 2019, ECF No. 28. Defendant United States ("Defendant") filed the administrative record on January 31, 2019. Ltr. from Brandon Custard, Office of the Chief Counsel for Trade Enforcement & Compliance, Commerce, to Mario Toscano, Clerk of the Court, U.S. Court of International Trade, Jan. 31, 2019, ECF No. 29.

Saha Thai, Thai Premium, and Pacific Pipe moved for judgment on the agency record. Pl. Saha Thai's Mot. J. Agency R. and Br. in Supp. ("Saha Thai Br."), May 15, 2019, ECF No. 39; Consol. Pl. Thai Premium's Mot. J. Agency R., May 15, 2019, ECF No. 37, and Mem. in Supp. ("Thai Premium Br."), May 15, 2019, ECF No. 37–2; Consol. Pl. Pacific Pipe's Mot. J. Agency R., May 15, 2019, ECF No. 41, and Mem.

of Points and Authorities in Supp. ("Pacific Pipe Br."), May 15, 2019, ECF No. 41–2. Defendant and Defendant-Intervenor responded. Def.'s Resp. to Pls.' Mots. J. Agency R. ("Def. Resp.") July 29, 2019, ECF No. 44; Def.-Intervenor's Resp. Br. ("Def.-Intervenor Br."), July 29, 2019, ECF No. 42. Plaintiffs replied. Saha Thai's Reply Br., Sept. 16, 2019, ECF No. 51; Thai Premium's Reply Br., Sept. 16, 2019, ECF No. 53; Pacific Pipe's Reply Br., Sept. 16, 2019, ECF No. 54. Defendant filed the joint appendix on September 24, 2019. J.A., Sept. 24, 2019, ECF No. 56.

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

I. Commerce's Finding of a Particular Market Situation

A. Governing Law

In determining antidumping duties, Commerce calculates "the amount by which the normal value [of subject merchandise] exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. When reviewing antidumping duties in an administrative review, Commerce must determine "(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry." *Id.* § 1675(a)(2)(A). Normal value represents the price at which the subject merchandise is first sold in the exporting country. *See id.* §§ 1677b(a)(1)(A), (B)(i). Export price is "the price at which the subject merchandise is first sold (or agreed to be sold)" in the United States. 19 U.S.C. § 1677a(a)).[2]

If Commerce cannot determine the normal value of the subject merchandise based on home-market sales or third-country sales, then Commerce uses a constructed value as a basis for normal value. *Id.* § 1677b(a)(4). Subsection (e) governs the calculation of a constructed value. *Id.* § 1677b(e). Constructed value represents: (1) "the cost of materials and fabrication or other processing of any kind [used] in

[2] Constructed export price represents "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter . . . ." 19 U.S.C. § 1677a(b).

producing the merchandise;" (2) "the actual amounts incurred and realized" for "selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country[;]" and (3) the cost for packing the subject merchandise. *Id.* §§ 1677b(e)(1), (e)(2)(A), (e)(3), and (e)(2)(B) (providing for the calculation of constructed value if actual data set out in subsection (2)(A) is unavailable).

When calculating constructed value under 19 U.S.C. § 1677b(e), if Commerce finds the existence of a particular market situation "such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, [then] [Commerce] may use another calculation methodology under this part or any other calculation methodology." 19 U.S.C. § 1677b(e).

Section 504(c) of the Trade Preferences Extension Act of 2015 ("TPEA") amended the statutory provision governing constructed value, 19 U.S.C. § 1677b(e). The amendment authorized Commerce to use alternative cost methodologies when computing constructive value after making a particular market situation determination. The amendment added the following language to the statute:

> [F]or purposes of paragraph (1) [in reference to calculating constructed value] if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority [Commerce] may use another calculation methodology under this subtitle or any other calculation methodology.

19 U.S.C. § 1677b(e). In other words, the amended statute gives Commerce discretion to adjust the cost of production calculation methodology when determining constructed value if Commerce finds that a particular market situation exists. *See id.* Section 504 did not amend the statute governing the calculation of cost of production (for below-cost-sales purposes) or application of the below-cost test set out in 19 U.S.C. § 1677(b)(3).

B. Application of Particular Market Situation Adjustment

1. Commerce's Cost-Based Particular Market Situation Adjustment When Calculating Normal Value

In this case, Commerce misapplies a particular market situation adjustment to a respondents' cost of production for purposes of the

home-market sales-below-cost test. Under 19 U.S.C. § 1677b(e), Commerce's authority to apply a particular market situation adjustment is limited to the calculation of costs of materials and fabrication under 19 U.S.C. § 1677b(e)(1). *See* 19 U.S.C. § 1677b(e) ("*For the purposes of paragraph (1)* [19 U.S.C. § 1677b(e)(1)], if a particular market situation exists . . . the administering authority may use another calculation methodology. . . ."). The amended statute pertains to particular market situations in the context of constructed value, i.e., when the dumping margin calculation is based on comparing U.S. prices to constructed value, but only when constructed value is the basis of "normal value," not home-market sales.

Commerce applied Section 504 in finding a particular market situation when it increased Plaintiffs' costs of production for purposes of the home-market sales-below-cost test. *See* Final IDM at 8–10; PPDM at 4–5. Commerce made the particular market situation adjustment after comparing Plaintiffs' U.S. sales to home-market sales. Final IDM at 14, 16, 18. Yet Commerce fails to explain how a cost of sale adjustment is appropriate when comparing U.S. sales and home-market sales. Analysis Mem. for the Final Results of the Antidumping Duty Administrative Review of Circular Welded Steel Pipes and Tubes from Thailand: [Saha Thai] at 4–5, PR 146 (Oct. 4, 2018) ("Saha Thai Final Calc. Mem."); Analysis Mem. for the Final Results of the Antidumping Duty Administrative Review of Circular Welded Steel Pipes and Tubes from Thailand: [Thai Premium] 2–4, PR 148 (Oct. 4, 2018) ("Thai Premium Final Calc. Mem."); Analysis Mem. for the Final Results of the Antidumping Duty Administrative Review of Circular Welded Steel Pipes and Tubes from Thailand: [Pacific Pipe] 3–6, PR 144, (Oct. 4, 2018) ("Pacific Pipe Final Calc. Mem."). Although Section 1677b(e), "Constructed Value," grants Commerce discretion to adjust a respondent's cost of production in an antidumping margin calculation upon finding a particular market situation, that margin calculation must be based on a comparison of U.S. prices to constructed value, not home-market sales prices or third-country sales prices.

Section 504 did not amend 19 U.S.C. § 1677b(b)(3), which governs cost of production calculations for determining whether home-market sales are below costs. Neither the term "ordinary course of trade" nor a reference to a particular market situation cost adjustment appears in Section 1677b(b)(3). Defendant's contention that Section 504 authorized Commerce's comparison of U.S. prices to home-market sales instead of constructed value is an interpretation that is unsupported in the law. *See Ad Hoc Comm. v. United States*, 13 F.3d 398, 403 (Fed.

Cir. 1994) ("*Ad Hoc I*") (When "the antidumping statute is not silent on the question, . . . the reasonableness or fairness of Commerce's interpretation of the Antidumping Act is irrelevant."); *Thomas v. Nicholson*, 423 F.3d 1279, 1284 (Fed. Cir. 2005) ("[W]here 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." (citations omitted)).[3] The court concludes that Commerce's particular market situation adjustment is not in accordance with 19 U.S.C. § 1677b(e).

2. Sales-Based Particular Market Situations

In the *Final Results*, Commerce made a particular market situation finding and increased Plaintiffs' costs of production. 83 Fed. Reg. at 51,928; Final IDM at 8; *see also* Wheatland Allegation at 4 (alleging that "two particular market situations . . . distorted the *cost of producing* CWP in Thailand during the POR." (emphasis added)). Saha Thai argues that Commerce made a cost-based particular market situation finding, which means that Commerce's findings cannot be grounded in 19 U.S.C. § 1677(15) (defining "ordinary course of trade") because a sales-based particular market situation adjustment under 19 U.S.C. § 1677(15) is distinct from a cost-based particular market situation adjustment under 19 U.S.C. § 1677b(e). Saha Thai Br. at 15–19. Defendant argues the TPEA "generally expanded the meaning of 'ordinary course of trade' to include any situation in which Commerce finds that a particular market situation prevents a proper comparison between markets." Def. Resp. at 20 (citing 19 U.S.C. § 1677(15)(C)).

[3] Defendant and Defendant-Intervenor argue that Commerce's particular market situation adjustment to Plaintiffs' costs of production is entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 842–42 (1984). Def. Resp. at 11–12, 26; Def.-Intervenor Br. at 8, 11–16. Defendant and Defendant-Intervenor's contention is incorrect because Congress has spoken directly to the precise question at issue: how to calculate the cost of production for purposes of the sales-below-cost test. The TPEA amended 19 U.S.C. § 1677b(b)(e)—the definition of constructed value. The TPEA did not amend 19 U.S.C. § 1677b(b)(3)—the applicable statute governing the calculation of cost of production for below-cost-sales—and Section 1677b(b)(3) contains no reference to a "particular market situation" finding. Commerce's particular market situation adjustment runs contrary to the plain meaning of the statute as to how Commerce must calculate the cost of production for purposes of the sales-below-cost test. *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1329 (Fed. Cir. 2018).

Section 504(a) amended 19 U.S.C. § 1677(15), allowing Commerce to consider certain "sales and transactions . . . to be outside the ordinary course of trade" when a "particular market situation prevents a proper comparison with the export price or constructed export price." 19 U.S.C. § 1677(15)(C).

In the underlying administrative review, Commerce found a particular market situation and adjusted Plaintiffs' costs of production by applying the particular market situation adjustment to Commerce's home-market sales calculation. *See* Final IDM at 8–10. Commerce's cost-based particular market situation adjustment does not implicate a sales-based particular market situation in the underlying administrative review. *See* 19 U.S.C. § 1677(15); 19 U.S.C. § 1677b(e). The record shows that Commerce distinguished between a sales-based and cost-based particular market situation at the administrative level. Wheatland made a cost-based particular market situation allegation. Wheatland Allegation at 1–2 ("[W]e hereby allege that a particular market situation existed in Thailand . . . such that the costs of production of . . . are distorted. We therefore request Commerce use an alternative methodology to calculate constructed value.").When accepting Wheatland's particular market situation allegation over Saha Thai's objection as being untimely, Commerce reasoned that its "regulations provide[d] a deadline for the submission of a sales-based [particular market situation] . . . [but] no such provision exist[ed] for the TPEA's cost-based [particular market situation] allegation." Final IDM at 5.

Commerce's argument here conflates the sales-based versus cost-based particular market situation provisions in the statute. The court rejects this post hoc rationalization for the *Final Results*. The TPEA did not provide a basis for calculating the cost of production in the sales-below-cost test. That Congress explicitly amended the sales-below-cost provision for a different purpose shows that Congress was aware of the sales-below-cost calculation when it enacted the TPEA. Section 505(a)(A). Further, Congress amended the sales-below-cost provision and did not make a cross-reference between 19 U.S.C. § 1677(15) and 19 U.S.C. § 1677b(e), which shows that Congress did not intend for Commerce to apply 19 U.S.C. § 1677(15)(C) in the manner Commerce proposes.

Because Commerce chose to make a comparison between home-market sales and U.S. price, Commerce may not apply a cost-based particular market situation adjustment in the context of this sales-based comparison. *See* Final IDM at 8–15. Commerce's post hoc ra-

tionalization does not support the *Final Results*. The court concludes that Commerce's particular market situation adjustment is not in accordance with the law.

3. Conclusion

Because the court determines that the particular market situation adjustment was not in accordance with the law, the court need not decide whether substantial evidence supports Commerce's particular market situation adjustment. The court remands the *Final Results* for further consideration consistent with this opinion.

II. Commerce's Actions When Conducting the Antidumping Review

Saha Thai contends that Commerce did not conduct the underlying administrative review in a fair and impartial manner. Saha Thai Br. at 40–52. First, Saha Thai claims that Commerce departed from its two-step approach taken in prior cases when examining a cost-based particular market situation allegation. *Id.* at 41–44. Second, Saha Thai avers that Commerce showed bias because Commerce: (1) accepted Wheatland's May 17, 2018 factual submission even though it was untimely and contained new factual information about the particular market situation allegation that neither rebutted, clarified, nor corrected another interested party's questionnaire response, and (2) failed to give interested parties a meaningful opportunity to offer information on Thai antidumping and safeguard duties applied to purchases of hot-rolled coil during the period of review when setting a case briefing schedule. *Id.* at 44–48.

Defendant responds that Commerce conducted the underlying administrative review fairly and provided interested parties sufficient time to comment on, and for Commerce to obtain, information as to Wheatland's particular market situation allegation. Def. Resp. at 47–49. Defendant also argues that the governing federal regulation, 19 C.F.R. § 351.309(c)(1)(ii), allows Commerce to modify the 30-day deadline in filing case briefs after publication of the preliminary results of review. *Id.* at 49–50. Defendant avers that Commerce could consider Wheatland's factual submission because it rebutted, clarified, or addressed Saha Thai's supplemental response as to "input purchases and tax and duty on such purchases, and calculations including the duty rates applicable to [hot-rolled coil] imported from certain countries during the period of review." *Id.* at 48 (citations omitted). Because the court has remanded to Commerce for reconsideration of its particular market situation adjustment, the court need not reach this issue.

III. Saha Thai's Duty Drawback Adjustment Argument

Saha Thai argues that Commerce should have made a duty drawback adjustment for "imputed Thai AD and safeguard duties that [Commerce] calculated on Saha Thai's purchased [hot-rolled coil] pursuant to its [particular market situation] adjustment methodology." Saha Thai Br. at 53–54. Wheatland responds that Saha Thai failed to exhaust its administrative remedies because Saha Thai raised the duty drawback argument as a ministerial error, and not in Saha Thai's case brief before Commerce. Def.-Intervenor Br. at 8–10; Ministerial Error Mem., PR 162 (Dec. 20, 2018). Defendants assert that Saha Thai's duty drawback argument falls beyond the nature of a ministerial error as defined in 19 C.F.R § 351.224. Def. Resp. at 50; Def.-Intervenor Br. at 10. Defendants contend there is no merit to Saha Thai's duty drawback claim because record evidence supports Commerce's determination that Saha Thai was ineligible for the duty drawback adjustment requested in its ministerial error comments. Def. Resp. at 51–54; Def.-Intervenor Br. at 10–11. Because the court remands for reconsideration of Commerce's particular market situation adjustment, the court need not address the issue of whether substantial evidence supports the duty drawback adjustment at this time.

CONCLUSION

For the foregoing reasons, the court concludes that Commerce's particular market situation adjustment is not in accordance with the law and remands for further consideration consistent with this opinion. An order will issue accordingly.

Dated: December 18, 2019
New York, New York

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

Slip Op. 19–166

TOSÇELIK PROFIL VE SAC ENDÜSTRISI A.Ş., Plaintiff, and ZEKELMAN INDUSTRIES, Consolidated Plaintiff, v. UNITED STATES, Defendant, and ZEKELMAN INDUSTRIES, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 17–00018

[Sustaining in part and remanding in part the U.S. Department of Commerce's second remand results.]

Dated: December 18, 2019

David L. Simon, Law Office of David L. Simon, of Washington, D.C., for Plaintiff Tosçelik Profil ve Sac Endüstrisi A.Ş.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *David W. Richardson*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Roger B. Schagrin and *Paul W. Jameson*, Schagrin Associates, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor Zekelman Industries.

OPINION AND ORDER

Choe-Groves, Judge:

This action arises out of the final results of the administrative review of welded carbon steel standard pipe and tube products from Turkey. *See Welded Carbon Steel Standard Pipe and Tube Products From Turkey*, 81 Fed. Reg. 92,785 (Dep't Commerce Dec. 20, 2016) (final results of administrative review; 2014–2015), *as amended*, 82 Fed. Reg. 11,002 (Dep't Commerce Feb. 17, 2017) (amended final results of antidumping duty administrative review; 2014–2015). Before the court are the Final Results of Redetermination Pursuant to Second Court Remand, May 30, 2019, ECF No. 67–1 ("*Second Remand Results*"). For the reasons discussed below, the *Second Remand Results* are remanded for further proceedings consistent with this opinion.

BACKGROUND

The court presumes familiarity with the facts and procedural history of this action. *See Tosçelik Profil ve Sac Endüstrisi A.Ş. v. United States*, 42 CIT __, 321 F. Supp. 3d 1270 (2018) ("*Tosçelik I*"); *Tosçelik Profil ve Sac Endüstrisi A.Ş. v. United States*, 42 CIT __, 375 F. Supp. 3d 1312 (2019) ("*Tosçelik II*"). In *Tosçelik I*, the court remanded to Commerce for reconsideration of Tosçelik's duty drawback adjustment and the circumstance of sale adjustment as to warehousing expenses. *Tosçelik I* at 1281.

After the first remand, Commerce recalculated Tosçelik's duty drawback adjustment by allocating import duties exempted by reason of export of finished product over total exports, as reported by Tosçelik. *Tosçelik II* at 1314. Because Commerce perceived an imbalance in its comparison between Tosçelik's export price and normal value, Commerce made an additional circumstance of sale adjustment. *Id*. Commerce also granted a circumstance of sale adjustment to Tosçelik

for warehousing expenses. *Id*. at 1316–17. The court concluded that Commerce's modified calculation of Tosçelik's duty drawback adjustment was not in accordance with the law, but sustained Commerce's circumstance of sale adjustment for warehousing expenses. *Id*. at 1317. The court remanded to Commerce for further proceedings. *Id*.

In the *Second Remand Results*, Commerce "amended its duty drawback calculation methodology . . . to ensure that [Commerce's] dumping calculation is duty neutral, meaning that the same amount of duties are accounted for on both sides of the dumping equation," by: "(1) making a per-unit adjustment to U.S. price in the full amount of the per-unit duty drawback granted on export, as claimed by Tos[ç]elik; and (2) making a circumstance of sale ... adjustment to [constructed value] and home market price to add the same amount of the per-unit amount of import duties added to U.S. price." *Second Remand Results* at 1–2.

Tosçelik filed comments on the *Second Remand Results*. Comments Pl. Tosçelik Profil ve Sac Endüstrisi A.Ş. Final Results Redetermination Pursuant to Second Remand, Jul. 31, 2019, ECF No. 82 ("Pl.'s Comments"). Zekelman filed comments in opposition. Def.-Intervenors' Comments in Opp'n to the Second Remand Redetermination, Jul. 31, 2019, ECF No. 81. Defendant responded. Def.'s Resp. to Comments on Second Remand Results, Aug. 30, 2019, ECF No. 85 ("Def.'s Reply"). The Parties filed a joint appendix. J.A., Sept. 12, 2019, ECF No. 87. The Parties filed supplemental briefing on December 6, 2019. Def.-Intervenors' Suppl. Br., Dec. 6, 2019, ECF No. 89; Pl.'s Suppl. Br., Dec. 6, 2019, ECF No. 90; Def.'s Suppl. Br., Dec. 6, 2019, ECF No. 91.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The results of a redetermination pursuant to court remand are reviewed also for compliance with the court's remand order. *See ABB Inc. v. United States*, 42 CIT __, __, 355 F. Supp. 3d 1206, 1210 (2018).

ANALYSIS

If Commerce finds that merchandise is being sold at less than fair value, Commerce issues an antidumping duty order imposing antidumping duties equivalent to the amount by which the normal value exceeds the export price for the merchandise. *See* 19 U.S.C. § 1673; *see also* 19 U.S.C. § 1675. Export price, or U.S. price, is the price at

which the subject merchandise is first sold in the United States. *See id*. § 1677a(a). A duty drawback adjustment is an adjustment to export price, specifically, an increase by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." *Id*. § 1677a(c)(1)(B).

Generally, normal value represents the price at which the subject merchandise is sold in the exporting country. *See id*. § 1677b(a)(1)(A). When determining the appropriate price for comparison, Commerce may make certain price adjustments, such as a circumstance of sale adjustment. *See id*. § 1677b(a)(6). Under the statute, the price may be:

> (C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to— ...
>
> (iii) other differences in the circumstances of sale.

Id. § 1677b(a)(6)(C)(iii). The purpose of statutory adjustments to normal value is to "ensure[ ] that there is no overlap or double-counting of adjustments." H.R. Rep. No. 103–826, pt. 1, at 84–85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3857–58.

Pursuant to 19 C.F.R. § 351.410(b), "the Secretary will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act [19 U.S.C. § 1677b(a)(6)(C)(iii)] only for direct selling expenses and assumed expenses." 19 C.F.R. § 351.410(b). Direct selling expenses are "expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." *Id*. § 351.410(c). Assumed expenses are "selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses." *Id*. § 351.410(d).

I. Commerce's Duty Drawback Adjustment

In the *Second Remand Results*, Commerce readdressed Tosçelik's request for a duty drawback adjustment pertaining to the Turkish IPR program, which is a duty exemption program. *Second Remand Results* at 16. Commerce explained that "since Tos[ç]elik never actually paid or recorded any duty costs associated with the [Turkish] IPR exemption program, there is no duty in [the] constructed value or home market price associated with this program, and no need to adjust Tos[ç]elik's cost of production," but, "[u]nder the IPR exemption program[,] ... an off the books liability was generated when

inputs were imported under the IPR program and that liability was later reversed upon exportation of subject merchandise to the United States and other markets." *Id*. at 16–17 (internal quotation marks omitted). As a result, Commerce made "a per-unit adjustment to U.S. price in the full amount of the per-unit duty drawback granted on export, as claimed by Tos[ç]elik." *Id*. at 1–2. Tosçelik does not contest this duty drawback adjustment. Pl.'s Cmts. at 22.

Under 19 U.S.C. § 1677a(c)(1)(B), a duty drawback adjustment is an adjustment to export price, i.e., an increase by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). Because Commerce's calculation and explanation of the duty drawback adjustment is in accordance with 19 U.S.C. § 1677a(c)(1)(B), the court concludes that Commerce's duty drawback adjustment to U.S. price is in accordance with the law.

II. Commerce's Circumstance of Sale Adjustment

On remand, Commerce made a circumstance of sale adjustment "to add the same per-unit duty amount to home market price and [constructed value] as that [was] granted [to] Tos[ç]elik for the full amount of duties that were drawn back or forgiven by virtue of the export of the merchandise to the United States under the IPR exemption program." *Second Remand Results* at 17. On remand, Commerce contends that this circumstance of sale adjustment "account[s] for the . . . imbalance between the amount of the claimed duty drawback and the absence of any import duty costs included in normal value." *Id*. at 7. Commerce claims the circumstance of sale adjustment supports a fair comparison between the U.S. price and the constructed value because: (1) "the import duty program and drawback provision impose a different set of accounting and duty treatments dependent upon the market to which the finished good was sold," and (2) there were three conditions that required a circumstance of sale adjustment. *See id*. at 14–15. Those conditions include: the input source market, "the effect of the different sourcing of inputs and associated duty costs," and the differences between the U.S. and the home market in duty drawback treatment. *Id*. at 14–15.

Plaintiff contends that the law does not require a duty-neutral outcome and that Commerce cannot use a circumstance of sale adjustment here because the use of a circumstance of sale adjustment is restricted to the direct selling expenses context. Pl.'s Cmts. at 4. Defendant argues that Commerce's circumstance of sale adjustment eliminates the perception of double counting, supports a fair compari-

son between export price and normal value, and is permitted because "the operation of Turkey's duty drawback scheme and the antidumping duty law duty drawback provision[] transform the import duties subject to the duty drawback scheme into a direct selling expense." Def.'s Reply at 6, 8–9.[1]

Defendant-Intervenors argue that Commerce should make an adjustment to the cost of production for uncollected duties. Def-Intervenors' Cmts. at 1. Defendant-Intervenors' argument "rel[ies] on a reading of *Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, 635 F.3d 1335 (Fed. Cir. 2011)[] that the court disapproved of in *Tosçelik I." Tosçelik II* at 1315. On remand, Commerce removed the adjustment to cost of production that Defendant-Intervenor now seeks to reintroduce. Commerce's removal of this adjustment to cost of production on remand is in accordance with *Tosçelik II* and the court sustains Commerce's removal of the adjustment to cost of production. *Tosçelik II* at 1315.

A. Commerce's Circumstance of Sale Adjustment Negates the Duty Drawback Adjustment

Defendant's and Defendant-Intervenors' arguments as to the perception of double counting lack merit. First, despite its claims to the contrary, Commerce made a circumstance of sale adjustment not for the purpose of preventing the double-counting of adjustments. *Second Remand Results* at 17. The purpose of statutory adjustments to normal value is so Commerce can "ensure[] that there is no overlap or double-counting of adjustments." H.R. Rep. No. 103–826, pt. 1, at 84–85 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 3857–58; *Tosçelik II* at 1315. Commerce fails to explain how the circumstance of sale adjustment prevents double-counting of adjustments when only Tosçelik's duty drawback adjustment is at issue.

Second, the circumstance of sale adjustment does not remedy an imbalance; it negates the duty drawback adjustment. Defendant concedes that the circumstance of sale adjustment negates the duty drawback adjustment. *Second Remand Results* at 1–2 (noting that Commerce made "a circumstance of sale ... adjustment to [constructed value] and home market price to add the same amount of the per-unit amount of import duties added to U.S. price."). Commerce is not permitted to "use the [circumstance of sale] provision to effectively writ[e] [a separate adjustment] section out of the statute."

[1] Defendant-Intervenors add that although "[t]he purpose of the duty drawback adjustment as stated in *Tosçelik II* may not require that the two adjustments should be equal or duty neutral, ... the purpose of the duty drawback adjustment as stated in *Saha Thai does* require duty neutrality." Def-Intervenors' Cmts. at 4 (emphasis in original) (quotation marks omitted).

Habaş Sinai Ve Tibbi Gazlar Istihsal Endüstrisi, A.Ş. v. United States, 2019 WL 5270152, at *22 (CIT 2019) (internal quotation marks omitted) (*"Habaş II"); see also Zenith Electronics Corp. v. United States*, 988 F.2d 1573, 1581 (Fed. Cir. 1993). The upward adjustment to constructed value contemplated by 19 U.S.C. § 1677b(a)(6)(C)(iii) aids Commerce's statutory duty to make a fair comparison between normal value or constructed value and export price. Because Commerce's circumstance of sale adjustment negates the statutory duty drawback adjustment, the court concludes that Commerce's circumstance of sale adjustment is not in accordance with the law.

B. Commerce's Circumstance of Sale Adjustment Is Not Supported By 19 C.F.R. § 351.410

Defendant's argument as to the treatment of duty drawback as a direct selling expense is unavailing. Commerce's circumstance of sale adjustment does not result from circumstances concerning the sale of merchandise because "[t]he duty drawback adjustment resulted from the operation of law." *See Habaş II* at *21–22, *26. A duty is an expense unlike "commissions, credit expenses, guarantees, and warranties" and further is not "assumed by the seller on behalf of the buyer, such as advertising expenses." 19 C.F.R. §§ 351.410(c) and (d). The duty imposed in this matter is therefore neither a direct selling expense nor an assumed expense as defined in 19 C.F.R. § 351.410. Because the adjustment at issue concerns the imposition of a duty, not a circumstance of sale, the court concludes that Commerce's explanation for the circumstance of sale adjustment is not in accordance with the law. *Compare* 19 U.S.C. § 1677a(c)(1)(B) *with* 19 C.F.R. §§ 35l.410(b), (c), and (d) (identifying types of expenses properly subject to a circumstance of sale adjustment).

CONCLUSION

Because Commerce's circumstance of sale adjustment negates the duty drawback adjustment and Commerce incorrectly treats the duty drawback as a direct selling expense, the court concludes that the circumstance of sale adjustment is not in accordance with the law. For the foregoing reasons, the court sustains Commerce's duty drawback adjustment and remands to Commerce for future proceedings in accordance with this opinion. Accordingly, it is hereby

ORDERED that the duty drawback adjustment is sustained; and it is further

ORDERED that the *Second Remand Results* are remanded to Commerce for further proceedings; and it is further

ORDERED that this action shall proceed in accordance with the following schedule:

1. Commerce shall file its remand determination on or before February 18, 2020;
2. Commerce shall file the administrative record on or before March 4, 2020;
3. Parties' comments in opposition to the remand determination shall be filed on or before March 20, 2020;
4. Parties' comments in support of the remand determination shall be filed on or before April 20, 2020; and
5. The Joint Appendix shall be filed on or before May 4, 2020.

Dated: December 18, 2019
New York, New York

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

Slip Op. 19–167

ZHEJIANG ZHAOFENG MECHANICAL and ELECTRONIC CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00004

[Sustaining the U.S. Department of Commerce's Remand Results.]

Dated: December 18, 2019

Adams C. Lee, Harris Bricken McVay Sliwoski, LLP, of Seattle, WA, for Plaintiff Zhejiang Zhaofeng Mechanical and Electronic Co., Ltd.

Kelly A. Krystyniak, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *James H. Ahrens, II*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Geert M. De Prest, Schagrin Associates, of Washington, D.C., and *William A. Fennell*, Stewart and Stewart, of Washington, D.C., for Defendant-Intervenor The Timken Company. With them on the briefs were *Terence P. Stewart, Patrick J. McDonough, Lane S. Hurewitz*, and *Shahrzad Noorbaloochi*. *Nicholas J. Birch* also appeared.

OPINION

Choe-Groves, Judge:

This action arises from the U.S. Department of Commerce's ("Commerce") administrative review of the antidumping order on tapered

roller bearings from the People's Republic of China. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 83 Fed. Reg. 1,238 (Dep't Commerce Jan. 10, 2018) (final results of antidumping duty administrative review and rescission of new shipper review; 2015–2016) ("*Final Results*"). Before the court are the Final Results of Redetermination Pursuant to Court Remand, April 25, 2019, ECF No. 58 ("*Remand Results*"). For the following reasons, the court sustains the *Remand Results*.

ISSUES PRESENTED

The court reviews the following issues:

1. Whether Commerce's determination to grant Zhaofeng a separate rate is supported by substantial evidence; and
2. Whether Commerce's decision to use an inference adverse to the interests of Zhaofeng in selecting from facts otherwise available is supported by substantial evidence and is in accordance with the law.

BACKGROUND

The court presumes familiarity with the facts and procedural history and discusses only those facts relevant to the review of the *Remand Results. Zhejiang Zhaofeng Mech. and Elec. Co., Ltd., v. United States*, 42 CIT __, 355 F. Supp. 3d 1329 (2018) ("*Zhaofeng I*").

In the underlying administrative proceeding, Commerce became aware of irregularities in Zhaofeng's submissions when The Timken Company ("Timken" or "Defendant-Intervenor") submitted comments identifying discrepancies in a verification exhibit. Pet'r's Pre-Preliminary Cmts. 1–3, PD 181, bar code 3576832–01 (May 31, 2019). Zhaofeng acknowledged the discrepancies, but averred that they were the result of clerical errors and that a review of Zhaofeng's U.S. sales invoice would resolve the discrepancies. *Remand Results* at 3 & nn.6–7 (citing Zhaofeng's Case Br. 3–4, PD 184, bar code 3604752–01 (Aug. 17, 2017)); *see also* Zhaofeng Cmts. at 4. Commerce obtained the corresponding entry documentation from U.S. Customs and Border Protection ("CBP") and set a schedule for submitting rebuttal factual information. *Remand Results* at 3; *see also* Entry Documents Placed on the Record, Opportunity to Submit Rebuttal Factual Information and Final Date for Rebuttal Br., bar code 3617066–01 (Sept. 7, 2017). When Commerce compared the entry documents to Zhaofeng's verification exhibit, Commerce identified several differences, including that "the number of line items, all product codes, and most individual quantities did not match," although "the invoice number, customer name, and total sales value were the same for each set of records."

Remand Results at 3–4 & n.8; *see also* Final Analysis Mem., bar code 3659982–01 (Jan. 2, 2018) ("Final Analysis Mem.") (comparing Zhaofeng's verification exhibit with the invoice filed by the importer).

In *Zhaofeng I*, the court concluded that Commerce could not disregard a respondent's separate rate information as "tainted" just because there were deficiencies in the respondent's sales or factors of production data. 42 CIT at __, 355 F. Supp. 3d at 1333–34. The court remanded to Commerce for reconsideration of Zhaofeng's separate rate status. *Id.* at 1335.

On remand, Commerce granted Zhaofeng a separate rate. *Remand Results* at 5. In determining Zhaofeng's dumping margin, Commerce reassessed the discrepancies between Zhaofeng's reconciliation worksheet and the invoice in the entry documents. *See id.* at 2–4, 6–22. In addition to the differences in the identification of goods as subject merchandise or non-subject merchandise, Commerce noted that the invoice in the entry documents contained a greater number of product codes and pieces, but the invoice reflected the same total value that was reported in the corresponding verification exhibit. *Id.* at 7. Commerce recognized that the discrepancies involved a single sale, but assessed that the sale represented a significant quantity and value relative to Zhaofeng's reported sales of subject merchandise. *Id.* at 2–4, 7, n. 20. As a result, Commerce found that "Zhaofeng withheld information from Commerce, . . . failed to provide information in the form and manner requested, by failing to report a significant quantity of its U.S. sales, . . . that Zhaofeng significantly impeded the proceeding by withholding sales information and misleading Commerce at verification, and then by providing additional false information to dismiss the inconsistencies found subsequent to verification." *Id.* at 8. Because Commerce determined that Zhaofeng failed to cooperate to the best of its ability, Commerce calculated a rate using an adverse inference to facts otherwise available ("adverse facts available" or "AFA"). *Id.* at 9; 19 U.S.C. § 1677e. Commerce assigned Zhaofeng a dumping margin of 92.84 percent, which was the AFA rate previously assigned in the June 1, 2006 through May 31, 2007 review of this proceeding. *Remand Results* at 10; *see Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 74 F.R. 3,987, 3,988–89 (Dep't Commerce Jan. 22, 2009) (final results of antidumping duty administrative review).

Timken filed comments in support of the *Remand Results*. Timken's Cmts. on Final Results of Redetermination Pursuant to Court Remand, May 13, 2019, ECF No. 62 ("Timken Cmts."). Zhaofeng filed comments in opposition. Pl.'s Reply Cmts. on DOC Remand Redetermination, June 10, 2019, ECF No. 63 ("Zhaofeng Cmts."). Defendant

and Timken filed reply comments. Def.'s Resp. to Pl.'s Cmts. on Remand Redetermination, Aug. 5, 2019, ECF No. 79 ("Def.'s Resp."); Reply Br. of Def.-Intervenor Timken, Aug. 5, 2019, ECF No. 80. The Parties filed a joint appendix. J.A., Aug. 19, 2019, ECF No. 84.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012) and 28 U.S.C. § 1581(c). The court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

I. Commerce's Decision to Grant Zhaofeng Separate Rate Status

On remand, Commerce granted Zhaofeng a separate rate. *See Remand Results* at 5. The Parties do not contest Commerce's grant of a separate rate to Zhaofeng. Zhaofeng Cmts. at 2; Def.'s Resp. at 3; Timken Cmts. at 2. Because Commerce examined Zhaofeng's information and determined that it satisfied the *de jure* and *de facto* criteria to obtain a separate rate, the court sustains the *Remand Results* as to Zhaofeng's separate rate status. *See Remand Results* at 5.

II. Commerce's Application of Adverse Facts Available to Zhaofeng

If an interested party: (1) "withholds information that has been requested," (2) "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," (3) "significantly impedes a proceeding," or (4) "provides such information but the information cannot be verified," then Commerce may rely on facts otherwise available. 19 U.S.C. § 1677e(a)(2)(A)–(D). If a party fails to cooperate to the best of its ability, Commerce may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. 19 U.S.C. § 1677e(b).

The U.S. Court of Appeals for the Federal Circuit has interpreted 19 U.S.C. § 1677e subsections (a) and (b) to have different purposes. *See Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1232 (Fed. Cir. 2014); 19 U.S.C. § 1677e(a)–(b). Subsection (a) applies "whether or not any party has failed to cooperate fully with the agency in its inquiry." *Mueller*, 753 F.3d at 1232. Subsection (b) applies only when Commerce makes a separate determination that the respondent failed to cooperate "by not acting to the best of its

ability." *Id.* A party fails to cooperate to the best of its ability when it does not "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of [its] ability to do so." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (noting that "intentional conduct, such as deliberate concealment or inaccurate reporting . . . evinces a failure to cooperate."); *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012). When making an adverse inference, Commerce may rely on information derived from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record. *See* 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c).

A. Application of Facts Available

First, Zhaofeng argues that the record does not support application of facts available. Zhaofeng contends, *inter alia*, that the sale involved non-subject merchandise, that Zhaofeng's information is consistent with Commerce's verification, and that Commerce cannot identify discrepancies in other transactions.[1] Zhaofeng's Cmts. at 5–15. Second, Zhaofeng contends that: (1) Commerce cannot show that Zhaofeng withheld any information, (2) Commerce did not explain how Zhaofeng failed to provide timely information or in the form and manner requested, (3) that Zhaofeng did not significantly impede the investigation, and (4) that Zhaofeng provided verifiable information. *Id.* at 16–18.

Defendant counters that Zhaofeng's verification and CBP entry documents contained inconsistencies, that Zhaofeng did not adequately explain its discrepancies, and that Zhaofeng did not supplement the record to show that issues raised by the transaction were an isolated occurrence. Def.'s Resp. at 14–16. Timken adds that Zhaofeng's transaction contained other discrepancies beyond the reporting of subject and non-subject merchandise, including that the quantity and line items in Zhaofeng's CBP entry documents were inconsistent with Zhaofeng's sales reconciliation worksheet. Timken Cmts. at 5–6.

Plaintiff's arguments are not persuasive. Commerce identified differences between Zhaofeng's sales verification worksheet and the corresponding CBP entry documents as to the number of line items, product codes, and individual quantities identified in the respective

[1] Plaintiff's reliance on Zhaofeng's verification is misplaced, as the verification occurred before the discovery of the discrepancies. *Micron Tech. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997) ("Verification is a spot check and is not intended to be an exhaustive examination of a respondent's business." (internal citation omitted)); 19 U.S.C. § 1677m(i); 19 C.F.R. § 351.307–351.308.

documents. *Remand Results* at 6–7 & nn. 18–20; *see also* Final Analysis Mem. at 4. Even if, as Zhaofeng contends, "the sales verification worksheet correctly identified this sale as a non-subject sale even though the line item product codes [were] incorrectly identified for this transaction," Zhaofeng's explanation does not resolve how the sales totals between the documents match despite differences in quantity and line items. *See* Zhaofeng's Cmts. at 6. Because the sales reconciliation was a critical link between Zhaofeng's sales of subject merchandise and Zhaofeng's accounting records, Commerce could conclude reasonably that Zhaofeng's sales database was unreliable.

Based on the identified discrepancies in the record, Commerce found that Zhaofeng withheld information and failed to provide information in the form and manner requested "by failing to report a significant quantity of its U.S. sales," and that "Zhaofeng significantly impeded the proceeding by withholding sales information and misleading Commerce at verification." *Remand Results* at 8 (citing 19 U.S.C. § 1677e(a)(2)(A)–(C)). The court concludes that Commerce's findings under 19 U.S.C. § 1677e(a) were supported by substantial evidence.

B. Application of Adverse Facts Available

Plaintiff argues that the record does not support the application of AFA[2] and that Commerce's application of AFA was not in accordance with the law because Commerce may not apply total AFA if Zhaofeng would not have received a benefit by submitting an inaccurate verifications sales reconciliation worksheet.[3] Zhaofeng's Cmts. at 2, 18–20; *see also Statement of Administrative Action* at 870, H.R. Rep. 103–316, reprinted in 1994 U.S.C.C.A.N. 4040, 4199 ("SAA"). Defendant avers that Commerce's *Remand Results* are supported by substantial evidence and are in accordance with the law. Defendant also responds that the benefit inquiry focuses on the significance of the issues and whether a correction is available, not whether a benefit would have been received. Def.'s Resp. at 18.

Plaintiff's arguments lack merit. First, when applying AFA, Commerce assessed that the discrepancies undermined the credibility of Zhaofeng's U.S. sales database. *Remand Results* at 25–26; Final Analysis Mem. at 1–2. Because Commerce identified discrepancies in the sales reconciliation, and the sales reconciliation was an important

[2] Zhaofeng also contends that the record does not support application of neutral or partial facts available. Zhaofeng's Cmts. at 5.

[3] Zhaofeng further argues that Commerce's application of AFA was arbitrary. Plaintiff misapprehends the standard of review for this action. *Compare* 19 U.S.C. § 1516a(b)(1)(A) *with* 19 U.S.C. § 1516a(b)(1)(B)(i).

link between Zhaofeng's sales of subject merchandise and Zhaofeng's accounting records, Commerce could reasonably draw an inference that Zhaofeng's U.S. sales database was not credible. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1357 (Fed. Cir. 2015) (noting that "misrepresentations may reasonably be inferred to pervade the data in the record beyond that which Commerce has positively confirmed as misrepresented" (internal quotation marks omitted)).

Second, as to benefit, Commerce may apply AFA if a respondent does not cooperate "to the best of [its] ability, regardless of motivation or intent." *Nippon Steel Corp.*, 337 F.3d at 1383. This standard "does not require perfection and recognizes that mistakes sometimes occur," but "it does not condone inattentiveness, carelessness, or inadequate record keeping." *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1379 (Fed. Cir. 2016) (quoting *Nippon Steel Corp.*, 337 F.3d at 1382). In this case, Commerce addressed the issue of benefit and found that Zhaofeng sought to "mislead Commerce and conceal multiple sales of subject merchandise." *Remand Results* at 25; *see also* SAA at 4199. This finding was supported by the discrepancies in the sales reconciliation, including the identification of a previously unnamed U.S. customer and a different quantity of merchandise for sale at issue. *Remand Results* at 25–26.

On remand, Commerce assigned Zhaofeng a dumping margin of 92.84 percent. *Id.* at 10. Under 19 U.S.C. § 1677e(d), if Commerce uses an inference that is adverse to the interests of a party under 19 U.S.C. § 1677e(b)(1)(A) in selecting among the facts otherwise available, then Commerce may use a dumping margin from any segment of the proceeding under the antidumping order. 19 U.S.C. § 1677e(d)(1)(B). Because Commerce assigned Zhaofeng the same AFA rate previously assigned in the June 1, 2006 through May 31, 2007 review of this proceeding, Commerce's determination of Zhaofeng's dumping margin is in accordance with the law. *see id.; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 74 F.R. at 3,988–89.

Because Commerce could conclude reasonably that Zhaofeng failed to act to the best of its ability, Commerce could apply AFA in this action. *See Papierfabrik August Koehler SE v. United States*, 843 F.3d at 1379. For these reasons, the court concludes that Commerce's decision to apply AFA was supported by substantial evidence and is in accordance with the law.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's *Remand Results*. Judgment will be entered accordingly.

Dated: December 18, 2019
New York, New York

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

Slip Op. 19–168

UTTAM GALVA STEELS LIMITED, Plaintiff, v. UNITED STATES, Defendant, and ARCELORMITTAL USA LLC, AK STEEL CORPORATION, STEEL DYNAMICS, INC., CALIFORNIA STEEL INDUSTRIES, INC., UNITED STATES STEEL CORPORATION, and NUCOR CORPORATION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 16–00162

[Sustaining the U.S. Department of Commerce's second remand results.]

Dated: December 18, 2019

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OPINION AND ORDER

Choe-Groves, Judge:

This action arises out of the final determination in an antidumping duty investigation by the United States Department of Commerce ("Commerce") regarding certain corrosion-resistant steel products from India. *See* Certain Corrosion-Resistant Steel Products From India, 81 Fed. Reg. 35,329 (Dep't Commerce June 2, 2016) (final

determination of sales at less-than-fair value), as amended, 81 Fed. Reg. 48,390 (Dep't Commerce July 25, 2016) (amended final affirmative determination and issuance of antidumping duty orders). Before the court are the Final Results of Redetermination Pursuant to Court Remand, May 29, 2019, ECF No. 95 ("*Second Remand Results*"). For the reasons discussed below, the court sustains Commerce's *Second Remand Results*.

PROCEDURAL HISTORY

The court presumes familiarity with the facts and procedural history of this case. *See Uttam Galva Steels Ltd. v. United States*, 42 CIT __, 311 F. Supp. 3d 1345 (2018) ("*Uttam Galva I*") and *Uttam Galva Steels Ltd. v. United States*, 43 CIT __, 374 F. Supp. 3d 1360 (2019) ("*Uttam Galva II*"). The sole issue in *Uttam Galva I* was whether Commerce reasonably calculated Uttam Galva's duty drawback adjustment by allocating import duties rebated and exempted by reason of export of finished product over total cost of production. *Uttam Galva I* at 1348. The court concluded that Commerce's methodology contravened the plain language of the underlying statute, 19 U.S.C. § 1677a(c)(1)(B), and remanded to Commerce with instructions to recalculate Uttam Galva's duty drawback adjustment. *Uttam Galva I* at 1357.

On remand, Commerce recalculated Uttam Galva's duty drawback adjustment by allocating import duties rebated and exempted by reason of export of finished product over total exports, as reported by Uttam Galva. *Final Results of Redetermination Pursuant to Court Remand*, Aug. 16, 2018, ECF No. 18 ("*First Remand Results*") at 1–2. Commerce made an additional circumstance of sale adjustment because Commerce perceived an imbalance in its comparison between Uttam Galva's export price and normal value. *See id.* at 2–4. The court concluded that: (1) Commerce's circumstance of sale adjustment double-counted Uttam Galva's import duties within normal value because Commerce's original calculation already incorporated the import duties incurred for merchandise sold in the home market, and (2) Commerce's revised calculation of Uttam Galva's duty drawback adjustment was unsupported by substantial evidence and not in accordance with the law. *Uttam Galva II* at 1364–65. The court remanded for further proceedings. *Id.* at 1365.

Commerce filed its *Second Remand Results* on May 29, 2019. *Second Remand Results* at 1–2. To remove "any perceived or actual double counting of import duties to ensure that our dumping calculation is duty neutral, meaning that the same amount of duties are

accounted for on both sides of the dumping equation," Commerce amended its duty drawback calculation methodology by:

> (1) making a per-unit adjustment to U.S. price in the full amount of the per-unit duty drawback granted on export, as claimed by Uttam Galva [(the "First Adjustment")]; (2) not including imputed import duties in Uttam Galva's cost of production . . . [(the "Second Adjustment")]; (3) making a [circumstance of sale] adjustment to remove all booked import duties from constructed value . . . and from Uttam Galva's reported home market prices [(the "Third Adjustment")]; and (4) making another [circumstance of sale] adjustment to [constructed value] and home market price to add the same amount of the per-unit amount of import duties added to U.S. price [(the "Fourth Adjustment")].

Id. at 2. Under Commerce's modified calculations, Commerce assigned Uttam Galva a weighted-average dumping margin of 0.00 percent. *Id.* at 16.

Plaintiff Uttam Galva filed comments on the *Second Remand Results*. Pl.'s Cmts. on the Second Remand Redetermination, June 28, 2019, ECF No. 98 ("Pl.'s Cmts."). Defendant-Intervenors ArcelorMittal USA LLC, AK Steel Corporation, Steel Dynamics, Inc., California Steel Industries, United States Steel Corporation, and Nucor Corporation filed comments. Def-Intervenors' Cmts. in Opp'n to the Second Remand Redetermination, June 28, 2019, ECF No. 97 ("Def-Intervenors' Cmts."). Defendant United States ("Defendant" or "Government") filed a reply and a corrected reply. Def.'s Reply to Cmts. on Second Remand Redetermination, Aug. 12, 2019, ECF No. 102; Def.'s Corrected Reply to Cmts. on Second Remand Redetermination, Aug. 20, 2019, ECF No. 107 ("Def.'s Reply").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c). The court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The results of a redetermination pursuant to court remand are reviewed also for compliance with the court's remand order. *See ABB Inc. v. United States*, 42 CIT __, __, 2018 WL 6131880, at *2 (CIT Nov. 13, 2018). Even though Uttam Galva has received a weighted-average dumping margin of 0.00 percent, Commerce protests the parts of the methodology it finds itself

compelled to accept, as do Defendant-Intervenors. *Second Remand Results* at 2; Def-Intervenors' Cmts. at 4. The court considers the entire methodology to be at issue.

ANALYSIS

On remand, Commerce granted Plaintiff the full duty drawback adjustment that Plaintiff claimed (the First Adjustment) and made three additional circumstance of sale adjustments (the Second, Third, and Fourth Adjustments). *Second Remand Results* at 2. Uttam Galva suggests that the Second, Third, and Fourth Adjustments are extraneous, but neither makes a legal challenge to any of the adjustments nor requests that the court remand to Commerce. Pl.'s Cmts. at 4. The Government argues that all four adjustments are needed. Def.'s Reply. at 10.

A duty drawback adjustment is an adjustment to export price, i.e., an increase by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). The purpose of a duty drawback adjustment is to correct an imbalance and to prevent an inaccurately high dumping margin by increasing export price to the level the export price likely would be absent a duty drawback.

Normal value represents the price at which the subject merchandise is sold in the exporting country. *See id.* § 1677b(a)(1)(A). When determining the appropriate price for comparison, Commerce may make certain price adjustments, such as a circumstance of sale adjustment. *See id.* § 1677b(a)(6). Under the statute, the price may be:

> (C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to— . . .
>
> (iii) other differences in the circumstances of sale.

Id. § 1677b(a)(6)(C)(iii). The purpose of statutory adjustments to normal value is to "ensure[] that there is no overlap or double-counting of adjustments." H.R. Rep. No. 103–826, pt. 1, at 84–85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3857–58.

"[T]he Secretary will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act [19 U.S.C. § 1677b(a)(6)(C)(iii)] only for direct selling expenses and assumed expenses." 19 C.F.R. § 351.410(b). Direct selling expenses are "expenses, such as commissions, credit expenses, guarantees, and warranties, that result from,

and bear a direct relationship to, the particular sale in question." 19 C.F.R. § 351.410(c). Assumed expenses are "selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses." 19 C.F.R. § 351.410(d).

1. *Commerce's First Adjustment Is In Accordance With The Law*

Uttam Galva does not contest Commerce's First Adjustment, which provides for a duty drawback adjustment, and contends that Commerce needed only to make the First Adjustment to comply with the court's orders. Pl.'s Cmts. at 4. Defendant recognizes that Commerce is subject to a statutory obligation to calculate a duty drawback adjustment. Def.'s Reply at 11. Defendant-Intervenors argue that Commerce should make an adjustment to cost of production for imputed (uncollected) duties. Def-Intervenors' Cmts. at 5–6 (citing *Saha Thai Steel Pipe (Public) Company Ltd. v. United States*, 635 F.3d 1335 (Fed. Cir. 2011) ("*Saha Thai*")). In substantiating Commerce's circumstance of sale adjustments, Defendant and Defendant-Intervenors rely on a reading of *Saha Thai* that the Court previously disapproved of in *Uttam Galva II*. Def.'s Reply at 15–16; *Uttam Galva II* at 1363. On remand, Commerce removed the adjustment to cost of production that Defendant-Intervenor now seeks to reintroduce. Def-Intervenors' Cmts. at 3. Commerce's removal of this adjustment to cost of production on remand is in accordance with *Uttam Galva II* and the court sustains Commerce's removal of the adjustment to cost of production. *Uttam Galva II* at 1363. Both Defendant and Defendant-Intervenors quote language from *Saha Thai* discussing the illogic of increasing export price without then calculating normal value based on an increased cost of production and constructed value. The quoted passage in *Saha Thai* relates "to an adjustment to normal value with respect to the particular facts, exemption program, and recordkeeping practices presented in *Saha Thai*, and should not be expanded to encompass all duty drawback adjustment calculations made by Commerce." *Uttam Galva II* at 1363 (quoting *Uttam Galva I* at 1355). Defendant-Intervenors quote the following passage:

> The government determined that adding exempted import duties to [export price] without also including the exempted duties in [cost of production] and [constructed value] could have unfairly distorted the dumping margin in Saha's favor. In Commerce's view, it should follow the "matching principle" in making such calculations, which is the basic accounting practice whereby expenses are matched with benefits derived from them. . . . We agree that Commerce reasonably decided that any increase to [export price] pursuant to a duty drawback adjustment

> should be accompanied by a corresponding increase to [cost of production] and [constructed value]. As discussed above, the entire purpose of increasing [export price] is to account for the fact that the import duty costs are reflected in [normal value] (home market sales prices) but not in [export price] (sales prices in the United States). An import duty exemption granted only for exported merchandise has no effect on home market sales prices, so the duty exemption should have no effect on [normal value]. Thus, because [cost of production] and [constructed value] are used in the [normal value] calculation, [cost of production] and [constructed value] should be calculated as if there had been no import duty exemption. It would be illogical to increase [export price] to account for import duties that are purportedly reflected in [normal value], while simultaneously calculating [normal value] based on a [cost of production] and [constructed value] that do not reflect those import duties. Under the "matching principle," [export price], [cost of production], and [constructed value] should be increased together, or not at all.

Def-Intervenors' Cmts. at 3 (quoting *Saha Thai* at 1342–43); *see* Def.'s Reply at 16 (quoting a subset of the text Defendant-Intervenors quote).

Because Commerce calculated a duty drawback adjustment as directed in accordance with 19 U.S.C. § 1677a(c)(1)(B), the court concludes that Commerce's First Adjustment is in accordance with the law.

2. *Commerce's Second, Third, And Fourth Adjustments*

On remand, Commerce made three circumstance of sale adjustments but calculated a 0.00 percent weighted-average dumping margin. Uttam Galva suggests that the circumstance of sale adjustments are extraneous, but neither makes a legal challenge to the Second, Third, or Fourth Adjustments nor requests that the court remand to Commerce. Pl.'s Comments at 4–5. Defendant contends that the import duties at issue are a direct selling expense under 19 C.F.R. §§ 351.410(b) and (c) and qualify for a circumstance of sale adjustment. Def.'s Reply at 13, 14; *Second Remand Results* at 13.

Defendant's justifications for the Second, Third, and Fourth Adjustments are suspect. A duty results from the operation of law; it is an expense unlike "commissions, credit expenses, guarantees, and warranties" and further is not "assumed by the seller on behalf of the buyer, such as advertising expenses." 19 C.F.R. §§ 351.410(c) and (d). The duty imposed in this matter is neither a direct selling expense

nor an assumed expense as defined in 19 C.F.R. § 351.410. The Second, Third, and Fourth Adjustments are not supported by either the statute's text or Commerce's implementing regulation. The Second Adjustment does not include imputed import duties in Uttam Galva's cost of production, and the Third Adjustment removes all booked import duties from constructed value and from Uttam Galva's reported home market prices. *Second Remand Results* at 2. The Fourth Adjustment negates the duty drawback adjustment provided for by the First Adjustment.

Commerce's circumstance of sale adjustments do not result from circumstances concerning the sale of merchandise because "[t]he duty drawback adjustment [instead] resulted from the operation of law." *See Habaş II* at 26, 21–22. The Second, Third, and Fourth Adjustments concern the imposition of a duty, not a circumstance of sale. *Compare* 19 U.S.C. § 1677a(c)(1)(B) *with* 19 C.F.R. §§ 351.410(b), (c), and (d) (identifying types of expenses properly subject to a circumstance of sale adjustment). Commerce used the Second and Third Adjustments to provide the portion of the duty drawback adjustment due to Uttam Galva that were attributable only to the rebate program (not the exemption programs) in which it participated. *Second Remand Results* at 15. Commerce is not permitted to "use the [circumstance of sale] provision to effectively writ[e] [a separate adjustment] section out of the statute." *Habaş Sinai Ve Tibbi Gazlar Istihsal Endüstrisi, A.Ş. v. United States*, 2019 WL 5270152 at *22 (Ct. Intl. Trade Oct. 17, 2019) (internal quotation marks omitted); *see also Zenith Electronics Corp. v. United States*, 988 F.2d 1573, 1581 (Fed. Cir. 1993). When Commerce makes an adjustment, it should rely on the relevant statutory provision; in this case and on these facts, that provision is 19 U.S.C. § 1677a(c)(1)(B). Because Plaintiff neither contests the legality of the Second, Third, and Fourth Adjustments nor requests that the court remand, the court sustains the *Second Remand Results*.

CONCLUSION

For the reasons set forth above, the court sustains Commerce's second remand redetermination. Judgment will be issued accordingly.

Dated: December 18, 2019
New York, New York

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