U.S. Customs and Border Protection

DELAYED DEPLOYMENT DATE FOR MODIFICATION OF TEST PROGRAM REGARDING ELECTRONIC FOREIGN TRADE ZONE ADMISSION APPLICATIONS FOR EXPANDED ZONE IDENTIFICATION NUMBERS

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

ACTION: General notice.

SUMMARY: This notice announces that the deployment date for the expanded zone identification number modifications to the electronic Foreign Trade Zone admission applications test is delayed until April 25, 2021. On September 25, 2020, U.S. Customs and Border Protection published a notice in the **Federal Register** announcing modifications to the electronic FTZ admission applications test including, *inter alia,* the expansion of the zone identification number from seven to nine digits. These zone identification number changes were to have been implemented on January 25, 2021, and this notice announces that the deployment date in the Automated Commercial Environment is delayed until April 25, 2021.

DATES: The expanded zone identification number will be implemented as of April 25, 2021. This test will continue until concluded by way of announcement in the **Federal Register**.

ADDRESSES: Comments concerning this notice and any aspect of this test may be submitted at any time during the test via email to Cargo & Conveyance Security, Office of Field Operations, U.S. Customs and Border Protection, at *FTZe214Test@cbp.dhs.gov,* with a subject line identifier reading "Comment on Electronic FTZ Admission Application FRN."

FOR FURTHER INFORMATION CONTACT: For operational questions, contact Lydia Jackson, Cargo & Conveyance Security, Office of Field Operations, U.S. Customs and Border Protection, at 202–344–3055 or *FTZe214Test@cbp.dhs.gov.* For technical questions, contact Arnold Buratty, Cargo Systems Program Directorate, Office of Information and Technology, U.S. Customs and Border Protection, at 571–468–5309 or *Arnold.Buratty@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On September 25, 2020, U.S. Customs and Border Protection (CBP) published a notice entitled "Modification of Test Program Regarding Electronic Foreign Trade Zone Admission Applications" in the **Federal Register** (85 FR 60479). The test is part of the National Customs Automation Program (NCAP), which was established by Subtitle B of Title VI—Customs Modernization in the North American Free Trade Agreement (NAFTA) Implementation Act (Customs Modernization Act) (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993) (19 U.S.C. 1411). The notice announced modifications to the electronic Foreign Trade Zone (FTZ) admission applications test including, *inter alia,* the expansion of the zone identification (ID) number from seven to nine digits. The deployment date in the Automated Commercial Environment (ACE) for the modifications regarding the expanded zone ID number was to have been January 25, 2021.

Subsequent to publishing the September 25, 2020, notice in the **Federal Register**, CBP published the relevant updates in the ACE FTZ chapter of the CBP and Trade Automated Interface Requirements (CATAIR), available at: *https://www.cbp.gov/trade/ace/catair.* CBP has assessed stakeholder readiness and determined that a delayed deployment date in ACE for the modifications regarding the expanded zone ID number is in the best interests of all parties involved. Delaying the deployment date will allow for the required programming modifications on the part of trade participants (specifically by allowing additional time to code and test) and will also provide CBP with more time to coordinate with local zone operators (who will be receiving new zone ID numbers). Accordingly, the deployment date in ACE for the modifications of the electronic FTZ admission application test regarding the expanded zone ID number is April 25, 2021.

Dated: December 31, 2020.

WILLIAM A. FERRARA,
Executive Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, January 7, 2021 (86 FR 1116)]

U.S. Court of International Trade

Slip Op. 21–01

HUSTEEL CO., LTD. et al., Plaintiff and Consolidated Plaintiffs, v. UNITED STATES, Defendant, and CALIFORNIA STEEL INDUSTRIES et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00169

[Sustaining the U.S. Department of Commerce's final results in the second remand redetermination in the 2015–2016 administrative review of the antidumping duty-order on welded line pipe from the Republic of Korea.]

Dated: January 4, 2021

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

J. David Park, *Henry D. Almond, Daniel R. Wilson*, and *Kang W. Lee*, Arnold & Porter Kaye Scholer LLP, of Washington, DC, for consolidated plaintiffs Hyundai Steel Company and NEXTEEL Co., Ltd.

Jeffrey M. Winton and *Amrietha Nellan*, Law Office of Winton & Chapman PLLC, of Washington, DC, for consolidated plaintiff SeAH Steel Corporation.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. Also on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of Counsel was *Reza Karamloo*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Elizabeth J. Drake, Roger B. Schagrin, Christopher Todd Cloutier, and *John Winthrop Bohn*, Schagrin Associates, of Washington, DC, for defendant-intervenors California Steel Industries and Welspun Tubular LLC USA.

Gregory J. Spak, F*rank J. Schweitzer, Kristina Zissis, Luca Bertazzo*, and *Matthew Wolf Solomon*, White & Case LLP, of Washington, DC, for defendant-intervenors Maverick Tube Corporation and IPSCO Tubulars Inc.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") second remand determination in the 2015–2016 administrative review of the antidumping duty ("ADD") order on welded line pipe ("WLP") from the Republic of Korea ("Korea"), filed pursuant to the court's remand order in *Husteel Co. v. United States*, 44 CIT __, __, 463 F. Supp. 3d 1334, 1344 (2020) ("*Husteel II*"). *See* Final Results of Redetermination Pursuant to Second Ct. Remand [in *Husteel II*],

Sept. 16, 2020, ECF No. 141 ("*Second Remand Results*"); *see also [WLP] from [Korea]*, 83 Fed. Reg. 33,919 (Dep't Commerce July 18, 2018) (final results of [ADD] admin. review; 2015–2016) ("*Final Results*") *as amended by [WLP] from [Korea]*, 83 Fed. Reg. 39,682 (Dep't Commerce Aug. 10, 2018) (amended final results of [ADD] admin. review; 2015–2016) ("*Amended Final Results*") and accompanying Issues and Decisions Memo. for the Final Results of the 2015–2016 Admin. Review of the [ADD] Order on Welded Line Pipe from Korea, A-580–876, (July 11, 2018), ECF No. 25–5 ("Final Decision Memo"). For the following reasons, the court sustains Commerce's second remand redetermination.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinions ordering remand to Commerce, and now recounts those facts relevant to the court's review of the *Second Remand Results*. *See Husteel II*, 44 CIT at __, 463 F. Supp. 3d at 1337–39; *see also Husteel Co. v. United States*, 44 CIT __, __, __, 426 F. Supp. 3d 1376, 1380–82 (2020) ("*Husteel I*"). On August 10, 2018, Commerce published its amended final determination in its 2015–2016 administrative review of the ADD order covering WLP from Korea. *See generally Amended Final Results*. Commerce calculated weighted average dumping margins of 18.77 percent for Hyundai Steel Company/Hyundai HYSCO ("Hyundai"), and 14.39 percent for SeAH Steel Corporation ("SeAH"). *See id.*, 83 Fed. Reg. at 39,682. Pursuant to U.S. Court of International Trade Rule 56.2, SeAH, Hyundai, NEXTEEL Co., Ltd. ("NEXTEEL"), and Husteel Co., Ltd. ("Husteel") brought this consolidated action on several motions for judgment on the agency record, challenging various aspects of Commerce's final determination. *See* Pl. [SeAH]'s Mot. J. Agency R., Feb. 1, 2019, ECF No. 37; Consol. Pl. [Hyundai]'s 56.2 Mot. J. Agency R., Feb. 1, 2019, ECF No. 39; Consol. Pl. [NEXTEEL]'s 56.2 Mot. J. Agency R., Feb. 1, 2019, ECF No. 41; Pl. [Husteel]'s Mot. J. Agency R., Feb. 1, 2019, ECF No. 42.

In *Husteel I*, the court remanded Commerce's final determination for further explanation or reconsideration. *See* 44 CIT at __, 426 F. Supp. 3d at 1395. The court held that Commerce's upward adjustment to the reported costs of hot rolled coil ("HRC")—an input used to produce WLP—to account for a particular market situation ("PMS") in Korea when subjecting Hyundai's home market sales of WLP to the below-cost sales test was unsupported by substantial evidence and contrary to law. *See id.*, 44 CIT at __, 426 F. Supp. 3d at 1383–92, 1394–95. The court also remanded Commerce's finding that SeAH's

third country sales into Canada were unrepresentative, and its resultant decision to use constructed value to determine the normal value of SeAH's sales, for further explanation or reconsideration. *See id.*, 44 CIT at __, 426 F. Supp. 3d at 1392–95.

In *Husteel II*, the court sustained Commerce's decision, under respectful protest,[1] to reverse its PMS finding and to calculate SeAH and Hyundai's dumping margin without applying an upward adjustment to the reported costs of HRC. *See Husteel II*, 44 CIT at __, 463 F. Supp. 3d at 1339–41; *see also* Final Results of Redetermination Pursuant to Ct. Remand [in *Husteel I*] at 1–2, Apr. 1, 2020, ECF No. 124. The court also sustained Commerce's decision to calculate SeAH's normal value using its third country sales into Canada. *See Husteel II*, 44 CIT at __, 463 F. Supp. 3d at 1341–42. However, as requested by Commerce, the court remanded Commerce's refusal to grant to SeAH a constructed export price offset when calculating SeAH's normal value. *See id.*, 44 CIT at __, 463 F. Supp. 3d at 1343–44.

For its second remand, upon reconsideration of the record evidence and the court's remand order, Commerce determined that a constructed export price offset for SeAH is warranted. *Second Remand Results* at 2–6. SeAH did not object to Commerce's redetermination, and no other party commented on the draft results. *Id.* at 5. Commerce indicated its intent to issue a Timken notice with the amended final results should the court sustain its second remand redetermination.[2] *Id.* at 6. On November 2, 2020, Defendant filed comments on the *Second Remand Results* with the court, notifying that no party filed comments challenging Commerce's redetermination, and requesting that the court sustain Commerce's *Second Remand Results* and enter judgment for the United States. *See* Def.'s Cmts. Regarding Commerce's [*Second Remand Results*], Nov. 2, 2020, ECF No. 143.

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)

[1] By adopting a position "under protest," Commerce preserves its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F. 3d 1371, 1376 (Fed. Cir. 2003).

[2] The Timken Notice stems from *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) ("*Timken Co.*"), as clarified by *Diamond Sawblades Mfrs. Coalition v. United States*, 626 F.3d 1374 (Fed. Cir. 2010), where the Court of Appeals for the Federal Circuit clarified the requirements of 19 U.S.C. § 1516a(c)(1). Commerce must notify the public when a court's final judgment in a case is "not in harmony" with an original agency determination, and Commerce will suspend liquidations to ensure that post-notice entries are liquidated at a rate consistent with a conclusive court decision. *Timken Co.*, 893 F.2d at 341.

(2012),[3] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an [ADD] order. The court will uphold Commerce's remand redetermination 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

Commerce, to the extent practicable, calculates normal value based on prices for sales in the comparison market that are made at the same level of trade ("LOT") as the export price (or constructed export price). 19 U.S.C. § 1677b(a)(1)(B)(i). "Sales are made at different levels of trade if they are made at different marketing stages (or their equivalent)." 19 C.F.R. § 351.412(c)(2) (2017).[4] When identifying the LOT for comparison market sales (here, third country sales) and export price sales, *see* 19 U.S.C. § 1677a(a), Commerce looks at what selling activities relate to the starting price before any statutory adjustments to the starting price are made. *See* 19 C.F.R. § 351.412(c)(i), (iii). However, when identifying the LOT for constructed export price sales, *see* 19 U.S.C. § 1677a(b), Commerce looks "only [at] the selling activities reflected in the price after the deduction of expenses and profit under [19 U.S.C. § 1677a(d)(2)]." *See [WLP] from [Korea]*, 83 Fed. Reg. 1,023 (Dep't Commerce Jan. 9, 2018) (prelim. results of [ADD] admin. review; 2015–2016) ("*Prelim. Results*") and accompanying Decisions Memo. for the [*Prelim. Results*] at 17, A-580–876, PD 259, bar code 3657712–01 (Jan. 2, 2018) ("Prelim. Decision Memo") (citing *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314–16 (Fed. Cir. 2001) ("*Micron*")); *see also* 19 C.F.R. § 351.412(c)(ii).

Under 19 U.S.C. § 1677b(a)(7)(A), if it is unable to match foreign market sales with export price (or constructed export price) sales at the same LOT, Commerce will make a LOT adjustment. *See* Prelim. Decision Memo at 17. Where Commerce uses constructed export price sales, if the normal value of those sales is established at a LOT which constitutes a more advanced stage of distribution than the con-

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[4] Further citations to Title 19 of the Code of Federal Regulations are to the 2017 edition.

structed export price, and if it lacks the necessary data to determine a LOT adjustment, Commerce will grant a constructed export price offset. *See* 19 U.S.C. § 1677b(a)(7)(B); Prelim. Decision Memo at 17. When granting a constructed export price offset, Commerce shall reduce the normal value "by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under [19 U.S.C. § 1677a(d)(1)(D)]." 19 U.S.C. § 1677b(a)(7)(B).

Commerce explains that it failed to include in its discussion of the LOT for the third country sales (here, Canada) the selling functions performed by SeAH's U.S. affiliates, Pusan Pipe America ("PPA") and State Pipe and Supply, Inc. ("State Pipe"), in addition to those performed by SeAH. *Second Remand Results* at 3; *see also* Prelim. Decision Memo at 19–20. Commerce thus revises its analysis as follows. *Second Remand Results* at 3–5.

Commerce determines the LOT for Canadian sales and U.S. sales in order to assess whether a LOT adjustment or constructed export price offset is warranted. In the Canadian market, Commerce determines the LOT by identifying the channels of distribution for SeAH's sales, and then ascertaining what selling functions and activities relate to the starting price, i.e., the price charged by SeAH and its affiliates to the unaffiliated customer. *See Second Remand Results* at 3–4. Commerce observes that SeAH made sales through two channels of distribution: (1) "back-to-back sales through PPA to unaffiliated Canadian customers"; and (2) "sales to unaffiliated Canadian customers from State Pipe's Canadian warehouse of merchandise purchased from PPA." *Id.* at 3. With the exception of warehouse operations, Commerce finds that SeAH performed the same selling functions and activities in both channels, *see id.* at 3–4, and sorts SeAH's selling functions and activities in both channels into four categories: sales and marketing; freight and delivery; inventory maintenance and warehousing; and warranty and technical support. *Id.* With respect to each category, Commerce finds that SeAH performed functions at the same level of intensity, and thus determines all of SeAH's Canadian market sales constitute one LOT. *Id.* at 4.

In the U.S. market, Commerce finds that SeAH made sales through three channels of distribution: (1) "back-to-back sales through its U.S. affiliate PPA to unaffiliated U.S. customers"; (2) "sales to unaffiliated U.S. customers from State Pipe's U.S. warehouse of merchandise purchased from PPA"; and (3) "sales of further manufactured merchandise from PPA's inventory." *Id.* Commerce examines SeAH's selling activities in each channel; however, in accordance with 19 C.F.R.

§ 351.412(c)(ii), Commerce excludes from its consideration those selling activities listed in 19 U.S.C. § 1677a(d),[5] i.e., those performed by PPA and State Pipe in the United States. *Compare Second Remand Results* at 4–5 *with* Prelim. Decision Memo at 19–20; *see also Micron*, 243 F.3d at 1314–16. Commerce finds SeAH performed "sales and marketing, freight and delivery services, and inventory maintenance and warehousing for each of its three reported U.S. channels" at the same level of intensity, and, as a result, determines that all of SeAH's constructed export sales constitute one LOT. *Second Remand Results* at 4–5.

After excluding the selling activities of State Pipe and PPA in the U.S. market, when comparing the LOT of SeAH's constructed export price sales to the LOT of its Canadian sales, Commerce finds there are "significant differences between the selling functions performed for U.S. and Canadian customers." *See id.* at 5. Namely, Commerce finds that SeAH performed many selling functions in the Canadian market that it did not perform in the U.S. market. *Id.* As a result, Commerce determines that the LOT of SeAH's Canadian sales is at a more advanced stage of distribution than the LOT of SeAH's constructed export price sales. *Id.* Noting that "no LOT adjustment is possible," Commerce grants a constructed export price offset pursuant to 19 U.S.C. § 1677b(a)(7)(B) and 19 C.F.R. § 351.412(f).[6] *Id.* Commerce calculates an estimated weighted-average dumping margin of 4.23 percent for SeAH and 9.24 percent for Hyundai, and calculates a review-specific rate applicable to non-selected respondents of 6.74 percent. *Id.* at 6.

Commerce's redetermination in its *Second Remand Results* is supported by substantial evidence and in accordance with law. Com-

[5] 19 U.S.C. § 1677a(d). Additional adjustments to constructed export price. For purposes of this section, the price used to establish constructed export price shall alsobe reduced by—
(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in theUnited States, in selling the subject merchandise (or subjectmerchandise to which value has been added)—
(A) commissions for selling the subject merchandise in the UnitedStates;
(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;
(C) any selling expenses that the seller pays on behalf of the purchaser; and
(D) any selling expenses not deducted under subparagraph (A), (B), or (C);
(2) the cost of any further manufacture or assembly (including additional material and labor), except in circumstances described in subsection (e); and
(3) the profit allocated to the expenses described in paragraphs (1) and (2).

[6] 19 C.F.R. § 351.412(f)(2). Amount of the offset. The amount of the constructed export price offset will be the amount of indirect selling expenses included in normal value, up to the amount of indirect selling expenses deducted in determining constructed export price. In making the constructed export price offset, "indirect selling expenses" means selling expenses, other than direct selling expenses or assumed sellingexpenses (see § 351.410), that the seller would incur regardless of whether particular sales were made, but that reasonably may be attributed, in whole or in part, to suchsales.

merce reasonably accounts for the selling activities of State Pipe and PPA in calculating SeAH's dumping margin, and none of the parties contest Commerce's determination. As such, Commerce's decision to grant SeAH a constructed export price offset is sustained.

CONCLUSION

For the foregoing reasons, Commerce's second remand redetermination is supported by substantial evidence and in accordance with law and is therefore sustained. Judgment will enter accordingly.

Dated: January 4, 2021
New York, New York

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

Slip Op. 21–02

CHANGZHOU TRINA SOLAR ENERGY CO., LTD. et al., Plaintiffs and Consolidated Plaintiffs, and JA SOLAR TECHNOLOGY YANGZHOU CO., LTD. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC. et al., Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00176

[Sustaining in part and remanding in part the results of Commerce's remand redetermination in the fourth administrative review of the antidumping duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules.]

Dated: January 4, 2021

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington, DC, for plaintiff.

Jeffrey S. Grimson, *Sarah M. Wyss*, and *Bryan P. Cenko*, Mowry & Grimson, PLLC, of Washington, DC, for consolidated plaintiffs and plaintiff-intervenors JA Solar Technology Yangzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd. and JingAo Solar Co., Ltd.

Timothy C. Brightbill, *Laura El-Sabaawi*, and *Usha Neelakantan*, Wiley Rein, LLP, of Washington, DC, for consolidated plaintiff and defendant-intervenor SolarWorld Americas, Inc.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. Also on the brief was *Jeffrey Bossert Clark*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of Counsel on the brief was *Ian McInerney*, Office of Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Commerce") remand redetermination filed pursuant to the court's order in *Changzhou Trina Solar Energy Co. v. United States*, 44 CIT __, __, 450 F. Supp. 3d 1301, 1317–18 (2020) ("*Changzhou I*"). *See* Final Results of Remand Redetermination, Aug. 7, 2020, ECF No. 91–1 ("*Remand Results*"). In *Changzhou I*, the court remanded Commerce's decision to value international freight expenses using Maersk Line ("Maersk") rate quotes. *See Changzhou I*, 44 CIT at __, 450 F. Supp. 3d at 1312–13. Moreover, the court remanded Commerce's refusal to increase Changzhou Trina Solar Energy Co., Ltd. et al.'s[1] ("Trina") export price (or constructed export price) ("U.S. Price") by the amount of the countervailing duty ("CVD") imposed to offset the benefit conferred to manufacturers and exporters of the subject merchandise by the Export Import Bank of China's ("Ex-Im Bank") Export Buyer's Credit Program ("Credit Program") in the concurrent administrative review of the companion CVD Order ("companion CVD review"). *See id.* at 1307–12.

On remand, Commerce continues to rely on Maersk data to value Trina's international freight expenses. *See Remand Results* at 4–17. Under respectful protest,[2] Commerce applies the statutory adjustment to Trina's U.S. Price. *See Remand Results* at 17–19. For the following reasons, Commerce's redetermination is remanded in part and sustained in part.

BACKGROUND

The court presumes familiarity with the facts of this case, as set out in the previous opinion ordering remand to Commerce, and now recounts the facts relevant to the court's review of the *Remand Results. See Changzhou I*, 44 CIT at __, 450 F. Supp. 3d at 1304–07. On July 27, 2018, Commerce published its final determination in the fourth administrative review of the antidumping duty ("ADD") order covering crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells" or "solar panels"), from the Peo-

[1] Changzhou Trina Solar Energy Co., Ltd., Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Solar Energy Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., Hubei Trina Solar Energy Co., Ltd., and Trina Solar (Hefei) Science & Technology Co., Ltd are referred to, collectively, as "Trina."

[2] By adopting a position forced upon it by the Court "under protest," Commerce preserves its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

ple's Republic of China ("PRC" or "China"). *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 83 Fed. Reg. 35,616 (Dep't Commerce July 27, 2018) (final results of [ADD] admin. review and final determination of no shipments; 2015–2016) ("*Final Results*") and accompanying Issues and Decisions Memo. for the [*Final Results*], A-570–979, (July 11, 2018), ECF No. 36–5 ("Final Decision Memo").

Given that Commerce considers the PRC to be a nonmarket economy ("NME"), when calculating Trina's dumping margin, Commerce determined the normal value of Trina's entries of subject merchandise by using data from a surrogate market economy country ("surrogate country") at a comparable level of economic development to value the factors utilized to produce the subject merchandise ("factors of production" or "FOPs"). *See* Section 773(c)(4) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(c)(4) (2018).[3] Commerce chose Thailand as the primary surrogate country. *See* SolarWorld Case Br. at 15, Feb. 28, 2018, PD 394, bar code 3678213–01.[4] Commerce compared the normal value of the subject merchandise to Trina's U.S. Price, and its final determination yielded a weighted average dumping margin of 15.85 percent for Trina. *See Final Results*, 83 Fed. Reg. at 35,618.

Trina, as well as JA Solar Technology Yangzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd. and JingAo Solar Co., Ltd. (collectively, "JA Solar"), and SolarWorld Americas, Inc. ("SolarWorld") appealed to this court and challenged various aspects of Commerce's final determination. *See* Pl. [Trina's] 56.2 Mot. J. Agency R., Feb. 15, 2019, ECF No. 41–1 ("Trina's Moving Br."); Consol. Pls.' & Pl.Intervenors' 56.2 Mot. J. Agency R., Feb. 15, 2019, ECF No. 43–1 ("JA Solar's Moving Br."); Def.-Intervenor and Consol. Def.-Intervenors' [SolarWorld's] 56.2 Mot. J. Agency. R., Feb. 15, 2019, ECF No. 44–2 ("SolarWorld's Moving Br."). Trina and JA Solar challenged Commerce's refusal to increase Trina's U.S. Price to account for the 5.46 percent *ad valorem* CVD rate it imposed, based on facts available with an adverse inference ("adverse facts available" or "AFA"),[5] on the subject merchandise

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

[4] On November 9, 2018, Defendant submitted indices to the confidential and public records underlying Commerce's Final Results. These indices are located on the docket at ECF Nos. 36–2 & -3 and 36–4, respectively. All further references in this opinion to administrative record documents are identified by the numbers assigned by Commerce in those indices and preceded by "PD" and "CD" to denote public or confidential documents.

[5] Parties and Commerce sometimes use the shorthand "AFA" or "adverse facts available" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. AFA, however, encompasses a two-part inquiry established by statute. *See* 19 U.S.C. § 1677e(a)–(b). It first requires Commerce to identify information missing

in the companion CVD review. *See* Trina's Moving Br. at 4–9; JA Solar's Moving Br. at 5–6; Final Decision Memo at 17–20; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 82 Fed. Reg. 32,678 (Dep't Commerce July 17, 2017) (final results of [CVD] admin. review, and partial rescission of [CVD] admin. review; 2014) ("*3rd CVD AR*") and accompanying Issues and Decisions Memo. for [3rd CVD AR] at Cmts. 1–2, C-570–980, (July 10, 2017), available at https://enforcement.trade.gov/frn/summary/prc/2017–14957–1.pdf (last visited Dec. 28, 2020) ("3rd CVD AR IDM").

With respect to its calculation of normal value, Trina and JA Solar challenged Commerce's decision to use Maersk data to value Trina's international freight expenses and refusal to exclude Thai import data with zero quantities when calculating surrogate values. *See* Trina's Moving Br. at 10–21; JA Solar's Moving Br. at 5–6. SolarWorld challenged Commerce's selection of unconsolidated financial statements from KCE Electronics Public Company Limited ("KCE") to derive surrogate financial ratios and Commerce's decision to value Trina's nitrogen input using Mexican import data. *See* SolarWorld's Moving Br. at 7–18.

On May 13, 2020, the court issued *Changzhou I*, where it sustained in part Commerce's final determination. *See Changzhou I*, 44 CIT at __, 450 F. Supp. 3d at 1301–18. Namely, the court sustained: Commerce's inclusion of zero quantity Thai import data when calculating surrogate values; Commerce's selection of KCE's statements to derive surrogate financial ratios; and Commerce's decision to use Mexican import data to value Trina's nitrogen inputs when determining the normal value of Trina's entries of subject merchandise. *See id.* at 1313–17.

However the court remanded for further explanation or reconsideration, Commerce's refusal to increase Trina's U.S. Price to account for the AFA CVD rate imposed to offset the benefit conferred to producers and manufacturers of the subject merchandise by the Credit Program in *3rd CVD AR*. *See Changzhou I*, 44 CIT at __, 450 F. Supp. 3d at 1307–13, 1317. The court held that Commerce did not support its finding that the Credit Program was never determined to be an export subsidy in *3rd CVD AR* solely on the fact that its decision to countervail the Credit Program there was based on AFA, because AFA still requires a record-based determination. *See id.* at 1308–09. Moreover, the court noted that descriptions of the Credit Program in *3rd CVD AR* demonstrated that Commerce found the program to be

from the record, and second, to explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *Id.*

export contingent. *See id.* at 1310. With respect to Commerce's selection of Maersk data to value Trina's international freight expenses, the court noted that Commerce's justifications for relying on the Maersk data were based on the mistaken observation that data from Xeneta AS ("Xeneta")—a source for freight rates Commerce weighed the Maersk data against—included handling charges. *See id.* at 1312–13.

On August 7, 2020, Commerce issued its remand redetermination. *See generally Remand Results*. Although Commerce conceded the Xeneta data was submitted without handling charges, Commerce continued to rely on the Maersk data to value international freight rates. *See Remand Results* at 4–17. Under respectful protest, Commerce applied the statutory adjustment to Trina's U.S. Price to account for the AFA CVD rate imposed in the companion CVD review. *See Remand Results* at 17–19.

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) (2018), which grant the Court authority to review actions contesting the final determination in an administrative review of an ADD order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. International Freight Expenses

Although Commerce now concedes that both data sets properly exclude brokerage and handling expenses,[6] Commerce maintains that the Maersk data is more specific to Trina's experience than the Xeneta data because it reflects the type of product and shipping container that Trina used. *See Remand Results* at 4–8. Trina contends that the record continues to contradict Commerce's conclusion. *See Remand Results* at 8–11. Commerce's determination is remanded for further consideration.

[6] As a threshold matter, Commerce previously determined the Maersk data was better than the Xeneta data because Maersk data was adjustable to excludebrokerage and handling charges. *See* Final Decision Memo at 30. Commerce found that the Xeneta data was not adjustable and would lead to double counting for these charges. *See id.* The court held that Commerce's conclusion was not supported by the record, which showed that both sets of data excluded brokerage and handling charges. *See Changzhou I*, 44 CIT at __, 450 F. Supp. 3d at 1312–13. On remand, Commerce agrees that it was incorrect to state that the Xeneta data failed to accountfor brokerage and handling charges. *See Remand Results* at 5. Nonetheless, on other grounds, Commerce continues to find that the Maersk data is superior to the Xeneta data. *See id*.

When valuing a respondent's FOPs and expenses, Commerce must use the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1). Commerce has broad discretion to decide what constitutes "the best available information," as the phrase is not statutorily defined. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) ("*QVD Food Co.*"). However, the agency must ground its selection in the overall purpose of the statute, which is to calculate accurate dumping margins. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also Parkdale Int'l. v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007).

Commerce selects the best available information by evaluating data sources based on their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Econ. Surrogate Country Selection Process*, Policy Bulletin 04.1 (Mar. 1, 2004), *available at* https://enforcement.trade.gov/policy/bull04–1.html (last visited Dec. 28, 2020); *see also* Final Decision Memo at 35.

Commerce's determination that the Maersk data is more specific than the Xeneta data, and thus more accurate, *see Remand Results* at 4–8, 11–17, is unsupported by substantial evidence. Commerce conflates two distinct rationales, each unsupported, in an attempt to justify its determination. First, Commerce concludes that the Maersk data is more specific because the rate is for the shipment of electronic goods. *See Remand Results* at 5.[7] Commerce reasons that electronics and solar panels are the same for purposes of shipping, and therefore Maersk data are "more specific to Trina's experience than the Xeneta rates[,]" which were "not specific to any product." *See Remand Results* at 4–5. Yet, Commerce does not address the court's concern that it does not cite any evidence that shipping electronics or shipping solar panels is more or less expensive than shipping anything else. *See Changzhou I*, 44 CIT at __, 450 F. Supp. 3d at 1313 ("Commerce does not cite record evidence to support the assumption that shipping solar panels requires special handling or containers, or incurs special charges, such that the Maersk rates for electronics would be more specific than rates derived from the Xeneta data."). Nothing in the record supports Commerce's implicit assumption that, for nonhazardous or nonrefrigerated goods, the type of goods matters for specificity

[7] Commerce states that the Harmonized Tariff Schedule supports its position that solar panels are comparable to "electronic goods." *See Remand Results* at 5–6.

purposes. Commerce assumes varying costs for shipping different types of goods (i.e., electronics vs. non-electronics), by conflating its discussion of the costs of shipping particular types of goods with the costs of shipping in different types of containers. *See Remand Results* at 12–13 (noting that the product being shipped can affect the container used and that different containers have different costs, but subsequently acknowledging that the different containers are for hazardous and refrigerated goods). Different types of containers may have varying costs, but nothing in the record suggests that solar panels or electronics are shipped in a container distinct from any other nonhazardous and nonrefrigerated goods.

Commerce's second basis to prefer the Maersk data focuses on the varying costs for different types of containers. Commerce notes that Maersk requires parties to identify whether goods are hazardous or require refrigeration. *See Remand Results* at 6. Commerce reasons that the Maersk data must therefore reflect rates exclusive of refrigerated or hazardous shipments. *See id.* Yet, Commerce's rationale for concluding that the Maersk data is exclusive of refrigerated and hazardous shipments conflicts with its rationale for concluding the opposite regarding the Xeneta data. Commerce states:

> when requesting rate quotations Maersk requests that customers identify whether a requested shipment contains hazardous goods or requires refrigeration and there is no indication that the petitioner identified such requirements in the Maersk rate quotations it submitted. By contrast, there is no evidence that the Xeneta data submitted by Trina distinguishes between regular shipments, hazardous shipments, and shipments that require refrigeration.

Remand Results at 6. Thus, Commerce states that there is no indication that the petitioners requested quotes for refrigerated or hazardous shipment and assumes that the lack of information supports the conclusion that the Maersk data did not include quotes for refrigerated or hazardous materials. *See id.* It then points to the lack of information concerning whether the Xeneta quotes were for refrigerated or hazardous materials and concludes that the Xeneta data includes quotes for refrigerated or hazardous materials. *See id.* Although it may be reasonable to infer that Maersk data can be sorted by shipping container while Xeneta data cannot, it is not reasonable to assume, without more, that the Maersk data supplied on this

record was exclusive of special charges for refrigerated or hazardous shipping containers.[8]

For the first time in the remand redetermination, Commerce highlights that the Maersk data states that it is for a 40-foot high cube dry container, while the Xeneta data is for "shipping unknown goods that could be dissimilar to solar panels and that could require special equipment or handling, unlike solar panels." *See Remand Results* at 6–7. It is unclear to the court if Commerce is arguing that the absence of the word "dry" in the Xeneta data indicates either that there are distinct types of 40-foot high cube containers, or that the Xeneta containers may either be for refrigerated goods or for hazardous goods because they do not indicate "dry." If the former, neither the Maersk data nor the Xeneta data on the record indicates that 40-foot containers are anything but dry. In fact, the Xeneta data indicates that there are three type of containers: 20-foot, 40-foot and 40-foot high cube.[9] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the [PRC]: Response to Request for International Freight Surrogate Values* [for the 2015–2016 Admin. Review] at Ex. 1, 4, CD 186, bar code 3594073–01 (July 17, 2017) ("Trina's Surrogate Value Freight Submission"). If the latter, as explained above, neither the Maersk data nor the Xeneta data makes clear whether the rates supplied are inclusive of refrigerated or hazardous goods.[10]

Given that Commerce cannot conclude that either data set excludes quotes for hazardous or refrigerated goods, and that the record lacks support for distinct costs for shipping electronics, Commerce's determination is unreasonable in light of the evidence that detracts from its determination. Commerce uses its unsupported conclusion regarding container specificity to elide an analysis of route specificity as well as representativeness, factors which detract from its determination.

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[8] As discussed further below, it seems reasonable that shipping containers for refrigerated or hazardous goods would be more, not less, expensive. Yet, Commerce assumes that the Xeneta data includes costs for shipping refrigerated or hazardous goods even though Xeneta rates are less expensive than Maersk rates. *See Remand Results* at 6; *compare* Trina's Surrogate Value Freight Submission at Ex. 2 (summarizing the Xeneta freight rates), *with* Petitioner's Submission of Surrogate Values and New Factual Information at Ex. 1, CD 417–426, bar code 3636213–01 (Nov. 2, 2017) (summarizing the Maersk freight rates) ("SolarWorld's Surrogate Value Freight Submission").

[9] In contesting the final results Trina represented that the Xeneta data reflects 40-foot high cube dry containers. *See* Trina's Moving Br. at 12. Neither the Defendant nor the Defendant-Intervenor contested that representation. Trina continues to represent in its submissions challenging the remand redetermination that the Xeneta data reflects 40-foot high cube dry containers. *See, e.g.*, Pl. Trina's Comments on Final Results of Remand Redetermination at 4, Sept. 8, 2020, ECF No. 93 ("Trina's Br.").

[10] For example, even though the Maersk data indicates that it is "dry", it does not indicate that it is not also for hazardous goods. There is no evidence on the record to support a finding that these classifications are mutually exclusive, which is what Commerce seems to suggest.

See Remand Results at 8, 16 ("[T]here is no benefit to including more data in an average if the data are not specific to Trina's experience.")

On remand Commerce must address evidence which detracts from its determination. First, Commerce does not confront the lack of route specificity in the Maersk data. *See* Final Decision Memo at 30; *compare* Trina's Surrogate Value Freight Submission at Exs. 2–3 (showing the routes covered by the Xeneta data), *with* Petitioner's Submission of Surrogate Values and New Factual Information at Ex. 1, CD 417–426, bar code 3636213–01 (Nov. 2, 2017) ("SolarWorld's Surrogate Value Freight Submission") (showing the routes covered by the Maersk data). Commerce's practice is to choose data that is specific to the input in question. The input here is freight. Taken together, the two datasets seem to indicate that a freight rate is a function of not only the container, but also the route. *See generally* SolarWorld's Surrogate Value Freight Submission; Trina's Surrogate Value Freight Submission. Commerce's choice of the Maersk data over the Xeneta data ignores the lack of two routes used by Trina in the Maersk data. *See* Final Decision Memo at 30; *compare* Trina's Surrogate Value Freight Submission at Exs. 2–3 (showing the routes covered by the Xeneta data), *with* SolarWorld's Surrogate Value Freight Submission at Ex. 1 (showing the routes covered by the Maersk data). It may be that Commerce can extrapolate missing route information from the information it has, but if it can do so, and is doing so, it should say so and say why doing so is reasonable.[11]

Second, Commerce should also address the comparative representativeness of the two data sets. Although it is reasonable for Commerce to choose price quotes over broad data sets in some circumstances, it is not clear to the court why doing so here is reasonable. According to Commerce, the Maersk data here comprises of 32 price quotes for various port to port combinations "on a few days in the POR." Final Decision Memo at 31. There is no explanation of how the days were chosen and why some days are relied on more heavily than others. *See, e.g.*, SolarWorld's Surrogate Value Freight Submission at Ex. 1 (there are 15 price quotes from August 5, 2016 and there is one price quote from February 2, 2016). Nor is there any explana-

[11] In the Final Decision Memo, Commerce found that it was reasonable to rely on the Maersk data despite the missing route information because of its concern that for the Xeneta data, it could not itemize the handling charges, which would lead to double counting of this charge when Commerce calculated Trina's net U.S. price. *See* Final Decision Memo at 31. Although Commerce now concedes that double counting is not a concern with the Xeneta data because it does exclude handling charges, it does not explain why it continues to be reasonable to extrapolate the missing route information in the Maersk data even though Trina raised this issue again in its comments. *See generally Remand Results*; Trina's Br. at 12.

tion why some port to port combinations have 3 quotes, *see, e.g.*, *id.* (3 price quotes for Shanghai to Houston), while other port to port combinations have 1 quote. *See, e.g.*, *id.* (1 price quote for Shanghai to Jacksonville). It may be that the days of the quotes and the number of quotes for each port-to-port combination provides for a representative selection, but Commerce has not explained that it does. Commerce has acknowledged that the Xeneta data "cover the entire POR" and that "methodology used in compiling the Xeneta data indicates that Xeneta gathers several hundred thousand rates per month and that before releasing any market information, a minimum of 4 rates, per route, per day, per equipment, is required." Final Decision Memo at 31. Given the paucity, as well as the randomness of the selection, of quotes for the Maersk data, some explanation of Commerce's reasoning is warranted.[12]

The differences in the representativeness of the data extend not just to the selection of specific days and routes, but to the volume of the data supplied, and how it compares to what Trina actually shipped. According to Trina, the Maersk price quotes represent 32 percent of the quantity of shipments by Trina.[13] Conversely, the Xeneta data reflects a broad market average for the entire POR of all the routes used by Trina. *See* Trina's Surrogate Value Freight Submission at Exs. 1–3. It covers all of Trina's shipments. *See id.* Of course, it is not the court's role to choose the best information available, it is only to ensure that Commerce's choice was reasonable. *See Fujitsu Gen. v. United States*, 88 F.3d 1034, 1043 (Fed. Cir. 1996) ("To survive judicial scrutiny, an agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation."). But without further explanation, and in light of record evidence as to the quantity of Trina's sales represented by the two potential data sources, the court cannot say that Commerce's choice was reasonable.

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[12] Commerce addresses this representativeness problem in the final results by concluding that the inability to deduct handling charges in the Xeneta data nonetheless renders the Maersk data preferable. *See* Final Decision Memo at 31. Although it now concedes its error with respect to handling charges in its remand redetermination it does not revisit this acknowledged representativeness flaw except to say that the broadness of the Xeneta data is undermined by the conclusion that it may include rates for refrigerated or hazardous goods. *See Remand Results* at 4–17.

[13] Of the total quantity that Trina shipped, Trina calculated that there is no Maersk data available for 68 percent of that total. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the [PRC]: [Trina's] Case Brief [for 2015–2016 Admin. Review]* at Enclosure 3, CD 483, bar code 3672048–01 (Feb. 12, 2018). Commerce does not specifically address this assertion, but rather rests on the broad proposition that breadth of information alone is not preferable when, according to commerce, the Xeneta price quotes are not as specific as the Maersk. *See, e.g.*, *Remand Results* at 8, 16.

Finally, Commerce bases its remand determination on its assumption that the Xeneta data includes refrigerated or hazardous shipping rates. *See Remand Results* at 6. Yet, nowhere does Commerce address an obvious implication of such an assumption. One would expect that the inclusion of refrigerated or hazardous shipping rates would render the Xeneta freight rates more expensive than shipping rates that did not include refrigerated or hazardous containers. Indeed, Trina made this argument to the agency. *See* Pl. Trina's Comments on Final Results of Remand Redetermination at 8–9, Sept. 8, 2020, ECF No. 93 ("Trina's Br.").[14] Commerce further assumes that the Maersk data does not include rates for shipping refrigerated or hazardous items. *See Remand Results* at 6. And yet, not only is the Maersk data reflective of rates much higher than the Xeneta data, *compare* Trina's Surrogate Value Freight Submission at Ex. 2 (summarizing the Xeneta freight rates), *with* SolarWorld's Surrogate Value Freight Submission at Ex. 1 (summarizing the Maersk freight rates), but Trina claims that the Maersk data is reflective of rates much higher than Maersk data from the prior review.[15] *See Remand Results* at 11; Trina's Br. at 6–7. It may be that the illogical implications of Commerce's assumptions can be perfectly explained by factors known to

[14] Trina states:

> [T]hat the Xeneta freight rates are significantly lower than the Maersk freight rates undermines Commerce conclusion that the Xeneta data includes rates for shipping refrigerated and hazardous cargo and the Maersk data does not. Considering the energy required to control the temperature of a container and the special handling required to convey hazardous cargo, it is reasonable to expect that a 40-foot [high cube] refrigerated container or a 40-foot[] [high cube] container for shipping hazardous cargo would be more expensive than a 40-foot [high cube] dry container. Yet, the per-container Maersk rates, with port-to-port costs ranging from $9,756 to $18,134 per container, are significantly higher than the Xeneta rates ranging from $893 to $4458 per container. If Commerce's finding that the Xeneta dataset might include rates for refrigerated and hazardous cargo and Maersk dataset does not include such rates were true, then the opposite should be expected. That Commerce ignores this fact further demonstrates the absence of any evidentiary basis for its conclusion.

Trina's Br. at 8 (citations omitted).

[15] Commerce purports to address this issue, stating that:

> Trina contends that the average per-container Maersk rates are significantly higher than the Xeneta rates, possibly because the rates are for shipping hazardous, specialty, or refrigerated goods, and that the Maersk rates are anomalous when compared to Maersk ocean freight rates in prior segments of the proceeding. We disagree. First, the record clearly demonstrates that the Maersk rates are for shipping electronic goods, not hazardous, specialty, or refrigerated goods. Second, the Court directed Commerce to explain why we find that the Maersk rates are more specific to Trina's experience than Xeneta rates and we have done so above. Trina has cited to nothing on the record demonstrating that the Maersk rates were miscalculated or otherwise inaccurate. Commerce has a long history of relying on Maersk ocean freight rates and as the Court has stated, 'given Maersk's prominent position in the shipping market, Commerce properly considered the Maersk data to be a reliable world market price.' Thus, Commerce has no reason to doubt the reliability or accuracy of the Maersk data.

Remand Results at 15 (citations omitted). This explanation falls short. Commerce does not offer any reason for the price discrepancy between the Maersk data for this review and the Maersk data from the prior review.

Commerce and not known to the court. If that is the case Commerce should further explain, or it should reconsider its determination.

II. Adjusting Trina's Net U.S. Price

When calculating the dumping margin, Commerce is statutorily required to increase the U.S. Price by the amount of any CVD imposed on the subject merchandise to offset an export subsidy. *See* 19 U.S.C. § 1677a(c)(1)(C). On remand, Commerce increases Trina's U.S. price by the amount of the CVD imposed on the Credit Program in accordance with the court's instruction. *See Remand Results* at 19.

As explained by the Court of Appeals for the Federal Circuit, that Commerce uses AFA to reach a decision to countervail a program "does not obviate Commerce's obligation to make the 'applicable determination'" and to support its determination with substantial evidence. *Changzhou Trina Solar Energy Co. v. United States*, Appeals No. 20–1004 at 16–17 Fed. Cir. Sept. 3, 2020) ("*Changzhou II*") (citations omitted); *see also* 19 U.S.C. §§ 1677e(a), 1671, 1677(5), (5A), 1516a(b)(1)(B)(i). Based on the fact that the Credit Program provides loan support through export buyer's credits, it is reasonable for Commerce to conclude in this proceeding that the Credit Program was determined to be specific based on export contingency—in fact, Commerce could only conclude that the Credit Program is an export subsidy. *Changzhou I*, 44 CIT __, Slip Op. 20–64, at 13–14 (May 13, 2020). Commerce's reliance on AFA does not undermine a finding that the Credit Program was an export subsidy. *See Changzhou II*, Appeals No. 20–1004 at 16–17. As such, Commerce's determination is sustained.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's decision to continue to rely on the Maersk data as a surrogate value is remanded for further consideration; and it is further

ORDERED that Commerce's decision to increase Trina's net U.S. price is sustained; and it is further

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

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

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

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

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

Dated: January 4, 2021
New York, New York

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

Slip Op. 21–03

GODACO SEAFOOD JOINT STOCK COMPANY, Plaintiff, and CAN THO IMPORT-EXPORT JOINT STOCK COMPANY, et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA, et al., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00063

[Sustaining in part and remanding in part the remand results of the U.S. Department of Commerce following the thirteenth administrative review of the antidumping duty order on certain frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: January 6, 2021

Andrew B. Schroth, *Jordan C. Kahn*, and *Ned H. Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of Washington, D.C., for Plaintiff GODACO Seafood Joint Stock Company.

Andrew B. Schroth and *Jordan C. Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of Washington, D.C., for Consolidated Plaintiff Golden Quality Seafood Corporation. *Andrew T. Shutz*, *Dhramendra N. Choudhary*, *Michael S. Holton*, and *Ned H. Marshak* also appeared.

Robert G. Gosselink, *Jonathan M. Freed*, and *Kenneth N. Hammer*, Trade Pacific, PLLC, of Washington, D.C., for Consolidated Plaintiffs Can Tho Import-Export Joint Stock Company, Vinh Quang Fisheries Corporation, NTSF Seafoods Joint Stock Company, Green Farms Seafood Joint Stock Company, and Hung Vuong Corporation.

John J. Kenkel, *Alexandra H. Salzman*, *Judith L. Holdsworth*, and *J. Kevin Horgan*, deKieffer & Horgan, PLLC, of Washington, D.C., for Consolidated Plaintiff Southern Fishery Industries Company, Ltd.

Kara M. Westercamp, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the briefs were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Ian A. McInerney*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Jonathan M. Zielinski and *James R. Cannon, Jr.*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenors Catfish Farmers of America, Simmons Farm Raised Catfish, Inc., Magnolia Processing, Inc. (d/b/a Pride of the Pond), Heartland Catfish Company, Guidry's Catfish, Inc., Delta Pride Catfish, Inc., Consolidated Catfish Companies LLC (d/b/a Country Select Catfish), America's Catch, and Alabama Catfish Inc. (d/b/a Harvest Select Catfish, Inc.).

OPINION AND ORDER

Choe-Groves, Judge:

This case involves frozen fish fillets, including regular, shank, and strip fillets and portions thereof, of the species *Pangasius Bocourti*, *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus* from the Socialist Republic of Vietnam ("Vietnam"). This action arises from the thirteenth administrative review initiated in October 2016 by the U.S. Department of Commerce ("Commerce"). *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam* ("*Final Results*"), 83 Fed. Reg. 12,717 (Dep't Commerce Mar. 23, 2018) (final results, final results of no shipments, and partial rescission of the antidumping duty administrative review; 2015–2016); *see* Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Mem. for the Final Results of the Thirteenth Antidumping Duty Admin. Review: 2015–2016, PD 337 (Mar. 14, 2018) ("IDM"); *see also Certain Frozen Fish Fillets from the Socialist Republic of Vietnam* ("*Prelim. Results*"), 82 Fed. Reg. 42,785 (Dep't Commerce Sept. 12, 2017) (preliminary results, preliminary determination of no shipments, and partial rescission of the antidumping duty administrative review; 2015–2016). Before the court are the Final Results of Redetermination Pursuant to Court Remand, ECF No. 77–1 ("*Remand Results*"), pursuant to the court's decision in *GODACO Seafood Joint Stock Co. v. United States* ("*GODACO I*"), 44 CIT __, 435 F. Supp. 3d 1342 (2020). For the reasons set forth in this opinion, the court sustains in part and remands in part the *Remand Results*.

BACKGROUND

The court presumes familiarity with the facts of this case. *See GODACO I*, 44 CIT at __, 435 F. Supp. 3d at 1346–50. In *GODACO I*, the court considered several Rule 56.2 motions for judgment on the agency record filed by the Parties. *See id.* at __, 435 F. Supp. 3d at 1347. The court sustained in part and remanded in part Commerce's *Final Results. Id.*

Commerce filed the *Remand Results* on July 21, 2020. Plaintiff GODACO Seafood Joint Stock Co. ("GODACO" or "Plaintiff") filed comments. Pl.'s Comments in Opp'n Remand Redetermination, ECF No. 79 ("GODACO Cmts."). Consolidated Plaintiffs Can Tho Import-Export Joint Stock Co., Green Farms Seafood Joint Stock Co., Hung Vuong Corp., NTSF Seafoods Joint Stock Co., and Vinh Quang Fisheries Corp. (collectively, "Consolidated Plaintiffs") filed comments jointly. Comments of Consol. Pls. [] on Final Results of Redetermina-

tion Pursuant to Court Remand, ECF No. 80 ("Consol. Pls. Cmts." or "Consolidated Plaintiffs' Comments"). Consolidated Plaintiffs' Comments incorporated by reference arguments made previously in the Memorandum in Support of Motion for Judgment Upon the Agency Record of Consolidated Plaintiffs Vinh Quang Fisheries Corp. et al. Mem. in Supp. of Mot. for J. Upon the Agency R. of Consol. Pls. Vinh Quang Fisheries Corp. et al., ECF No. 28–1 ("Consol. Pls. Mot. for J."). Consolidated Plaintiff Southern Fishery Industries Co. ("South Vina") filed a Rule 56.2 motion for judgment upon the agency record and a reply brief, which included arguments opposing the rate imposed by Commerce on South Vina. Consol. Pl. [South Vina]'s Rule 56.2 Mot. for J. Upon the Agency R., ECF No. 33 ("South Vina Mot. for J."); [Consol. Pl.] [South Vina] Reply Br., ECF No. 52.

The court refers collectively to Consolidated Plaintiffs and South Vina as "Separate Rate Plaintiffs." The court also refers collectively to parties not individually examined and assigned the all-others separate rate as "separate rate respondents." *See generally Prelim. Results*, 82 Fed. Reg. at 42,786 (listing additional companies, including Consolidated Plaintiffs, as separate rate respondents not individually examined.).

Defendant United States ("Defendant") responded. Def.'s Resp. Supp. Remand Redetermination, ECF No. 83 ("Def. Cmts."). Defendant-Intervenors Catfish Farmers of America, Simmons Farm Raised Catfish, Inc., Magnolia Processing, Inc. (d/b/a Pride of the Pond), Heartland Catfish Co., Guidry's Catfish, Inc., Delta Pride Catfish, Inc., Consolidated Catfish Cos. LLC (d/b/a Country Select Catfish), America's Catch, and Alabama Catfish, Inc. (d/b/a Harvest Select Catfish, Inc.) (collectively, "Defendant-Intervenors" or "Catfish Farmers of America") responded. [Catfish Farmers of America's] Comments Supp. of Remand Results, ECF No. 84 ("Catfish Farmers of America Cmts."). GODACO and Consolidated Plaintiff Golden Quality Seafood Corp. filed the joint appendix. J.A., ECF Nos. 85, 86 ("Joint Appendix"). GODACO filed two notices of supplemental authority. Notice of Suppl. Authority, Dec. 8, 2020, ECF No. 87 ("First Suppl. Authority"); Notice of Suppl. Authority, Dec. 28, 2020, ECF No. 89 ("Second Suppl. Authority").

ISSUES PRESENTED

This case presents the following issues:

1. Whether Commerce's application of adverse facts available ("AFA") to GODACO is supported by substantial evidence;
2. Whether Commerce's application of the AFA rate to GODACO is in accordance with the law; and

3. Whether Commerce's application of GODACO's rate to Separate Rate Plaintiffs is in accordance with the law.

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 will hold unlawful any determination 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).

DISCUSSION

I. Commerce's Application of AFA to GODACO

The first issue addressed by the court is whether Commerce's application of AFA to GODACO is supported by substantial evidence. Plaintiff challenges Commerce's application of total AFA to GODACO, contending that 1) GODACO provided all requested information to Commerce, and 2) GODACO cooperated to the best of its ability. GODACO Cmts. at 3–23. Defendant argues that Commerce's determinations that GODACO failed to provide necessary information and did not cooperate to the best of its ability in the administrative proceeding are supported by substantial evidence and asks the court to sustain Commerce's application of total AFA to GODACO. Def. Cmts. at 13–28.

If necessary information is not available on the record, or 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)(1), (2)(A)–(D). If a party fails to cooperate to the best of its ability, Commerce may use an inference adverse to the interests of that party in selecting from among the facts otherwise available. *Id.* § 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* ("*Mueller*"), 753 F.3d 1227, 1232 (Fed. Cir. 2014) (discussing 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. *Id.* A respondent's mere failure to furnish requested information—for *any reason*—requires Commerce to resort to other sources of information

to complete the factual record. *Id.* Subsection (b) applies only when Commerce makes a separate, additional determination that the respondent failed to cooperate by not acting to the best of its ability. 19 U.S.C. § 1677e(b); *see also Canadian Solar Int'l Ltd. v. United States*, 43 CIT __, __, 378 F. Supp. 3d 1292, 1320 (2019) (noting that "Commerce must invoke subsection (a) to reach subsection (b)"). 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).

Commerce may consider an adverse inference when a respondent fails to cooperate to the best of the respondent's 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). 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 for Farming Factors of Production

Plaintiff argues that Commerce's reliance on facts otherwise available for GODACO's farming factors of production is not supported by substantial evidence. GODACO Cmts. at 3–8. GODACO asserts that compliance with Commerce's instruction to report all factors of production on a control number ("CONNUM")-specific basis is impossible for farming factors of production.[1] *Id.* at 19–20. GODACO states that it reported correct CONNUM-specific farming factors of production in the administrative review. *Id.* at 16. The court remanded this issue because Commerce did not support its prior analysis with proper explanations and citations to evidence in the administrative record. *GODACO I*, 44 CIT at __, 435 F. Supp. 3d at 1354–55.

[1] A CONNUM is a contraction of the term control number and is Commerce jargon for a unique product (defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding). *Union Steel v. United States*, 36 CIT 288, 291 (2012) (internal quotation marks and citation omitted).

On remand, Commerce relied upon 19 U.S.C. § 1677e(a)(1) and (2)(A)–(C) to determine that the use of facts otherwise available was warranted and supported its analysis with explanations and citations to the record. *Remand Results* at 6–8. Commerce stated that GODACO was required to report its farming factors of production on a CONNUM-specific basis but failed to do so. *Id.* at 7–8. GODACO was required to provide Commerce with factors of production information that reconciled to all of the CONNUMs at issue. *GODACO I*, 44 CIT at __, 435 F. Supp. 3d at 1351–52; GODACO Suppl. Questionnaire Resp., PD 197–98, CD 158–59, CD 160–186 at 12 (July 17, 2017) ("GODACO's SQR") (requesting CONNUM-specific reporting for all of GODACO's factors of production); IDM at 12 (noting that GODACO was to report factors of production information on a CONNUM-specific basis); *see also Mueller*, 753 F.3d at 1232 (noting that regardless of the reason, a respondent's failure to provide requested information requires Commerce to resort to other sources of information). Commerce explained that evidence on the record established that GODACO reported its farming factors of production on a "harvested-whole-live-fish" basis instead of the CONNUM-specific basis requested by Commerce. *Remand Results* at 7–8; *see, e.g.*, GODACO's SQR, Ex. S-26(b) (data tables showing that the factor of production ratios for fish feed are equivalent to the mass of each fingerling category divided by the total mass of all harvested live fish); *see also* GODACO Section D Questionnaire Resp., PD 127, CD 95–96 (Apr. 19, 2017), Ex. D-19 (relating to medicine, nutrition, environmental treatment, lime, and salt), Ex. D-20 (relating to labor), Ex. D-21 (relating to electricity), Ex. D-9.5, Ex. D-9.6 (also demonstrating factors of production ratios calculated on the basis of all harvested live fish) as Ex. S-26(b). GODACO concedes that it allocated its farming factors of production on a "total harvested fish" basis. GODACO Cmts. at 17 ("GODACO clearly explained how it allocated all upstream farming inputs in its vertically integrated operation over total harvested fish from each pond during the [period of review].").

This Court has found it reasonable for Commerce to require respondents to report all factors of production on a CONNUM-specific basis, including inputs such as farming factors of production. *See An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States* ("*An Giang*"), 42 CIT __, __, 287 F. Supp. 3d 1361, 1367–71 (2018) (concerning the eleventh administrative review of the antidumping duty order at issue here). Because Commerce cited substantial evidence on the record establishing that GODACO failed to provide the required CONNUM-specific information, the court finds that Commerce deter-

mined correctly to use facts available. *Remand Results* at 7–8. In addition to GODACO's failure to provide requested CONNUM-specific reporting, this court previously sustained Commerce's determination that the record contained additional deficiencies, including: 1) lack of reconciliation of GODACO's factors of production information with the CONNUMs at issue; 2) GODACO's net weight reporting; and 3) misallocated factors of production that co-mingled subject products with non-subject products that had a higher water content. *GODACO I*, 44 CIT at __, 435 F. Supp. 3d at 1352. The court concludes that substantial evidence on the record supports Commerce's determination that GODACO failed to provide necessary information pursuant to 19 U.S.C. § 1677e(a).

B. GODACO's Lack of Cooperation to the Best of its Ability

The next inquiry is whether Commerce's determination that GODACO failed to cooperate by not acting to the best of its ability under 19 U.S.C. § 1677e(b) is supported by substantial evidence. GODACO argues that it cooperated to the best of its ability because it was purportedly impossible to report its farming factors of production on a CONNUM-specific basis. GODACO Cmts. at 22–23. GODACO asserts that it implemented a CONNUM-specific methodology and that any deficiencies in GODACO's reporting are excusable because it is the first respondent to the underlying antidumping duty order to provide factors of production information in a CONNUM-specific format. *Id.* at 3, 9. Defendant responds that GODACO reported its factors of production on the wrong basis and that the adverse inference is otherwise appropriate. Def. Cmts. at 21–28. The court remanded for Commerce to explain how its application of an adverse inference was supported by substantial evidence under 19 U.S.C. § 1677e(b). *GODACO I*, 44 CIT at __, 435 F. Supp. 3d at 1355.

On remand, Commerce determined that GODACO failed to act to the best of its ability to comply with Commerce's requests for CONNUM-specific reporting. *Remand Results* at 8–11. Commerce explained that GODACO failed to cooperate "by not developing a methodology to report CONNUM-specific sales and cost information (which is essential to the accurate calculation of GODACO's dumping margin), as Commerce requested on multiple occasions . . . ." *Id.* at 9. Commerce stated that not only was necessary information missing from the record, but respondents to the antidumping duty order had been on notice of the CONNUM-specific reporting requirement for years and it was within GODACO's ability to provide such informa-

tion. *Id.* at 9–10. This Court has recognized Commerce's requests for CONNUM-specific reporting since as early as the eighth administrative review, noting that Commerce put respondents on advance notice about the CONNUM-specific requirement. *An Giang*, 42 CIT at __, 287 F. Supp. 3d at 1369–70. The court in *An Giang* stated that "[g]iven the advance notice afforded to respondents, the court cannot find that Commerce's request for CONNUM-specific reporting, here, was unreasonable . . . ." *Id.* at __, 287 F. Supp. 3d at 1370 (referring to the eleventh administrative review). This case concerns the thirteenth administrative review. Because respondents had advance notice for several years of Commerce's request for CONNUM-specific reporting, the court holds that it was reasonable for Commerce to expect GODACO to provide CONNUM-specific information and be more forthcoming with its responses.

Commerce may apply an adverse inference in circumstances under which it is reasonable for the agency "to expect that more forthcoming responses should have been made." *Nippon Steel Corp.*, 337 F.3d at 1382. Commerce's application of an adverse inference is reasonable because Commerce expected that GODACO would have collected and reported factors of production information on a CONNUM-specific basis after giving respondents advance notice for several years that CONNUM-specific information would be required in this administrative review. *Remand Results* at 40–42.

To summarize, the court finds that Commerce's determination that GODACO failed to provide necessary information was supported by substantial evidence, and it was appropriate under 19 U.S.C. § 1677e(a) to use facts otherwise available. Furthermore, because GODACO failed to cooperate to the best of its ability to obtain and produce the requested information, Commerce was justified in concluding that GODACO had not acted to the best of its ability and reasonably used an adverse inference under 19 U.S.C. § 1677e(b) in selecting the facts otherwise available.

II. Commerce's Application of the AFA Rate to GODACO

The second issue is whether Commerce's application of the AFA rate of $3.87 per kilogram to GODACO is in accordance with the law. The court remanded this issue pending Commerce's explanation of its adverse inference determination. *GODACO I*, 44 CIT at __, 435 F. Supp. 3d at 1355, 1360.

On remand, Commerce continued to assign a rate of $3.87 per kilogram to GODACO. *Remand Results* at 19. Commerce calculated the rate of $3.87 per kilogram in a new shipper review conducted during the eighth administrative review of the antidumping duty

order at issue. *Id.* at 45. The $3.87 per kilogram rate is the highest margin calculated in this proceeding. *Id.* at 3. GODACO argues that the $3.87 per kilogram rate is aberrational because it exceeds the second-highest rate by approximately $1.50 per kilogram and is based on a new shipper review. GODACO Cmts. at 23–30. GODACO contends also that Commerce is required to corroborate the AFA rate. *Id.* Defendant responds that the $3.87 per kilogram rate is not aberrational or otherwise inappropriate and does not need to be corroborated under the applicable statute. Def. Cmts. at 28–30.

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); *Zhejiang Zhaofeng Mech. & Elec. Co. v. United States*, 43 CIT __, __, 416 F. Supp. 3d 1395, 1401 (2019). Under 19 U.S.C. § 1677e(c)(2), Commerce is not required to corroborate rates applied in a previous segment of the same proceeding. *See* 19 U.S.C. § 1677e(c)(2) (Commerce "shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding."). Here, Commerce determined the rate applied to GODACO in the eighth administrative review of the antidumping duty order, and subsequently applied this rate to GODACO by application of facts available with an adverse inference in the thirteenth administrative review. *Remand Results* at 45. Commerce thus applied the rate from a separate segment of these proceedings and was therefore under no obligation to corroborate.

Commerce may apply the highest rate based on Commerce's evaluation of the situation that resulted in Commerce's use of an adverse inference in selecting among the facts otherwise available. 19 U.S.C. § 1677e(d)(2) ("[T]he administering authority may apply any of the countervailable subsidy rates or dumping margins specified . . . including the highest such rate or margin, based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available."). Commerce supported its selection of the highest rate in the *Remand Results* under 19 U.S.C. § 1677e(d)(2) by explaining that GODACO provided information that was unusable to Commerce, failed to correct its deficient reporting when it had the opportunity to do so, otherwise did not act to the best of its ability, and failed to provide any record evidence undermining the reasonableness of the use of the $3.87 per kilogram rate for total AFA. *Remand Results* at 44–49. Because Commerce provided a sufficient evaluation of the specific situation to justify its selection of the

highest rate under 19 U.S.C. § 1677e(d)(2), the court concludes that Commerce's selection of the AFA rate is in accordance with the law. The court sustains Commerce's selection of the $3.87 per kilogram rate for total AFA as applied to GODACO.

III. Commerce's Application of GODACO's AFA Rate to Separate Rate Plaintiffs

The third issue before the court is whether the total AFA rate applied to Separate Rate Plaintiffs is in accordance with the law. Consolidated Plaintiffs and South Vina argue that Commerce's application of GODACO's total AFA rate to Separate Rate Plaintiffs is unreasonable and not in accordance with the law. Consol. Pls. Mot. for J. at 7–30; South Vina Mot. for J. at 7–13. The court did not opine on this issue in *GODACO I* because the court remanded the issue of whether GODACO's rate was supported by substantial evidence. *GODACO I*, 44 CIT at __, 435 F. Supp. 3d at 1360. The court directed Commerce to consider South Vina's arguments on remand after finding that South Vina did not fail to exhaust its administrative remedies. *Id.*

On remand, Commerce considered South Vina's and Consolidated Plaintiffs' substantive concerns under protest, arguing that South Vina failed to exhaust its administrative remedies because South Vina did not submit comments on the *Final Results*. *Remand Results* at 12. Commerce continued to determine that the assignment of GODACO's total AFA rate of $3.87 per kilogram to Separate Rate Plaintiffs, including South Vina, was appropriate. *Id.* at 2. GODACO is the only individually-examined respondent remaining under review in this proceeding and received a total AFA rate, which Commerce applied to cooperating Separate Rate Plaintiffs. *Id.* at 20, 48–49; Def. Cmts. at 12. Commerce explained that it applied the "expected method" under Section 1673d(c)(5)(B), yet the court observes that Commerce also stated that it applied "any reasonable method" under the statutory exception. *Remand Results* at 13; *see also* Consol. Pls. Mot. for J. at 17–19 (Consolidated Plaintiffs note that Commerce did not apply the "expected method" because it did not weight-average any rates but rather used the "any reasonable method" approach). Commerce asserted that the statute permits "the use of 'any reasonable method' to establish the estimated all-others rate for exporters and producers not individually investigated, including 'averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.'" *Remand Results* at 13.

Commerce stated that 19 U.S.C. § 1673d(c)(5)(B) permitted Commerce to apply the AFA rate that Commerce selected for GODACO to

Separate Rate Plaintiffs. *Id.* at 12–20. Consolidated Plaintiffs counter that Commerce's determination is unlawful because Commerce's application of GODACO's AFA rate to cooperating Separate Rate Plaintiffs is unreasonable. Consol. Pls. Mot. for J. at 9. Consolidated Plaintiffs and South Vina contend that Commerce instead should use the more reasonable rate of $0.69 per kilogram applied to cooperative separate rate respondents in the immediately preceding administrative review. *Id.* at 12; South Vina Mot. for J. at 11–13.

Commerce is authorized by statute to calculate and impose a dumping margin on imported subject merchandise after determining it is sold in the United States at less than fair value. 19 U.S.C. § 1673. Under the general rule of § 1673d(c)(5)(A), Commerce determines an all-others rate assigned to non-examined companies by calculating the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely on the basis of facts available, including AFA. *Id.* § 1673d(c)(5)(A); *see Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1351 (Fed. Cir. 2016). If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis, or are determined entirely under 19 U.S.C. § 1677e, Commerce may invoke an exception to establish a separate rate for exporters and producers not individually investigated. 19 U.S.C. § 1673d(c)(5)(B). The Statement of Administrative Action ("SAA") provides guidance that when the dumping margins for all individually examined respondents are determined entirely on the basis of the facts available or are zero or de minimis, the "expected method" of determining the all-others rate is to weight-average the zero and de minimis margins and margins determined pursuant to the facts available, provided that volume data is available. Uruguay Round Agreements Act, SAA, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201. Commerce may depart from the "expected method" and use "any reasonable method," but only if Commerce reasonably determines that the expected method is not feasible or results in an average that would not be reasonably reflective of potential dumping margins. *See* 19 U.S.C. § 1673d(c)(5)(B); *Navneet Publ'ns (India) Ltd. v. United States*, 38 CIT __, __, 999 F. Supp. 2d 1354, 1358 (2014) ("[T]he following hierarchy [is applied] when calculating all-others rates—(1) the '[g]eneral rule' set forth in § 1673d(c)(5)(A), (2) the alternative 'expected method' under § 1673d(c)(5)(B), and (3) any other reasonable method when the 'expected method' is not feasible or does not reasonably reflect potential dumping margins."); *see also*

SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201; *Albemarle Corp.*, 821 F.3d at 1351–52 (quoting SAA at 873, *reprinted in* 1994 U.S.C-.C.A.N. at 4201). Commerce must determine that the expected method is not feasible or would not be reasonably reflective of the potential dumping margins for non-investigated exporters or producers based on substantial evidence. *Albemarle Corp.*, 821 F.3d at 1352–53; *see also Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1012 (Fed. Cir. 2017). The exception in 19 U.S.C. § 1673d(c)(5)(B) applies expressly to market economy proceedings but has been extended to non-market economy proceedings as well. *Albemarle Corp.*, 821 F.3d at 1352 n.6.

Commerce determined on remand that the expected method:

> demonstrates that the Act clearly envisions that Commerce base the separate rate on the experience of all of the individually examined respondents, including those assigned an AFA rate, where all of the dumping margins calculated for the individually examined respondents are zero, *de minimis*, or based entirely on facts available.

Remand Results at 13. Commerce stated that its assignment of GODACO's AFA rate to Separate Rate Plaintiffs was consistent with legal precedent and Commerce's practice. *Id.* Commerce contended that the rate assigned to Separate Rate Plaintiffs was reflective of the potential dumping margin because it represented the period of review dumping margin assigned to the sole individually-examined respondent. *Id.* at 19–20.

The court observes that Commerce did not appear to employ the "expected method" of determining the all-others rate in this case, as Commerce did not weight-average the zero and de minimis margins and margins determined pursuant to the facts available, but Commerce instead applied the "any reasonable method" approach by using the one rate determined pursuant to AFA as the all-others rate applied to Separate Rate Plaintiffs. *Id.* Because Commerce departed from the "expected method" and employed the "any reasonable method" approach, Commerce was required first to demonstrate that the expected method was not feasible or resulted in an average that would not be reasonably reflective of the potential dumping margins, which Commerce did not do here. *See* 19 U.S.C. § 1673d(c)(5)(B).

Notwithstanding Commerce's failure to substantiate its departure from the "expected method," the court considers whether Commerce's use of the "any reasonable method" approach to apply GODACO's total AFA rate to Separate Rate Plaintiffs is in accordance with the law. Commerce did not cite any record evidence to support the reasonableness of GODACO's total AFA rate of $3.87 per kilogram as

applied to cooperative Separate Rate Plaintiffs. Commerce stated merely that the relevant statutes and caselaw did not prohibit the use of an AFA rate under the expected method, that the AFA rate was contemporaneous due to its application to GODACO in the same administrative review, and that GODACO's rate represented the dumping margin assigned to the sole individually-examined respondent remaining in the administrative review. *Remand Results* at 13–20. To the contrary, although it is not their burden to provide such evidence, Consolidated Plaintiffs cite record evidence of an apparently more reasonable rate of $0.69 per kilogram that was assigned to separate rate respondents in the prior twelfth administrative review. Consol. Pls. Mot. for J. at 17–18. Consolidated Plaintiffs assert that GODACO's AFA rate was derived from a rate calculated five years prior to the present administrative review and was neither timely nor reasonably reflective of Separate Rate Plaintiffs' potential dumping margins. Consol. Pls. Mot. for J. at 26. Consolidated Plaintiffs and South Vina note that Commerce in the past has determined that it was reasonable to carry forward rates from prior reviews in other administrative proceedings. Consol. Pls. Mot. for J. at 24–25; South Vina Mot. for J. at 11–13.

Commerce is required to support its application of the "any reasonable method" exception in 19 U.S.C. § 1673d(c)(5)(B) by demonstrating that the calculated margin is reasonable. The rate selected must serve the purpose of calculating dumping margins as accurately as possible. The court concludes that Commerce's determination to apply a total AFA rate to fully cooperating Separate Rate Plaintiffs is unreasonable and unsupported by any evidence on the record. To the contrary, the court observes that evidence on the record suggests instead that Separate Rate Plaintiffs' rate may be reasonably closer to the $0.69 per kilogram rate assigned to separate rate respondents in the prior twelfth administrative review, rather than the total AFA rate of $3.87 per kilogram from the thirteenth administrative review.

The court remands Commerce's assignment of the total AFA rate to fully cooperating Separate Rate Plaintiffs as unreasonable and not in accordance with the law. The court directs Commerce to reevaluate the rate applied to Separate Rate Plaintiffs in light of the evidence on the record as a whole and in accordance with this opinion.

CONCLUSION

For the foregoing reasons, the court sustains in part and remands in part Commerce's *Remand Results*.

Accordingly, it is hereby

ORDERED that the *Remand Results* are remanded to Commerce to reevaluate its determination regarding the dumping margin for Separate Rate Plaintiffs; and it is further

ORDERED that Commerce shall afford the parties at least twelve (12) business days to comment on the draft second remand results; and it is further

ORDERED that this case shall proceed according to the following schedule:

1. Commerce shall file the second remand results on or before March 5, 2021;
2. Commerce shall file the administrative record on or before March 19, 2021;
3. Comments in opposition to the second remand results shall be filed on or before April 23, 2021;
4. Comments in support of the second remand results shall be filed on or before May 28, 2021; and
5. The joint appendix shall be filed on or before June 18, 2021.

Dated: January 6, 2021
New York, New York

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

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