U.S. Customs and Border Protection

19 CFR PART 177

MODIFICATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE APPLICABILITY OF SUBHEADING 9817.00.96, HTSUS TO CERTAIN REACHING AIDS

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

ACTION: Notice of modification of two ruling letters, and of revocation of treatment relating to the applicability of subheading 9817.00.96, Harmonized Tariff Schedule of the United States (HTSUS) to certain reaching aids.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying two ruling letters concerning the applicability of subheading 9817.00.96, HTSUS, to certain reaching aids. Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 32, on September 6, 2023. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after **[60 DAYS FROM PUBLICATION DATE].**

FOR FURTHER INFORMATION CONTACT: Uzma S. Bishop-Burney, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–3782.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obli-

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 32, on September 6, 2023, proposing to modify two ruling letters pertaining to the applicability of subheading 9817.00.96, HTSUS, to certain reaching aids. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In Headquarters Ruling Letter ("HQ") 556449, dated May 5, 1992, and New York Ruling Letter ("NY") 813853, dated September 8, 1995, CBP granted 9817.00.96, HTSUS treatment to certain reaching aids. CBP has reviewed HQ 556449 and NY 813853 and has determined the ruling letters to be in error. It is now CBP's position that reaching aids are not eligible for 9817.00.96, HTSUS treatment and should be modified in accordance with *Sigvaris, Inc. v. United States*, 889 F.3d 1308 (Fed. Cir. 2018).

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying HQ 556449 and NY 813853 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H327276 and HQ H330680, set forth as attachments to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H327276

2023

OT:RR:CTF:VS HQ H327276 UBB

CATEGORY: Classification

HAROLD M. GRUNFELD
GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN & WRIGHT
599 LEXINGTON AVE, FL. 36
NEW YORK, NY 10022

RE: Articles for the handicapped; Subheading 9817.00.96; Reaching aids

DEAR MR. GRUNFELD,

This is in reference to one ruling issued to your law firm on behalf of an unnamed client, concerning the tariff classification of various reaching aids under the Harmonized Tariff Schedule of the United States ("HTSUS"). Specifically, in New York Ruling Letter ("NY") 813853, dated September 8, 1995, the merchandise was determined to be eligible for subheading 9817.00.96, HTSUS, treatment as an article for the handicapped.

We have reviewed the ruling and find it to be in error regarding the applicability of subheading 9817.00.96, HTSUS. For the reasons set forth below, we are modifying the ruling which approved the applicability of heading 9817, which provides for "articles for the handicapped" to various reaching aids.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on September 6, 2023, in Volume 57, Number 32, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

NY 813853 addresses various types of reachers or reaching aids used for retrieving objects beyond an individual's reach or for picking articles off the floor. The ruling describes the reacher, noting that it "basically consists of a long aluminum rod with a handle and trigger mechanism at one end and a spring operated gripping jaw at the other." The ruling also states that the reachers "appear to be designed primarily for the use of individuals whose ability to move or bend to reach needed objects is substantially and chronically impaired." The ruling contains no other information regarding the reachers or reaching aids and does not provide a detailed legal analysis regarding the applicability of 9817.00.96, HTSUS to the merchandise.

ISSUE:

Whether the reaching aids are eligible for duty-free treatment under subheading 9817.00.96, HTSUS, as "articles specially designed or adapted for the handicapped."

LAW AND ANALYSIS:

The Nairobi Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials of 1982, Pub. L. No. 97–446, 96 Stat. 2329, 2346 (1983) established the duty-free treatment for certain articles for the

handicapped. Presidential Proclamation 5978 and Section 1121 of the Omnibus Trade and Competitiveness Act of 1988, provided for the implementation of the Nairobi Protocol into subheadings 9817.00.92, 9817.00.94, and 9817.00.96, HTSUS.

Subheading 9817.00.96, HTSUS, covers: "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles . . . Other." In *Sigvaris, Inc. v. United States*, 227 F. Supp 3d 1327, 1336 (CIT 2017), *aff'd*, 899 F.3d 1308 (Fed. Cir. 2018), the U.S. Court of International Trade ("CIT") explained that:

> The term "specially" is synonymous with "particularly," which is defined as "to an extent greater than in other cases or towards others." Webster's Third New International Dictionary 1647, 2186 (unabr. 2002). The dictionary definition for "designed" is something that is "done, performed, or made with purpose and intent often despite an appearance of being accidental, spontaneous, or natural." Webster's Third New International Dictionary 612 (unabr. 2002).

Subheading 9817.00.96, HTSUS, excludes "(i) articles for acute or transient disability; (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (iii) therapeutic and diagnostic articles; or, (iv) medicine or drugs." U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS. Thus, eligibility within subheading 9817.00.96, HTSUS, depends on whether the article is "specially designed or adapted for the use or benefit of the blind or physically and mentally handicapped persons," and whether it falls within any of the enumerated exclusions under U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS.

The term "blind or other physically or mentally handicapped persons" includes "any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working." U.S. Note 4(a), Subchapter XVII, Chapter 98, HTSUS. While the HTSUS does not establish a clear definition of substantial limitation, in *Sigvaris*, 227 F. Supp 3d at 1335, the CIT explained that "[t]he inclusion of the word 'substantially' denotes that the limitation must be 'considerable in amount' or 'to a large degree.'"

We must first evaluate "for whose, if anyone's, use and benefit is the article specially designed," and then, whether "those persons [are] physically handicapped []." *Sigvaris*, 899 F.3d at 1314. In other words, we must consider whether such persons are suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities.

The Court of Appeals for the Federal Circuit ("CAFC") clarified that to be "specially designed," the merchandise "must be intended for the use or benefit of a specific class of persons to an extent greater than for the use or benefit of others. This definition of 'specially designed' is consistent with factors that Customs uses in discerning for whose use and benefit a product is 'specially designed" ... we adopt them in our analysis ...." *Id.* at 1314–15. In *Danze, Inc. v. United States*, 319 F. Supp. 3d 1312, 1326 n.22 (CIT 2018), the CIT held that ADA compliance alone was insufficient to show that an item was "specifically designed or adapted" for the handicapped under subheading 9817.00.96, HTSUS.

Thus, to determine whether the reachers or reaching aids in question are "specially designed" for the use or benefit of a class of persons to an extent greater than for others, we must examine the following five factors used by U.S. Customs and Border Protection ("CBP") and adopted by the CAFC in *Sigvaris*, 899 F.3d at 1314–15: (1) physical properties of the article itself (*e.g.*, whether the article is easily distinguishable in design, form and use from articles useful to non-handicapped persons); (2) presence of any characteristics that create a substantial probability of use by the chronically handicapped, so that the article is easily distinguishable from articles useful to the general public and any use thereof by the general public is so improbable that it would be fugitive; (3) importation by manufacturers or distributors recognized or proven to be involved in this class or kind of articles for the handicapped; (4) sale in specialty stores that serve handicapped individuals; and (5) indication at the time of importation that the article is for the handicapped. *See also* T.D. 92–77 (26 Cust. B. 240 (1992)).

The first two factors to consider in determining whether an article is "specially designed" are the physical properties of the article and any characteristics of the article that easily distinguish it from articles useful to the general public. In this case, the reachers described in NY 813853 do not possess any features that are distinguishable from features found in reachers available to the general public. We have found reachers with identical or similar features described as useful for picking up items that are too far to reach, for picking up trash, litter and garbage, for gathering dangerous items such as shards of glass, for reaching tight or hard to reach spots, for use for the elderly, in nursing homes, and for use for the physically impaired. There is no particular distinction between reachers that are marketed to the general public (including the elderly) for ease with daily or specialized activities and reachers that are specially designed for individuals suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities.

The third and fourth factors to consider in determining whether an article is "specially designed" are whether it is imported by manufacturers or distributors recognized to be involved in this class or kind of articles for the handicapped and whether it is sold in specialty stores that serve handicapped individuals. Reachers that are substantially similar to the reachers described in NY 813853 proliferate at e-commerce websites that serve the general public and these websites market the reachers both to the general public as well as to individuals who may be handicapped. NY 813853 does not identify the importer on whose behalf the ruling was requested.

The fifth and final factor to consider is whether there was an indication at the time of importation that the article is for the handicapped. NY 813853 was an advance ruling request and did not address an importation that had taken place, therefore the fifth factor doesn't apply in this case.

Finally, subheading 9817.00.96, HTSUS, does not cover articles for acute or transient disability. *See* U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS. NY 813853 does not define or describe the specific handicap or disability that would necessitate the use of the subject merchandise, and makes only a conclusory statement that the reachers are designed primarily for the use of individuals whose ability to move or bend to reach needed objects is substantially and chronically impaired. There is no doubt that there are chronic handicap or disabilities that would result in dexterity or mobility issues of this type, however, there are also transient or acute conditions that would do

the same (e.g. surgery, an accident), as well as age related limitations in mobility and dexterity as well. As we have noted above, reachers and reaching aids that are substantially similar to the ones described in NY 813853 are now routinely marketed to and available for purchase by the general public for precisely this type of use.

Thus, the reachers in NY 813853 do not have any features which are "specifically designed or adapted" for the handicapped. Rather, the general public would likely use the reachers for the many uses described above. Although the importer may claim the reachers are for persons who are chronically handicapped, we do not believe the reachers have any significant adaptations that would benefit the handicapped community. While reachers and reaching aids may have been directed at chronically handicapped individuals at one point in time, they now appear to be common to members of the general public who may benefit from the convenience of using a reaching tool, to reach items that are places high and beyond reach or in tight spaces, to pick up trash and litter or dangerous items such as shards of glass, as well as by members of the general public who may have impaired mobility as a result of transient injury or advanced age, but who are not chronically handicapped as set forth in 9817.00.96, HTSUS, *Sigvaris,* or the *Nairobi Protocol, Annex E to the Florence Agreement*, found in T.D. 92–77, *supra*.

Accordingly, the reachers and reaching aids are not adaptive articles of subheading 9817.00.96, HTSUS.

HOLDING:

The reachers and reaching aids identified in NY 813853 are ineligible for subheading 9817.00.96, HTSUS, which provides for as "articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons . . . other."

EFFECT ON OTHER RULINGS:

NY 813853, dated September 8, 1995, is hereby modified to reflect that the reachers and reaching aids identified therein are ineligible for subheading 9817.00.96, HTSUS.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial Trade and Facilitation

HQ H330680

2023
OT:RR:CTF:VS HQ H330680 UBB
CATEGORY: Classification

KENNETH SPETT, PRESIDENT AND CEO
GRAHAM-FIELD HEALTH PRODUCTS
ONE GRAHAM-FIELD WAY
ATLANTA, GA 30340–3140

RE: Articles for the handicapped; Subheading 9817.00.96; Reaching aids

DEAR MR. SPETT,

This is in reference to one Protest and Application for Further Review that concerned certain merchandise imported by Lumex, Inc. The ruling concerned the tariff classification of, among other items, various reaching aids under the Harmonized Tariff Schedule of the United States ("HTSUS"). Specifically, in Headquarters Ruling Letter ("HQ") 556449, dated May 5, 1992, the merchandise was determined to be eligible for subheading 9817.00.96, HTSUS treatment as an article for the handicapped.

We have reviewed the ruling and find it to be in error regarding the applicability of subheading 9817.00.96, HTSUS to the reaching aids. For the reasons set forth below, we are modifying the ruling which approved the applicability of heading 9817, which provides for "articles for the handicapped" to various reaching aids.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on September 6, 2023, in Volume 57, Number 32, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

In HQ 556449, Lumex, Inc. ("Lumex" or "Protestant")[1] claimed that a number of articles imported from Sweden were eligible for duty-free treatment under subheading 9817.00.96, HTSUS. Among the articles subject to the protest were reachers and turners of various designs for use in retrieving objects beyond an individual's reach or for picking up items off the floor. The ruling describes the items as having a handle on one end with control mechanisms and "jaws" to grip items on the other end. According to the ruling, the protestant stated the reachers to be for safety purposes so individuals with limited mobility do not attempt to stand on chairs to reach items or for those who find it painful to bend down to the floor to retrieve items. The ruling set forth the factors relevant to whether an article is specifically designed or adapted for the use or benefit of the handicapped, however the ruling did not analyze the facts of the specific merchandise (reachers and turners) against those factors, with the exception of noting that although the

[1] HQ 556449, dated May 5, 1992, was a response to a Protest and Application for Further Review (AFR) concerning various household articles imported from Sweden by Lumex, Inc. ("Lumex"). It does not appear that Lumex was represented by counsel in that matter. Internet research shows that Lumex is now a part of Graham-Field Health Products, Inc., a manufacturer of medical products in the healthcare industry. *See https://grahamfield.com/about/company-information/*. As such, this letter is directed to the corporate entity that appears to be the legal successor of Lumex.

Protestant and its supplier were recognized as distributors of articles for the handicapped, this factor alone was not dispositive. The ruling then provided, without additional analysis, that the reachers and turners were considered to be articles specifically designed or adapted for the handicapped.

ISSUE:

Whether the reachers and turners are eligible for duty-free treatment under subheading 9817.00.96, HTSUS, as "articles specially designed or adapted for the handicapped."

LAW AND ANALYSIS:

The Nairobi Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials of 1982, Pub. L. No. 97–446, 96 Stat. 2329, 2346 (1983) established the duty-free treatment for certain articles for the handicapped. Presidential Proclamation 5978 and Section 1121 of the Omnibus Trade and Competitiveness Act of 1988, provided for the implementation of the Nairobi Protocol into subheadings 9817.00.92, 9817.00.94, and 9817.00.96, HTSUS.

Subheading 9817.00.96, HTSUS, covers: "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles . . . Other." In *Sigvaris, Inc. v. United States*, 227 F. Supp 3d 1327, 1336 (CIT 2017), *aff'd*, 899 F.3d 1308 (Fed. Cir. 2018), the U.S. Court of International Trade ("CIT") explained that:

> The term "specially" is synonymous with "particularly," which is defined as "to an extent greater than in other cases or towards others." Webster's Third New International Dictionary 1647, 2186 (unabr. 2002). The dictionary definition for "designed" is something that is "done, performed, or made with purpose and intent often despite an appearance of being accidental, spontaneous, or natural." Webster's Third New International Dictionary 612 (unabr. 2002).

Subheading 9817.00.96, HTSUS, excludes "(i) articles for acute or transient disability; (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (iii) therapeutic and diagnostic articles; or, (iv) medicine or drugs." U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS. Thus, eligibility within subheading 9817.00.96, HTSUS, depends on whether the article is "specially designed or adapted for the use or benefit of the blind or physically and mentally handicapped persons," and whether it falls within any of the enumerated exclusions under U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS.

The term "blind or other physically or mentally handicapped persons" includes "any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working." U.S. Note 4(a), Subchapter XVII, Chapter 98, HTSUS. While the HTSUS does not establish a clear definition of substantial limitation, in *Sigvaris*, 227 F. Supp 3d at 1335, the CIT explained that "[t]he inclusion of the word 'substantially' denotes that the limitation must be 'considerable in amount' or 'to a large degree.'"

We must first evaluate "for whose, if anyone's, use and benefit is the article specially designed," and then, whether "those persons [are] physically handicapped []." *Sigvaris*, 899 F.3d at 1314. In other words, we must consider whether such persons are suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities.

The Court of Appeals for the Federal Circuit ("CAFC") clarified that to be "specially designed," the merchandise "must be intended for the use or benefit of a specific class of persons to an extent greater than for the use or benefit of others. This definition of 'specially designed' is consistent with factors that Customs uses in discerning for whose use and benefit a product is 'specially designed" ... we adopt them in our analysis ...." *Id.* at 1314–15. In *Danze, Inc. v. United States*, 319 F. Supp. 3d 1312, 1326 n.22 (CIT 2018), the CIT held that ADA compliance alone was insufficient to show that an item was "specifically designed or adapted" for the handicapped under subheading 9817.00.96, HTSUS.

Thus, to determine whether the reachers and turners are "specially designed" for the use or benefit of a class of persons to an extent greater than for others, we must examine the following five factors used by U.S. Customs and Border Protection ("CBP") and adopted by the CAFC in *Sigvaris*, 899 F.3d at 1314–15: (1) physical properties of the article itself (*e.g.*, whether the article is easily distinguishable in design, form and use from articles useful to non-handicapped persons); (2) presence of any characteristics that create a substantial probability of use by the chronically handicapped, so that the article is easily distinguishable from articles useful to the general public and any use thereof by the general public is so improbable that it would be fugitive; (3) importation by manufacturers or distributors recognized or proven to be involved in this class or kind of articles for the handicapped; (4) sale in specialty stores that serve handicapped individuals; and (5) indication at the time of importation that the article is for the handicapped. *See also* T.D. 92–77 (26 Cust. B. 240 (1992)).

The first two factors to consider in determining whether an article is "specially designed," are the physical properties of the article and any characteristics of the article that easily distinguish it from articles useful to the general public. In this case, the reachers and turners in HQ 556449 were described as "various designs for use in retrieving objects beyond an individual's reach or for picking up items off the floor. On one end is a handle with control mechanisms, and on the other are "jaws" to grip items." The ruling did not examine the probability that these items would be of particular use to handicapped persons or whether they were easily distinguishable in design, form and use from articles useful to non-handicapped persons. In fact, the ruling describes the articles as useful for "individuals with limited mobility" and "for those who find it painful to bend down to the floor." We note that neither limited mobility nor pain in bending down is necessarily an indication of handicap and could be caused by issues that are more transient, such as injury or recovery from surgery or a medical procedure. While the ruling concluded without additional analysis that the reachers and turners were specially designed for use by the chronically handicapped, we disagree. We have found various e-Commerce websites that advertising substantially similar reachers and turners to the general public, for use with reaching items that are too high or in narrow spaces, for picking up litter or hazardous materials such as broken glass, reaching into the washer for socks or for

picking up small items. The design of these reachers marketed to the general public appears to be indistinguishable from that of the reachers and turners described in HQ 556449. The reachers and turners in HQ 556449 were claimed to be for use for individuals with limited mobility, but the ruling did not address the likelihood that the merchandise was useful to the general public. We do not agree that the reachers and turners as described in HQ 556449 have characteristics that create a substantial probability that they will be used by the chronically handicapped and that any use by the general public would be fugitive. On the contrary, similar reachers and turners appear to be marketed towards persons suffering from various limitations to their mobility, ranging from transient limitations resulting from surgery, limitations due to arthritis (which may or may not rise to the level of a chronic handicap), age, and disability.

The third and fourth factors to consider in determining whether an article is "specially designed" are whether it is imported by manufacturers or distributors recognized to be involved in this class or kind of articles for the handicapped and whether it is sold in specialty stores that serve handicapped individuals. The protestant and their supplier in HQ 556449 were recognized distributors of articles for the handicapped. However, this factor alone is not dispositive. Reachers that are substantially similar to the reachers and turners described in HQ 556449 proliferate at e-commerce websites that serve the general public and these websites market the reachers both to a general public as well as to individuals who may be handicapped. Substantially similar reachers and turners are also sold at hardware stores. Thus, it appears that reachers and turners are sold both in specialty and general stores, and on general e-Commerce websites, as well as by specialized purveyors such as Graham Field/Lumex.

The fifth and final factor to consider is whether there was an indication at the time of importation that the article is for the handicapped, HQ 556449 was issued in response to an AFR. However, the ruling did not address the condition as imported of the reachers and turners.

Taken together, the five factors adopted by the CAFC and CBP weigh against a determination that the reachers and turners are specially designed for the use or benefit of disabled persons.

Finally, subheading 9817.00.96, HTSUS, does not cover articles for acute or transient disability. See U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS. The protestant in HQ 559446 never defines or describes the specific handicap or disability that would necessitate the use of the subject merchandise. Instead, protestant states that the products are to be used by those with limited mobility or those who find it painful to bend down to the floor to retrieve items. There is no doubt that there are chronic handicap or disabilities that would result in dexterity or mobility issues of this type, however, there are also transient or acute conditions that would do the same (e.g. surgery, an accident), as well as age related limitations in mobility and dexterity as well.

Based upon the nature of the reachers and turners, we believe it is unlikely that the reachers/turners would likely be sold exclusively to the handicapped, as opposed to the general public or to individuals with a transient or acute condition that does not rise to the level of a chronic disability. It is possible that at the time that HQ 556449 was issued, the reachers and turners were marketed, sold to and used by handicapped individuals and those with chronic disability, and that in the intervening period the articles have become

popular and useful for transient conditions and for the general public.[2] Accordingly, these articles are not adaptive articles of subheading 9817.00.96, HTSUS.

HOLDING:

The reachers and turners identified in the aforementioned ruling letter are ineligible for subheading 9817.00.96, HTSUS, which provides for as "articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons . . . other."

EFFECT ON OTHER RULINGS:

HQ 556449, dated May 5, 1992, is hereby modified to reflect that the reachers and turners identified therein are ineligible for subheading 9817.00.96, HTSUS.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial Trade and Facilitation

[2] We note that our assessment of use for transient or acute disability and use by the general public is based upon current information. We may revisit our decision as circumstances change.

NEW DATE FOR THE SPRING 2024 CUSTOMS BROKER'S LICENSE EXAMINATION

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

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection has changed the date on which the semi-annual examination for an individual broker's license will be held to Wednesday, May 1, 2024.

DATES: The customs broker's license examination originally scheduled for April 2024 will be held on Wednesday, May 1, 2024.

FOR FURTHER INFORMATION CONTACT: Omar Qureshi, Branch Chief, Broker Management Branch, Commercial Operations and Entry Division, Trade Policy and Programs Directorate, Office of Trade, (202) 909–3753, or *brokermanagament@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides that a person (an individual, corporation, association, or partnership) must hold a valid customs broker's license and permit in order to transact customs business on behalf of others, sets forth standards for the issuance of brokers' licenses and permits, and provides for the taking of disciplinary action against brokers that have engaged in specified types of infractions. This section also provides that an examination may be conducted to assess an applicant's qualifications for a license.

The regulations issued under the authority of section 641 are set forth in title 19 of the Code of Federal Regulations, part 111 (19 CFR part 111). Part 111 sets forth the regulations regarding the licensing of, and granting of permits to, persons desiring to transact customs business as customs brokers. These regulations also include the qualifications required of applicants and the procedures for applying for licenses and permits. Section 111.11 of the CBP regulations (19 CFR 111.11) sets forth the basic requirements for a broker's license, and in paragraph (a)(4) of that section provides that an applicant for an individual broker's license must attain a passing grade (75 percent or higher) on the examination.

Section 111.13 of the CBP regulations (19 CFR 111.13) sets forth the requirements and procedures for the examination for an individual broker's license and states that the customs broker's license exami-

nations will be given on the fourth Wednesday in April and October unless the regularly scheduled examination date conflicts with a national holiday, religious observance, or other foreseeable event.

The regularly scheduled examination date for April 2024 (Wednesday, April 24, 2024) coincides with the observance of the religious holiday of Passover. In consideration of this conflict, CBP has decided to change the regularly scheduled date of the examination. As a result, this document announces that CBP will hold the customs broker's license examination on Wednesday, May 1, 2024.

JOHN P. LEONARD,
Acting Executive Assistant Commissioner,
Office of Trade.

U.S. Court of International Trade

Slip Op. 23–165

WILMAR TRADING PTE LTD., PT WILMAR BIOENERGI INDONESIA, and WILMAR OLEO NORTH AMERICA LLC, Plaintiffs, and P.T. MUSIM MAS and GOVERNMENT OF THE REPUBLIC OF INDONESIA, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and NATIONAL BIODIESEL BOARD FAIR TRADE COALITION, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Consol. Court No. 18–00121
PUBLIC VERSION

[U.S. Department of Commerce's remand results are sustained, in part, and remanded. Commerce's final adverse facts available determination with respect to Consolidated Plaintiff P.T. Musim Mas is sustained.]

Dated: November 21, 2023

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OPINION AND ORDER

Eaton, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce" or the "Department") remand redetermination pursuant to the court's order in *Wilmar Trading Pte Ltd. v. United States*, 46 CIT __, 582 F. Supp. 3d 1243 (2022) ("*Wilmar I*"). *See* Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF Nos. 91 (Confidential) & 92 (Public). In *Wilmar I*, the court sustained in part, and remanded, Commerce's final determination in

the less-than-fair-value investigation of biodiesel from Indonesia. *See Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1259; *see also Biodiesel From Indon.*, 83 Fed. Reg. 8,835 (Dep't of Commerce Mar. 1, 2018) ("Final Determination") and accompanying Issues and Decision Mem. (Feb. 20, 2018) ("Final IDM"), PR 303.

Specifically, the court remanded, for further consideration or explanation, Commerce's determination that multiple particular market situations existed with respect to Wilmar's sales of biodiesel made outside of Indonesia's Public Service Obligation program (the "Program").[1] In addition, the court remanded, for further consideration or explanation, Commerce's adjustment to constructed value (as normal value[2]) to account for the value of Renewable Identification Numbers ("RINs").[3] *See Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1259. The court reserved decision on Consolidated Plaintiff P.T. Musim Mas's ("Musim Mas") challenges to Commerce's use of adverse facts available, pending the results of the redetermination. *See id.*

On remand, Commerce continued to find that multiple particular market situations existed with respect to Wilmar's non-Program sales, rendering them outside the ordinary course of trade and, therefore unusable for purposes of determining normal value. *See* Remand Results at 14–18. Commerce reconsidered, however, its decision to account for RINs by increasing constructed value (as normal value), and instead accounted for RINs by decreasing U.S. price (i.e., export price[4] or constructed export price[5]). *See* Remand Results at 6–12.

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[1] Wilmar's domestic sales made outside the Program are referred to herein as "non-Program" sales.

[2] Normal value refers to:

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . . .

19 U.S.C. § 1677b(a)(1)(B)(i) (2018).

[3] As shall be seen, Renewable Identification Numbers or "RINs" are "tradeable credits [created] pursuant to a U.S. regulatory scheme administered by the Environmental Protection Agency." *Vicentin S.A.I.C. v. United States*, 43 CIT __, __, 404 F. Supp. 3d 1323, 1328 (2019) ("*Vicentin I*").

[4] Export price refers to:

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under [19 U.S.C. § 1677a(c)].

19 U.S.C. § 1677a(a).

[5] Constructed export price refers to:

> 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, as adjusted under [19 U.S.C. § 1677a(c), (d)].

19 U.S.C. § 1677a(b).

Plaintiffs Wilmar Trading Pte Ltd., PT Wilmar Bioenergi Indonesia, and Wilmar Oleo North America LLC (collectively, "Wilmar") challenge the Department's remand redeterminations. *See* Pls.' Cmts. Opp'n to Final Results of Redetermination Pursuant to Ct. Remand ("Pls.' Cmts."), ECF Nos. 96 (Confidential) & 97 (Public). Defendant the United States, on behalf of Commerce, and Defendant-Intervenor National Biodiesel Board Fair Trade Coalition, urge the court to sustain the Remand Results. *See* Def.'s Resp. to Cmts. Remand Results ("Def.'s Cmts."), ECF Nos. 104 (Confidential) & 105 (Public); Def.-Int.'s Cmts. Supp. of Final Results of Redetermination Pursuant to Ct. Remand ("Def.-Int.'s Cmts."), ECF Nos. 106 (Confidential) & 107 (Public).

For the following reasons, the court sustains, in part, and remands Commerce's Remand Results. The court sustains Commerce's particular market situation finding based on the export levy imposed by the Government of Indonesia in 2015 ("2015 Export Levy"). The court also sustains Commerce's method of accounting for RINs as an adjustment to U.S. price. The court remands, however, on one issue—the potential imposition of a double remedy. Specifically, Commerce shall reconsider its decision to disregard Indonesian crude palm oil prices—when constructing normal value for Wilmar—based on the existence of a particular market situation (i.e., the 2015 Export Levy), or explain why doing so does not result in a double remedy.

With respect to Musim Mas's challenge to its adverse facts available rate, which is being considered for the first time, the court finds that Commerce's adverse facts available determination for Musim Mas was supported by substantial evidence and otherwise in accordance with law.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2018) and will uphold Commerce's determinations 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).

BACKGROUND

This opinion presumes familiarity with *Wilmar I*, which concerned the less-than-fair-value investigation of biodiesel from Indonesia covering the period of January 1, 2016, through December 31, 2016. *See Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1245. The following facts are relevant to the court's review of the Remand Results.

I. Measures Taken by the Government of Indonesia to Strengthen Its Biodiesel Industry

A. Indonesia's Biodiesel Subsidy Fund

In 2015, the Government of Indonesia implemented a regulatory system with the intention of bolstering its biodiesel industry. *Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1247. As part of this system, the Indonesian government created the Biodiesel Subsidy Fund (the "Fund"). *Id.* The Fund was structured so that "when biodiesel producers, such as Wilmar and Musim Mas, made sales through [the Program], they received payments from the Fund in addition to a government-mandated amount that Program-designated purchasers paid." *Id.* As a result, when Wilmar and Musim Mas made sales through the Program, they received payment for those sales in two parts:

> (1) a payment from the purchaser in a government-mandated amount designated to match the market price for petrodiesel—a cheaper fuel than biodiesel (the "Petrodiesel Price"); and (2) a payment from the Indonesian government (through the Fund) intended to make up the difference between the Petrodiesel Price and what the Indonesian government estimated as the "market price" for biodiesel (the "Fund Payment").

Id.

The aim of the Program was to support Indonesia's biodiesel market by allowing domestic producers of biodiesel, like Wilmar and Musim Mas, "to receive a competitive price for their biodiesel, even though their purchasers paid the lower Petrodiesel Price." *Id.*

B. Export Restraints on Crude Palm Oil (Primary Biodiesel Input)

Also in 2015, the Government of Indonesia imposed an export levy on all exports of crude palm oil—the primary input in producing biodiesel in Indonesia. The amount of the levy was $50 per metric ton.[6] *Id.* "As a result of the levy, more crude palm oil was available for purchase in the Indonesian market, and less was present in the world market." *Id.* Furthermore, "the world market price of Indonesian crude palm oil increased, and the price of crude palm oil fell for domestic consumers, including biodiesel producers such as Wilmar and Musim Mas." *Id.*

[6] Crude palm oil is the primary input in the biodiesel fuel produced by Wilmar and Musim Mas. *See Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1247.

II. Commerce's Antidumping Duty Investigation

On March 1, 2018, Commerce published its Final Determination pursuant to its antidumping duty investigation of biodiesel from Indonesia. *See* Final Determination, 83 Fed. Reg. at 8,835. Commerce selected Wilmar and Musim Mas as mandatory respondents because they were the two largest, publicly identifiable Indonesian exporters of biodiesel by volume, to the United States during the period of investigation. *See* Respondent Selection Mem. (May 3, 2017), PR 47.

In the Final Determination, Commerce determined Wilmar's normal value by using constructed value, after finding that multiple particular market situations in Indonesia (arising from both the Program and 2015 Export Levy) rendered all of Wilmar's home market sales[7] of biodiesel (i.e., its Program sales *and* non-Program sales) outside the ordinary course of trade. *See* Final IDM at 11–16. Additionally, when calculating Wilmar's dumping margin, Commerce increased the constructed value (as normal value) of the subject merchandise to account for the estimated value of RINs associated with Wilmar's U.S. sales of biodiesel. *See* Final IDM at 6–8.

As for Musim Mas, Commerce found that it could not determine the normal value of the company's sales in Indonesia or its U.S. sales prices because the company failed to provide necessary information in response to the Department's questionnaires, thus warranting the use of facts available.[8] *See* Final IDM at 49–55. Commerce further found that Musim Mas failed to cooperate to the best of its ability to comply with the Department's requests for such information, warranting the use of an adverse inference[9] in selecting from among the facts otherwise available. *See* Final IDM at 53–55. Thus, Commerce did not calculate an individual antidumping duty rate for Musim Mas, but instead, applied what it called "total" adverse facts available and selected a 276.65% rate (i.e., Wilmar's highest transaction-specific margin) for Musim Mas. *See id.* at 54–55.

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[7] Wilmar made two kinds of home market sales during the period of investigation: (1) Program sales (i.e., sales made through the Government of Indonesia's Program, for which it received payment in, the above described, two parts), and (2) non-Program sales (i.e., sales made outside the Program, which were not subject to the two-part payment system). *See* Final IDM at 11–16.

[8] "If . . . necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]," "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," or "significantly impedes a proceeding," Commerce uses the facts otherwise available in place of the missing information. 19 U.S.C. § 1677e(a)(1)-(2).

[9] "If [Commerce] finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the [Department]," then "[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)(1).

III. *Wilmar I*

In *Wilmar I*, the court sustained, in part, and remanded Commerce's Final Determination. Relevant here, the court found that Commerce had not adequately explained and supported with evidence (1) its decision to disregard Wilmar's non-Program sales when determining normal value, and rely instead on constructed value (as normal value); and (2) its decision to adjust constructed value (as normal value) to account for RINs associated with Wilmar's U.S. sales. *See Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1253–59.

Because Commerce's findings on remand regarding the determination of normal value for Wilmar had the potential to impact the Department's dumping analysis, the court reserved decision on Musim Mas's challenges to Commerce's use of adverse facts available until the results of redetermination were before the court. *See id.* at __, 582 F. Supp. 3d at 1259.

IV. Remand Results

On September 22, 2022, the Department issued the Remand Results. On remand, Commerce continued to find that multiple particular market situations existed with respect to Wilmar's non-Program sales, rendering them outside the ordinary course of trade and, therefore unusable for purposes of determining normal value. *See* Remand Results at 14–18. Commerce reconsidered, however, its decision to account for RINs by increasing constructed value (as normal value), and instead accounted for RINs by adjusting U.S. price. *See* Remand Results at 7–12.

Wilmar opposes the Remand Results and argues that Commerce once again failed to explain how its particular market situation and RIN value determinations are supported by substantial evidence and in accordance with law. *See* Pls.' Cmts. at 4. Wilmar further contends that Commerce's particular market situation determinations impose an unlawful double remedy. *See id.* Defendant and Defendant-Intervenor insist that Commerce got it right, and ask the court to sustain the Remand Results. *See* Def.'s Cmts. at 23; *see also* Def.-Int.'s Cmts. at 20.

DISCUSSION

I. Commerce's Particular Market Situation Determination

The antidumping statute provides that a "particular market situation" may render a respondent's home market sales, or its cost of production, outside the ordinary course of trade, and therefore unus-

able for purposes of determining normal value. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III) (sales), (e) (costs). While the statute does not explicitly define "particular market situation," the Statement of Administrative Action accompanying the Uruguay Round Agreements Act of 1994 ("SAA")[10] provides some guidance as to how Commerce may determine whether one exists: "[A] particular market situation . . . might exist . . . where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, 822 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4162; *see also NEXTEEL Co. v. United States*, 28 F.4th 1226, 1234 (Fed. Cir. 2022) (citing SAA examples). Thus, broadly speaking, "a [particular market situation] exists when the market under investigation possesses a unique set of circumstances that 'prevents a proper comparison' between a product's normal value and its export price or constructed export price." *HiSteel Co. v. United States*, 45 CIT __, __, 547 F. Supp. 3d 1233, 1239 (2021).

When Commerce determines that a particular market situation takes home market sales outside the ordinary course of trade ("sales-based particular market situation"), rendering them unusable as a basis for normal value, the Department may construct normal value based on a respondent's production costs (i.e., constructed value).[11] *See* 19 U.S.C. § 1677b(a)(4); *see also* 19 C.F.R. § 351.404(c)(2)(i) (2019).

When calculating constructed value, another type of particular market situation can render a respondent's costs of production themselves outside the ordinary course of trade ("cost-based particular market situation"). This occurs where "the cost of materials and fabrication or other processing of any kind . . . [do] not accurately reflect the cost of production in the ordinary course of trade," and are therefore unusable to determine constructed value. 19 U.S.C. § 1677b(e). In this instance, the statute permits Commerce to "use

[10] The SAA was adopted by Congress with the Uruguay Round Agreements Act. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040; *see also* 19 U.S.C. § 3511(a) (approving the SAA). By statute, the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[11] The statute defines "constructed value" as the sum of "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade" and "the actual amounts incurred and realized by the specific exporter or producer being examined . . . 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." 19 U.S.C. § 1677b(e)(1)-(2)(A).

another calculation methodology under this part or any other calculation methodology" to determine the cost of production in the exporting country for purposes of calculating constructed value. *Id.* Thus, if a single particular market situation distorts both a respondent's home market sales and its cost of production it may result in Commerce (1) disregarding home market sales as the basis for determining normal value and (2) disregarding the actual cost of production values when constructing an alternative normal value.

On remand, Commerce found that the Government of Indonesia's Program and the 2015 Export Levy each created a sales-based particular market situation that, on its own, rendered Wilmar's non-Program sales outside the ordinary course of trade and thus unusable for purposes of determining normal value. *See* Remand Results at 14–18. Commerce therefore disregarded Wilmar's non-Program sales and relied on constructed value (as normal value).[12]

Commerce also found that the 2015 Export Levy created a cost-based particular market situation that caused Wilmar's crude palm oil costs to inaccurately reflect the cost of production of biodiesel in the ordinary course of trade and therefore unusable for determining constructed value. *Id.* at 18. Consequently, Commerce relied on the world market prices for crude palm oil instead of domestic Indonesian crude palm oil prices when constructing normal value for Wilmar. Wilmar opposes Commerce's determinations on remand. For Wilmar, the Department once again failed to reconcile its determinations with substantial record evidence and the law.

A. Commerce's Finding That the Public Service Obligation Program Created a Particular Market Situation That Distorted Wilmar's Non-Program Sales Price Is Not Supported by Substantial Evidence

In *Wilmar I*, the court found that Commerce failed to provide substantial evidence of a price effect by the Program sales on the non-Program sales sufficient to cause the non-Program sales to be outside the ordinary course of trade. *See Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1256. That is, Commerce failed to show just how the Government of Indonesia's regulation of biodiesel sold through the Program, resulted in a particular market situation affecting the non-Program sales prices to such an extent that they, too, could not be considered competitively set. The court remanded to Commerce with instructions to "support with substantial evidence a finding that one

[12] The Program sales were also unusable because the sales prices were determined by the Government of Indonesia and not the market. *See Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1254.

or more particular market situations existed with respect to Wilmar's non-Program sales or use the price paid for these sales in its normal value determination." *Id.* at __, 582 F. Supp. 3d at 1259.

As has been noted, sales made through the Program paid the sellers in two parts: (1) a government set payment from the purchaser and (2) a payment from the Fund. The idea was for the purchaser to pay no more than the lower Petrodiesel Price and for the seller to profitably sell its product.

In the Remand Results, Commerce makes two related arguments in support of its determination that the Government of Indonesia's Program results in a particular market situation that renders Wilmar's non-Program sales outside the ordinary course of trade. First, Commerce argues that "the funding mechanism and the configuration of the [Program] payments *suggest* that the [Government of Indonesia's] *intent* is to ensure the existence and growth of the biodiesel industry as a whole," and therefore "it is *reasonable to conclude* that the [Government of Indonesia's Program] payments affect the price of all sales (*i.e.*, [Program] and non-[Program] sales) made by Indonesian biodiesel producers, including Wilmar." Remand Results at 15–16 (emphasis added). For Commerce, substantial evidence supports this conclusion because (1) the Government of Indonesia makes payments to biodiesel producers under the Program for their Program sales; (2) the Government of Indonesia's export tax on crude palm oil is the source of funding[13] for the Program payments to biodiesel producers; and (3) the Government of Indonesia stated[14] that an "export taxes on primary commodities can be used to reduce the domestic price of primary products in order to guarantee supply of intermediate inputs at below world market prices for domestic processing industries." *See* Remand Results at 15.

Thus, according to Commerce, the Government of Indonesia's Program payments affect all Indonesian sales of biodiesel (i.e., Program and non-Program sales prices), and not just sales of biodiesel made under the Program. The Department insists that this is the case because the Government of Indonesia's stated *purpose* for imposing export taxes on primary commodities is to "reduce the domestic price

[13] "The record demonstrates that the [Government of Indonesia]'s export tax on [crude palm oil] is the source of funds for the [Government of Indonesia]'s [biodiesel subsidy fund] payments to biodiesel producers." Remand Results at 15.

[14] The Government of Indonesia's statement, as relied upon by Commerce, provides:

> export taxes on primary commodities can be used to reduce the domestic price of primary products in order to guarantee supply of intermediate inputs at below world market prices for domestic processing industries. In this way, export taxes provide an incentive for the development of domestic manufacturing or processing industries with higher value-added exports.

Remand Results at 15.

of primary products," and because the proceeds from the export tax on crude palm oil is the source of funding for the Program payments.

Despite the Department's further explanation on remand, it has nevertheless failed to support with substantial evidence just how the Program payments distorted the price of Wilmar's non-Program sales. That the proceeds from the export tax on crude palm oil are used to finance the Program payments, and that the Government of Indonesia's stated purpose for imposing export taxes on primary commodities is "to reduce the domestic price of primary products in order to guarantee supply of intermediate inputs at below world market prices for domestic processing industries," does not demonstrate with substantial evidence that the non-Program sales prices were, in fact, affected by the Program payments.

While the facts appear to support the idea that export taxes on primary commodities, like crude palm oil, are intended to benefit the domestic biodiesel industry as a whole (i.e., by keeping more crude palm oil in the country, which results in cheaper domestic crude palm oil prices and thus lowering the cost of manufacture for all biodiesel), it does not explain how using the proceeds from the export tax to fund the Program payments furthered that intent. This is particularly true considering that the payments are limited to biodiesel sales made through the Program, and Commerce did not provide any further evidence indicating that the Program payments somehow impacted the price of non-Program biodiesel.

Instead, Commerce directs the court's attention to what it believes is "reasonable to conclude" without any evidence that there was any actual affect. The Department has merely made a claim and stated it as fact. *See* Remand Results at 15–16 ("[T]he funding mechanism and the configuration of the [Program] payments suggest that the [Government of Indonesia's] intent is to ensure the existence and growth of the biodiesel industry as a whole . . . . Thus, it is reasonable to conclude that the [Government of Indonesia's Program] payments affect the price of all sales (*i.e.*, [Program] and non-[Program] sales) made by Indonesian biodiesel producers, including Wilmar.").

As for Commerce's second argument, it asserts that Wilmar's non-Program sales prices are "not competitively set" because the Government of Indonesia, through the Program, "redirects the supply of available biodiesel from non-Program [customers] to [two] Program [customers]"[15] and, as a result, "the part of the market comprised of

[15] The two customers are PT Pertamina (Perseo) and PT AKR Corporindo Tbk. *See* Pet'r's Particular Market Situation Allegation Regarding Resp't's Home Market Sales and Costs of Production (July 25, 2017) ("PMS Allegation") Ex. 1, PR 114–16. PT Pertamina is a large state-owned oil and gas company that purchases and supplies biodiesel, while PT AKR is a fuel distribution company that owns petrol stations. *See id.*

non-[Program] sales does not include the [largest] biodiesel customers . . . or the vast majority of available biodiesel." Remand Results at 16. Commerce found this to be sufficient evidence that a particular market situation existed because it claims the Indonesian biodiesel market "functions as a whole," and therefore "it would be illogical to conclude that a small portion of Wilmar's sales in that market (*i.e.*, its non-[Program] sales) are somehow insulated from the market distortions," caused by the Government of Indonesia's pervasive regulation of the domestic biodiesel market through the Program. Remand Results at 17. Importantly, Commerce cites record evidence that the price of the overwhelming majority of biodiesel in Indonesia is not set by the market. And that the two largest purchasers do not make non-Program purchases. *See* Remand Results at 16 ("[T]he record of the underlying investigation shows that the [Government of Indonesia] mandates producer-specific minimum sale quantity requirements for [Program] sales," and "[a]s a result of these quantity requirements, [Program] sales comprise the vast majority of Indonesian biodiesel consumption at the country-wide level. All [Program] sales, including those made by Wilmar, are made to [two Indonesian customers]. Thus . . . the [Government of Indonesia] substantially redirects the supply of biodiesel available from non-[Program] to [Program] consumers. This means that non-[Program] prices are not competitively set because the part of the market comprised of non-[Program] sales does not include the [largest] biodiesel customers . . . in Indonesia or the vast majority of available biodiesel."). Though Commerce comes awfully close to satisfying the substantial evidence standard of review, the court finds that it has not cited substantial evidence that the prices for non-Program sales are not set by the market.

Although, with respect to this second argument, Commerce cites some actual evidence, it nevertheless has failed to adequately explain just how the non-Program sales prices were affected (i.e., rendered outside the "ordinary course of trade") by the Government of Indonesia's redirection of the biodiesel supply through the Program, or muster evidence that the sales prices for non-Program sales were actually distorted. For example, Commerce has offered no evidence-based explanation for its proposition that the Program and non-Program sales were subject to the same market forces, or that the non-Program sales prices were distorted because two large customers did not purchase non-Program biodiesel. Moreover, Commerce failed to meaningfully address contradictory record evidence—specifically, that the Government of Indonesia does not place any limitations on

how much biodiesel producers may sell outside of the Program, or that the Government of Indonesia exerts no control over the price of the non-Program sales. *See* Remand Results at 37; *see also* Verification Report for Pls.' Sales Responses (Nov. 22, 2017) at 6, PR 265. This evidence tends to support a finding that, with respect to the non-Program market, the Government of Indonesia does not have control over pricing "to such an extent that home market prices cannot be considered to be competitively set." SAA at 822.

The result of all this is that Commerce has not supported with substantial evidence its finding that the Government of Indonesia's distortive control of the Program sales market impacted the Indonesian biodiesel market as a whole (i.e., Program and non-Program sales of biodiesel). It is worth keeping in mind that, under the statute, the mere existence of government intervention in the market is not enough for Commerce to disregard a respondent's home market sales. That is, even though Commerce has established that the Government of Indonesia intervened in the domestic biodiesel market through its implementation of the Program, it also must show, through reasonable explanation and evidentiary support, just how that intervention prevented a proper comparison between the home market sales price and export price. *See, e.g.*, *Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1335 ("Commerce determines normal value based upon constructed value, rather than home market sales, where a [particular market situation] exists that *prevents a proper comparison with the export price or constructed export [price]* because such sales occurred outside the ordinary course of trade." (emphasis added)); *see also, e.g.*, 19 U.S.C. § 1677(15) ("[Commerce] shall consider the following sales and transactions, among others, to be outside the ordinary course of trade: . . . Situations in which [Commerce] determines that the particular market situation *prevents a proper comparison with the export price or constructed export price*." (emphasis added)).

While Commerce did support a finding that the Government of Indonesia has intervened in the domestic biodiesel industry through the Program, it did not explain, by use of substantial evidence, how this government intervention caused the non-Program sales to be outside the ordinary course of trade (i.e., prevents a proper comparison with export price or constructed export price). Instead, Commerce merely speculates that "it would be illogical to conclude that a small portion of Wilmar's sales in that market (*i.e.*, its non-[Program] sales) are somehow insulated from the market distortions," created by the Program sales. Remand Results at 17. Such speculation does not amount to substantial evidence. Therefore, the court finds that sub-

stantial evidence does not support Commerce's finding that the non-Program sales prices were not within the ordinary course of trade.

B. Commerce's Finding That the 2015 Export Levy Created Both a Sales-Based and a Cost-Based Particular Market Situation That Distorted Wilmar's Non-Program Sales Prices and Domestic Crude Palm Oil Prices Is Supported by Substantial Evidence

In the Remand Results, Commerce found that the 2015 Export Levy created a sales-based particular market situation warranting its disregard of Wilmar's non-Program home market sales information and reliance instead on constructed value to determine normal value. Commerce also found that the 2015 Export Levy created a cost-based particular market situation warranting its use of world market crude palm oil prices instead of domestic Indonesian crude palm oil prices when constructing normal value.

Commerce determined that a sales-based particular market situation existed with respect to Wilmar's non-Program home market sales because the cost of crude palm oil—the main input used to produce biodiesel in Indonesia—was distorted by the 2015 Export Levy and "[a]bsent the [particular market situation] with respect to [crude palm oil] prices in Indonesia, the cost of all sales of biodiesel would likely have been significantly higher." Remand Results at 17. When making this finding, Commerce calculated the difference between the costs actually incurred by Wilmar (i.e., based on domestic Indonesian crude palm oil values) and what the company's costs would have been in the ordinary course of trade (i.e., based on the world market prices for crude palm oil), and found that "Wilmar's weighted-average cost for biodiesel sold in the home market would likely have increased,[16]" if not for the distortion of crude palm oil prices caused by the 2015 Export Levy. Remand Results at 17.

For Commerce, "because the [cost of manufacture] for the [non-Program] products . . . was impacted significantly due to the government's intervention in the [crude palm oil] market, and because Wilmar considered that [cost of manufacture] when setting its prices, [Commerce found] it [was] reasonable to conclude that the biodiesel market in Indonesia as a whole is distorted," and "[i]t would be illogical to conclude that Wilmar's non-[Program] sales are immune to distorted [crude palm oil] costs that affect all production of biodiesel in Indonesia." Remand Results at 17–18, 36.

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[16] Specifically, Commerce determined that Wilmar's weighted-average cost for biodiesel sold in the home market would likely have increased by [[ ]]%. *See* Remand Results at 17.

Commerce thus found that the 2015 Export Levy's distortion of domestic crude palm oil prices resulted in a sales-based particular market situation that affected the price of Wilmar's non-Program sales, such that the non-Program sales could not be considered within the ordinary course of trade. Therefore, Commerce disregarded Wilmar's non-Program sales values when determining normal value and relied instead on constructed value (as normal value).

Furthermore, when determining constructed value, Commerce found that the 2015 Export Levy also created a separate cost-based particular market situation that caused Wilmar's crude palm oil costs to not accurately reflect the cost of production of biodiesel in the ordinary course of trade. Consequently, Commerce used the world market prices for crude palm oil instead of domestic Indonesian crude palm oil prices for purposes of constructing normal value.

Wilmar challenges Commerce's 2015 Export Levy particular market situation determinations on remand as unsupported by substantial evidence. Pls.' Cmts. at 13.

The court, for the following reasons, rejects Wilmar's various arguments and concludes that Commerce has supported with substantial evidence its findings that the 2015 Export Levy created a sales-based particular market situation that rendered Wilmar's non-Program sales unusable for purposes of normal value, as well as a cost-based particular market situation that rendered Wilmar's reported crude palm oil costs unusable for calculating constructed value.

Wilmar first argues that Commerce raised "an entirely new theory" on remand. *See* Pls.' Cmts. at 13 ("For starters, Commerce advances in the Final Remand Results an entirely new theory based on Wilmar's reported [crude palm oil] costs."). This is not the case. The court's remand instructions explicitly acknowledged Commerce's argument that the "cost of crude palm oil—the main input in biodiesel—was distorted by the particular market situation created by Indonesia's export taxes and levies, including the 2015 Export Levy." *See Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1256. In fact, the court said that "it was not necessarily unreasonable for Commerce to assume that a cost-based particular market situation contributed to non-Program sales being outside the ordinary course of trade." *Id.* (citation omitted). Here, Commerce's quantification of the difference between the costs actually incurred by Wilmar and what the company's costs would have been in the ordinary course of trade does not amount to a "new theory." Rather, the Department is simply addressing the court's concerns about just how the 2015 Export Levy affected the non-Program sales prices. Thus, Wilmar's claim is without merit.

Next, Wilmar argues that Commerce merely "speculate[d] that Wilmar's [crude palm oil] costs 'likely' would increase, [and] such speculation cannot 'substitute for substantial evidence in justifying decisions.'" Pls.' Cmts. at 13. Again, Wilmar's claim cannot be credited.

In the Remand Results, Commerce presented its evidence and analysis. It

> compared the [period of investigation] world market price of [crude palm oil] to Wilmar's [period of investigation] weighted-average [crude palm oil] value, and then adjusted the [crude palm oil] portion of Wilmar's [cost of manufacture] by the resulting percentage. This calculation showed that Wilmar's weighted-average [cost of manufacture] for biodiesel sold in the home market would increase.[17]

Remand Results at 34–35.

Thus, Commerce did not merely speculate that "Wilmar's weighted-average [cost] for biodiesel sold in the home market would [likely have] increase[d],[18]" but rather arrived at this conclusion by comparing Wilmar's domestic crude palm oil prices against a benchmark of world market crude palm oil prices. *Id.* Commerce showed that the domestic price for crude palm oil was significantly less than the world market price.[19] *See* Cost of Production & Constructed Value Calculation Adjustments (Oct. 19, 2017), CR 298. Accordingly, the result of this comparison demonstrated that the domestic price of crude palm oil in Indonesia was distorted by the 2015 Export Levy. Wilmar does not dispute its reported crude palm oil costs or the world market price for crude palm oil during the relevant time period. It is apparent, then, that Commerce reasonably relied on substantial evidence to demonstrate that Wilmar's weighted-average cost of manufacture for

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[17] Specifically, Commerce's calculation showed that Wilmar's weighted-average cost of manufacture for biodiesel sold in the home market would increase from $[[ ]] per metric ton to $[[ ]] per metric ton. For reference, Wilmar's average price for its non-Program sales was $[[ ]] per metric ton. Remand Results at 34–35.

[18] Commerce determined that Wilmar's weighted-average cost for biodiesel sold in the home market would likely have increased by [[ ]]%. Remand Results at 34.

[19] Commerce showed that the weighted-average domestic crude palm oil price from Wilmar's reported cost of production information was $[[ ]] per metric ton during the period of investigation, whereas the world market price of crude palm oil during the period of investigation was $681.06 per metric ton. *See* Cost of Production & Constructed Value Calculation Adjustments (Oct. 19, 2017), CR 298.

biodiesel sold in the home market would increase significantly[20] if the company paid the world market prices for crude palm oil.[21]

Finally, Wilmar argues that Commerce's reliance on the "purported differences in prices and costs [does] not 'in and of itself' establish that a [particular market situation] existed as to non-[Program] sales." Pls.' Cmts. at 14. The Department, however, did not find the existence of a particular market situation based solely on these "purported differences in prices and costs." Instead, Commerce emphasized that "[t]he [Government of Indonesia] has stated that: export taxes [(i.e., the 2015 Export Levy)] on primary commodities [(i.e., crude palm oil)] can be used to reduce the domestic price of primary products [(i.e., biodiesel)] . . . ." Remand Results at 15. Commerce then demonstrated that the Government of Indonesia's 2015 Export Levy had that desired effect (i.e., reducing crude palm oil costs, which also had the effect of reducing domestic biodiesel sales prices) by quantifying the differences between Wilmar's crude palm oil costs and the world market price for crude palm oil and linking Wilmar's distorted crude palm oil costs to the company's non-Program sales prices. *See id.* at 34–35; *see, e.g.*, *NEXTEEL Co.*, 28 F.4th at 1234 ("[A] quantitative comparison showing a difference between costs incurred and costs in the ordinary course of trade could be substantial evidence supporting the existence of a particular market situation.").

It is worth noting that, in *Wilmar I*, the court concluded that "substantial evidence supports the finding that the cost of crude palm oil . . . was distorted by the particular market situation created by Indonesia's export taxes and levies, including the 2015 Export Levy." *See Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1256 ("Indonesian [crude palm oil] prices were below world market prices in each month since the imposition of the levy (including each month of the [period of investigation])."). The court remanded the issue, however, because "Commerce ha[d] failed to show just how the price paid for the biodiesel sold in non-Program sales was affected by the distorted cost of crude palm oil." *Id.*

Here, Commerce provided substantial evidence linking the distorted costs of Indonesian crude palm oil to the price paid for Wilmar's non-Program biodiesel. On remand, Commerce calculated Wil-

[20] Commerce's calculations showed that Wilmar's weighted-average cost of manufacture for biodiesel sold in the home market would increase from approximately $[[ ]] per metric ton to $[[ ]] per metric ton if the company paid the world market prices for crude palm oil. Remand Results at 35.

[21] If Wilmar's crude palm oil costs were within the ordinary course of trade, the cost of manufacturing the biodiesel would be more than Wilmar's average price for its non-Program sales ($[[ ]] per metric ton). Therefore, Wilmar would necessarily have to increase its sales prices to cover the higher manufacturing costs to sell the biodiesel in the ordinary course of trade (i.e., at above-cost prices). *See* Remand Results at 35.

mar's cost of manufacture, using non-distorted world market crude palm oil prices, and then compared it to Wilmar's reported cost of manufacture, which was based on the Indonesian crude palm oil prices that were distorted as a result of the 2015 Export Levy. The results of this comparison showed that, by replacing the distorted Indonesian crude palm oil prices with crude palm oil prices found in the ordinary course of trade, Wilmar's weighted-average cost of manufacture for its biodiesel sold in the domestic market would increase.[22] Thus, the *cost of manufacture*[23] calculated using crude palm oil prices found in the ordinary course of trade is more than the average price paid for Wilmar's non-Program *sales*[24] during the period of investigation. *See* Remand Results at 34–35. That is, if Wilmar's crude palm oil costs were not distorted, the company's cost of manufacture would exceed its sales price for non-Program sales. If the cost of manufacture (the majority of which is based on the price of crude palm oil)[25] did not, in any way, impact Wilmar's non-Program sales prices, then this would result in Wilmar selling its biodiesel at a loss because it would cost more to produce the biodiesel than what the company's non-Program customers would pay for it.[26]

Commerce also noted that Wilmar's average price per metric ton for its non-Program sales of biodiesel was nearly identical to the average world market price per metric ton for crude palm oil. Put another way, the average price for Wilmar's non-Program sales was approximately the same as the non-distorted price of crude palm oil alone—the major input in producing biodiesel, but an input, nonetheless. This evidence led Commerce to reasonably conclude that the lowered costs of crude palm oil in the Indonesian domestic market resulted in lowered domestic sales prices for biodiesel, such that Wilmar's non-Program sales prices were not competitively set.

The court concludes that Commerce has provided substantial evidence that a particular market situation distorted the domestic costs of crude palm oil and that Wilmar's non-Program sales prices were

[22] Specifically, Wilmar's weighted-average cost of manufacture for its biodiesel sold in the domestic market would increase from $[[ ]] per metric ton to $[[ ]] per metric ton. Remand Results at 35.

[23] Wilmar's estimated cost of manufacture, if it were to rely on crude palm oil prices found in the ordinary course of trade (i.e., world market crude palm oil prices), would be $[[ ]] per metric ton. Remand Results at 35.

[24] The average price paid for Wilmar's non-Program sales was $[[ ]] per metric ton. Remand Results at 35.

[25] Crude palm oil comprises [[ ]] of Wilmar's total biodiesel cost of manufacture. *See* Cost of Production & Constructed Value Calculation Adjustments.

[26] "This calculation showed that Wilmar's weighted-average [cost of manufacture] for biodiesel sold in the home market would increase from $[[ ]]/[metric ton] to $[[ ]]/[metric ton]. For reference, Wilmar's average price for its non-[Program] sales was $[[ ]]/[metric ton]." Remand Results at 34–35.

impacted by those distorted costs of crude palm oil, rendering the company's non-Program sales outside the ordinary course of trade and unreliable as a basis for determining normal value under 19 U.S.C. § 1677b(a)(1).

As a result of this finding, Commerce reasonably determined normal value based upon constructed value, instead of using Wilmar's distorted home market sales values. Furthermore, when calculating constructed value, Commerce has shown that another particular market situation existed such that the cost of crude palm oil does not accurately reflect the cost of production of biodiesel in the ordinary course of trade. Based on this finding, Commerce reasonably relied on an alternative method for constructing normal value under 19 U.S.C. § 1677b(e), which used world market prices for crude palm oil—instead of domestic crude palm oil prices—when calculating constructed value. *See* 19 U.S.C. § 1677b(e) ("[I]f 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, [Commerce] may use another calculation methodology under this part or any other calculation methodology.").

Commerce's alternative calculation method, however, appears to correct for a distortion in home market prices caused by a domestic subsidy (i.e., the 2015 Export Levy) that has potentially already been accounted for in the companion countervailing duty case. *See generally Wilmar Trading Pte Ltd. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1334 (2020) ("*Wilmar CVD*"). In other words, Commerce has failed to explain why its alternative method for constructing normal value—using world market crude palm oil prices—is reasonable given the possibility that it results in the imposition of a double remedy. Accordingly, for the reasons discussed in the following section, Commerce's chosen alternative method for constructing Wilmar's normal value is remanded for further explanation or reconsideration.

II. Commerce's Chosen Method for Constructing Wilmar's Normal Value Is Remanded for Further Explanation or Reconsideration of the Potential Imposition of a Double Remedy

Wilmar claims that Commerce's particular market situation findings resulted in the imposition of a double remedy because the Department, "[i]n the companion countervailing duty investigation . . . countervailed the same two . . . programs that formed the basis of the cost-based and sales-based [particular market situations] at issue in this litigation." Pls.' Cmts. at 14. For Wilmar, "the imposition of a

higher antidumping duty margin due to the rejection of Wilmar's home market sales and costs, as well as a [countervailing duty] rate based on the same government programs, amounts to the imposition of double remedies by Commerce." Pls.' Br. at 30.[27]

For its part, Defendant insists that the law does not require Commerce to consider the possibility of a double remedy when adjusting constructed value based on a particular market situation. Nevertheless, Commerce claims that its use of world market prices instead of Indonesian crude palm oil prices when constructing normal value does not result in a double remedy. For the following reasons, Commerce's determination is remanded for further explanation or reconsideration.

As an initial matter, it is worth noting that this Court has recently addressed Wilmar's arguments in the *Vicentin* line of cases. In the *Vicentin* cases, the Court considered, among other things, whether Commerce's use of an alternative method under 19 U.S.C. § 1677b(e)[28] for determining constructed value remedied the effects of domestic subsidization already remedied by a concurrent countervailing duty case.[29] *Vicentin S.A.I.C. v. United States*, 44 CIT __, __ 466 F. Supp. 3d 1227, 1242–45 (2020) ("*Vicentin II*"). There, Commerce found that the Government of Argentina's export tax on soybeans resulted in a particular market situation, which caused Argentine domestic soybean prices—the major input for Argentine biodiesel—to inaccurately reflect the cost of production in the ordinary course of trade. *Id.* at 1231. Commerce therefore used an alternative method[30] for calculating constructed value under 19 U.S.C.§ 1677(e). *Id.*

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[27] The court only considers the potential imposition of a doubly remedy related to Commerce's 2015 Export Levy particular market situation determination because Commerce's Public Service Obligation Program particular market situation determination is unsupported by substantial evidence.

[28] 19 U.S.C. § 1677b(e) concerns the calculation of constructed value. It states, in relevant part, that "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, [Commerce] may use another calculation methodology under this part or any other calculation methodology." 19 U.S.C. § 1677b(e).

[29] In the concurrent countervailing duty case in the *Vicentin* line of cases, "Commerce imposed a [countervailing duty], apparently based upon a finding that the [Government of Argentina's] export tax regime artificially decreased Argentine soybean prices, and that the policy met the statutory requirements to constitute a countervailable subsidy." *Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1342 n.29. In the companion antidumping duty investigation, the double remedy issue arose because Commerce relied on that same export tax regime as the basis for its particular market situation finding and subsequent disregard of Argentine soybean prices as part of its chosen method for constructing normal value. *Id.* at 1342.

[30] Here, like in the *Vicentin* cases, Commerce used an alternative method in constructing normal value for Wilmar because the Department found that a particular market situation distorted the price of Indonesian crude palm oil (as a factor of cost of manufacture) such that the cost of manufacture for biodiesel was not within the ordinary course of trade.

As part of its alternative method, Commerce relied on market-determined soybean prices instead of domestic Argentine soybean prices. This reliance resulted in an increased dumping margin for the respondent. *Id.* at 1245. The Court remanded, holding that "[a]lthough the statute contains no prohibition on imposing [countervailing duties] and [antidumping duties] in relation to the same conduct," Commerce's chosen alternative method must be a reasonable one, and the Department "failed to explain . . . why its rejection of Argentine soybean costs—part of its chosen methodology—is reasonable given that Commerce seem[ed] to have remedied the export tax regime in the [countervailing duty] determination." *Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1342 ("Given that the subsidies distorting the Argentine soybean market seemingly were remedied in the [countervailing duty] determination, it is not clear why Commerce should disregard that remedy.").

As in the *Vicentin* cases, here, Commerce found that a particular market situation existed in Indonesia—based on the 2015 Export Levy—such that the domestic Indonesian price of crude palm oil did not accurately reflect the cost of production in the ordinary course of trade. Final IDM at 21–24. Commerce therefore used an alternative method for calculating constructed value under 19 U.S.C. § 1677b(e). *Id.* As part of its chosen method, Commerce relied on world market crude palm oil prices instead of domestic Indonesian crude palm oil prices for purposes of constructing normal value.[31] *Id.*

Under the statute, when relying on constructed value (as normal value) Commerce may resort to "another calculation methodology" if a particular market situation renders the cost of materials and fabrication (or other processing of any kind) outside the ordinary course of trade.[32] 19 U.S.C. § 1677b(e). While Commerce "may" choose any other method for determining normal value, its chosen method must be reasonable. *See Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1342 ("[A]lthough Commerce may choose any calculation methodology, 19 U.S.C. § 1677b(e), it is bound by reasonableness."). This Court has held that "[b]oth Congress's use of the word 'may,' as well as principles fundamental to review under the substantial evidence standard require that Commerce's determination be reasonable." *Vicentin I*, 43 CIT at __, 404 F. Supp. 3d at 1342 (first citing 19 U.S.C. § 1677b(e);

[31] In the previous section the court has found Commerce's actions to be in accordance with law.

[32] Section 1677b(e) provides that:

> 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 may use another calculation methodology under this part or any other calculation methodology.

19 U.S.C. § 1677b(e).

then citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); and then citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Although record evidence establishes that the 2015 Export Levy distorted the costs of domestic crude palm oil in Indonesia and rendered Wilmar's home market sales values useless for determining normal value, it is unclear why the effects of such distortion were not remedied by the imposition of countervailing duties in the companion countervailing duty investigation. *See generally Wilmar CVD*, 44 CIT at __, 466 F. Supp. 3d at 1348–57.[33] Commerce countervailed the difference between the Indonesian and world market crude palm oil prices in *Wilmar CVD*, just as it substituted the world market price for the price that Wilmar paid for crude palm oil in Indonesia when constructing Wilmar's normal value in the antidumping duty investigation. In other words, Commerce's imposition of a higher antidumping duty rate due to the rejection of Wilmar's home market sales and costs based on the 2015 Export Levy, as well as a countervailing duty rate based on the same 2015 Export Levy, seems to impose two remedies—once in the context of the antidumping duty proceeding and once in the context of the countervailing duty proceeding—for the same government program. Therefore, Commerce's alternative constructed value calculation method appears to have remedied at least some of the distortion in home market prices caused by the 2015 Export Levy that may have been accounted for in *Wilmar CVD*.

Commerce, however, has not sufficiently explained how any distortion created by the 2015 Export Levy has not already been remedied by the countervailing duties imposed in *Wilmar CVD* that were based on the same export tax regime. Instead, the Department claims that the statute in no way prohibits the application of the particular market situation provisions when determining constructed value in an antidumping duty investigation where there is a companion countervailing duty investigation. *See* Def.'s Resp. Pls.' Mots. J. Agency R. ("Def.'s Br.") at 43, ECF No. 50. In support of its claim, Commerce emphasizes the fact that "antidumping and countervailing duty investigations proceed under two separate statutes and involve indi-

[33] In the companion countervailing duty case here, Commerce imposed countervailing duties based on, *inter alia*, the Government of Indonesia's 2015 Export Levy, which Commerce determined was a countervailable program that provided crude palm oil for less than adequate remuneration. *See Wilmar CVD*, 44 CIT at __, 466 F. Supp. 3d at 1348–49. There, the Department calculated an individual subsidy rate for Wilmar of 34.45%. *Id.* at __, 466 F. Supp. 3d at 1341. For Wilmar's subsidy rate, 24.92% ad valorem was attributed to the Fund; 9.47% ad valorem was attributed to both the 2015 Export Levy and the 1994 Export Tariff (not at issue here); and 0.06% ad valorem was attributed to another, uncontested subsidy. *Id.*

vidual determinations based on independent records." *Id.* at 40. Thus, for Commerce, "[t]he two distinct laws treat price discrimination as a separate act to be remedied separately." *Id.* at 41. The Department's observation, however, does not address the fact that the companion countervailing duty remedy appears to have remedied at least some of the distortions created by the same underlying export tax regime (i.e., the 2015 Export Levy).

Commerce primarily argues that Congress's silence on the issue of double remedies when enacting the particular market situation provisions necessarily leaves Wilmar without recourse. *See* Def.'s Br. at 44 ("[I]n amending the antidumping statute through the [Trade Preferences Extension Act] just three years after adding the non-market economy double-counting provision, Congress in expanding the particular market situation concept to incorporate costs involved in calculating normal value *neither* provided an offset for an alleged doubly remedy *nor* expressed a concern about potential double counting stemming from the amended section 1677b(e).").

Commerce is correct that the statute does not expressly mandate offsetting countervailing duties from a companion countervailing duty investigation where the Department uses constructed value (or an alternative method) under 19 U.S.C. § 1677b(e). Such lack of statutory directive, however, does not relieve Commerce of its obligation to explain why its chosen method is a reasonable one. *See Vicentin II*, 44 CIT at __, 404 F. Supp.3d at 1243 ("Commerce and Defendant correctly observe that the statute does not mandate offsetting [countervailing duties] from a concurrent [countervailing duty] case where Commerce uses constructed value or an alternative under 19 U.S.C. § 1677b(e). However, the lack of a statutory directive does not render Commerce's alternative methodology reasonable." (citation omitted)).

Here, Commerce has failed to explain why its rejection of Indonesian crude palm oil costs—part of its chosen method under 19 U.S.C. § 1677b(e)—is reasonable given that Commerce may have remedied the distorted costs of crude palm oil caused by the 2015 Export Levy in *Wilmar CVD*. Nor has Commerce explained why it cannot adjust its chosen method to account for the countervailing duty remedy when constructing normal value. Commerce may have a reason to believe that the countervailing duties imposed in *Wilmar CVD* do not remedy the distortion of crude palm oil prices in the Indonesian market for purposes of the antidumping duty investigation; however, if Commerce has such a reason, it must explain it.

The court thus holds that Commerce's decision to disregard Indonesian crude palm oil prices—based on the 2015 Export Levy par-

ticular market situation—is unsupported by substantial evidence because the Department failed to sufficiently explain how any distortion created by the 2015 Export Levy in this case has not been remedied by the companion countervailing duty case. Accordingly, on remand, Commerce must either reconsider its decision to disregard Indonesian crude palm oil prices when constructing normal value for Wilmar or explain why doing so does not result in a double remedy. *Cf.* 19 U.S.C. § 1677f-1(f)(1)(C) (instructing Commerce to offset a potential double remedy caused by using surrogate values for determining normal value in a non-market economy antidumping duty case).

III. Commerce's Method of Accounting for RINs, as an Adjustment to U.S. Price, Is Sustained

Renewable Identification Numbers or "RINs" are

> tradeable credits [created] pursuant to a U.S. regulatory scheme administered by the [Environmental Protection Agency, or "EPA"]. The EPA requires that biodiesel producers or importers ("obligated parties") meet an annual "renewable volume obligation," pursuant to which obligated parties must submit RINs equal to the number of gallons of renewable fuel comprising their renewable volume obligation. RINs are generated through biodiesel production in the United States or importation of biodiesel. The obligated party that generates RINs may use them to satisfy its renewable volume obligation, or it may trade or sell them to other obligated parties.

Vicentin I, 43 CIT at __, 404 F. Supp. 3d at 1328.

When certain biodiesel is imported into the United States, the purchaser of the biodiesel receives an amount of RINs (usually one RIN per gallon of biodiesel imported) in addition to the biodiesel itself. At the time RINs are created, they have no denominated dollar value. The RINs, however, can be (and often are) traded or sold on a secondary market. Thus, despite having no denominated dollar value, because the RINs can be traded or sold, they do, in fact, have actual value. Therefore, the U.S. purchaser of biodiesel receives something of value (i.e., the value associated with RINs) in addition to the value of the biodiesel itself (i.e., the value of the subject merchandise). *See, e.g.*, *Vicentin S.A.I.C. v. United States*, 42 F.4th 1372, 1375 (Fed. Cir. 2022) ("RINs are tradeable credits created by the importation and

domestic production of renewable fuels. RINs are 'attached' to biodiesel at the time of importation, and importers can later sell them as 'detached' or 'separated' RINs.").

In the Final Determination, Commerce found that there was no "RIN value" included in the Indonesian biodiesel sales prices. In other words, Commerce "determined that the value of RINs embedded in the value of subject merchandise sold on the United States market creates an imbalance between [normal value] and U.S. price because there is no comparable value added to sales of biodiesel in Indonesia." Final IDM at 6.

Commerce therefore determined that it was appropriate to correct the imbalance between normal value (i.e., the RIN-exclusive Indonesia prices) and export price (i.e., the RIN-inclusive U.S. purchase price) in order to make a fair "apples-to-apples" comparison when determining a dumping margin. Commerce did this by making an upward adjustment to constructed value (as normal value), pursuant to 19 C.F.R. § 351.401(c), to offset the value of the RINs embedded in the U.S. sales price. Final IDM at 6–8.

In *Wilmar I*, the court concluded that remand was appropriate because Commerce failed to explain adequately why it made the RIN adjustment to constructed value (as normal value), rather than U.S. price, or cite sufficient legal authority for its adjustment. *See Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1257–58. In fact, "Commerce cited no provision in the statute or in its own regulations authorizing the addition of an amount to constructed value (as normal value) to account for increases in U.S. price." *Id.* at __, 582 F. Supp. 3d at 1258. Thus, "Commerce's decision fail[ed] to establish the necessary legal authority for applying a price adjustment to normal value when the factual basis for its adjustment concerned U.S. price." *Id.* While the court noted that "the statutory path for an adjustment to export price (U.S. price) [to account for RINs] appears to be clear," it ultimately held that Commerce failed to "demonstrate why [it] left U.S. sales unaffected in its calculations, when those are the sales that actually contain RIN values." *Id.*

On remand, Commerce reconsidered its decision to account for RINs by increasing constructed value (as normal value) as it had in the Final Determination in *Wilmar I*, and instead accounted for RINs by decreasing U.S. price. *See* Remand Results at 6–7. Commerce relied upon 19 U.S.C. § 1677a(a) (export price) and

(b) (constructed export price),[34] along with 19 C.F.R. § 351.401(c),[35] as the legal basis for its decision to account for RINs by adjusting U.S. price—rather than adjusting normal value. *See id.* at 7. Commerce made its adjustment by taking the same RIN values used in the Final Determination and deducting those values from U.S. price—rather than adding them to normal value as it had in *Wilmar I*. *See id.* at 10. Although Commerce changed its method for accounting for RIN values on remand, the rates determined for Wilmar (92.52%) and the separate rate companies (92.52%) remain the same. *See id.* at 12. The Department maintains that accounting for RINs in this manner is consistent with the *Vicentin* line of cases. *See id.* at 6–7.

Wilmar contends that Commerce's RIN adjustment on remand—despite making the adjustment to U.S. price, instead of normal value as in the Final Determination—remains unsupported by substantial evidence. Pls.' Cmts. at 6. Wilmar makes two arguments in support of this contention. First, it argues that Commerce erroneously relied on 19 C.F.R. § 351.401(c) because RINs are not the types of "price adjustments," contemplated by the regulation, that permit Commerce to adjust export price. In fact, Wilmar claims that the RINs are not price adjustments at all, but are instead "a fundamental and inextricable component of the full value of the imported biodiesel," which cannot be isolated under 19 C.F.R. § 351.401(c). *See id.* at 7 ("RINs are not adjustments to the buyer's 'net outlay,' but rather an integral component of the full price (or 'net outlay') paid [by] the buyer"; thus, for Wilmar, "RIN values do not reflect 'a change' in the buyer's net outlay under 19 C.F.R. § 351.102(b)(38), but rather form part of 'the price at which the subject merchandise is first sold' under 19 U.S.C. § 1677a(a), (b)."). Second, Wilmar argues that Commerce's reliance on the *Vicentin* line of cases is misguided because the facts in *Vicentin* are inapposite. Specifically, Wilmar asserts that *Vicentin* is distinguishable because this line of cases "does not address the undisputed fact that the starting price for Wilmar's RIN-inclusive biodiesel includes the value of RINs." *Id.* at 8.

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[34] 19 U.S.C. § 1677a(a) and (b) define export price and constructed export price, respectively. *See supra* notes 4 and 5 providing the statutory definitions of export price and constructed export price.

[35] 19 C.F.R. § 351.401(c) concerns the "[u]se of price net of price adjustments" when calculating U.S. price as part of Commerce's antidumping duty analysis. It states:

> In calculating export price, constructed export price, and normal value (where normal value is based on price), [Commerce] normally will use a price that is net of price adjustments, as defined in § 351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable). [Commerce] will not accept a price adjustment that is made after the time of sale unless the interested party demonstrates, to the satisfaction of the [Department], its entitlement to such an adjustment.

19 C.F.R. § 351.401(c).

For the following reasons, the court sustains Commerce's adjustment to U.S. price to account for RINs.

A. Commerce's Determination That RIN Values Are Price Adjustments Under the Relevant Statutory and Regulatory Framework Is Supported by Substantial Evidence

To determine whether subject merchandise—here, biodiesel from Indonesia—is being sold at less than fair value, Commerce must make "a fair comparison . . . between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). Put another way, Commerce must make a comparison of the price at which the subject merchandise is first sold (to an unaffiliated purchaser) in the United States with the price at which the same merchandise is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country. *See* 19 U.S.C. § 1677a(a), (b); *see also id.* § 1677b(a)(1)(B)(i). There is no statutory formula that dictates how Commerce should determine "the price at which the subject merchandise is first sold." *See id.* § 1677a(a), (b). Instead, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986) (citations omitted).

Here, Commerce cited 19 C.F.R. § 351.401(c) as the regulatory basis for its decision to treat the RINs as "price adjustments" when determining "the price at which the subject merchandise . . . [was] first sold (or agreed to be sold) in the United States" (i.e., the U.S. biodiesel price) under 19 U.S.C. § 1677a.[36] Remand Results at 22. Section 351.401(c) provides that "[i]n calculating export price, constructed export price, and normal value (where normal value is based on price), [Commerce] normally will use a price that is net of price adjustments . . . ." 19 C.F.R. § 351.401(c). Commerce's regulations define "price adjustment" as "a change in the price charged for subject merchandise or the foreign like product, such as a discount, rebate, or *other adjustment*, including, under certain circumstances, a change that is made after the time of sale . . . that is reflected in the

[36] As discussed in the following subsection, this method is consistent with Federal Circuit precedent. *See Vicentin*, 42 F.4th at 1379 (holding that "19 C.F.R. §§ 351.401(c) and 351.102(b)(38) allow [Commerce] to subtract the value of RINs from export price as a 'price adjustment'").

purchaser's *net outlay*." 19 C.F.R. § 351.102(b)(38) (emphasis added). This definition of "price adjustment" is not limited to just "discounts" and "rebates"—it encompasses other types of adjustments as well. *See Vicentin*, 42 F.4th at 1378 ("The two phrases 'such as' and 'or other adjustment' convey that the definition is not limited to discounts and rebates.").

In support of its determination that RIN values constitute price adjustments under 19 C.F.R. §§ 351.401(c) and 351.102(b)(38), Commerce cited a Congressional Research Report, which provides:

> The [Renewable Fuel Standard] is a market-based compliance system in which obligated parties (generally refiners and/or terminal operators) must submit credits to cover their obligations. These credits—Renewable Identification Numbers, or RINs—are *effectively commodities that can be bought or sold* like other commodities. For each gallon of renewable fuel in the RFS program, one RIN is generated.

Remand Results at 9 (emphasis added).

The Department also referenced a report produced by the U.S. International Trade Commission as further support for its claim that the biodiesel invoice price contains an upward adjustment to account for RIN values. The data in that report showed that "B99 (a biodiesel blend containing 99.0 to 99.9 percent biodiesel) sold in the United States for $2.27 per gallon in 2016 on average with RINs included, and for $1.01 per gallon when sold without RINs." *Id.* at 9.

Based on these reports, Commerce determined that the

> RIN values embedded in United States biodiesel prices are best characterized as a price adjustment "already included in the reported invoice price for biodiesel" and, therefore, that they must be netted out under section 351.401(c) because RIN-eligible biodiesel prices are adjusted upwards by the buyer and seller to account for the RINs.

Def.'s Cmts. at 7 (citing Remand Results at 7–10). That is, Commerce considered RIN value to be a "price adjustment" as defined under 19 C.F.R. § 351.102(b)(38) because the invoice price did not reflect the price at which the *subject merchandise* (i.e., the biodiesel itself) was first sold—because the invoice price is adjusted upward to include the value of RINs. Thus, for Commerce, "[f]ailing to use a United States price that is 'net of price adjustments' [(i.e., RIN values)] would thus prevent a fair comparison between the United States price and normal value, as is required." *Id.* at 7; *see, e.g.*, *NEXTEEL Co. v. United States*, 43 CIT __, __, 355 F. Supp. 3d 1336, 1359 (2019) ("Section

1677a requires Commerce to make adjustments when calculating export price or constructed export price 'to create a fair, 'apples-to-apples' comparison between U.S. price and foreign market value." (citation omitted)).

The court agrees with Commerce that 19 C.F.R. §§ 351.401(c) and 351.102(b)(38) permits it to subtract the value of RINs from U.S. price as a "price adjustment."

Moreover, Commerce's determination that RINs have a value of their own is supported by substantial evidence. The reports cited by Commerce show (1) that RINs have their own value that is distinct from the value of the subject biodiesel itself and (2) that RIN value is reflected by an upward adjustment to the invoice price for biodiesel exported to the United States. Thus, when purchasing RIN-eligible biodiesel an importer receives a fungible credit (i.e., RINs) affecting its "net outlay" for the biodiesel. Therefore, RIN value is a type of "adjustment" that "is reflected in the purchaser's net outlay," fitting squarely within the definition of a "price adjustment" under 19 C.F.R. § 351.102(b)(38) to be "netted out" pursuant to 19 C.F.R. § 351.401(c) when determining export or constructed export price under 19 U.S.C. § 1677a(a) and (b).

B. Commerce Permissibly Relied on the *Vicentin* Line of Cases

Here, Commerce relied on the same "price adjustment" method recently upheld by the Federal Circuit in *Vicentin*. As is the case here, *Vicentin* considered whether Commerce could rely on 19 U.S.C. § 1677a(a) and (b)—as well as 19 C.F.R. § 351.401(c)—to deduct the value of RINs from U.S. price as a "price adjustment" to isolate the starting price of biodiesel for purposes of making an accurate comparison between U.S. price and normal value. *See Vicentin*, 42 F.4th at 1378–79. There, the Court held that "[g]iven the similarities between RINs and rebates [(an example of a type of "price adjustment" listed under 19 C.F.R. § 351.102(b)(38))], the non-limiting language of the regulation, and the fact that Commerce's calculation effects the overall statutory scheme, the regulation *unambiguously* permits Commerce to subtract the RINs values." *Vicentin*, 42 F.4th at 1379 (emphasis added). Thus, the Federal Circuit's holding in *Vicentin* authorizes Commerce to do exactly what it did, on remand, here. That is, to treat RINs as "price adjustments" and deduct the estimated value of the RINs from U.S. price in order to make an accurate "apples-to-apples" comparison between U.S. price and normal value. *See id.* at 1374 ("Certain renewable fuels, such as the biodiesel at issue here, are entitled to tradeable tax credits. In calculating export

price, Commerce subtracted the value of these tradeable credits, calling the credits "price adjustments" under 19 C.F.R. § 351.401(c). Because the credits fall within the regulatory definition of a "price adjustment" and substantial evidence supports the value Commerce used for the credits, we affirm Commerce's export price calculation.").

According to Wilmar, however, Commerce's reliance on *Vicentin* is misguided because that case "does not address the undisputed fact that the starting price for Wilmar's RIN-inclusive biodiesel includes the value of RINs." Pls.' Cmts. at 8. In other words, Wilmar maintains that *Vicentin* is "inapposite" because that case does not address its argument that "RINs are 'actual values' that are included in 'the gross or starting prices reported to Commerce,'" which means that they "form part of 'the price at which the subject merchandise is first sold'" and therefore "do not reflect 'a change' in the buyer's net outlay under 19 C.F.R. § 351.102(b)(38)." *Id.* at 7.

Wilmar misreads the precedent. In *Vicentin*, the Federal Circuit explained that record evidence showed "that the invoice price does not reflect the 'price at which the *subject merchandise* is first sold,' as required by 19 U.S.C. § 1677a(a) 'because [the invoice price] includes a RIN value.'" *Vicentin*, 42 F.4th at 1378. The Court then went on to reject the appellant's argument that the regulations require either a "starting price actually paid by a customer" (i.e., the RIN-inclusive invoice price that Wilmar argues for), or an "adjusted price agreed between the buyer and the seller." *Id.* at 1379. Thus, contrary to Wilmar's assertions, *Vicentin* does indeed address the fact that the invoice or "starting" price includes the value of RINs. The invoice price for sales made to the United States reflected the price for the biodiesel itself plus RINs. That is why the value of the RINs must be subtracted from the invoice price—so that a comparison of normal value and U.S. price is for biodiesel only. The Federal Circuit's pellucid reasoning makes perfect sense and is directly applicable to this case. Even if Commerce had used the non-Program sales price for normal value (rather than using constructed value) that sales price would have been for biodiesel only, not for biodiesel plus RINs.

Therefore, Wilmar's argument must fail because in *Vicentin*—which involved nearly identical facts and the same regulatory scheme at issue in this case—the Federal Circuit affirmed that Commerce could adjust U.S. price to account for RIN values, just as it did here. *Id.* ("We agree with Commerce that 19 C.F.R. §§ 351.401(c) and 351.102(b)(38) allow it to subtract the value of RINs from export price as a 'price adjustment.'").

Based on the foregoing, the court sustains Commerce's adjustment for RIN values as a deduction to U.S. price because it is supported by substantial evidence and in accordance with law.

IV. Commerce's Application of Adverse Facts Available to Determine Musim Mas's Dumping Margin Is Sustained

The court next turns to Musim Mas's challenge to Commerce's decision to disregard all of the information that the company placed on the record and, instead, select an adverse facts available rate of 276.65%—Wilmar's highest transaction-specific margin on the record.[37]

"It is well-established that Commerce is required to calculate antidumping duty margins as accurately as possible in each segment of a proceeding." *U.S. Steel Corp. v. United States*, 34 CIT 252, 280, 712 F. Supp. 2d 1330, 1354–55 (2010) (citation omitted). During an antidumping proceeding, Commerce asks the parties for the information that the Department deems necessary to make its margin determinations through questionnaires. *See BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1295 (Fed. Cir. 2019). The burden of creating the administrative record, on which Commerce will base its factual findings, lies with the interested parties. *Id.* (citation omitted).

During an administrative investigation, "[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . withholds information that has been requested by [Commerce]," "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," or "significantly impedes a proceeding," Commerce uses the facts otherwise available in place of the missing information. 19 U.S.C. § 1677e(a)(1)-(2)(A)-(C).

Where Commerce determines that the use of facts available is warranted, it may apply adverse inferences to those facts when replacing an interested party's information only if it makes the requisite additional finding that that party has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1). To find a respondent has failed to cooperate to the best of its ability, the Department performs two tasks:

> First, it must make an objective showing that a reasonable and responsible [respondent] would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Second, Commerce

[37] Musim Mas does not contest its adverse facts available rate as punitive. Instead, it contests Commerce's decision to use adverse facts available in the first place.

> must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382–83 (Fed. Cir. 2003) (citation omitted).

"It is worth noting that the subjective component of the 'best of its ability' standard judges what constitutes the maximum effort that a particular respondent is capable of doing, not some hypothetical, well-resourced respondent." *Nat'l Nail Corp. v. United States*, 43 CIT __, __, 390 F. Supp. 3d 1356, 1373 (2019). Thus, "[a]n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown." *Nippon Steel*, 337 F.3d at 1383.

The application of *adverse* facts available is, then, a two-step process. *See Nippon Steel*, 337 F.3d at 1381 ("The statute has two distinct parts respectively addressing two distinct circumstances under which Commerce has received less than the full and complete facts needed to make a determination. . . . The focus of subsection (a) is respondent's *failure to provide information*. The reason for the failure is of no moment."). Thus, generally only after Commerce has determined that there is information missing, creating a gap in the record, can it apply an adverse inference when selecting among the facts otherwise available. *See id.* ("As a separate matter, subsection (b) permits Commerce to 'use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available,' only if Commerce makes the separate determination that the respondent 'has failed to cooperate by not acting to the best of its ability to comply.' The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability,* not its failure to provide requested information." (alteration in original)). Importantly, the use of facts available generally requires a finding of missing information. The application of an adverse inference is based on a respondent's behavior.

Finally, the assignment of an adverse facts available rate to a respondent is meant to encourage future compliance, not to punish. *See Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1224, 1242 (2021).

In the Final Determination, Commerce found that the information the company placed on the record was so incomplete that it was impossible to perform a dumping analysis. Specifically, Commerce found that the record was missing information that it needed to determine either normal value or U.S. price. Regarding normal value, the record was missing (1) a usable home market sales reconciliation and (2) cost of production data, specifically CONNUM-specific[38] production quantity information. As for U.S. price, the record was missing estimated RIN value information for Musim Mas's U.S. sales. According to Commerce, "[t]he information that [was] missing render[ed] the information that Musim Mas . . . provided to the Department too incomplete to serve as a reliable basis for [the] . . . dumping margin analysis." PDM at 7. Commerce further stated that "all of this [missing] information" was necessary because it was "core to Commerce's ability to calculate Musim Mas' dumping margin." Final IDM at 49.

Because, for Commerce, without the missing information, the information that Musim Mas did place on the record was unusable, and thus it found that the use of facts otherwise available was required.[39] *See id.* In addition, Commerce concluded that Musim Mas had failed to cooperate to the best of its ability and applied an adverse inference when selecting from among the facts available to fill gaps in the record, under 19 U.S.C. § 1677e(b).[40] *See id.*

Musim Mas argues that substantial evidence does not support the Department's finding that the record was missing (1) a home market sales reconciliation, (2) CONNUM-specific production quantities in the company's cost of production information, or (3) estimated RIN values for the company's U.S. sales. Musim Mas further maintains that it did its best to provide Commerce with the information it requested.

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[38] A control number, or "CONNUM," is a number composed of a series of digits each of which corresponds to a physical characteristic of a product, as defined by Commerce in a questionnaire. Each CONNUM is assigned to a unique product and is "designed to reflect the 'hierarchy of certain characteristics used to sort subject merchandise into groups' and allow Commerce to match identical and similar products across markets." *Manchester Tank & Equip. Co. v. United States*, 44 CIT __, __ n.3, 483 F. Supp. 3d 1309, 1312 n.3 (2020) (quoting *Bohler Bleche GmbH & Co. KG v. United States*, 42 CIT ___, ___, 324 F. Supp. 3d 1344, 1347 (2018)).

[39] "If . . . necessary information is not available on the record . . . [Commerce] *shall*. . . use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a)(1) (emphasis added).

[40] "If [Commerce] finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce], the [Department] . . . 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)(1)(A).

A. Substantial Evidence Supports Commerce's Decision to Use Facts Available with Respect to All of Musim Mas's Reported Information

1. Home Market Sales Reconciliation

Commerce first found that Musim Mas had failed to provide a usable reconciliation of its total home market sales and its general ledger and financial statements so that the Department could determine the quantity and value of all sales during the period of investigation. *See* Final IDM at 49–50. For Commerce, "a usable home market sales reconciliation is core to a margin calculation because it is one of the 'essential building blocks' used to verify a respondent's data." *Id.*

Musim Mas argues that it submitted sufficient data for Commerce to reconcile its home market sales with its general sales information. *See* Mem. Supp. Musim Mas's Mot. J. Agency R. ("Musim Mas's Br.") at 4, ECF No. 32. That is, for Musim Mas, the information it supplied was adequate for Commerce to perform a proper sales reconciliation at verification.

In addition, Musim Mas argues that, even if Commerce found deficiencies in the company's home market sales reporting, those deficiencies could have been resolved at verification, if Commerce had scheduled one for the company.[41] *See id.* at 5 ("[E]ven if [Musim Mas] had submitted the most detailed, voluminous documentation in its questionnaire responses, Commerce still would have conducted an extensive review of the reconciliation methodology and the underlying information in [Musim Mas's] records at on-site verification."). In a related argument, Musim Mas contends that Commerce should

[41] Musim Mas does not argue that Commerce failed to comply with the requirements of 19 U.S.C. § 1677m(d), which states that Commerce "shall promptly inform" the respondent who has submitted a deficient response "of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews." 19 U.S.C. § 1677m(d). It is undisputed that for each response that Commerce found to be deficient here, the Department issued a supplemental questionnaire alerting Musim Mas to the deficiencies Commerce identified in the company's initial responses. *See* Musim Mas Suppl. Secs. B & C Quest. (Aug. 10, 2017), PR 153; Musim Mas Suppl. Sec. D Quest. (Aug. 7, 2017), PR 149. Thus, unlike in *Hitachi Energy USA Inc. v. United States*, 19 U.S.C. § 1677m(d) would not require Commerce to provide Musim Mas with the opportunity to supplement the record at verification—had verification been conducted—because Commerce already provided Musim Mas with notice and the opportunity to remedy the deficiencies in the company's reported information that led the Department to apply facts available. *Cf.* 34 F.4th 1375, 1383–85 (Fed. Cir. 2022), *modified on denial of reh'g*, No. 20–2114, 2022 WL 17175134 (Fed. Cir. Nov. 23, 2022) (holding that "the statutory entitlement to notice and opportunity to remedy any deficiency [under 19 U.S.C. § 1677m(d)] is unqualified in the circumstances of this case").

have been able to verify the information submitted because it was able to verify the company's home market information in the parallel countervailing duty proceeding. *See* Musim Mas's Br. at 6 ("Commerce successfully accepted and verified [Musim Mas's] submitted reconciliation data in the [countervailing duty] investigation.").

For its part, Commerce maintains that Musim Mas submitted only total home market sales *quantities*, not total sales *values*—and thus the worksheet and supporting documentation provided by the company could not "be tied to [its] financial statements or ledgers." Final IDM at 50. Accordingly, for Commerce, absent a usable reconciliation of the home market sales data and the general ledger and financial statements, verification would have been "impossible." *Id.* The Department emphasized that "[v]erification is not a forum for Commerce to resolve issues that have not been resolved in questionnaire responses, especially when the issues pertain to the integrity and accuracy of the totality of the data." *Id.*

The court finds that Commerce reasonably determined that necessary information, in the form of a usable home market sales reconciliation, was missing from the record.[42] Thus, the Department's decision to disregard Musim Mas's submitted home market sales data in its use of facts available was supported by substantial evidence.

When determining whether to use facts available because a respondent has not provided usable information, Commerce must explain "exactly what information is missing from the record." *Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1333 (2019); *see also* 19 U.S.C. § 1677e(a)(2). Here, Commerce found that Musim Mas had failed to provide a usable home market sales reconciliation because the chart(s) the company submitted did not include sales values that could be tied to its general ledger and financial statements. *See* Final IDM at 50 ("The exhibit that Musim Mas points to includes a chart that does not show any sales values; thus, the chart and 'supporting documentation' cannot be tied

[42] Musim Mas does not dispute that a home market sales reconciliation is necessary to Commerce's antidumping analysis generally. In a footnote, however, the company claims that, because "Commerce ultimately decided to apply [a] 'particular market situation' . . . to disregard all home market sales in the Final Determination," it was "penalized for not submitting a reconciliation for data which would have never been used under Commerce's methodology." Musim Mas's Br. at 6 n.3. This assertion puts the cart before the horse. As the court previously noted, when discussing Wilmar's home market sales, Commerce is required to determine whether a company's home market sales are both viable in terms of quantity, and made in the ordinary course of trade, before relying on constructed value as normal value. *See* 19 U.S.C. § 1677b(a)(1)(B)(i), (4); *see also* 19 C.F.R. § 351.404(a), (b)(1)-(2). Therefore, a home market sales reconciliation was necessary to Commerce's antidumping analysis.

to Musim Mas' financial statements or ledgers. Therefore, we find that it would be impossible for Commerce to perform a proper sales reconciliation at verification.").

The record supports the Department's conclusions. Both Commerce's initial questionnaire and supplemental questionnaire asked Musim Mas to

> [p]lease provide a complete package of documents and worksheets demonstrating how you identified the sales you reported to the Department and reconciling the reported sales to the total sales listed in your general ledger. Include a copy of all computer programs used to separate the reported sales from your total sales and to calculate expenses. In your response, *please tie the reported sales back to Musim Mas and IBP's*[43] *general sales ledgers, and tie those amounts to the financial statements in your section A response*.

Musim Mas Suppl. Secs. B & C Quest. (Aug. 10, 2017) at 3, PR 153 (emphasis added); *see also* Musim Mas Secs. B-E Quest. (May 16, 2017), PR 57.

Musim Mas submitted two "reconciliations" of its home market sales, (1) one in response to the Department's initial questionnaire for home market information; and (2) another in response to the supplemental questionnaire, which sought to clarify the prior submission. *See* Musim Mas's Resp. Secs. B & C Quest. (June 29, 2017) at 4 & Ex. 2, PR 100; Musim Mas's Resp. Suppl. Secs. B & C Quest. (Aug. 24, 2017) at 1 & Ex. 1, PR 173.

Musim Mas relies primarily on the second submission when arguing that it submitted sufficient information for reconciliation. *See* Musim Mas's Br. at 4. Both "reconciliations," however, lack identifiable sales *values*, as Commerce found in the Final Determination. Musim Mas's first submitted response is inadequate, for example, because it does not identify the significance of the numbers it included in its reconciliation. *See* Musim Mas's Resp. Secs. B & C Quest. Ex. 2. Thus, the data provided in Musim Mas's initial response could not be tied to the company's financial statements or ledgers. Therefore, Commerce could not perform a proper sales reconciliation.

The second submission, on which Musim Mas relies, contains a worksheet purporting to reconcile the total home market sales, but the worksheet shows only total sales quantities. It does not show any

[43] P.T. Intibenua Perkasatama or "IBP" is an affiliate company of Musim Mas. Both Musim Mas and IBP are subsidiaries of the same holding company, Musim Mas Holdings Pte Ltd. *See* Musim Mas's Partial Resp. Sec. A Quest. (May 19, 2017), PR 65.

sales values, just as Commerce found. *See* Musim Mas's Resp. Suppl. Secs. B & C Quest. Ex. 1. As for the company's claims that the second submission "also contains 14 additional pages that indicate the value of sales associated with the above-referenced quantities," these pages do not support Musim Mas's argument. *See* Musim Mas's Br. at 4. It is unclear to the court, as it was to Commerce, how the totals listed in the worksheet (total quantities listed as metric tons and kilograms) link to the attached, confidential exhibits (appearing to show screen-captures of company software, with numbers possibly representing some individual sales values). *See* Musim Mas's Resp. Suppl. Secs. B & C Quest. Ex. 1.

Before Commerce, Musim Mas did not provide any explanation as to how its documents could be read together, or how a reconciliation could be created based on the underlying information. Nor did Musim Mas explain how to link its reconciliation worksheets with any other home market information, such as its home market sales database. In both narrative questionnaire responses to the Department's request to "tie the reported sales back to [your] general sales ledgers, and tie those amounts to the financial statements in your section A response," Musim Mas only pointed Commerce to the worksheets, without explaining what the numbers reported there represented, or showing Commerce where corresponding sales values could be found and linked to the reported quantities. *See* Musim Mas's Resp. Secs. B & C Suppl. Quest. at 1 ("Please see Exhibit 1."); *see also* Musim Mas's Resp. Secs. B & C Quest. at 4 ("Please see Exhibit 2 for the sales reconciliation package.").

Accordingly, Commerce's conclusion that the worksheet(s) and supporting documentation did not constitute a usable home market sales reconciliation was reasonable. Moreover, even if Commerce were to try to create a reconciliation based on the additional data submitted with Musim Mas's supplemental questionnaire response (i.e., the screen-captures of Musim Mas's software), there does not seem to be a way for Commerce to identify the sales values that correspond with the total reported quantities. Indeed, in its brief before the court, Musim Mas concedes that the submissions it provided do not match completely: "The first page is a worksheet demonstrating the reconciliation of sales as reported in [Musim Mas's] databases, *which were based on the contract date*, with the sales figures recorded in [Musim Mas's] records maintained in the ordinary course of business, *which were based on invoice date*." Musim Mas's Br. at 4 (emphasis added). While Musim Mas provides this explanation before the court, it does not reveal how contract date sales can be matched with invoice date

entries. Further, Musim Mas did not include even this inadequate statement in its narrative responses to Commerce. Therefore, in the absence of *any* narrative explanation to Commerce as to how to tie together contract date quantities and invoice date sales, it is impossible to see how Commerce could have reconciled the information.

Next, Musim Mas's argument that Commerce should have conducted verification of its home market information to resolve the issue of the missing reconciliation and unidentified sales values can only be understood as a request to submit new information at verification. This argument fails, however, because verification "represents a point of no return," where information *already submitted* is tested "for accuracy and completeness."[44] *Ghigi 1870 S.p.A. v. United States*, 45 CIT __, __, 547 F. Supp. 3d 1332, 1334 (2021) (quoting *Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1343–44 (Fed. Cir. 2021)). Therefore, the Department's determination that it need not conduct verification where there was no usable reconciliation to be checked for accuracy and completeness was reasonable.

Finally, Musim Mas's contention that the information it submitted was verifiable because Commerce conducted verification in the parallel countervailing duty investigation is unpersuasive. "[A]ntidumping duty and countervailing duty investigations operate pursuant to different statutory provisions, are separate administrative proceedings, and as such, each investigation has its own unique and separate administrative record." *Yama Ribbons & Bows Co. v. United States*, 36 CIT 1250, 1256, 865 F. Supp. 2d 1294, 1300 (2012) (citation omitted). Musim Mas's argument assumes, without establishing any basis in the law or in the record, that Commerce's analysis of information should be identical in two distinct investigations. *See* Musim Mas's Br. at 6 ("[W]here Commerce successfully accepted and verified [Musim Mas's] submitted reconciliation data in the [countervailing duty] investigation, while using the very same reconciliation data in the companion [antidumping] investigation as a basis for an [adverse facts available] finding, logically seems absurd."). This argument, however, ignores the Department's finding that the home market information Musim Mas submitted *on this record* lacked sales values that could be reconciled with sales quantities. Musim Mas's submis-

[44] It is, of course, the case that Commerce has accepted new information at verification. *See, e.g.*, *Coal. for Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 93, 44 F. Supp. 2d 229, 236 (1999) (where Commerce accepted new information at verification to correct and supplement minor errors and omissions in respondent's questionnaires responses, "Commerce's action conforms with the statutory directive of 19 U.S.C. § 1677m(d) (1994) which allows for the submission of new information at verification in order to 'remedy or explain' a deficiency"). Verification occurs so late in the administrative process that courts should be particularly wary of intervening in a way that would direct the introduction of new information.

sions in another investigation are not relevant where the deficiency here lies in its failure to explain and clarify its submissions in this proceeding.

Musim Mas's argument is also not credible because it has not established—or even consistently claimed—that the information it submitted in the two investigations was identical. *See* Musim Mas's Case Br. (Nov. 29, 2017) at 4, PR 275 ("In [the countervailing duty] proceeding, [Musim Mas] submitted a worksheet *similar* to what had been submitted in this proceeding." (emphasis added)); *see also* Final IDM at 50 ("[T]here is no information on the record that supports Musim Mas' contention that its deficient home market sales reconciliation submitted on this record is similar to information submitted on the record of the concurrent [countervailing duty] investigation."). Musim Mas's argument amounts to an attempt to impermissibly shift its burden of developing the record to Commerce. *See Hyundai Steel Co. v. United States*, 45 CIT __, __, 518 F. Supp. 3d 1309, 1321 (2021) ("The burden of creating the administrative record lies with the interested parties." (citing *BMW*, 926 F.3d at 1295)).

In sum, Commerce reasonably found that the specific information it repeatedly requested— a reconciliation of Musim Mas's home market sales quantity and value, linking sales values to quantities—was missing from the record. Accordingly, because it was not possible for the Department to identify, at a minimum, the value of Musim Mas's home market sales and reconcile them with the company's general ledger and financial statements, the Department's use of facts available to fill gaps with respect to Musim Mas's home market sales information was supported by substantial evidence.

2. CONNUM-Specific Production Quantities

The next category of information that Commerce found missing from the record concerned Musim Mas's reporting of CONNUM-specific production quantities.

As an initial matter, the court notes that Musim Mas reported five CONNUMs in its Section B (home market sales) and Section C (U.S. sales) questionnaire responses.[45] *See* Musim Mas's Resp. Sec. D Quest. (July 3, 2017) at D-25, PR 102 ("We acknowledge that appli-

[45] According to Musim Mas, each of the five CONNUMs correlates to a different product characteristic, but all CONNUMs are fundamentally the same product:

> [Musim Mas] does not record costs on a basis that would allow it to assign cost differences to each product characteristic. This reflects the fact that the merchandise under consideration is fundamentally the same product, regardless of destination market or customer. [Musim Mas] does sell products that are certified as having meeting [sic] different industrial standards. However, this reflects the customer's certification requirement, rather than any actual differences in the product (or any resulting cost differences).

cation of the Department's CONNUM characteristics have resulted in 5 CONNUMs in the Section B and C databases."). Because Musim Mas represented that it made sales having characteristics of five different CONNUMs, Commerce quite naturally framed its questions with those CONNUMs in mind.

In its Section D questionnaire, Commerce asked Musim Mas to identify and report CONNUM-specific production quantities in its reporting of costs (i.e., to report not only the costs, but also the quantities associated with those costs, on a CONNUM-specific basis). For example, Commerce asked Musim Mas (1) to report cost of production and constructed value figures, on a weighted-average basis, using the CONNUM-specific production quantity as the weighting factor; (2) to describe how the company used its normal cost and accounting records to compute production quantity; and (3) to report the quantity produced, for each CONNUM, during the cost calculation period, under the PRODQTY[46] field name. *See* Final IDM at 50–51. If Musim Mas had any questions, the questionnaire instructed the company to notify Commerce before preparing its responses.

In response, Musim Mas (1) reported cost of production and constructed value figures as a weighted-average of its and its affiliate's costs, but it did not report the quantities, for each CONNUM, associated with those costs; (2) reported that it used the actual weight of inputs and outputs to compute production quantity, without addressing whether and how it used cost and accounting records; and (3) reported the "total company-wide biodiesel production quantity in the PRODQTY field of every CONNUM reported in the cost file," but not "the quantity produced for each CONNUM." Final IDM at 51. In other words, when reporting quantity Musim Mas reported the sum quantity of all CONNUMs despite having been asked to report quantity on an individual (per CONNUM) basis, and despite having identified its products as possessing the characteristics of five different CONNUMs.

With respect to the PRODQTY field, Commerce issued a supplemental questionnaire instructing Musim Mas "to report in the PRODQTY data field of each CONNUM the quantity of the products produced during the cost calculation period and included under the CONNUM." *Id.* This question is similar to that found in the initial questionnaire, which asked for CONNUM-specific quantities and *not*

Musim Mas's Resp. Sec. D Quest. (July 3, 2017) at D-25, PR 102. Thus, the CONNUMs "reflect differences in the standards being certified in the sale, rather than actual differences in product characteristics and any resulting differences in production costs." *Id.*

[46] PRODQTY represents the production quantity data field (to be reported in metric tons), for each CONNUM, under which Musim Mas was asked to report "the quantity of the products produced during the cost calculation period." *See* Musim Mas Suppl. Sec. D Quest. (Aug. 7, 2017) at 10, PR 149.

the "total company-wide biodiesel production quantity." *Id.* Musim Mas responded by directing Commerce to previously submitted cost files that reported "company-wide" biodiesel production quantities, but "failed to show the aggregate quantities of individual products it classified to the individual CONNUMs." *Id.*; *see also* Musim Mas's Resp. Sec. D Quest. Ex. 12; Musim Mas's Resp. Suppl. Sec. D Quest. (Aug. 23, 2017) Ex. 25, PR 172.

In the Final Determination, Commerce found that though Musim Mas had provided "some cost differentiation between CONNUMs," it had "failed to report the associated CONNUM-specific production quantities" that the Department requested. *See* Final IDM at 51. For Commerce, "[w]ithout this data, [the Department] cannot reconcile reported CONNUM costs to a company's normal books and records. Further, without verifiable costs, Commerce cannot perform an accurate cost test, cannot make appropriate selections for price-to-price comparisons, and cannot determine accurate constructed values for use as normal value." *Id.* Commerce noted that although Musim Mas reported CONNUM-specific sales quantities in its Sections B and C responses, the company "did not attempt to derive the CONNUM-specific production quantities from its CONNUM-specific sales quantities." *Id.* at 52. Ultimately, Commerce found that CONNUM-specific production quantities were missing from the record. Because CONNUM-specific production quantities were never provided, Commerce determined that it could not verify the reported costs of production or verify that all costs of production were included in Musim Mas's responses. *See id.*

Musim Mas does not claim that it provided the information Commerce requested—only that it was impossible for it to do so. *See* Musim Mas's Br. at 6 ("[Musim Mas] explained repeatedly in its responses [to Commerce's questionnaires] that it did not record production costs on a CONNUM-specific basis and that it was incapable of reporting costs on a CONNUM-specific basis."). Musim Mas points to its initial and supplemental responses to Commerce's cost of production questionnaires, where the company stated that it did not provide the information requested. Musim Mas claimed that it "does not record *costs* on a basis that would allow it to assign *cost differences to each product characteristic*." Musim Mas's Resp. Sec. D Quest. at D-25 (emphasis added). Apparently, this was because the subject merchandise—the biodiesel—"is fundamentally the same product," even though Musim Mas conceded that it sold "products that are certified as having [met] different industrial standards," as required by its customers. *Id.*

The record shows, however, that Musim Mas's explanations miss the mark because the company failed to provide—or explain why it could not provide—the actual information Commerce was seeking. As summarized in the Final Determination, Commerce did not ask for CONNUM-specific *costs*, but rather, CONNUM-specific *production quantities* associated with its biodiesel cost of production information. *See* Final IDM at 51; Musim Mas Sec. B-E Quest. at D-17 ("For each CONNUM, *report the quantity produced during the cost calculation period*." (emphasis added)). Musim Mas conceded that it made distinctions among types of biodiesel when selling to its customers. *See* Musim Mas's Resp. Suppl. Sec. D Quest. at 21. For example, to some customers Musim Mas may have identified biodiesel by sulfur content, and to other customers by its monoglyceride content. *See id.*

Because Musim Mas reported that it sold products that it identified under five different CONNUMS, it was not unreasonable for Commerce to ask the company to report the quantities produced on a CONNUM-specific basis—i.e., to break down its production quantities according to the characteristics it certified to various customers. Based on Musim Mas's failure to provide such a breakdown—instead, repeating the total figure for quantity produced for all CONNUMs in its submissions—the Department reasonably concluded that CONNUM-specific product quantities were missing from the record.

In sum, the record shows that despite having multiple opportunities to do so, Musim Mas failed to provide CONNUM-specific production quantities for its biodiesel. Under the statute, "Commerce is required to verify all information it relies upon in making a final determination in an investigation, 19 U.S.C. § 1677m(i), and is prohibited from relying on unverified information." *Içda ú Celik Enerji Tersane ve Ulasim Sanayi A.S. v. United States*, 45 CIT __, __, 498 F. Supp. 3d 1345, 1360 (2021) (citation omitted). Here, Commerce could not verify Musim Mas's reported cost information because of the company's failure to provide CONNUM-specific production quantities associated with its biodiesel cost of production. Without verifiable cost information, Commerce could not perform an accurate cost test for calculating normal value. Nor could Commerce construct normal value absent its ability to calculate a home market sales price. The Department was therefore deprived of necessary information crucial to its normal value calculations—an essential component of the Department's dumping analysis. As such, the court finds that Commerce's determination that necessary information was missing from the record is supported by substantial evidence, and the use of facts available was required as to Musim Mas's CONNUM-specific production quantities.

3. Estimated RIN Values for U.S. Sales

Finally, the court turns to Commerce's finding that necessary information was missing from the record in the form of Musim Mas's estimated RIN values. In its questionnaires, the Department asked Musim Mas for RINs information for its U.S. sales during the period of investigation, including estimates of RIN values.[47] As summarized by Commerce:

> [T]he original section B questionnaire instructed Musim Mas to provide the value of the RINs included with each sale of biodiesel to the U.S. market. RINs are credits issued by the Environmental Protection Agency . . . that have fluctuating values, and can be traded and sold on the open market. The questionnaire also stated that if Musim Mas did not know the value of the RINs, then to "report an estimated value and explain how this was obtained." Musim Mas originally omitted this column in the sales database stating, "the RIN was issued by an unaffiliated importer, so we do not know the RIN value of the shipment." In a supplemental questionnaire, we again asked Musim Mas to provide an estimated RIN value for each U.S. sale. Musim Mas responded that they "cannot estimate the RIN value."

PDM at 7 (footnotes omitted). The Department preliminarily found it incredible that Musim Mas could not report an estimated RIN value:

> Musim Mas should have been able to at least provide the Department with an estimate as to the value of the RINs attached to their sales of biodiesel to the United States during the [period

[47] As described above, RINs are tradeable credits that a purchaser generates by the importation of biodiesel into the United States. In its initial questionnaire concerning product characteristics, Commerce asked Musim Mas to "[r]eport the value of the RINs included with each gallon of biodiesel sold" for its U.S. sales, stating that, "[i]f a RIN value is not recorded on the invoice," the company should "report an estimated value and explain how this was obtained (*e.g.,* based on the RIN market prices at the time the purchase agreement was signed or the date of shipment)." Prod. Characteristics & Other Info. Quest. (May 19, 2017) at 5, PR 64. In response, Musim Mas declined to provide any information—even an estimate—of RIN values. *See* Musim Mas's Resp. Secs. B & C Quest. at 34–35 ("The RIN was issued by an unaffiliated importer, so we do not know the RIN value of the shipment. Accordingly, we have omitted this column.").

Thereafter, in a supplemental questionnaire, Commerce asked Musim Mas to provide an estimate of RIN values for its U.S. sales. *See* Musim Mas Suppl. Secs. B & C Quest. (Aug. 10, 2017) at 5, PR 153 ("Concerning field 3.11 (RINVALU), you reported that you 'do not know the RIN value of the shipment,' please provide the previously requested estimate and supporting documentation."). Musim Mas responded that, as it was not the RIN-generator or the importer of record, it could not "estimate the RIN value," because RIN-generation "takes place quite some time after the contract, after the shipment, after the invoice and after arrival in the United States." Musim Mas's Resp. Suppl. Secs. B & C Quest. at 10–11; *see also* Musim Mas's Br. at 9.

> of investigation]. We note that the other mandatory respondent, Wilmar, was able to estimate the RIN values as to its U.S. sales without difficulty. Moreover, counsel for Musim Mas stated at the ITC staff conference, "the price includes the liquid. It includes the RIN. It includes a tax credit. No matter how many ways you slice it, it's all built into the product." We find that this statement further supports that Musim Mas took the value of the RINs into account when negotiating its U.S. sales prices and should have been able to provide the RIN values, as requested.

Id. (footnotes omitted). Thus, in the Final Determination, Commerce continued to find that necessary information was missing from the record:

> Musim Mas' arguments concerning its inability to provide Commerce with estimated RIN values for its sales of biodiesel to the United States are unpersuasive. Musim Mas did, in fact, provide RIN values for [two types of] RINs from April 2013, through July 2017. However, the figures are not accompanied by any narrative or citations indicating where those values came from, nor did Musim Mas incorporate those figures into its U.S. sales database as instructed by Commerce. Musim Mas' submission of the RIN values shows that it was at least aware of the intrinsic value of RINs. We also note that during the public hearing for this investigation, counsel for Musim Mas stated, in response to a question from Commerce, that "of course . . . everyone does" have an understanding of RIN values. That statement provides more credence to the argument that Musim Mas should have been able to provide estimated RIN values for each sale of biodiesel to the United States. . . . [W]e have applied an adjustment to Wilmar's [normal value] to account for the imbalance between [normal value] and US price in order for a fair comparison to be made pursuant to [19 U.S.C. § 1677b(a)]. Musim Mas' refusal to provide estimated RIN values precluded Commerce from properly comparing [normal value] to US price.

Final IDM at 52 (footnotes omitted). In other words, for Commerce, because the value of the RINs was included in the sales price of the subject biodiesel that Musim Mas sold into the United States and the company knew there was some added value in each sale, the company should have been able to determine actual or estimated RIN values for its U.S. sales. *See id.* ("The fact that Musim Mas is not the importer of record for its sales of biodiesel to the United States is

irrelevant. Musim Mas sold RIN eligible biodiesel to the United States, therefore, the value of the RINs was included in the sales price." (footnote omitted)).

For Commerce, Musim Mas's failure to provide RIN estimates created a gap in its reported U.S. sales information that, together with the other gaps in its questionnaire responses, rendered the information that Musim Mas did provide regarding its U.S. sales "too incomplete to serve as a reliable basis for our calculations, because the missing information is core to Commerce's ability to calculate a weighted-average dumping margin for the respondent." Final IDM at 53. Commerce therefore determined that "resorting to the facts available continues to be appropriate." *Id.*

As with the CONNUM information discussed above, there is no real dispute that Musim Mas never provided Commerce with any serious estimated RIN values.[48] While Musim Mas argues here that "Commerce penalized [Musim Mas] for failing to provide information which was not in its control," it does not claim that it actually provided the information Commerce requested. *See* Musim Mas's Br. at 8. In addition, for the values it did provide, it did not include the source. It may well be that any estimate Musim Mas gave would be of little value to the Department, but the court cannot monitor the value of Commerce's questions beyond stating that asking for Musim Mas to provide estimated RIN values is not unreasonable. Thus, because information was missing from the record creating a gap for Commerce to fill, the court finds no error with Commerce's finding that the use of facts available was required with respect to estimated RIN values.

B. Commerce's Application of an Adverse Inference When Selecting from Among the Facts Available Was Supported by Substantial Evidence and in Accordance with Law

As noted, the court has found that Commerce lawfully used facts available with respect to all of Musim Mas's reported information

[48] Musim Mas notes in its brief that it submitted some RIN value data as a "good faith" attempt to cooperate with Commerce's request for RIN values. *See* Musim Mas's Br. at 10. The company concedes, however, that "the RIN values [it] submitted are more representative of publicly available data for RINs than of the transactional realities which in fact took place." *Id.* Because the provided values were "not the actual values associated with [Musim Mas's] sales, nor were they even potentially applicable to the sales," Musim Mas stated that "even assuming that one of the RIN values provided by [Musim Mas] could be used for a price adjustment, the choice of any of these RIN values would be arbitrary." *Id.* For its part, Commerce found the information unintelligible and unusable. *See* Final IDM at 52 ("Musim Mas did, in fact, provide RIN values for [two types of] RINs from April 2013, through July 2017. However, the figures are not accompanied by any narrative or citations indicating where those values came from, nor did Musim Mas incorporate those figures into its U.S. sales database as instructed by Commerce." (footnote omitted)).

based on the company's failure to provide (1) a usable reconciliation of its total home market sales, (2) CONNUM-specific production quantities, and (3) estimated RIN values for its U.S. sales. Regarding Commerce's adverse facts available finding, Musim Mas does not argue that it provided all of the information that Commerce requested, but rather, that it was a cooperative respondent that provided the information it had at its disposal and was capable of producing. *See* Musim Mas's Br. at 3 ("[Musim Mas] submitted all information reasonably within its control, . . . there was no evidence to show that the information reported was not complete or accurate, and [Musim Mas] ultimately was a fully cooperative respondent at each and every stage of the proceeding. [Musim Mas's] participation in the proceeding included the provision of voluminous, timely filed questionnaire responses within a tight timeframe of less than 90 days.").

In this case, upon determining that the use of facts available was necessary, Commerce could apply an adverse inference only when it supported, with substantial evidence, its finding that Musim Mas "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1). To apply an adverse inference to a non-cooperating respondent, Commerce must support two findings with substantial evidence: one objective, one subjective. That is, Commerce must

> [f]irst . . . make an objective showing that a reasonable and responsible [respondent] would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its *maximum efforts* to investigate and obtain the requested information from its records.

Nippon Steel, 337 F.3d at 1382–83 (emphasis added) (citation omitted). The "maximum effort" standard looks to "the maximum effort that a particular respondent is capable of doing, not some hypothetical, well-resourced respondent." *Nat'l Nail*, 43 CIT at __, 390 F. Supp. 3d at 1373. Put another way, "[a]n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcom-

ing responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown." *Nippon Steel*, 337 F.3d at 1383; *see also Nat'l Nail*, 43 CIT at __, 390 F. Supp. 3d at 1373 ("While there is no required formula for Commerce to follow in reaching its conclusion, a reviewing court must be able to conclude that Commerce looked at the respondent's ability to comply as well as its performance in complying."). The adverse inference standard "does not condone inattentiveness, carelessness, or inadequate record keeping." *Nippon Steel*, 337 F.3d at 1382. That is, "[a] respondent does not cooperate to the best of its ability when it fails to put forth its maximum effort to provide Commerce with full and complete answers to all inquiries." *Goodluck India Ltd. v. United States*, 43 CIT __, __, 393 F. Supp. 3d 1352, 1358 (2019) (cleaned up).

Here, Commerce found that Musim Mas failed to cooperate to the best of its ability with respect to all three categories of information found to be deficient: (1) home market sales (reconciliation), (2) cost of production (CONNUM-specific production quantities), and (3) estimated U.S. sales (RIN values). For the following reasons, the court finds that Commerce supported, with substantial evidence, its application of an adverse inference "in selecting from among the facts otherwise available." *See* 19 U.S.C. § 1677e(b)(1)(A). The court addresses each category of information in turn.

1. Home Market Sales Reconciliation

With respect to the missing home market sales information, Commerce found that "Musim Mas failed to provide an adequate home market sales reconciliation, even after having been given the opportunity to remedy its deficient response." Final IDM at 55. For Commerce, "Musim Mas did not provide an explanation for why it failed to provide an adequate home market sales reconciliation." *Id.* Commerce acknowledged that a respondent's mere failure to respond was insufficient to justify the use of adverse inferences, but that here, "the information Musim Mas failed to provide 'is the type of information that a large international company such as Musim Mas should reasonably be able to provide.' It was therefore appropriate to expect that Musim Mas would be more forthcoming with this information." *Id.* at 53–54 (footnote omitted).

Again, as noted, the missing sales reconciliation information is essential to the accurate calculation of an antidumping duty margin because a usable sales reconciliation is one of the essential building blocks used to verify a respondent's data. During the course of the investigation, Musim Mas had more than one opportunity to explain

and supplement the reconciliation that Commerce had indicated was deficient.[49] It is clear from the record, however, that Musim Mas's questionnaire responses contain no narrative that would explain how Commerce (or the reviewing court) might understand the sales reconciliation information submitted by the company. In its brief, Musim Mas concedes that there were internal differences in the information it provided: "The first page is a worksheet [the chart] demonstrating the reconciliation of sales as reported in [Musim Mas's] databases, *which were based on contract date*, with the sales figures recorded in [Musim Mas's] records maintained in the ordinary course of business, *which were based on invoice date*." Musim Mas's Br. at 4 (emphasis added). This acknowledgement of internal differences, however, does not provide an explanation as to how Commerce should reconcile the incongruous information submitted by Musim Mas. What it does show is that Musim Mas could have provided more information in its narrative responses, beyond a single sentence pointing Commerce to the exhibits containing the company's sales reconciliation information.

Further, as Commerce points out, Musim Mas gave no indication that it was incapable of producing a home market sales reconciliation. Rather, instead of complying with Commerce's instructions to directly link sales quantities and values, Musim Mas argues that it would have been unnecessary to make more of an effort to comply, since Commerce could have solved any issues at verification. *See* Musim Mas's Br. at 4–5. Musim Mas argues that *Commerce* should have taken steps to rely on the company's submissions "as is," (i.e., verify them) while failing to explain why Musim Mas did not take steps *itself* to further explain its own information.

This, however, is not the way the unfair trade administrative process works. First, "[t]he burden of creating the administrative record lies with the interested parties," not with Commerce. *Hyundai Steel*, 45 CIT at __, 518 F. Supp. 3d at 1321 (citing *BMW*, 926 F.3d at 1295). Musim Mas had Commerce's questions. It appears to have made little effort to help Commerce get the information it needed to complete the investigation. Nor did it make any serious effort to explain the information it did produce. Rather, the company threw up its corporate hands.

Next, as to Musim Mas's argument that Commerce could have resolved the deficiencies in the company's responses at verification, a

[49] Musim Mas does not dispute that a home market sales reconciliation was required, or that it should have maintained records of its home market sales. As such, the reasonableness of Commerce's application of an adverse inference turns on the subjective prong under *Nippon Steel*: whether Musim Mas exerted its "maximum effort" in responding to the Department's questionnaires. *See* 337 F.3d at 1382–83.

respondent's opportunity to make the record is provided by way of questionnaire. As a general rule, verification looks at the record previously created and is not a time for completing a deficient record. *See Goodluck*, 11 F.4th at 1343 ("Verification represents a point of no return."). While it is certainly true that Commerce has put new information on the record at verification, a respondent travels at its own risk when hoping that it will do so in a particular case.

Because the record shows that Musim Mas could have produced a more complete response as to its home market reconciliation but for its lack of effort, and that it did not adequately explain the information it did produce, Commerce reasonably found that the company failed to cooperate to the best of its ability. Therefore, the Department's application of an adverse inference when selecting from among facts available to fill gaps as to Musim Mas's home market information was supported by substantial evidence and in accordance with law.

2. CONNUM-Specific Production Quantities

Next, Commerce concluded that Musim Mas's failure to provide CONNUM-specific production *quantities* in its cost of production responses showed a failure to cooperate because the company never tried to calculate the production quantities. For Commerce, the use of an adverse inference was supported by substantial evidence because:

> Musim Mas had multiple opportunities to explain to Commerce why it was not able to report CONNUM-specific production quantities, while it acknowledged that products receive different processing. Moreover, Musim Mas did not attempt to derive the CONNUM-specific production quantities from its CONNUM-specific sales quantities. . . . [Despite this,] *Musim Mas demonstrated that it was able to differentiate production by certain product characteristics*.

Final IDM at 52 (emphasis added).

The court finds that Commerce's application of an adverse inference was warranted. As noted above, the CONNUM-specific information was necessary for the Department to (1) reconcile reported CONNUM costs to Musim Mas's normal books and records, (2) perform an accurate cost test, (3) make appropriate selections for price-to-price comparisons, and (4) accurately determine normal value. *Id.* at 51. At all relevant times, Musim Mas ignored Commerce's directive to "report the *quantity produced* during the cost calculation period" for each CONNUM. *See* Musim Mas Sec. B-E Quest. at D-17 (emphasis added). Instead of trying to meet Commerce in the middle and make

some attempt to report CONNUM-specific *production quantities*, Musim Mas insisted that it was futile for it to try to calculate CONNUM-specific *costs*. *See, e.g.*, Musim Mas's Resp. Sec. D Quest. at D-25 ("[Musim Mas's] production and accounting records do not provide any information with which to calculate any differences in production *costs* on anything other than a speculative basis, and even then, [Musim Mas] speculates that any potential cost differences are not material . . . ." (emphasis added)). As noted, Commerce did not ask Musim Mas for CONNUM-specific *costs*. Rather, Commerce asked Musim Mas for CONNUM-specific *production quantities* associated with its biodiesel cost of production information.

Musim Mas's conduct further fails to meet the "maximum effort" standard because the company seems to have had in its control the very information that Commerce was seeking. In its responses to Commerce's questionnaires, Musim Mas admitted that "when selling [its] product to the customer, distinctions are indicated in the documentation and *were used to report the CONNUM product specifications*." Musim Mas's Resp. Suppl. Sec. D Quest. at 19, 21 (emphasis added) ("[T]he reported CONNUMs are based on the product specifications stated in the documentation given to the customer."). In fact, Musim Mas reported five CONNUMs in its Section B (home market sales) and Section C (U.S. sales) questionnaire responses. *See* Musim Mas's Resp. Sec. D Quest. at D-25 ("We acknowledge that application of the Department's CONNUM characteristics have resulted in 5 CONNUMs in the Section B and C databases."). In other words, Musim Mas *did* distinguish among its product(s) based on characteristics when it made specific sales. The company divided up its sales by CONNUMs based on these characteristics and it did report *some* CONNUM-specific information in its responses to Commerce. *See, e.g.*, Final IDM at 52 ("Musim Mas did not attempt to derive the CONNUM-specific production quantities from its CONNUM-specific sales quantities, which it was capable of reporting for sections B and C.").

In the relevant PRODQTY column of its spreadsheets, however, Musim Mas merely repeated the total production quantity for all CONNUMs in each CONNUM-specific row. As Commerce concluded, Musim Mas "would have had to know what it needed to produce to meet customer needs and to know the quantities and processes it applied to obtain products of different physical characteristics." Final IDM at 51. In its questionnaire responses, though, Musim Mas failed to produce CONNUM-specific information or give an adequate explanation for being unable to track its specific sales. That is, Musim Mas

did not explain why it could not calculate the CONNUM-specific production quantities underlying these sales to its customers and comply with Commerce's request.

Because the evidence on the record shows that Musim Mas could have responded to Commerce's request if it had made its maximum effort and cooperated to the best of its ability, the Department's application of an adverse inference when replacing the missing CONNUM-specific production quantities in Musim Mas's cost of production responses was justified.

3. Estimated RIN Values for U.S. Sales

Finally, Commerce found that Musim Mas's failure to provide estimated RIN values was the result of a failure by the company to cooperate to the best of its ability because "Musim Mas was at least aware of the intrinsic value of RINs, and should have been able to provide Commerce the requested values in its U.S. sales database." Final IDM at 55. For Commerce, "[t]he fact that Musim Mas is not the importer of record for its sales of biodiesel to the United States is irrelevant. Musim Mas sold RIN eligible biodiesel to the United States, therefore, the value of the RINs was included in the sales price." *Id.* at 52 (footnote omitted). In other words, Musim Mas should have been able to estimate how much of its sales price to its customers was attributable to the biodiesel itself, and how much was attributable to the RINs. As a result of Commerce's finding that Musim Mas did not act to the best of its ability to comply with the Department's requests for RIN values, Commerce applied an adverse inference when filling the gap in the record created by Musim Mas's failure to provide RIN value estimates.

Commerce's conclusion that Musim Mas was "aware of the intrinsic value of RINs" was founded on two bases in the record. Final IDM at 52. First, Commerce found that Musim Mas had provided "RIN values for [two types of] RINs from April 2013, through July 2017"—which Musim Mas itself concedes. *See id.* at 52; *see also* Musim Mas's Br. at 10. There is no real dispute, however, that these RIN values were unusable for Commerce's purposes. *See* Final IDM at 52; Musim Mas's Br. at 10 ("These RIN values [were] not the actual values associated with [Musim Mas's] sales, nor were they even potentially applicable to the sales . . . .").

Second, Commerce points to a statement by Musim Mas's counsel at the public hearing for the investigation. *See* Final IDM at 52 ("[C]ounsel for Musim Mas stated, in response to a question from Commerce, that 'of course . . . everyone does' have an understanding of RIN values.")). For Commerce, "[t]hat statement provides more credence

to the argument that Musim Mas should have been able to provide estimated RIN values for each sale of biodiesel to the United States." *Id.*

The court finds that Commerce's use of an adverse inference when filling the gap created in the record by Musim Mas's failure to produce RIN value estimates was justified.

As a threshold matter, Commerce was aware that Musim Mas was not the importer of record when it requested estimated RIN values. After the company responded to the initial questionnaire by stating that it could not supply values because it did not have the information at its disposal, Commerce issued a supplemental questionnaire focused solely on *estimated* values. *See* Musim Mas's Resp. Suppl. Secs. B & C Quest. at 10 ("Concerning field 3.11 (RINVALU), you reported that you 'do not know the RIN value of the shipment,' please provide the previously requested estimate and supporting documentation."). In other words, Commerce took into account the capability of the "particular respondent" before it, not a "hypothetical" respondent, and did not insist that Musim Mas provide actual values. *Nat'l Nail*, 43 CIT at __, 390 F. Supp. 3d at 1373. It is worth keeping in mind that Musim Mas was perfectly aware that its biodiesel was going to be imported into the United States, where, in addition to purchase price, the importer would receive RINs. Commerce also noted that during an International Trade Commission staff conference, Musim Mas's counsel stated "the price includes the liquid. It includes the RIN. It includes a tax credit. No matter how many ways you slice it, *it's all built into the product*." PDM at 7. Thus, it was not unreasonable for Commerce to assume that Musim Mas took RIN values into account when setting its sales price.

Under *Nippon Steel*, "[a]n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown." 337 F.3d at 1383. Here, while Musim Mas repeatedly claimed that it could not comply in *any* way with the Department's request to provide actual or estimated RIN values, its conduct suggests that it could have produced a more complete response if it had made its "maximum effort."

Specifically, Musim Mas's submission of *some* RINs data, however imperfect, suggests that the company had information at its disposal that it could have used to estimate RIN values, as requested by the Department. Yet Musim Mas did not try to explain or otherwise link

the RIN values it submitted to its own U.S. sales. Instead, it later stated that the information it had submitted was probably unusable. *See* Musim Mas's Br. at 10 ("[Musim Mas] did make a good faith effort to provide RIN values to the Department. . . . *These RIN values [were] not the actual values associated with [Musim Mas's] sales, nor were they even potentially applicable*. . . ." (emphasis added)).

Musim Mas's contention that its submission of data *it believed to be inadequate* was evidence of cooperation ignores the actual reason that Commerce rejected the potentially inapplicable RIN values. *See* Musim Mas's Br. at 10; *see also* Final IDM at 52 ("[T]he figures *are not accompanied by any narrative or citations indicating where those values came from*, nor did Musim Mas incorporate those figures into its U.S. sales database as instructed by Commerce." (emphasis added)). In other words, Commerce rejected the RIN values because Musim Mas failed to take full advantage of its opportunity to submit narrative responses explaining its factual submissions. These narrative responses were clearly part of the question Musim Mas was instructed to answer. *See* Musim Mas's Resp. Secs. B-E Quest. at 34–35 ("If a RIN value is not recorded on the invoice, report an estimated value and explain how this was obtained (*e.g.,* based on the RIN market prices at the time the purchase agreement was signed or the date of shipment). Provide an explanation of how you obtained the estimate as well as any supporting documentation used to value your estimate."). Thus, the record shows that Musim Mas failed to make a meaningful effort to comply with Commerce's request even though it was fully aware that the value of RINs was built into the purchase price. Rather, the company simply claimed it could not comply with the questionnaire, without making any apparent effort to supply the missing information.

Because Musim Mas failed to cooperate to the best of its ability, the Department's application of an adverse inference when filling gaps with respect to the missing estimated RIN values was justified.

C. Commerce's Selection of Musim Mas's Adverse Facts Available Rate Is Sustained

As discussed, Commerce determined that the record was missing Musim Mas's (1) home market sales reconciliation, (2) CONNUM-specific production quantities, and (3) estimated RIN vales for its U.S. sales:

> We continue to find that Musim Mas' home market sales reconciliation, CONNUM-specific production quantities, and estimated RIN vales for its U.S. sales constitute necessary information that is missing from the record within the meaning of [19

> U.S.C. § 1677e(a)(1)]. . . . As we explained in the *Preliminary Determination*, all of this information is core to Commerce's ability to calculate Musim Mas' dumping margin.

Final IDM at 49.

For Commerce, the missing information was so significant that it rendered the information that Musim Mas provided to the Department too incomplete to serve as a reliable basis for determining normal value or U.S. price. *Id.* at 52–53. In situations, such as this, where there is missing information that cannot be supplied by facts otherwise available, and as a result either normal value or U.S. price, or both, cannot be determined, Commerce cannot perform a dumping analysis, i.e., a comparison of normal value and U.S. price.

Where there are no other facts on the record that can be substituted for the missing information, Commerce has been permitted to find that it cannot calculate a rate and substitute a rate for what would otherwise be a calculation. *See Hyundai Elec. & Energy Sys. Co. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1303, 1309 (2020) (upholding Commerce's substitution of a previously calculated rate where "one of the major categories of information necessary to perform a dumping calculation (U.S. sales, home market sales, cost of production, or constructed value) has not been provided" (citing *Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 486, 149 F. Supp. 2d 921, 927–28 (2001))).

Commerce might say—as it has here—that, in these situations, it is entitled to apply what it calls "total" facts available and assign a rate, even an adverse rate. Here, Commerce, using "total" adverse facts available,[50] substituted a rate for what would otherwise be a calculation. Commerce did so because the missing information "render[ed] the information that Musim Mas did provide to Commerce too incomplete to serve as a reliable basis for [its] calculations, because the missing information [was] core to [its] ability to calculate a weighted-average dumping margin for [Musim Mas]." Final IDM at 53.

Although Commerce claims that it applied "total" adverse facts available, the court believes that, while the result is the same, the lawful reason for applying the rule is something different. Because of the missing information Commerce was unable to calculate normal value or U.S. price, and therefore could not perform a dumping analy-

[50] "Total" adverse facts available is not defined by statute or agency regulation. Commerce uses this term "to refer to [its] application of adverse facts available . . . to the facts respecting *all of respondents' production and sales information that the Department concludes is needed for an investigation or review*." *Nat'l Nail*, 43 CIT at __, 390 F. Supp. 3d at 1374 (emphasis added) (citation omitted). In other words, Commerce assigns an antidumping rate based entirely on facts selected using an adverse inference, ignoring all of a respondent's information.

sis (i.e., a comparison of normal value and U.S. price). What results from these circumstances is akin to an impossibility. Thus, the proper analysis might be found in those cases holding that, given the lack of facts on the record, Commerce simply cannot perform its statutory task. *See, e.g.*, *Steel Auth. of India*, 25 CIT at 486, 149 F. Supp. 2d at 927–28 (upholding Commerce's decision to disregard all of a respondent's reported information and substitute a rate for what would otherwise be a calculation where "the absence of either cost of production, home market sales, or U.S. sales data makes it impossible for the Department to make price-to-price comparisons" necessary to determine an accurate dumping margin). In other words, where either normal value or U.S. price cannot be ascertained, it is simply not possible to determine a weighted-average dumping margin and hence an antidumping duty rate. *See id.* at 486, 149 F. Supp. 2d at 927 ("[I]n order to make a reliable antidumping determination, the Department needs the respondent's data on U.S. sales, home market sales, cost of production, and constructed value.").

Based on this analysis, Commerce may disregard all of Musim Mas's reported information and assign a rate because the missing home market sales quantities and values, production quantities, and estimated RIN information are necessary for the Department to make the comparisons essential to the calculation of a dumping margin. Because this information is missing from the record it is impossible for the Department to accurately calculate a dumping margin for Musim Mas. The court thus concludes that Commerce lawfully disregarded all of Musim Mas's information in favor of selecting a rate.

As noted by Commerce, "[t]he Department's practice is to select, as an [adverse facts available] rate, the higher of: (1) the highest dumping margin alleged in the petition, or (2) the highest calculated dumping margin of any respondent in the investigation." PDM at 9. If Commerce departs from its normal practice, however, it must adequately explain its decision to do so. *See PSC VSMPO-AVISMA Corp. v. United States*, 35 CIT 283, 291, 755 F. Supp. 2d 1330, 1339 (2011) ("[W]hen Commerce departs from its normal practice and bases an AFA rate on a single-transaction margin, it must explain its decision.").

Here, Commerce found that it could not apply the highest dumping margin alleged in the petition (28.11%) as Musim Mas's adverse facts available rate since it "would in fact reward Musim Mas for being uncooperative, because that rate is lower than fully cooperative respondent Wilmar's calculated margin." Final IDM at 55. Commerce also found that using the highest calculated dumping margin of any

respondent in the investigation (i.e., Wilmar's calculated dumping margin of 92.52%) as Musim Mas's adverse facts available rate was "insufficient to induce cooperation" and "unfair to Wilmar, since Wilmar cooperated fully with Commerce in this investigation" whereas Musim Mas did not. *Id.* at 54. Commerce thus departed from its normal practice and, pursuant to 19 U.S.C. § 1677e(d)(1)(B),[51] selected Wilmar's highest transaction-specific dumping margin of 276.65% as Musim Mas's total adverse facts available rate. The court finds that Commerce adequately explained its decision to depart from its normal practice in this instance. This is consistent with prior proceedings in which this Court has upheld Commerce's departure from its normal practice. *See Branco Peres Citrus, S.A. v. United States*, 25 CIT 1179, 1190–92, 173 F. Supp. 2d 1363, 1376–77 (2001) (upholding Commerce's departure from its normal practice because the Department reasonably explained why all previous weighted-average margins were too low to provide an incentive to cooperate).

The purpose of adverse facts available "is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United* States, 216 F.3d 1027, 1032 (Fed. Cir. 2000). For Commerce, because the 276.65% rate "does not involve an aberrational sale in terms of the type of product or quantity sold," and "is also within the mainstream of Wilmar's other calculated rates," it therefore "strikes an appropriate balance between the goal of inducing future cooperation by Musim Mas, and the rate not being punitive." Final IDM at 55. The court agrees.

Under the statute, Commerce may use "any dumping margin from any segment of the proceeding under the applicable antidumping order," 19 U.S.C. § 1677e(d)(1)(B), and may apply "the highest such rate or margin, based on the evaluation by [Commerce] of the situation that resulted in the [Department] using an adverse inference," *id.* § 1677e(d)(2). That is what Commerce did here.

A "dumping margin," as defined by the statute, is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). Here, the 276.65% transaction-specific margin equates to the amount by which the normal value exceeds the export price of the subject merchandise with respect to a single transaction. Thus, the 276.65% rate is a dumping margin within the plain meaning of the statute. The 276.65% rate is also from a "segment" of the proceeding under the

[51] Section 1677e(d)(1)(B) provides: "If [Commerce] uses an inference that is adverse to the interests of a party . . . in selecting among the facts otherwise available, [Commerce] may . . . in the case of an antidumping duty proceeding, use any dumping margin from any segment of the proceeding under the applicable antidumping order."

applicable antidumping order. The term segment, while undefined by the statute, is defined by Commerce's regulations as "a portion of the proceeding that is reviewable under [19 U.S.C. § 1516a]." 19 C.F.R. § 351.102(b)(47)(i). Examples of a "segment" of a proceeding, as provided in Commerce's regulations, are "[a]n antidumping or countervailing duty *investigation* or a review of an [antidumping or countervailing duty] order . . . ." *Id.* § 351.102(b)(47)(ii) (emphasis added). Here, the 276.65% transaction-specific margin was calculated during the underlying antidumping duty investigation that is the subject of this case (i.e., a reviewable portion of the proceeding or "segment" of the proceeding).

Thus, it follows that the 276.65% rate is a dumping margin as defined by the statute, 19 U.S.C. § 1677(35)(A), and was pulled from a segment of the proceeding. Commerce therefore acted within its discretion in its selection of Musim Mas's non-aberrational adverse facts available rate. As a result, the court sustains the Department's rate selection.

CONCLUSION AND ORDER

Based on the foregoing, it is hereby

ORDERED that the Remand Results, as well as the issues from the Final Determination upon which the court had previously reserved decision, are sustained, in part, and remanded; it is further

ORDERED that Commerce shall submit a redetermination upon remand that complies in all respects with this Opinion and Order; it is further

ORDERED that Commerce's particular market situation finding based on the 2015 Export Levy is sustained; however, its decision to disregard Indonesian crude palm oil prices—based on the 2015 Export Levy particular market situation—is unsupported by substantial evidence. On remand, Commerce must either reconsider its decision to disregard Indonesian crude palm oil prices when constructing normal value for Wilmar or explain why doing so does not impose a double remedy; it is further

ORDERED that Commerce's adjustment to U.S. price for an estimated value of RINs is sustained; it is further

ORDERED that Commerce's use of adverse facts available and selection of Musim Mas's rate is sustained; and it is further

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

Dated: November 21, 2023
New York, New York

/s/ *Richard K. Eaton*
JUDGE

Slip Op. 23–172

KISAAN DIE TECH PRIVATE LIMITED, et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 21–00512

[Remanding an agency decision concluding an administrative review of an antidumping duty order on stainless steel flanges from India]

Dated: December 8, 2023

Duane W. Layton, Mayer Brown LLP, of Washington, D.C., for plaintiff Kisaan Die Tech Private Limited.

Peter J. Koenig, Squire Patton Boggs (US) LLP, of Washington, D.C., for plaintiff Chandan Steel Limited.

Jeremy W. Dutra, Squire Patton Boggs (US) LLP, of Washington, D.C., for plaintiffs Echjay Forgings Private Limited, Jai Auto Pvt. Ltd., Goodluck India Limited, Jay Jagdamba Forgings Private Limited, Hilton Metal Forging, Limited, Jay Jagdamba Limited, Jay Jagdamba Profile Private Limited, Shree Jay Jagdamba Flanges Pvt. Ltd., Balkrishna Steel Forge Pvt. Ltd., Pradeep Metals Limited, and Bebitz Flanges Works Private Limited. With him on the brief was *Peter J. Koenig*.

Geoffrey M. Long, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Ashlande Gelin*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Stanceu, Judge:

Plaintiffs contest a decision issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to conclude a review of an antidumping duty ("AD") order on stainless steel flanges from India. Because Commerce unlawfully chose to examine only one respondent individually and unlawfully assigned an unreasonable rate to the respondents it did not individually examine, the court orders corrective action.

I. BACKGROUND

A. The Contested Determination

Commerce published the contested determination (the "Final Results") as *Stainless Steel Flanges From India: Final Results of Antidumping Duty Administrative Review: 2018–2019*, 86 Fed. Reg. 47,619 (Int'l Trade Admin. Aug. 26, 2021) ("*Final Results*"). Commerce incorporated into the Final Results by reference an explanatory "Issues and Decision Memorandum." *Stainless Steel Flanges from India: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review; 2018–2019* (Int'l Trade Admin. Aug. 20, 2021), P.R. 116 ("*Final I&D Mem*.").[1]

B. Prior Administrative Determinations

The review at issue in this case was the first administrative review of an antidumping duty order (the "Order"). *Stainless Steel Flanges From India: Antidumping Duty Order*, 83 Fed. Reg. 50,639 (Int'l Trade Admin. Oct. 9, 2018) ("*Order*").[2] Issuance of the Order followed the Department's final determination of sales at less than fair value, *Stainless Steel Flanges From India: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Critical Circumstance Determination*, 83 Fed. Reg. 40,745 (Aug. 16, 2018) ("*Final LTFV Determination*"), and a September 28, 2018 notification to Commerce by the U.S. International Trade Commission ("ITC") of the ITC's affirmative determination of injury to the domestic industry, *see Order*, 83 Fed. Reg. at 50,639 & 50,639 n.2.

Commerce initiated the first administrative review in late 2019. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 67,712 (Int'l Trade Admin. Dec. 11, 2019). It pertained to entries of stainless steel flanges from India (the "subject merchandise) made during a period of review ("POR") of March 28, 2018 through September 30, 2019. *Id*., 84 Fed. Reg. at 67,714; *Final Results*, 86 Fed. Reg. at 47,619.

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[1] Documents in the Joint Appendix (May 26, 2022), ECF Nos. 60 (confidential), 61 (public) are cited "P.R. __" (for public documents). The information disclosed in this Opinion and Order was obtained from the public versions of the record documents.

[2] The "Scope of the Order" is defined as "certain forged stainless steel flanges, whether unfinished, semi-finished, or finished" that are made of "alloy steel containing, by actual weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements." *Stainless Steel Flanges From India: Antidumping Duty Order*, 83 Fed. Reg. 50,639, 50,640 (Int'l Trade Admin. Oct. 9, 2018). "The scope includes six general types of flanges." *Id*. (listing "Weld neck," threaded," "slip-on," "lap joint," "socket weld," and "blind" with their general uses). "Specifically excluded . . . are cast stainless steel flanges." *Id*. "The sizes . . . of the flanges within the scope . . . range from one-half inch to twenty-four inches nominal pipe size." *Id*.

Commerce published "Preliminary Results" of the first administrative review in early 2021. *Stainless Steel Flanges From India: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019*, 86 Fed. Reg. 11,233 (Int'l Trade Admin. Feb. 24, 2021) ("*Preliminary Results*").

C. The Parties

Plaintiff Chandan Steel Limited ("Chandan") was the sole mandatory respondent, i.e., the only exporter or producer of subject merchandise selected by Commerce for individual examination in the first administrative review. *Antidumping Duty Administrative Review of Stainless Steel Flanges from India, 2018–2019: Respondent Selection* at 1 (Int'l Trade Admin. Mar. 13, 2020) ("*Respondent Selection Mem*."). In the Final Results, Commerce assigned Chandan a dumping margin of 145.25% *ad valorem*. *Final Results*, 86 Fed. Reg. at 47,619.

Commerce assigned a 145.25% *ad valorem* rate to the respondents it did not examine individually in the review, which Commerce based on the rate it assigned to Chandan. *Id*. Twelve of the unexamined respondents are plaintiffs in this consolidated action.[3] They are: (1) Kisaan Die Tech Private Limited ("Kisaan"), (2) Echjay Forgings Private Limited, (3) Jai Auto Pvt. Ltd., (4) Goodluck India Limited, (5) Jay Jagdamba Forgings Private Limited, (6) Hilton Metal Forging, Limited, (7) Jay Jagdamba Limited, (8) Jay Jagdamba Profile Private Limited, (9) Shree Jay Jagdamba Flanges Pvt. Ltd., (10) Balkrishna Steel Forge Pvt. Ltd., (11) Pradeep Metals Limited, and (12) Bebitz Flanges Works Private Limited.

II. DISCUSSION

Before the court are plaintiffs' motions for judgment on the agency record, brought according to USCIT Rule 56.2. In its motion, Chandan claims that Commerce misapplied section 776 of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1677e,[4] in assigning it a margin of 145.25% based on the "total" use of "facts otherwise available" under § 1677e(a) and "adverse inferences" under § 1677e(b).[5] In their Rule 56.2 motions, all other plaintiffs contest the Department's assigning them the 145.25% rate as respondents not selected for individual examination.

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[3] Consolidated under the lead case are Court Nos. 21–00540 and 21–00542. Order (Nov. 30, 20201), ECF No. 18.

[4] Citations to the United States Code herein are to the 2018 edition. Citations to the Code of Federal Regulations are to the 2020 edition.

[5] The term "adverse facts available," or "AFA," is often used when a determination is made to apply both provisions.

For the reasons discussed herein, the court denies Chandan's Rule 56.2 motion and grants the Rule 56.2 motions of the other plaintiffs.

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court exercises jurisdiction of actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including an action contesting a final determination that concludes an administrative review of an antidumping duty order, *id*. § 1516a(a)(2)(B).

In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

B. Use of "Total Adverse Facts Available" to Determine the Antidumping Duty Margin for Chandan

1. Findings upon which Commerce Based Its Use of "Total AFA"

Commerce based its use of facts otherwise available and adverse inferences on three groups of factual findings. First, Commerce found that Chandan repeatedly misreported the information on its foreign sales, which information Commerce requires for calculation of a dumping margin. *Final I&D Mem.* at 5–11. Second, Commerce found that Chandan failed to report, on a control-number ("CONNUM") specific basis, as Commerce had requested, information on the cost of production of the merchandise in its foreign sales. *Id*. at 14–19. Third, Commerce found that Chandan's responses to information requests "contained additional deficiencies relating to its reporting of gross unit price, quantity discounts, other discounts, and duty refunds" that Chandan failed to remedy. *Id.* at 19–22.

Commerce concluded that the "fundamental reporting deficiencies" affecting Chandan's responses to its questionnaires justified the use of "facts otherwise available" according to 19 U.S.C. § 1677e(a). *Id*. at 5. Specifically, Commerce found that Chandan's inadequate responding, even after Commerce allowed an opportunity to explain and to take remedial action, constituted the withholding of requested information as described in 19 U.S.C. § 1677e(a)(2)(A) and the failure to provide information "in the form and manner requested," *id*. §

1677e(a)(2)(B). *Final I&D Mem.* at 5. Commerce found, further, that Chandan's misreporting "significantly impeded the proceeding" within the meaning of 19 U.S.C. § 1677e(a)(2)(C). *Id*. (footnote omitted). Commerce concluded, further, that the use of an adverse inference, 19 U.S.C. § 1677e(b), was warranted because, it found, Chandan did not act to the best of its ability in responding to the Department's information requests. *Id*. As a basis for "total adverse facts available," Commerce found that "the level of inattentiveness and inaccuracy of Chandan's reporting throughout this review undermines the reliability of the company's responses as a whole and, in accordance with section 776(b) of the Act [19 U.S.C. § 1677e(b)], warrants the application of an adverse inference in selecting from the facts available." *Id*. (footnote omitted). As an adverse inference, and as it did in the Preliminary Results, Commerce assigned Chandan a rate of 145.25%, which was the rate it had assigned in the antidumping duty investigation to a respondent it found to be uncooperative, reasoning that "to create a proper deterrent against future non-cooperation, Commerce continues to find that the application of the highest rate assigned under this order is appropriate." *Id*. at 31.

2. Chandan's Challenge to the Use of "Total Adverse Facts Available"

Chandan challenges the Department's assigning it the 145.25% rate on several grounds. It argues that "[i]t is unlawful for Commerce to use *total* adverse facts where at best (and erroneously) the record only supports applying *partial* adverse facts to some U.S. sales." Pl. Chandan's Mot. for J. on the Agency R. 6 (June 30, 2022), ECF No. 37 ("Chandan's Mot."). It maintains, further, that the use of an adverse inference was unlawful because: (1) there was no gap in information that needed to be filled by the use of facts otherwise available, *id.* at 5–25; (2) Commerce unlawfully used adverse facts available without notifying Chandan of deficiencies in the submissions of information to Commerce and allowing Chandan an opportunity to address them, *id.* at 25–27; (3) Chandan acted to the best of its ability in responding to the Department's information requests, and any errors are insufficient for the use of adverse inferences, *id*. at 27–35; and (4) the adverse inferences Commerce used were unlawfully "punitive," *id*. at 35–40.[6]

[6] In an unrelated claim, Chandan argues that antidumping and countervailing duty cash deposits should not have been deducted from U.S. price. Pl. Chandan's Mot. for J. on the Agency R. 40–41 (June 30, 2022), ECF No. 37. The court addresses this claim later in this Opinion and Order.

3. Chandan's Omissions of "Window Period" and Small-Size Sales when Reporting its Comparison Market Sales Database

In calculating a weighted average dumping margin, Commerce ordinarily compares "U.S. price," which is determined on an export price ("EP") or constructed export price ("CEP") basis from prices of the exporter's subject merchandise in sales to the United States, with a group of sales of the "foreign like product," *see* 19 U.S.C. § 1677(16), that the exporter made in the "comparison" market. The "comparison market" normally is the home market of the exporter, but if the home market is not "viable," *see* 19 U.S.C. § 1677b(a)(1)(C), Commerce may use the exporter's sales in a market in a third country, *id*. § 1677b(a)(1)(B)(ii). *See* 19 C.F.R. §§ 351.404 (selection of comparison market), 351.414 (comparison of normal value with U.S. price). In the first review, Commerce used a third country, the Netherlands, as a comparison market. Chandan's Mot. 6.

Commerce is directed to identify comparison market sales of the foreign like product according to criteria set forth in 19 U.S.C. § 1677(16). Ideally, comparison market sales will be sales of "merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as," the subject merchandise. *Id*. § 1677(16)(A). If Commerce cannot make a determination satisfactorily on that basis, Commerce may base its comparison on sales of "[m]erchandise—(i) produced in the same country and by the same person as the subject merchandise, (ii) like that merchandise in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to that merchandise." *Id*. § 1677(16)(B). If Commerce cannot compare sales on the basis of this second category, Commerce instead may base its comparison on sales of "[m]erchandise—(i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise, (ii) like that merchandise in the purposes for which used, and (iii) which the administering authority determines may reasonably be compared with that merchandise." *Id*. § 1677(16)(C).

Commerce requested in its initial questionnaire (the "March 13, 2020 Questionnaire") that Chandan "report all sales of the foreign like product during the three months preceding the earliest month of U.S. sales, all months from the earliest to the latest month of U.S. sales, and the two months after the latest month of U.S. sales." *Final I&D Mem.* at 5 (quoting *Antidumping Duty Admin. Review: Request for Information* at B-1 (Int'l Trade Admin. Mar. 13, 2020), P.R. 28–

29).[7] In requiring reporting of comparison market sales that occurred during the five-month "window period," including those that may have occurred outside the actual POR, Commerce was effectuating its "average-to-transaction" method of comparing sales. *See* 19 C.F.R. § 351.414; *Final I&D Mem*. at 8 (". . . in administrative reviews, Commerce normally compares the export price (EP) or constructed export price (CEP) of an individual U.S. sale to an average normal value (NV) based on a contemporaneous month in the comparison market."). Under this method, the "comparison month" is the same month as the U.S. sale or, if no matching sales occurred during that month, then the comparison month is "the most recent of the three months prior to the month of the U.S. sales in which there was a sale of the foreign like product." 19 C.F.R. § 351.414(f)(2). "If there are no sales of the foreign like product during any of these months," the comparison month will be "the earlier of the two months following the month of the U.S. sales in which there was a sale of the foreign like product." *Id*. § 351.414(f)(3). As discussed below, Chandan did not submit a comparison market database correctly during the entire questionnaire process, even though Commerce pointed out Chandan's errors and allowed the opportunity for correction.

Chandan's response to the March 13, 2020 Questionnaire (the "June 30, 2020 Response") did not include a complete list of the requested sales in the comparison market.[8] *See Certain Stainless Steel Flanges from India, Section-B and Section-C response* (June 30, 2020), P.R. 67. Commerce found that in Exhibit B-2 of that submission, which contained the comparison market sales, "Chandan reported to Commerce only the comparison market sales that it made during the POR itself, *i.e.*, not for the window period." *Final I&D Mem*. at 5 (footnote omitted). Chandan does not dispute that its June 30, 2020 Response failed to report the sales outside the POR but gives as a justification for its misreporting that "Chandan has not done a Commerce administrative review for fifteen years" and states, further, that "the concept of window period sales was novel to Chandan." Chandan's Mot. 11.

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[7] Commerce issued several questionnaires during the administrative review, which, as are the responses, are identified herein by dates of issuance and citations to record documents.

[8] "Section A" of the antidumping duty questionnaire ("Organization, Accounting Practices, Markets, and Merchandise") requests general company information. *Antidumping Duty Admin. Review: Request for Information* at A-1 (Int'l Trade Admin. Mar. 13, 2020), P.R. 28–29. Pertinent to this case, "Section B" of the questionnaire requests information on "Sales in the Home Market or to a Third Country"; "Section C" requests information on "Sales to the United States"; and "Section D" requests information on "Cost of Production and Constructed Value." *See* Def.'s Resp. to Pl.'s Mots. for J. on the Agency Record 3 (Oct. 14, 2022), ECF No. 52.

Commerce addressed Chandan's misreporting in an "August 19, 2020 Supplemental Questionnaire" and gave Chandan an opportunity to correct its error by allowing it to resubmit its comparison market database to include any window period sales that occurred outside the POR. *Antidumping Duty Administrative Review of Stainless Steel Flanges from India: Section B and C Supplemental Questionnaire* at 4 ¶ 21 (Int'l Trade Admin. Aug. 19, 2020), P.R. 80. Chandan's "September 11, 2020 Response" to this questionnaire also was unsatisfactory. *Final I&D Mem*. at 5 & 5 n.27 (citing *Certain Stainless Steel Flanges from India, Section B & C Supplemental Questionnaire Response for question 21* (Sept. 21, 2020), P.R. 91). The Department's "November 25, 2020 Supplemental Questionnaire" concluded that Chandan's reporting of the window period sales occurring outside the POR did not include flanges of nominal pipe size below 1.5 inches and, therefore, failed to include sales of subject flanges that were of a smaller nominal size. *See Antidumping Duty Administrative Review of Stainless Steel Flanges from India: Supplemental Questionnaire* at 1 ¶ 1 (Int'l Trade Admin. Nov. 25, 2020), P.R. 104; *Order*, 83 Fed. Reg. at 50,640 ("The sizes . . . of the flanges within the scope . . . range from one-half inch to twenty-four inches nominal pipe size.").

Chandan concedes that its September 11, 2020 Response omitted sales of the foreign like product of nominal size less than 1.5 inches. Chandan's Mot. 11 ("Chandan originally reported sales for 1.5 to 24 inch flanges, believing that was what was requested."). In its "December 9, 2020 Response" to the November 25, 2020 Supplemental Questionnaire, Chandan submitted a database to correct for this error, *Certain Stainless Steel Flanges from India, Section B & C Supplemental Questionnaire Responses to questions 1 through 30* at 1 (Dec. 9, 2020), P.R. 111, but Commerce again found a deficiency because "Chandan once again submitted a comparison market database without including sales covering the full five-month window period." *Final I&D Mem*. at 6 (footnote omitted). Chandan objects, to no avail, that Commerce did not "explicitly" request reporting of window period sales outside the POR in the November 25, 2020 Supplemental Questionnaire. Chandan's Mot. 11 ("Chandan thus provided the information for the POR, as it had done in the initial response."). In the earlier, August 19, 2020 Supplemental Questionnaire, Commerce already had placed Chandan on notice that it was necessary that Chandan report window period sales occurring outside the POR.

As it did before Commerce, Chandan argues before the court that Commerce should have allowed it to correct the error in the December

9, 2020 Response of omitting the window period sales of flanges less than 1.5 inches in nominal size that occurred outside the POR. Chandan argues that Commerce was placed under an obligation to do so by section 782(d) of the Tariff Act, 19 U.S.C. § 1677m(d), but failed to comply with this statutory directive. Chandan contends that it "submitted the window period sales as to the 0.5-to-1.5 inch flanges as soon as Commerce first specifically alerted Chandan to the issue in its preliminary decision." Chandan's Mot. 14 (citing *Claimed Minor Errors In Reporting Comparison Market Sales and Cost Build-Ups—No New Facts Filing* (Mar. 16, 2021), P.R. 120). Chandan argues that Commerce impermissibly rejected this information as untimely submitted new factual information. *Id*. (citing *Antidumping Duty Administrative Review of Stainless Steel Flanges from India: Rejection of New Factual Information* (Int'l Trade Admin. Mar. 24, 2021), P.R. 127).

For the Final Results, Commerce rejected the arguments that it should have notified Chandan and should have accepted the corrected database Chandan submitted on March 16, 2021, concluding that "Chandan did not provide a substantial amount of information after multiple explicit requests from Commerce for such information," *Final I&D Mem*. at 10, that certain precedent relied upon by Chandan was inapplicable, *id.* at 10–11, and that "Chandan's interpretation would essentially require that Commerce permit any party to correct deficiencies of any magnitude, at any time during an administrative proceeding—including after Commerce has already issued a preliminary decision," *id*. at 11.

The statutory provision at issue reads as follows:

> If the administering authority . . . determines that a response to a request for information under this subtitle does not comply with the request, the administering authority . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—(1) the administering authority . . . finds that such response is not satisfactory, or (2) such response is not submitted within the applicable time limits, then the administering authority . . . may, subject to subsection (e), disregard all or part of the original and subsequent responses.

19 U.S.C. § 1677m(d). Chandan argues that accepting the March 16, 2021 database would not have been impracticable in that the Final Results were published on August 26, 2021. Chandan's Mot. 14.

The court concludes that Commerce did not act contrary to 19 U.S.C. § 1677m(d) in declining to accept the revised home market database Chandan submitted on March 16, 2021. Commerce first requested that database a year earlier (on March 13, 2020). By the time Chandan made its March 16, 2021 submission, Chandan had submitted that database three times before: on June 30, 2020, when it incorrectly omitted the window period sales outside of the POR, on September 11, 2020, when Chandan responded to the Department's notifying it of that error by adding such sales but then erroneously omitted sales of the foreign like product of nominal size less than 1.5 inches, and on December 9, 2020, when it again omitted window period sales outside the POR when correcting for that error. In all three instances, Chandan failed to follow the Department's instructions for reporting the same requested information, despite the Department's identifying the errors and allowing for correction. Chandan's fourth submission of information to complete the comparison market sales database on March 16, 2021 occurred nearly eleven months after the initial due date for the original submission. By that time, Commerce already had issued the Preliminary Results (on February 24, 2021). Commerce identified the error in the December 9, 2020 submission in issuing the Preliminary Results, but this was the second time Chandan committed the same reporting error, i.e., omission of window period sales outside the POR, even after Commerce brought that error to Chandan's attention in the August 19, 2020 Supplemental Questionnaire.

As 19 U.S.C. § 1677m(d) requires, Commerce not only identified the "window period" reporting error but allowed Chandan the opportunity to correct it. Similarly, Commerce allowed Chandan to correct its failure to report the sales in the smaller sizes that were within the scope of the Order. The Tariff Act does not require Commerce to allow two opportunities to correct the same error. By the time Chandan attempted to correct, again, its non-POR window period misreporting error, the Preliminary Results had been issued (again notifying Chandan of the window-period reporting error), and the submission of information necessary to correct that error was no longer within the due date for submission of information in response to the November 25, 2020 Supplemental Questionnaire. *See* 19 U.S.C. § 1677m(d) (allowing rejection of a response "not submitted within the applicable

time limits"); 19 C.F.R. § 351.301. As explained in the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act:

> New section 782(d) requires Commerce and the Commission to notify a party submitting deficient information of the deficiency, and to give the submitter an opportunity to remedy or explain the deficiency. *This requirement is not intended* to override the time-limits for completing investigations or reviews, nor to allow parties *to submit continual clarifications or corrections of information* or to submit information that cannot be evaluated adequately within the applicable deadlines. If subsequent submissions remain deficient *or are not submitted on a timely basis*, Commerce and the Commission may decline to consider all or part of the original and subsequent submissions.

H.R. Rep. No. 103–316, at 865 (1994) ("*SAA*") (emphasis added). Based on the record information considered on the whole, Commerce acted within its statutory and regulatory discretion in refusing to accept the March 16, 2021 submission. In arguing to the contrary, Chandan maintains that accepting the March 16, 2021 database was required by "[e]xtensive court precedent." Chandan's Mot. 14 & 14 n.30 (citing two precedential decisions, *Timken Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006) and *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207–09 (Fed. Cir. 1995)). Neither case is on point. *Timken Corp*. and *NTN Bearing Corp*. did not involve the use of facts otherwise available or adverse inferences. Both involved situations in which a respondent brought an error to the Department's attention.

Chandan's argument that there was no gap in information requiring use of facts otherwise available, Chandan's Mot. 5–25, is also unavailing. Commerce did not receive a complete and reliable comparison market sales database during the questionnaire period and, for the reasons the court has pointed out, permissibly refused to accept the fourth iteration of the comparison market database. Nor is Chandan correct in asserting that Commerce unlawfully used adverse facts available without notifying Chandan of deficiencies in the submissions of information to Commerce and allowing Chandan an opportunity to address them. *Id.* at 25–27. Commerce accepted Chandan's September 11 and December 9, 2020 resubmissions of the comparison market database, which responded to reporting errors Commerce identified.

The court also finds unpersuasive Chandan's arguments that Chandan acted to the best of its ability in responding to the Department's information requests and that any errors are insufficient for adverse inferences. *Id*. at 27–35. The record reveals that Commerce permissibly found repeated misreporting of the comparison market sales database, refuting any notion that Chandan acted to the best of its ability. Chandan highlights the circumstances that it "is a small company, with limited professional staff, limited as to understanding all aspects of a complex and hugely demanding U.S. antidumping duty law, and not fully proficient in English (not the native language of the staff)." *Id*. at 29 (footnote omitted). It argues, moreover, that Commerce did not allow it sufficient time to respond to requests for information, allowing only 19 total days of extension out of a total of 31 days requested, and in doing so failed to recognize the difficulties caused by the Covid emergency. *Id*. at 29–32. These arguments do not convince the court that Commerce was statutorily barred from invoking an adverse inference. Commerce gave Chandan two opportunities to resubmit the comparison market database, without any adverse action, over the course of the time period from the March 13, 2020 date of the initial questionnaire to the December 9, 2020 date of Chandan's second resubmission. That second resubmission still was unsatisfactory because Chandan, for the second time, failed to include sales outside the POR as directed by Commerce.

Chandan argues that any errors in the comparison market database were too minor or insufficient for adverse inferences and did not prevent Commerce from using the database with certain allowances or adjustments, *id*. at 8–10, but this argument also is misguided. Commerce must be able to obtain from cooperative respondents, on a timely basis, a reliable comparison market database in order to calculate a weighted average dumping margin. As of the time it issued the Preliminary Results, it still lacked reporting of sales of Chandan's smaller-sized flanges that occurred outside the POR, which sales were unavailable for comparison with U.S. sales. The implied premise of Chandan's argument is that Commerce was obligated to examine, rather than reject, the reporting of additional information that Chandan later submitted, on March 16, 2021, and use it to calculate a dumping margin. As the court has explained, the statute and regulations allowed the rejection of this information and its exclusion from the record. Thus, Commerce was under no obligation to use this information or to review it to determine the degree to which the omission of the information from the database submitted earlier would have affected adversely the calculation of a dumping margin.

4. Chandan's Reporting of the Costs of Production of the Foreign Like Product and Other Reporting Issues Identified by Commerce

Commerce requested data on Chandan's U.S. sales and comparison market sales that were organized according to "CONNUM" (or "control number"), which it defined as "an identifier for a product, or a group of products, with a unique and specifically-defined set of physical characteristics." *Decision Mem. for Prelim. Results of the Antidumping Duty Admin. Review: Stainless Steel Flanges from India; 2018–2019* at 7 n.36 (Int'l Trade Admin. Feb. 17, 2021), P.R. 116 ("*Prelim I&D Mem*."). Commerce concluded that Chandan did not report correctly its production costs for the foreign like product "at the CONNUM-specific level," as Commerce had requested. *Final I&D Mem*. at 14. Commerce concluded, further, that this misreporting prevented Commerce from making correctly several determinations it is required to make, including: (1) determining which comparison market sales may have been made at less than the cost of production and therefore deleted from the comparison market data base pursuant to 19 U.S.C. § 1677b(b)(1); (2) identifying sales of "similar merchandise" for comparison to U.S. sales of subject merchandise; (3) making "difference in merchandise" adjustments pursuant to 19 U.S.C. § 1677b(a)(6)(C); and (4) calculating "constructed value" pursuant to 19 U.S.C. § 1677b(e). *Id*. Commerce concluded that "Chandan's cost reporting failures have key implications for our margin analysis," *id*. at 15, and "support the application of AFA," *id*. at 14.

Commerce found (and Chandan does not contest) that "Chandan does not maintain product-specific costs in its normal books and records, and, therefore, it used an allocation methodology to determine the per-unit costs for each reported CONNUM" and that "[t]hese allocations are heavily reliant on weight." *Id*. at 19. The parties disagree on whether the allocation method adopted by Chandan produced accurate and reliable cost build-ups for each CONNUM. Based on what it considered to be discrepancies and inconsistencies in the reported information, Commerce found that "Chandan's reported per-unit cost data are inaccurate and unreliable," *id.* at 15, a finding Chandan contests before the court, Chandan's Mot. 15 ("Chandan accurately reported production cost."). Chandan asserts that the Department's claims of misreporting "at best, are the result of Commerce's unlawful failure to notify Chandan of any concerns and provide an opportunity to address." *Id*.

As to the other reporting issues Commerce raised, Chandan submits that "Commerce's alleged deficiencies in Chandan's reported gross unit price, quantity discounts, other discounts, and duty re-

funds are minor, remediable from the record, and do not individually warrant facts available." Pl. Chandan Reply Br. 13 (Jan. 17, 2023), ECF No. 59 (citing Chandan's Mot. 24–25, 40–41). According to Chandan, "[t]he quantity discounts were reported accurately even though they were not reported in the exact form requested by Commerce in its supplemental questionnaire" and that, in any event, that "[t]he reported quantity discount is insignificant—i.e., 0.18% of total sales value to the United States." Chandan's Mot. 24 (footnote omitted). It argues, further, that information on gross unit prices of comparison market sales was on the record and available to calculate normal value. *Id*. at 24–25.

The court need not resolve the disagreements between the parties that arise from Chandan's allocation method for the reporting of the costs of production and from reporting of gross unit price, quantity discounts, other discounts, and duty refunds. Even if the reporting errors claimed by Commerce to have occurred in these categories were nonexistent, minor, or inconsequential (as Chandan argues they were), the court is not able to presume that the omission of sales of smaller-size flanges occurring in window periods outside of the POR could be so described. The information necessary to show the effect of the failure to report the sales of the smaller-size flanges that occurred outside the POR is not on the record, Commerce permissibly having excluded it. As the court concluded previously, that omission left Commerce without a reliable comparison market sales database as of the time it issued the Preliminary Results. A reliable comparison market sales database for matching with a U.S. sales database is fundamental and essential for the Department's ability to calculate a weighted average dumping margin. Therefore, this omission justified the use of facts otherwise available as a total substitute for that database and, accordingly, for the assignment of a dumping margin. Because Commerce lacked a complete database even after allowing Chandan opportunities to correct its reporting errors, Commerce also acted within its discretion in using an adverse inference when selecting from among those facts otherwise available.

5. Selection of an Adverse Inference Rate

Chandan argues that the 145.25% rate Commerce chose as an adverse inference was unlawfully "punitive." Chandan's Mot. 35–40. The court disagrees.

The immediate source of the 145.25% rate was the antidumping duty investigation, in which Commerce assigned this rate as an adverse inference "to an uncooperative respondent, the Bebitz/Viraj

single entity."[9] *Final I&D Mem*. at 32. The rate assigned to that entity was derived from the antidumping duty petition: Commerce explained that "in the *Preliminary Results*, Commerce selected the highest rate alleged in the petition, because it is higher than the only rate calculated in the investigation." *Id*. at 33. Commerce did not depart from this reasoning for the Final Results. *Id*.

The Tariff Act provides that an adverse inference "may include reliance on information derived from . . . the petition," 19 U.S.C. § 1677e(b)(2), as Commerce has done here. It further provides that Commerce, in selecting among the facts otherwise available, may . . . use any dumping margin from any segment of the proceeding under the applicable antidumping order." *Id*. § 1677e(d)(1)(B). In choosing one of those dumping margins, Commerce "may apply any of the . . . dumping margins specified under that paragraph [i.e., paragraph (1) of § 1677e(d)], *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." *Id*. § 1677e(d)(2) (emphasis added).

As outlined above, Commerce found itself in a "situation" in which a mandatory respondent twice (on September 11 and December 9, 2020) resubmitted its comparison market database in response to errors identified by Commerce without doing so in a way that would have allowed Commerce to use that database to calculate a correct dumping margin. Chandan failed to provide Commerce a database that complied fully with reporting instructions even though Commerce allowed resubmissions to correct the failure to report window period sales outside of the POR and the failure to report sales of small-size flanges after bringing those errors to Chandan's attention. In such a situation, Commerce must have discretion to choose a rate sufficiently adverse to create the incentive for the careful and timely responses to requests for information that are needed for the calculation of a weighted average dumping margin.

6. Deduction of Antidumping and Countervailing Duty Cash Deposits from U.S. Price

Chandan claims that it "inadvertently included AD/CVD [antidumping duty and countervailing duty] cash deposits" when report-

[9] Commerce assigned this rate as the dumping margin to the Bebitz/Virage entity and also to the "Echjay single entity." *Stainless Steel Flanges From India: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Critical Circumstance Determination*, 83 Fed. Reg. 40,745, 40746 (Int'l Trade Admin. Aug. 16, 2018). The only other dumping margin Commerce calculated in the investigation was a 19.16% margin assigned to Chandan Steel Limited. *Id*.

ing customs duties in a questionnaire field and, therefore, that "Commerce should remove those cash deposits" to ensure that these cash deposits are not deducted from U.S. price in the calculation of a dumping margin. Chandan's Mot. 40. The court interprets this claim as pertinent to the calculation of U.S. price, and therefore pertinent to the calculation of a weighted average dumping margin based on Chandan's sales pertaining to the POR, should the court direct Commerce to do so in its remand order.

As discussed above, Chandan has not demonstrated its right to a remand order that would set aside the Department's decision to assign it the 145.25% rate, which is based on an adverse inference rather than an examination of Chandan's sales. Therefore, the court concludes that no relief can be granted on Chandan's claim relating to deposits of antidumping and countervailing duties.

C. Assignment of the 145.25% Rate to the "Companies Not Individually Examined"

For the reasons stated below, the court sets aside as unlawful the Department's assigning the 145.25% rate to respondents not individually examined in the first administrative review.

1. Assignment of the 145.25% Rate to the Companies Not Individually Examined Violated the Rule of *YC Rubber*

The Court of Appeals for the Federal Circuit ("Court of Appeals") issued *YC Rubber Co. (North America) LLC v. United States*, No. 21–1489, 2022 WL 3711377 (Fed. Cir. Aug. 29, 2022) ("*YC Rubber*") one year after the publication of the Final Results. The precedent established by *YC Rubber* requires the court to invalidate the Department's assignment of the 145.25% rate to the respondents Commerce did not examine individually in the first administrative review.

Like this case, *YC Rubber* arose from a challenge to the results of an administrative review of an antidumping duty order and, like this case, involved the selection of an "all others" rate based on the individual examination of one respondent. Specifically, after examining individually "only a single mandatory respondent" in the review at issue in *YC Rubber*, Commerce assigned the weighted average dumping margin it determined for this respondent, which was 64.57%, to "all participants in the review." *Id.* at *2.

In *YC Rubber*, the Court of Appeals interpreted section 777A(c)(2) of the Tariff Act, 19 U.S.C. § 1677f-1(c)(2), which provides that "[i]f it is not practicable to make individual weighed average dumping margin determinations . . . because of the large number of exporters or

producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for *a reasonable number* of exporters or producers." The Court of Appeals held that Commerce fails to comply with this provision when it bases its rate for unexamined respondents on the individual examination of only one exporter or producer: "We conclude that a 'reasonable number' is generally more than one." *Id*. at *4. The appellate court declined to accord the Department's interpretation of § 1677f-1(c)(2) deference under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), noting that the provision at issue is an exception to a general rule: "The statute calls for all respondents to be individually investigated, unless the large number makes separate review impracticable." *Id*. at *3. Addressing the government's argument that "Commerce's position that it suffices to review only one respondent warrants *Chevron* deference," the Court of Appeals concluded "that Commerce's interpretation is contrary to the statute's unambiguous language." *Id*.

YC Rubber is directly on point. In the review at issue here, Commerce decided to examine individually only Chandan, finding that "an individual examination of the largest exporter and producer will account for a significant volume of subject merchandise during the POR." *Respondent Selection Mem*. at 4. Commerce further decided, over the objections of some respondents, *see Final I&D Mem*. at 33–36, that it permissibly could use the margin it determined for Chandan as the rate to be applied to the reviewed but unexamined respondents. Under the binding precedent of *YC Rubber*, both decisions were unlawful, and, therefore, the resulting assignment of the 145.25% rate to the unexamined respondents must be invalidated.

Defendant argues that the holding in *YC Rubber* does not apply in this litigation because "neither Kisaan nor the Other Plaintiffs requested to be voluntary respondents, and so they did not exhaust their administrative remedies." Def.'s Resp. to Pls.' Mots. for J. on the Admin. R. 42 n.1 (Oct. 14, 2022), ECF No. 52. Defendant submits that:

> Although the Federal Circuit in *YC Rubber* noted that no exporter had requested to be a voluntary respondent, . . . the court did not address administrative exhaustion or otherwise suggest that the court was altering the established requirement that only non-examined producers that have sought to be voluntary respondents may challenge the respondent selection process."

Id. (citing *YC Rubber,* 2022 WL 3711377, at *2). Defendant's argument misconstrues the claims the plaintiffs other than Chandan are raising. They are challenging the Department's assigning them the 145.25% rate as a rate for respondents not individually examined (i.e., an "all-others" rate). They are not challenging their non-selection as respondents for which Commerce would conduct an individual examination of their respective sales.

This Court rejected a similar "failure to exhaust" argument in *Siemens Gamesa Renewable Energy v. United States*, 47 CIT __, __, 621 F. Supp. 3d 1337, 1348 (2023) ("*Siemens Gamesa*"). The plaintiff in that case, Siemens Gamesa, had been assigned a 73.00% rate as an all-others rate based on an investigation of a single respondent; in its opinion, the Court concluded that:

> Siemens Gamesa was under no obligation to request to be a voluntary respondent (or, for that matter, to be a substitute mandatory respondent) in order to exhaust administrative remedies and thereby preserve its right to contest the Department's assigning it the 73.00% rate as an all-others rate, as any respondent adversely affected by that rate potentially could have done.

Id. Here, as in *Siemens Gamesa*, the all-others rate was a consequence of the Department's conducting the proceeding in violation of 19 U.S.C. § 1677f-1(c)(2). It also is pertinent to the issue of exhaustion of administrative remedies that *YC Rubber* was decided after the issuance of the Final Results. As *Siemens Gamesa* stated, "[c]ourts have long recognized 'intervening legal authority' as an exception to the exhaustion requirement." 47 CIT at __, 621 F. Supp. 3d at 1348 (citation omitted).

2. Assigning the 145.25% Rate to the "Companies Not Individually Examined" Violated the "Reasonable Method" Requirement

In addition to violating the rule of *YC Rubber*, the Department's decision to assign the 145.25% rate to the unexamined respondents was unlawful because it did not comport with the "reasonable method" requirement imposed by the Tariff Act.

Congress addressed the method of determining an "all-others" rate in an antidumping duty investigation in section 735(c)(5) of the Tariff Act, 19 U.S.C. § 1673d(c)(5). Although this provision "applies on its face only to investigations, not periodic administrative reviews, . . . the statutory framework contemplates that Commerce will employ the same methods for calculating a separate rate in periodic administrative reviews as it does in initial investigations." *Albemarle Corp.*

v. United States, 821 F.3d 1345, 1352 (Fed. Cir. 2016) ("*Albemarle*") (footnote and internal citations omitted).

The Tariff Act applies a "general rule" under which "the estimated all-others rate shall be an amount equal to 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 under section 1677e of this title." 19 U.S.C. § 1673d(c)(5)(A). Because Commerce determined only one margin in the review, and because that margin was "determined entirely under section 1677e," Commerce was not in a position to apply the "weighted average" method of the "general rule." In § 1673d(c)(5)(B), Congress provided an "exception" to the "general rule," as follows:

> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 1677e of this title, the administering authority may use 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.

Id. § 1673d(c)(5)(B). In *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370 (Fed. Cir. 2013) ("*Bestpak*"), the Court of Appeals resolved an interpretive question raised by § 1673d(c)(5)(B). Under the holding in *Bestpak*, the specific mention of the "averaging" method in the provision does not signify congressional intent that resort to this method is *per se* reasonable. Instead, *any* rate Commerce would apply to respondents that it does not investigate or review individually must satisfy the "reasonable method" test.

In the antidumping duty investigation culminating in *Bestpak*, Commerce calculated an all-others rate by taking a simple average of a 247.65% "AFA China-wide rate," which Commerce assigned to one of the two mandatory respondents based entirely on 19 U.S.C. § 1677e for failure to cooperate in the investigation, with a de minimis margin assigned to the other, cooperating mandatory respondent, resulting in a 123.83% "all-others" rate that Commerce applied to respondents that were not individually investigated. *Id*., 716 F.3d at 1375. The Court of Appeals explained that "[a]lthough Commerce may be permitted to use a simple average methodology to calculate the separate rate [which Commerce applied to respondents that dem-

onstrated independence from the Chinese government but were not individually investigated], the circumstances of this case renders a simple average of a *de minimis* and AFA China-wide rate unreasonable as applied." *Id*., 716 F. 3d at 1378. The Court concluded that "a review of the administrative record reveals a lack of substantial evidence showing that such a determination reflects economic reality." *Id*. The Court further observed that "[t]his case is peculiar in that Commerce identified only two significant exporters/producers, yet one was assigned a *de minimis* dumping margin while the other was assigned the highest possible AFA China-wide margin." *Id.*, 716 F.3d at 1380. "The result is not only limited and frustrating, as the Court of International Trade described it, but is also unreasonable." *Id*.

In the administrative review at issue in this case, Commerce cited what it termed the "expected method" of § 1673d(c)(5)(B) as identified in *Albemarle* in applying the 145.25% rate to the unexamined respondents. Commerce recounted that "[i]n the *Preliminary Results*, we applied Chandan's dumping margin to the companies subject to this review that were not individually examined, consistent with the expected method under section 735(c)(5)(B) of the Act," *Final I&D Mem.* at 33, and then concluded that "application of the expected method is reasonable here because the record evidence does not rebut the presumption that margin [*sic*] for the mandatory respondent is representative," *id*. at 38. Commerce referred to the averaging method of § 1673d(c)(5)(B) as the "expected method" based on language in *Albemarle*, 821 F.3d at 1352 & 1352 n.5 (quoting *SAA* at 873).

Nothing in the SAA supports the Department's imposing a rebuttable "presumption" that the 145.25% rate, which was based entirely on AFA, was representative of a margin that would be reasonable if applied to every unexamined respondent in the review, i.e., every respondent other than Chandan. The relevant text of the SAA (quoted in *Albemarle*, 821 F.3d at 1352 n.5), is as follows:

> Section 219(b) of the bill adds new section 735(c)(5)(B) which provides an exception to the general rule if the dumping margins for all of the exporters and producers that are individually investigated are determined entirely on the basis of the facts available or are zero or *de minimis.* In such situations, Commerce may use any reasonable method to calculate the all others rate. The expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available. However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of

> potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.

SAA at 873. An obvious flaw in the Department's analysis is that Commerce did not actually apply the "expected method" described in the SAA. Commerce did not "weight average," let alone average, anything in determining its all-others rate. "Averaging" necessarily involves the situations of different exporters and thus rests on a wider data base than does use of only one margin. But the Department's selection of only one respondent for individual examination (which itself was unlawful, as discussed above) left it with only one margin, and thus no averaging of any kind was possible. That deficiency aside, the application of the 145.25% rate to the unexamined respondents, in additional respects, was unreasonable and unsupported by substantial record evidence.

Commerce offered, in essence, only one evidence-based rationale for its conclusion that assigning the 145.25% rate to the unexamined respondents was "reasonable": that this was the rate assigned to the exporter, Chandan, that "accounted for a substantial portion of the subject merchandise exports of all exporters and producers for which Commerce had remaining requests for review." *Final I&D Mem*. at 41 (quoting *Qingdao Qihang Tyre Co. v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1329, 1363 (2018)). This rationale is specious. Chandan's failure to act to the best of its ability in responding to information requests in the review, which was the sole basis upon which Commerce applied "total adverse facts available" to Chandan, had no factual relationship to the unexamined respondents' sales of subject merchandise that pertained to the first administrative review. These were sales that Commerce, of its own volition, refused to examine. The rate from which the 145.25% rate was taken, which was assigned to an uncooperative respondent in the investigation and also was based on total AFA, similarly lacked a relationship to those sales. In that respect, the Department's use of the 145.25% rate as an "all-others" rate was even less representative of respondents not individually examined than was the rate held unlawful in *Bestpak*.

Nor can support for the Department's assigning the 145.25% rate to the unexamined respondents be found in the decision of the Court of Appeals in *Albemarle*, which involved facts and circumstances highly dissimilar to those of the review at issue in this case. *Albemarle* arose from the third periodic administrative review of an antidumping duty order on activated carbon from China, following which Commerce published final results assigning zero margins to the two mandatory

respondents. *Albemarle*, 821 F.3d at 1349. But rather than follow the "expected method" of 19 U.S.C. § 1673d(c)(5)(B) by averaging these two calculated margins to yield zero margins for the three separate rate respondents in the review that were not examined individually, Commerce assigned each of these three respondents the specific-tariff antidumping duty margins it had determined for them in the previous, second review of the antidumping duty order. *Id*. For one of those three, a mandatory respondent in the second review, Commerce carried over the individually-calculated $0.44/kg. margin from that review; the other two separate rate respondents received in the third review the $0.28/kg. margin they were assigned in the second review, which Commerce had obtained by averaging the individually-determined margins of two mandatory respondents in that review. *Id*. The Court of Appeals disallowed the Department's decision to carry over the margins from the previous review, holding that Commerce instead should have followed the "expected method," under which Commerce would have averaged the two zero margins to obtain zero margins for the three respondents that Commerce did not examine individually in the third review. The Court reasoned that Commerce has no "mandate to routinely exclude zero or de minimis margins" and that "Commerce's insistence on using its hostility to de minimis rates as the driving force behind its methodology is on its face arbitrary and capricious."[10] *Id*., 821 F.3d at 1354.

III. CONCLUSION AND ORDER

For the reasons set forth in the foregoing, the court sustains the Department's assigning the rate of 145.25% to Chandan and sets aside as unlawful the assignment of that rate to the other plaintiffs in this case.

Therefore, upon consideration of plaintiffs' Rule 56.2 motions and all papers and proceedings had herein, and upon due diligence, it is hereby

ORDERED that Chandan's motion for judgment on the agency record be, and hereby is, denied; it is further

ORDERED that the motions for judgment on the agency record of the other plaintiffs in this case be, and hereby are, granted; it is further

ORDERED that defendant shall consult with counsel for plaintiffs other than Chandan and submit to the court, by January 22, 2024, an agreed-upon proposed schedule for the conducting of proceedings that will conclude the litigation before the court; and it is further

[10] A zero or "de minimis" rate, unlike a rate based entirely on facts otherwise available with an adverse inference, is a margin calculated from the individual examination of a respondent's sales.

ORDERED that if defendant and the plaintiffs other than Chandan are unable to reach agreement on the above-referenced proposed schedule, these parties shall submit, by January 22, 2024, a joint status report on their negotiations.

Dated: December 8, 2023
New York, New York

/*s*/ *Timothy C. Stanceu*
TIMOTHY C. STANCEU JUDGE

Slip Op. 23–173

VECOPLAN, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 20–00126

[On classification of size-reduction machinery, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.]

Dated: December 11, 2023

Lawrence M. Friedman, Barnes, Richardson & Colburn, LLP, of Chicago, IL, argued for Plaintiff Vecoplan, LLC. With him on the brief was *Pietro N. Bianchi*.

Monica P. Triana, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant the United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Justin R. Miller*, Attorney-In-Charge.

OPINION

Eaton, Judge:

Before the court are the cross-motions for summary judgment of plaintiff Vecoplan, LLC ("Plaintiff") and defendant the United States, on behalf of U.S. Customs and Border Protection ("Customs"). *See* Pl.'s Corrected Mot. Summ. J. ("Pl.'s Br."), ECF No. 55; Pl.'s Resp. Def.'s Cross-Mot. Summ. J. and Reply Def.'s Resp. Pl.'s Mot. Summ. J. ("Pl.'s Reply"), ECF No. 58; Def.'s Cross-Mot. Summ. J. ("Def.'s Br."), ECF No. 51; Def.'s Reply Supp. Cross-Mot. Summ. J. and Opp'n Pl.'s Resp. ("Def.'s Reply"), ECF No. 61. At issue is the proper classification of Plaintiff's recycling machines, which reduce the size of waste material. *See* Compl. ¶ 9, ECF No. 12. The machines were imported from Germany by Plaintiff in 2018 and 2019. *See id.* ¶ 10; Am. Summons, ECF No. 21.

For the reasons set forth below, Plaintiff's motion is granted, Customs' cross-motion is denied, and the court concludes that Plaintiff's size-reduction machinery is properly classified under the Harmonized

Tariff Schedule of the United States ("HTSUS") (2019)[1] subheading 8479.82.00 as "[m]ixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines."

BACKGROUND

The facts described below have been taken from the admitted portions of the parties' USCIT Rule 56.3 statements and supporting exhibits, as well as from the summons and complaint. The parties agree on the facts not in dispute, except in a few limited instances that are not material to the court's analysis of the issues. *See* Pl.'s Statement of Material Facts Not in Dispute ("Pl.'s SOF"), ECF No. 55–4; Pl.'s Resp. to Def.'s Statement of Material Facts Not in Dispute ("Pl.'s Resp. SOF"), ECF No. 58–3; Def.'s Statement of Material Facts Not in Dispute ("Def.'s SOF"), ECF No. 51–1; Def.'s Resp. to Pl.'s Statement of Material Facts Not in Dispute ("Def.'s Resp. SOF"), ECF No. 51–2. The facts below also consist of findings based on record evidence on which no reasonable fact-finder could come to an opposite conclusion.

The subject merchandise is size-reduction machinery manufactured by Plaintiff's German parent company, Vecoplan Maschinenfabrik GmbH & Co. KG, specifically the VAZ 1600 and VAZ 1800 models.[2] Pl.'s SOF ¶ 6; Compl. ¶ 9. The machines reduce solid waste material of various kinds, including plastic, paper, wood, and solid waste.[3] Def.'s SOF ¶¶ 6, 14. These models are "large industrial machines, measuring approximately 10 to 14 feet long, 9 to 10 feet wide, and weighing up to 24,000 pounds." *Id.* ¶ 4.

The size-reduction process varies slightly depending on the type of material that is being reduced. *Id.* ¶ 56. For each process, however, material is first loaded into an infeed hopper by a forklift or similar device. *See* Pl.'s SOF ¶¶ 10–11; Def.'s SOF ¶ 28. The material then falls to a horizontal plate at the bottom of the inside of the machine. Def.'s SOF ¶ 28. The horizontal plate is at the bottom of an interior space called the cutting chamber. *Id.* A hydraulic ram then pushes, or applies pressure to, the waste material to move it toward the cutting

[1] All citations to the HTSUS refer to the 2019 edition. *See* Am. Summons (indicating that Plaintiff's subject merchandise was entered in 2018 and 2019). The pertinent tariff provisions in the 2018 edition were unchanged in the 2019 edition.

[2] Each model has several variations. The relevant models here are the VAZ 1600 S, VAZ 1600 SXL, VAZ 1600 SXLT, VAZ 1600 M, VAZ 1600 MXL, VAZ 1800 T, and VAZ 1800 NT. Def.'s SOF ¶ 3. The different letters represent variations for the size of the machine, diameter of the rotor, length of the rotor and ram stroke, and function of the machine's drive. *See id.* ¶ 5.

[3] For instance, the machines reduce materials such as Kevlar helmets, bowling balls, aluminum and copper radiators, shoes, woven seatbelts, newspapers, and vinyl flooring. *See* Pl.'s Br. Ex. 15, ECF No. 55–2.

rotor. *See* Pl.'s SOF ¶ 11; Def.'s SOF ¶ 37.

The rotor is a single-shaft rotating cylinder that is at the core of Plaintiff's machines. *See* Pl.'s SOF ¶ 9; Def.'s SOF ¶¶ 1, 16. This rotor is a "high torque" rotor, with "torque" being the force with which the rotor spins. *See* Def.'s Br. Ex. 4, Kolbet Dep. 103:16–25, ECF No. 51–3 ("Kolbet Dep."); *see also id.* Ex. 3, Sturm Dep. 131:8–10, ECF No. 51–3 ("Sturm Dep."). In other words, the rotor exerts significant force as it spins—it is "very strong." *See* Kolbet Dep. 104:1–3. The rotor's horsepower, or "power," is also significant, ranging from 75–150 horsepower in the VAZ 1600 models and up to 200 horsepower in the VAZ 1800 models. Def.'s SOF ¶ 69. A greater horsepower means that the rotor is spinning with greater force, and thus, more force is supplied to the cutting inserts.[4] *See* Kolbet Dep. 116:21–117:9.

The cutting inserts[5] are mounted on, and protrude from, ribs of the rotor. Pl.'s SOF ¶ 12; Def.'s SOF ¶ 19. The VAZ 1600 machines have between 42 and 74 cutting inserts, and the VAZ 1800 machines can have 84 or more cutting inserts. Def.'s SOF ¶ 23. Initially, the cutting inserts take scoops out of the material, and thus reduce its size by the force of their action. *See* Pl.'s SOF ¶ 18; Def.'s SOF ¶ 38. The cutting inserts are sharp and have four points. Def.'s SOF ¶¶ 24–25. When the points become dull, the cutting inserts can be rotated so that a sharper edge interacts with the waste material. *Id.* ¶ 24.

After the rotor's cutting inserts initially reduce the size of the material, it falls to the horizontal plate to which the stationary counter knife is fixed. Pl.'s SOF ¶ 19; Def.'s SOF ¶¶ 18, 38–41; Def.'s Resp. SOF ¶ 13. The counter knife is below the rotor. *See* Pl.'s Br. Ex. 1 at 003, ECF No. 55–1 ("Pl.'s Ex. 1"). Here, when the rotor spins, the cutting inserts mesh with v-shaped recesses of the counter knife to further cut the material, reducing it in size even more. Def.'s SOF ¶¶ 19, 42. Once the material is small enough, it passes through the gap between the cutting inserts and the counter knife. Pl.'s SOF ¶¶ 15–16; Def.'s SOF ¶ 58.

Both the VAZ 1600 and VAZ 1800 machines feature a screen, which is almost always used, and has openings ranging from 3/8 inch in diameter to six inches in diameter. *See* Def.'s SOF ¶ 57; Pl.'s Resp. SOF ¶ 57. Material that passes through the space between the rotor and the counter knife must be small enough to fit through the screen's opening. Def.'s SOF ¶ 58.

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[4] The horsepower of the rotor equals speed (in rotations per minute) multiplied by force. *See* Def.'s SOF ¶ 68; Sturm Dep. 130:21–131:14.

[5] The cutting inserts are also called cutters, cutter inserts, and v-cutters. *See* Pl.'s Resp. SOF ¶ 16; *see also* Pl.'s Br. Ex. 1 at 003, ECF No. 55–1; *id.* Ex. 17 at 001, ECF No. 55–2.

The size of the output material varies, depending on (1) the size of the cutting inserts, (2) the size of the screens, and (3) the type of the material being reduced. Def.'s SOF ¶ 60. Sometimes, the output material can be larger than the size of the screen's opening owing to the material's shape. *See id.*¶ 63. In this case, material moves back to the cutting chamber for further size reduction. *Id.* ¶ 59; *see also* Pl.'s SOF ¶ 16.

In 2018 and 2019, Plaintiff imported the subject machines as separate entries through four ports in the United States. *See* Summons, ECF No. 1; *see also* Am. Summons. At entry, Customs classified the machines under HTSUS 8479.89.94 ("Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: . . . Other machines and mechanical appliances . . . Other . . . Other"), dutiable at 2.5%. *See* Am. Summons. This subheading is a basket provision.

Plaintiff timely protested Customs' liquidation of entries under HTSUS 8479.89.94 and asserted that the correct classification is HTSUS 8479.82.00 ("Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: . . . Other machines and mechanical appliances . . . Mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines"), a duty-free provision. Pl.'s SOF ¶¶ 2–3. Customs denied the protests, and Plaintiff timely filed a complaint with the court. *Id.*¶ 4; Compl.

JURISDICTION AND STANDARD OF REVIEW

The court has subject matter jurisdiction under 28 U.S.C. § 1581(a) and reviews Customs' classification determination *de novo*. *See* 28 U.S.C. § 1581(a) (2018); *see also id.* § 2640(a)(1); *Telebrands Corp. v. United States*, 36 CIT 1231, 1234, 865 F. Supp. 2d 1277, 1279–80 (2012), *aff'd*, 522 F. App'x 915 (Fed. Cir. 2013). Summary judgment shall be granted "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." USCIT R. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000) (citing *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999)). In the context of a customs classification case, summary judgment is appropriate when there is no factual dispute as to the nature of the merchandise in question. *See Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006).

LEGAL FRAMEWORK

The objective in a classification case is to determine the correct tariff provision for the subject merchandise. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). While the court affords deference to Customs' classification rulings relative to their "power to persuade," it has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citation omitted). As such, "the court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark*, 733 F.2d at 878 (emphasis in original).

The court follows a two-step process when determining the classification of merchandise under the HTSUS. *See Rubies Costume Co. v. United States*, 922 F.3d 1337, 1342 (Fed. Cir. 2019). First, the court "determines the proper meaning of specific terms in the tariff provisions"—a question of law. *Gerson Co. v. United States*, 898 F.3d 1232, 1235 (Fed. Cir. 2018). Second, "the court determines under which subheading the subject merchandise is most appropriately classified"—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.'" *Otter Prods., LLC v. United States*, 834 F.3d 1369, 1375 (Fed. Cir. 2016) (quoting *Cummins Inc.*, 454 F.3d at 1363); *see also Rollerblade, Inc. v. United States*, 24 CIT 812, 813, 116 F. Supp. 2d 1247, 1250 (2000) ("Summary judgment of a classification issue is . . . appropriate 'when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is.'" (quoting *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998))).

The General Rules of Interpretation ("GRI") "govern classifications of imported goods under [the] HTSUS and [are] appl[ied] . . . in numerical order." *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011) (citing *BASF Corp. v. United States*, 482 F.3d 1324, 1325–26) (Fed. Cir. 2007)). GRI 1 directs the inquiry to the proper heading.[6] *See Telebrands Corp.*, 36 CIT at 1235, 865 F. Supp.

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[6] GRI 1 states, in full:

> The table of contents, alphabetical index, and titles of sections, chapters and subchapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the [subsequent GRIs].

GRI 1, HTSUS.

2d at 1280. If a good is not classifiable under GRI 1, and if the headings and notes do not require otherwise, then the other GRIs will be considered in numerical order. *See Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1163 (Fed. Cir. 2017) ("The GRI apply in numerical order, meaning that subsequent rules are inapplicable if a preceding rule provides proper classification." (citation omitted)). Under GRI 1, the court determines the appropriate classification of merchandise "according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS. The HTSUS section and chapter notes "are not optional interpretive rules," but rather have the force of statutory law. *Aves. in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005) (quoting *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 926 (Fed. Cir. 2003)).

"Only after determining that a product is classifiable under [a specific] heading should the court look to the subheadings . . . ." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). Moreover, "the possible [tariff] headings are to be evaluated without reference to their subheadings, which cannot be used to expand the scope of their respective headings." *R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1353 (Fed. Cir. 2014) (citing *Orlando Food Corp.*, 140 F.3d at 1440). "[T]he court also may consider the Explanatory Notes to the Harmonized Commodity Description and Coding System [(the "Explanatory Notes")], developed by the World Customs Organization." *See Rubies Costume Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1145, 1154 (2017) (citation omitted). The Explanatory Notes (unlike the section and chapter notes) are not legally binding or dispositive, but "may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *Aves. in Leather, Inc.*, 423 F.3d at 1334 (citation omitted).

Once it is determined[7] that merchandise is properly classified under a particular heading, "the court applies GRI 6 to determine the appropriate subheading." *StarKist Co. v. United States*, 29 F.4th 1359, 1361 (Fed. Cir. 2022) (citing *Orlando Food Corp.*, 140 F.3d at 1440); *see also Sony Elecs., Inc. v. United States*, 37 CIT 1748, 1751 (2013) (not reported in Federal Supplement) ("'At the subheading level, [GRI] 6 controls and gives priority to the terms of those subheadings and any related subheading notes as well as the relevant section, chapter, and subchapter notes' and applies GRIs 1–5 as appropriate." (citation omitted)). GRI 6 states:

[7] As will be seen, the parties agree, and the court concludes, that the appropriate heading is HTSUS 8479 ("Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: . . . Other machines and mechanical appliances").

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis,[8] to [GRIs 1–5], on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

GRI 6, HTSUS.

Importantly, when interpreting the HTSUS provisions, "[a] tariff term undefined by the HTSUS is construed in accordance with its common and commercial meaning," which are presumed to be the same. *ME Global, Inc. v. United States*, 47 CIT __, __, 633 F. Supp. 3d 1349, 1365 (2023) (citation omitted); *StarKist*, 29 F.4th at 1361 (citation omitted). "To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information." *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999) (citation omitted); *see also Sony Elecs., Inc.*, 37 CIT at 1758–59 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

DISCUSSION

Plaintiff and Customs agree (as does the court) that the proper heading for classification of the size-reduction machinery is HTSUS 8479 ("Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: . . . Other machines and mechanical appliances"). *See* GRI 1. They disagree on the appropriate subheading within this heading. Plaintiff argues that Customs' classification of the size-reduction machinery in a basket subheading for "Other" machines was improper because the machines are classifiable in subheading 8479.82.00 as "crushing, grinding, or screening machines." Pl.'s Br. at 3. Customs, on the other hand, argues that the basket subheading of HTSUS 8479.89.94 is correct because the machines' principal function is "cutting or shredding" and "none of the[] processes [listed in Plaintiff's preferred subheading, i.e., crushing, grinding, or screening] reflect the principal function of the machines." Def.'s Br. at 2, 21.

For the following reasons, the court concludes that the machines perform the overlapping functions of crushing and grinding (and less

[8] Black's Law Dictionary defines "mutatis mutandis" as "[a]ll necessary changes having been made; with the necessary changes," meaning that matters or things are generally the same, but to be altered when necessary. *See Mutatis Mutandis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

importantly, screening), and therefore, that they are properly classified under HTSUS 8479.82.00 ("Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: . . . Other machines and mechanical appliances . . . Mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines").

I. Plaintiff's Machines Are Properly Classified Under HTSUS Subheading 8479.82.00

Plaintiff argues that the machines should be classified under subheading 8479.82.00 ("Mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines") because they "operate by crushing, grinding, and screening," and these functions are found in the terms of the subheading. Pl.'s Br. at 3. Plaintiff is right.

A. Plaintiff's Machines Are Crushing Machines

1. Construction of the Term "Crushing"

In accordance with GRI 6, the court will first construe the term "crushing" according to its common and commercial meaning. For purposes of this discussion, the court relies on its own understanding of the word "crush" and concludes that the Collins Dictionary definition of "crush," submitted by Defendant, provides guidance as to the common and commercial meaning of the term. *See* Def.'s Br. Ex. 14, ECF No. 51–3 ("Def.'s Ex. 14") ("To crush something means to press it very hard so that its shape is destroyed or so that it breaks into pieces."). The court notes that the Collins' definition is in accord with the other definitions suggested by the parties. *See, e.g.*, *id.* Ex. 13, ECF No. 51–3 (Cambridge Dictionary) (defining "crush" as "to press something very hard so that it is broken or its shape is destroyed"); *id.* Ex. 12, ECF No. 51–3 (Merriam-Webster Dictionary) (defining "crush" as "to squeeze or force by pressure so as to alter or destroy structure"); Pl.'s Br. Ex. 3 at 003, ECF No. 55–1 (American Heritage Dictionary) (defining "crush" as "[t]o press between opposing bodies so as to break or injure; mash; squeeze").

There are two parts to the definition of "crush": (1) the action and (2) the result. *See* Def.'s Ex. 14 ("To crush something means to press it very hard so that its shape is destroyed or so that it breaks into pieces."). This is to say, (1) the action involves pressing the material very hard and (2) the result is that the material's shape is destroyed, or that the material is broken into pieces. Under this definition, "crushing" occurs at two points in Plaintiff's machines. First, crushing

occurs between the hydraulic ram and the cutting rotor. Crushing happens a second time between the cutting inserts and the counter knife.

2. Crushing Occurs Between the Hydraulic Ram and the Cutting Rotor

At the first stage of the crushing process, waste material is crushed between the hydraulic ram and the cutting rotor. The hydraulic ram is part of a hydraulic power system and is "operated using a hydraulic cylinder."[9] Kolbet Dep. 120:3–121:10. The hydraulic cylinder is responsible for moving the ram toward and away from the cutting rotor. *Id.* 120:25–121:5; 125:8–18; *see also* Pl.'s Ex. 1 at 003 (identifying "[h]eavy dual cushioned hydraulic cylinders to advance process ram"). The ram "extends out until it almost gets to the rotor" but will never hit the rotor. Kolbet Dep. 124:6–7, 124:16–19. As the ram is extended, it presses the material against the rotor so that the rotor can act upon the material. Def.'s SOF ¶ 30; *see also* Kolbet Dep. 62:17–20, 126:3–9 ("You have to be able to move the material to the rotor . . . and you have to be able to keep the material on the face of that rotor so that rotor is -- can work on that material."); Sturm Dep. 65:7–9 ("[T]he ram pushes the material *against* the rotor so that the rotor can grab the material." (emphasis added)).

Gary Kolbet, Vice President of Engineering at Vecoplan, LLC, described the "very high pressure" of the hydraulic cylinder:

> [T]here is a limit to the amount of pressure that those cylinders will apply, but it is *very high pressure*. I mean, it's *pushing really hard*. That's a very violent operation along the face of that rotor. It — It has to be strong to be able to hold that.

Kolbet Dep. 9:9–11, 126:11–18 (emphasis added). In other words, as a result of the hydraulic ram's connection to the hydraulic cylinder, the very high pressure of the cylinder applies to the ram as the cylinder pushes the ram forward. By its extension, the ram applies this high pressure to the waste material as it pushes the material against the rotor. *See* Def.'s SOF ¶ 37; Kolbet Dep. 171:4–172:8 (confirming that the ram applies pressure or force to the waste material to push it to the rotor); *see also* Sturm Dep. 110:2–3 (identifying the hydraulic ram as a "mechanical pusher that pushes the material towards the spinning rotor").

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[9] The hydraulic cylinder is run by a hydraulic power pack, which has approximately 10 horsepower. *See* Def.'s SOF ¶ 70; Kolbet Dep. 121:5–19.

As the ram applies pressure[10] by forcing the waste material against the rotor, the spinning rotor reduces it by the action of the cutting inserts. *See* Pl.'s SOF ¶ 18; Def.'s SOF ¶ 38; *see also* Kolbet Dep. 62:3–20. To withstand this violent action of the rotor, the ram must act as an oppositional force by pressing the material very hard. If the ram did not press the material against the rotor, the material would not be effectively reduced. Kolbet confirmed this in his deposition:

> Q. But the ram needs to keep the material close enough to allow [the rotor to reduce the material]?
>
> A. You have it. Correct. If that ram . . . pulls back, if — it'll — most cases, if that ram pulls back, you — you've gone to nearly doing nothing.

Kolbet Dep. 126:24–127:5. Thus, if the ram, having pushed waste material to the rotor, prematurely retracts without continuing to hold it against the rotor, the material will not be reduced. Kolbet also described the importance of the ram's pressure in the reduction of bowling balls: "[The bowling ball] needs to get down to the floor [of the cutting chamber] and have the ram apply pressure between — apply pressure to it where it is between the ram and the face of the rotor." *Id.* 266:17–267:8. The ram, then, crushes the waste material between itself and the rotor. As the ram exerts pressure on the waste material, the material is simultaneously met with pressure from the rotor's cutting inserts, which, through their great force, press into the waste material very hard. Therefore, the material endures the pressure of the ram, on one end, and the pressure of the rotor, by being a resistant object against which the material is pushed. In this manner, the waste material is pressed very hard and "crushed" between the ram and the rotor.[11]

While the pressure from the ram does not by itself reduce the size of the material, absent that pressure no size reduction would take place.

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[10] "Pressure" is "force that you produce when you press hard on something." *Pressure*, COLLINS DICTIONARY, https://www.collinsdictionary.com/dictionary/english/pressure (last visited Dec. 11, 2023).

[11] Regardless of what type of material is being reduced, there is no dispute that the high-torque rotor exerts significant force, through its cutting inserts, upon the waste material, pressing it very hard and breaking (as well as chopping) it into pieces. *See* Def.'s SOF ¶¶ 64, 68, 71. Accordingly, the rotor crushes each type of material. Def.'s Ex. 14 ("To crush something means to press it very hard so that its shape is destroyed or so that it breaks into pieces.").

This crushing process is evident in a video[12] demonstrating how the machine crushes a bowling ball.[13] In the video, the hydraulic ram retracts to allow the bowling balls to fall to the bottom of the cutting chamber. *See* Vecoplan Industrial Shredders, *Vecoplan Shreds BOWLING BALLS!*, YOUTUBE (Sept. 7, 2011), https://www.youtube.com/watch?v=JBxWcjMxhkg (last visited Dec. 11, 2023). Then, the ram extends forward and pushes the bowling balls against the rotor, which, using rotating force, breaks them into pieces. As the video concludes, it shows small pieces of waste material exiting the machine.

3. Crushing Occurs Between the Rotor and the Counter Knife

The material is crushed a second time between the rotor and the counter knife. After the rotor's cutting inserts have initially reduced the waste material into pieces (as a result of the ram pressing the material against the rotor), these pieces drop into the space between the rotor and the counter knife. *See* Pl.'s SOF ¶¶ 16, 19; Def.'s SOF ¶ 41; Kolbet Dep. 243:12–21. In this space, the rotor, by its cutting inserts, exerts force and pressure on the pieces of waste material.[14] *See* Kolbet Dep. 176:1–177:1; *see also id.* at 153:11–14 ("You're applying a force or pressure to the material. It's being held back by the floor of the machine and the counter knife."). That is, the cutting inserts press the pieces against the counter knife, which acts as an opposi-

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[12] The video, while not an exhibit, is on the record, appearing as a link in both Plaintiff's brief and Plaintiff's response to Defendant's first interrogatories. *See* Pl.'s Br. at 18; Def.'s Br. Ex. 1 at 9, ECF No. 51–3. Plaintiff also referenced the video at oral argument.

[13] While the machine in the video was a different model than the subject machines, it operates in the same manner, as it is "the same machine design" with a minor difference that is not relevant here. *See* Pl.'s Br. at 18; *see also id.* Ex. 14, ECF No. 55–2.

[14] Kolbet's deposition states:

> [Q.] But, again, the — the space [between the cutting insert and the counter knife] is not the — it's not how the merchandise is set; right? It's not how the merchandise is — is provided with a space. It's — That's how it — that's how it gets over time; correct?
>
> A. Correct. Yes. Yes.
>
> Q. Okay. Right. Because it says, over time, the edges of the tools become worn and dull, but *grinding and crushing still occurs because force and pressure causes the destruction and size reduction of the feedstock* [i.e., the waste material]; correct? That's what it says?
>
> A. That — That's true.
>
> Q. And, again, the *force — the — the force and pressure comes from the — the — the rotating rotor with the — the V cutters; right?*
>
> A. *Yes. Correct*.

Kolbet Dep. 176:7–177:1 (emphasis added).

tional force by "resisting the material from passing."[15] Kolbet Dep. 244:3–8; *id.* at 58:18–59:14. Simultaneously, as the rotor spins, the cutting inserts mesh with the v-shaped recesses of the counter knife to further break the pieces of waste material into smaller pieces. *See* Def.'s SOF ¶¶ 19, 42; Pl.'s SOF ¶ 15; *see also* Def.'s Br. Ex. 5, Beusse Dep. 66:19–67:5, ECF No. 51–3 ("Beusse Dep."). Thus, by exerting force and pressure on these pieces to press them against the counter knife and break them, the rotor's cutting inserts "crush" the pieces of waste material. At this stage size reduction does not take place solely by the action of crushing—the cutting inserts are sharp and thus the force of crushing is assisted by the chopping action of the counter knife's sharp teeth.

Testimony from Plaintiff's former Chief Operating Officer, Len Beusse, confirms that this second process involves "crushing." Beusse Dep. 4:21–23. Mr. Beusse described the interaction between the rotor and the counter knife as a "punch and die" concept, where the punch is the cutting insert, and the counter knife is the die: "anything that punches through a die to . . . generate a part or a particle would be considered a punch and die concept." *Id.* 163:24–164:15. Put another way, the cutting inserts on the rotor "punch" through the stationary counter knife, breaking the material. Punching indicates force or pressing very hard and is consistent with the "high torque" nature of the rotor, which spins with great force and power. *See Punch*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/

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[15] Kolbet's deposition states:

> Q. [H]ow do you define — or what do you mean when you say crushing?
> A. Well, *so the cutters [i.e., cutting inserts] apply forces to the material*, and — and we talked earlier about how there's all these different materials that we process.
> So a more rigid material that can provide some resistance against the forces applied by that cutter would be crushed by that cutter. That's — And it — And it may — in that impact, it may be crushed and come apart. It may be crushed and scooped out. It just depends on what material it is specifically.
> Q. Okay. So when you — you say crushed, you — you mean the result of the impact between the — the —
> A. Yeah —
> Q. — the cutter and the material?
> A. Yeah, with the *counter knife holding it and not allowing it to — to pass*.
>
> Yes.

Kolbet Dep. 58:18–59:14 (emphasis added). This indicates that the rotor's cutting inserts press the material against the counter knife, which holds the material in place as the cutting inserts crush the material.

Kolbet provided additional explanation on how the counter knife resists the material: "This primary function of this machine is the *counter knife is resisting the material from passing, and the rotor is acting upon the material grinding and crushing it*. That is the primary function." *Id.* 244:3–8 (emphasis added). In other words, the primary function of the machine is grinding and crushing because the counter knife resists the material from passing as the rotor acts upon it.

punch (last visited Dec. 11, 2023) (defining "punch" as "to strike with a forward thrust especially of the fist"; "to drive or push forcibly by or as if by a punch").

Thus, when the rotor's cutting inserts punch through the counter knife, they are using significant force to further break down the pieces of waste material that are pressed against the stationary counter knife. By this application of force, the pieces of material are being pressed very hard against the counter knife and crushed a second time into smaller pieces. Again, in this second operation there is both the "action" and "result" needed to satisfy the definition of crushing. The action is the pressing force applied by the moving cutting inserts against the stationary counter knife. The result is the reduction of the material to smaller pieces. As with the first step of the process, the material is reduced in size by a combination of crushing and chopping. Absent the function of crushing, however, the material would not be reduced in size.

4. Defendant's "Crushing" Argument Is Unpersuasive

Defendant makes two arguments as to why the machines do not crush. According to Customs, the machines' work "does not involve the squeezing of material between two opposing bodies or the exertion of 'very hard' pressure to alter or destroy the material" and because the action of the machines does not "reduce the material to particles, as is anticipated by the common meaning of the term 'crush.'" Def.'s Br. at 27–28.

As to this first argument, as seen in the previous discussion, there is no question that the machines squeeze the material between opposing bodies and exert "very hard" pressure, resulting in the destruction of the material by reducing it to pieces. The opposing bodies of the ram and the rotor apply pressure, as do the cutting inserts against the counter knife.

Next, Customs cites a definition of "crush" from the Merriam-Webster Dictionary as support for the proposition that the result of crushing must be that the material is reduced to "particles." Def.'s Br. at 27. Although the second meaning from the definition of "crush" cited by Defendant does mention particles, when that definition is read in its entirety, it is clear that the common and commercial meaning of "crush" does not require that the result of crushing be particles. Defendant cites the Merriam-Webster Dictionary definition of "crush":

> 1a: to squeeze or force by pressure so as to alter or destroy structure
> crush grapes

b: to squeeze together into a mass
She crushed her clothes into a bag.
2: to reduce to particles by pounding or grinding crush rock
3a: to subdue completely
The rebellion was crushed.
b: to cause overwhelming emotional pain to (someone)
Her insults crushed him.
c: to oppress or burden grievously crushed by debt
d: to suppress or overwhelm as if by pressure or weight
4: crowd, push
[we] were crushed into the elevator
5: hug, embrace
She crushed her child to her breast.
6 archaic: drink

See Def.'s Br. Ex. 12 (Merriam-Webster Dictionary). It is worth noting that the first meaning the definition provides for "crush" is in accord with the Collins Dictionary. *Compare id.* (defining "crush" as "to squeeze or force by pressure so as to alter or destroy structure") *with* Def.'s Ex. 14 (Collins Dictionary) ("To crush something means to press it very hard so that its shape is destroyed or so that it breaks into pieces."). In fact, material can be the result of crushing if its shape is merely altered or destroyed. *See* Def.'s Ex. 14 (Collins Dictionary) ("To crush something means to press it very hard so that its shape is destroyed *or* so that it breaks into pieces." (emphasis added)). Customs' citation of the second meaning ("to reduce to particles by pounding or grinding") is certainly a valid meaning for the word "crush" but does not change the court's conclusion that the act of crushing need not result in "particles."

Because the machines perform the function of crushing by both the action of pressing the material very hard and by the result of the material being broken into pieces, they perform the function of crushing.

B. Plaintiff's Machines Are Grinding Machines

1. Construction of the Term "Grinding"

In addition to performing the function of crushing, Plaintiff's machines function as grinding machines. "Grinding" is another term found in subheading 8479.82.00 ("Mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines").

Plaintiff urges the court to construe "grinding" broadly: "a grinder is a machine that break [sic] input material into relatively smaller

'bits or fine particles.'" Pl.'s Br. at 7. Customs, on the other hand, argues that there are two relevant components to the definition of "grinding": "Consistent throughout [both parties'] definitions is both [1] a description of the process, characterized by the use of pressure, force or friction between hard surfaces, and [2] the end result or output material from the 'grinding' process, described as material broken down into very small pieces, particles or powder." Def.'s Br. at 18. In support of its argument, Defendant submitted the Collins Dictionary definition of "grind." *Id.* at 17; Def.'s Ex. 14 (Collins Dictionary). Although Defendant directs the court's attention to the first and second meanings found in the definition, the entry also includes: "to chop into small pieces or fine particles by means of sharp metal blades" as one meaning. Def.'s Ex. 14 (Collins Dictionary).

Other dictionary sources include as a meaning both the idea of cutting with blades and that the result of grinding need not be "particles or powder." *See, e.g.*, Def.'s Br. Ex. 15, ECF No. 51–3 (Macmillan Dictionary) (defining "grind" as "to cut food, especially raw meat, into very small pieces using a machine"); *Grind*, THE BRITANNICA DICTIONARY, https://www.britannica.com/dic tionary/grind (last visited Dec. 11, 2023) (defining "grind" as "to cut (meat) into small pieces by putting it through a special machine"). Relying on its own understanding of the term and considering dictionary definitions, the court concludes that, included in the common and commercial meaning of "grind," is "to chop into small pieces or fine particles by means of sharp metal blades." Def.'s Ex. 14 (Collins Dictionary). It is evident that "grinding" is "broad enough to cover a variety of processes by which materials are divided into relatively small particles" and, while "definitions of grinding contemplate a reduction to small particles *or* to powder," no definition "gives actual limiting dimensions of the particles or powder included in the definition of the word 'grind' or 'ground.'" *United States v. Colonial Commerce Co.*, 44 C.C.P.A. 18, 20–21 (1956).[16] Thus, while "grinding" may involve a process of size reduction that results in output material that can be described either as "small pieces" or "fine particles," there is no defined requirement as to how small these pieces must be. Construing the term in this way confirms that Plaintiff's machines are also grinding machines.

[16] The court finds instructive the interpretation of "grinding" in *Colonial Commerce*. *See JVC Co.*, 234 F.3d at 1355 ("While prior TSUS cases may be instructive in interpreting identical language in the HTSUS, they are not dispositive."). In *Colonial Commerce*, while the tariff term was "ground" ("Spices and spice seeds: . . . sage, unground, 1 cent per pound; ground, 3 cents per pound"), the court considered the meaning of "grinding" because "ground" is "the past tense of the verb 'grind,'" and "must necessarily include consideration of the process employed as well as the end result." *Colonial Commerce*, 44 C.C.P.A. at 19–20.

2. Process of Size Reduction

As relevant here, "grind" includes chopping using sharp metal blades in the process of size reduction. *See* Def.'s Ex. 14 (Collins Dictionary) (defining "grind" as "to chop into small pieces or fine particles by means of sharp metal blades"). Chop is synonymous with cut. *See Chop*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/chop (last visited Dec. 11, 2023) (defining "chop" as "to *cut* into or sever usually by repeated blows of a sharp instrument" (emphasis added)); *see also Chop*, COLLINS DICTIONARY, https://www.collinsdictionary.com/dictionary/english/chop (last visited Dec. 11, 2023) (stating, by way of example, "[i]f you chop something, you cut it into pieces with strong downward movements of a knife or an axe"); *id.* (defining "chop" as "to cut (something) with a blow from an axe or other sharp tool" and "to cut into pieces"). Thus, chopping (or cutting) is one process by which material may be ground.

In Plaintiff's machines, chopping or cutting occurs when the cutting inserts on the spinning cutting rotor "cut" the waste material to reduce it in size. *See* Pl.'s SOF ¶¶ 12, 18; Def.'s SOF ¶¶ 19, 38. The use of "sharp metal blades" to chop or cut the material is present here. The cutting rotor, the "core part of the machine," has between 42 and 74 or over 84 cutting inserts (depending on the model of machine). *See* Def.'s SOF ¶¶ 16, 23, 27. These cutting inserts are sharp and have four points that can be rotated when dull to ensure a sharper edge interacts with the waste material—essentially acting as sharp blades.[17] *See id.* ¶¶ 24–25. To be sure, this cutting or chopping happens in concert with the action of crushing—both functions, crushing and grinding, occur together. Therefore, the action of the cutting rotor with its sharp cutting inserts on the waste material is consistent with the definition of "grind."

In this way, Plaintiff's machines are akin to a coffee grinder. A coffee grinder is typically one of three types: a blade grinder, a conical burr grinder, or a flat burr grinder. A blade grinder consists of a propellor-like blade, which spins and chops the coffee beans into small pieces. *See* Pl.'s Br. Ex. 5, ECF No. 55–1. So, too with a meat grinder where blades are used to cut meat into smaller pieces. *See id.* Ex. 9, ECF No.

[17] "Blade" is defined as "[t]he blade of a knife, axe, or saw is the flat sharp part that is used for cutting" and as a "rotor blade." *Blade*, COLLINS DICTIONARY, https://www.collinsdictionary.com/dictionary/english/blade (last visited Dec. 11, 2023); *see also Blade*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/blade (last visited Dec. 11, 2023) (defining "blade" as "the cutting part of an implement"; "the broad flat or concave part of a machine (such as a bulldozer or snowplow) that comes into contact with the material to be moved").

55–1; *id.* Ex. 10, ECF No. 55–1.[18]

The function of the blade coffee grinder, or of a meat grinder, is similar to that of the cutting rotor on Plaintiff's machinery, which spins and chops up the waste material into small pieces. Additionally, burr coffee grinders and meat grinders possess many cutting edges that, to give the best grind of the coffee beans or reduce the size of a piece of meat, must remain sharp. *See id.* Exs. 9–10; *id.* Ex. 7, ECF No. 55–1 ("Dull burrs slowly do less grinding and more mashing."); *id.* Ex. 8, ECF No. 55–1 ("It's important to keep your grinder and burrs sharp as this makes your homemade coffee ground consistent and taste better."). Similarly, the cutting rotor on Plaintiff's machines has numerous cutting inserts that, ideally, remain sharp to grind the waste material. *See* Def.'s SOF ¶¶ 24–25, 35, 44. Thus, like a coffee grinder or a meat grinder, under the common meaning of "grinding," Plaintiff's machines "grind" the waste material.

That this grinding function works in concert with the crushing action of the machines demonstrates the overlapping nature of the crushing and grinding functions. Just as the cutting inserts perform a crushing action against the counter knife, the blades of the cutting inserts perform a grinding action against the counter knife by chopping the waste material.

3. Size of the Output Material

Although the output of the grinding function includes "small pieces or fine particles," no exact size is required. Def.'s Ex. 14 (Collins Dictionary); *see Colonial Commerce*, 44 C.C.P.A. at 21. The size of Plaintiff's output varies, depending on what type of waste material is fed into the machine and what size screen is used. *See* Def.'s SOF ¶ 60. A screen is almost always used and has openings that range from 3/8 inch in diameter to six inches in diameter. *See id.* ¶ 57; Pl.'s Resp. SOF ¶ 57. A commonly used screen is the 3/4-inch screen. *See* Sturm Dep. 87:4–6. Material must be small enough to pass through the

[18] The court concludes, over Defendant's objection, that it is not precluded from considering Plaintiff's website exhibits about coffee and meat grinders because they are not offered to support or dispute a fact. USCIT R. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."). Rather, they are offered as examples of common usage to interpret the tariff term "grinding"—a legal question. The dictionary definition of "grinding" itself references, as an example, use of a coffee grinder. *See* Def.'s Ex. 14 (Collins Dictionary) (defining "grind" as "to chop into small pieces or fine particles by means of sharp metal blades[,e.g.,] *to grind coffee beans*"). Even if Plaintiff's exhibits were offered to support a fact, "for summary judgment purposes, the inquiry is whether the cited evidence may be reduced to admissible form, not whether it is admissible in the form submitted at the summary judgment stage." *United States v. Sterling Footwear, Inc.*, 41 CIT __, __, 279 F. Supp. 3d 1113, 1124 (2017). Notably, Defendant has cited no Federal Rule of Evidence, or other authority, in support of its objection to the admissibility of Plaintiff's exhibits. *See* Def.'s Br. at 26; Def.'s Reply at 17–18.

screen, and if it is not, it goes back to the cutting chamber for further size reduction. Pl.'s SOF ¶ 16; Def.'s SOF ¶ 59. Output material can sometimes be larger than the size of the screen's opening owing to the material's shape. Def.'s SOF ¶ 63. While the parties do not say exactly what the output size consistently is—because it varies, depending on the type of material being reduced and the screen size—commonly, the output size is between one and three inches. *See* Def.'s SOF ¶¶ 60–61; *see also* Kolbet Dep. 230:9–22. It seems, therefore, that the smallest output ranges from 3/8 inch (the smallest screen size) to one inch (the more common output size).

The output size of material processed through Plaintiff's machines is "small pieces." For instance, Kevlar helmets, processed with a 3/4-inch screen, result in a uniform output size similar in appearance to small pieces of cotton. *See* Pl.'s Br. Ex. 15, ECF No. 55–2. Teflon purge,[19] also processed with a 3/4-inch screen, results in small pieces of material comparable to croutons. *See id.* Even bowling balls processed with a two-inch screen are broken into small chunks. *See id.* Material that has been processed without a screen, like vinyl flooring, is larger. *See id.* It is not typical, however, to use the machines without a screen. *See* Sturm Dep. 60:2–12; Kolbet Dep. 89:5–9. Even at variable sizes, the output of the machines, fitting through a 3/4-inch screen, or even ranging from one to three inches, is still "small pieces." As small pieces, the output material fits the definition of "grind." Therefore, Plaintiff's machines are grinding machines because (like meat grinders) they chop waste material into small pieces by means of the rotor's sharp cutting inserts and the sharp teeth of the counter knife. *See* Def.'s Ex. 14 (Collins Dictionary) (defining "grind" as "to chop into small pieces or fine particles by means of sharp metal blades").

C. Plaintiff's Machines Are Screening Machines

A screen is almost always used when processing waste material in Plaintiff's machines. *See* Def.'s SOF ¶ 57; Sturm Dep. 60:2–12 ("Ninety-nine percent of the applications require a screen. . . . There's very, very little occasions where you would say a screen is not necessary, but the utmost number of applications that I know would definitely require a screen."). As has been seen, the screen's role is to only allow material which is small enough to fit through the screen's holes

[19] Teflon is a trademark for polytetrafluoroethylene ("PTFE"), a chemical compound that serves as a coating commonly found on nonstick cookware. It is also manufactured into certain industrial products like bearings, pipe liners, and parts for valves and pumps. *See Polytetrafluoroethylene*, BRITANNICA, https://www.britannica.com/science/polytetrafluoroethylene (Oct. 20, 2023).

to exit the machine.[20] Def.'s SOF ¶ 58. If material is too large to pass through the screen, it moves back to the cutting chamber for additional size-reduction. *Id.* ¶ 59. The verb "screen" means to "separate or sift out by means of a sieve or screen." Pl.'s Br. Ex. 3 at 008 (American Heritage Dictionary); *see also id.* at 016 (Random House Dictionary) (defining screen as "to sift or sort by passing through a screen"). Therefore, because Plaintiff's machines separate waste material by allowing material that fits through the screen's holes to exit the machine, and sending back for further size-reduction material that is too large, Plaintiff's machines are screening machines. The screen too, acts in concert with the crushing and grinding functions of Plaintiff's machines.

II. Because the Functions of Crushing, Grinding, and Screening Work in Concert to Accomplish the Machines' Purpose of Reducing the Size of Waste Material, the Machines Are Properly Classified Under HTSUS Subheading 8479.82.00

For Plaintiff, its machines are "crushing, grinding, and screening machines that reduce the size of waste products to produce valuable material for recycling. The machines operate by crushing, grinding, and screening to reach the desired output." Pl.'s Br. at 3. Accordingly, Plaintiff argues that "[t]hese machines . . . are crushing, grinding, and screening machines. They are, therefore, properly classified in 8479.82.00." Pl.'s Br. at 29.

III. Plaintiff's Machines Are Properly Classified Under HTSUS Subheading 8479.82.00

As noted, both parties claim, and the court agrees, that Plaintiff's size-reduction machines are properly classified under heading 8479, which provides: "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: . . . Other machines and mechanical appliances."

The court further concludes that Plaintiff's machines are properly classified under subheading 8479.82.00 ("Mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines"). This conclusion is reached by a straightforward application of GRI 6, which provides that "the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings." GRI 6. As has been seen, in order to perform size reduction, the machines always use two of the functions found in the terms of the subheading, i.e., "crushing" and "grinding" and one of

[20] Sometimes, however, material that is larger than the size of the screen's opening passes through the screen, owing to the shape of the material. Def.'s SOF ¶ 63.

the functions, "screening," most of the time. That the functions overlap does not detract from the conclusion that the machines are properly classified under HTSUS subheading 8479.82.00. Rather, this overlap confirms it, by demonstrating that machines performing these functions are the kinds of machines the drafters intended to be classified under this subheading by the inclusion of the terms therein.

Customs' contention that the machines should be classified under the basket subheading 8479.89.94 "Other" machines cannot be credited. Indeed, Customs' analysis is more inventive than legal.

In its analysis Customs first determined what the machines were and then took the surprising step of finding that they perform the functions of "cutting or shredding."[21] Def.'s Br. at 21 ("Plainly, the principal function of the machines can be described as cutting or shredding, as those terms are defined by their common meaning . . . ."). For Customs, because the functions of "cutting or shredding" are not found in the terms of any subheading under heading 8479 then they must be classified under the basket category. *See* Def.'s Br. at 17.

By first finding that the machines perform the functions of "cutting or shredding," Customs has turned the GRI 6 analysis on its head. Customs would have the court find that GRI 6 should be applied in the following way: (1) first, determine the function of the machines as being "cutting or shredding" and nothing more; (2) then, search terms of the subheadings under heading 8479 for those words, and those words only; and (3) hold that since those words are not found in any subheading, the machines must necessarily be classified under the basket category of subheading 8479.89.94.

This, however, is not the way GRI 6 is usually applied. Under the usual analysis, once it has been determined what the article is, a two-step process is performed: the classifier first "ascertain[s] the meaning of the specific terms in the tariff provision" and then "determine[s] whether the goods come within the description of those terms." *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644 (Fed. Cir. 2013) (citation omitted). The terms can describe the merchandise in a number of ways, for example, by name (*eo nomine*) or by use or, as here, by the function or functions of the machines. Using this straightforward analysis, the terms "crushing" and "grinding" (and "screening" too) can be said to describe the functions by which the machines reduce the size of the waste material.

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[21] For Customs, note 3 to section XVI applies:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

Section XVI, Note 3, HTSUS.

In its papers, Customs also claims that a principal function analysis is directed by note 3 to section XVI. The note provides:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

Section XVI, Note 3, HTSUS.

First, the note does not apply to Plaintiff's machines because they are not "composite" machines. *See McKesson Canada Corp. v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1310, 1316 n.7 (2019) ("Examples of composite machines are: 'printing *machines* with a subsidiary *machine* for holding the paper (heading 84.43); a cardboard box making *machine* combined with an auxiliary *machine* for printing a name or simple design (heading 84.41); . . . a cigarette making *machinery* combined with a subsidiary packaging *machinery* (heading 84.78)." (emphasis added)).

More importantly, any comparison of functions made under the facts of this case would not be the sort anticipated by the note. In *Sony Electronics Inc. v. United States*, a case involving subheadings, the court found that the merchandise at issue (Sony's Net-Sharing Cam) was "a machine capable of two functions, i.e., capturing moving and still images" and "both of those functions are described by subheading 8525.80.40." 37 CIT at 1767. The court concluded:

> Note 3 is only applicable where an item possesses multiple functions that are accounted for in different tariff provisions. Where a heading describes all of the functions of a multifunction article, an analysis of the principal function under Note 3 is not necessary. As noted, subheading 8525.80.40 covers all of the primary functions of the merchandise. Consequently, a principal function analysis is not appropriate.

Id. Thus, where the functions of a machine are found under one heading or subheading, "a principal function analysis is not appropriate." *Id.* Here, all of the functions (crushing, grinding, and screening) are described by the terms of one subheading. Thus, a principal function analysis under note 3 to section XVI is not provided for.

Finally, the note does not provide for Customs' comparing terms of its own choosing with those in the HTSUS. Rather, it provides for comparison of terms actually found in headings or subheadings of the HTSUS.

Because the function of the machines is found in the overlapping terms "crushing," "grinding," and "screening," the court concludes that they are not properly classified under Customs' proposed basket subheading.

CONCLUSION

For the foregoing reasons, the court holds that the subject size-reduction machines are classifiable under HTSUS 8479.82.00 ("Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: . . . Other machines and mechanical appliances . . . Mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines"). The court grants Plaintiff's motion for summary judgment and denies Customs' cross-motion for summary judgment. Judgment will be entered accordingly.

Dated: December 11, 2023
New York, New York

/*s*/ *Richard K. Eaton*
JUDGE

Slip Op. 23–174

TRINA SOLAR (CHANGZHOU) SCIENCE & TECHNOLOGY CO., LTD., et al., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN ALLIANCE FOR SOLAR MANUFACTURING, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 23–00219

[Defendant's Motion for Remand is granted.]

Dated: December 12, 2023

Kenneth Neal Hammer, Trade Pacific PLLC, of Washington, DC, for Plaintiffs. With him on the complaint were *Jonathan M. Freed* and *MacKensie R. Sugama*.

Joshua E. Kurland, Senior Trial Counsel, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, for the Defendant. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Ashlande Gelin*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Laura El-Sabaawi, Wiley Rein, LLP, of Washington, DC, for Defendant-Intervenor.

MEMORANDUM AND ORDER

Before the court is a consent motion to remand to the United States Department of Commerce ("Commerce") in *Trina Solar (Changzhou) Science & Technology Co., LTD v. United States*. Defendant's Affirmative Motion for Remand, ECF No. 23 (Dec. 11, 2023). All parties in

this case consent to this motion. *See* Def.'s Affirmative Mot. for Remand at 2. Upon consideration of the motion the court remands, with additional guidance as welcomed by the Government. *Id.* at 8.

The sole issue raised in this case is the ocean freight benchmark for calculation of a subsidy based on less than adequate remuneration ("LTAR"). On remand, Commerce should consider the court's ruling in *Risen Energy Co. v. United States*, Slip Op. 23–48, 2023 WL 2890019 (CIT Apr. 11, 2023), as well the court's other rulings on the ocean freight issue. *See e.g.*, *Risen Energy Co. v. United States*, 570 F. Supp. 3d 1369, 1372 (CIT 2022). Commerce should additionally consider the statutory preference for a broadly based ocean freight rate for an LTAR benchmark. If other factors outweigh that interest here and compel the use of a single rate source, Commerce should explain with as much numerical evidence as possible why that is appropriate. In the absence of the ability to concretely explain a strong reason for a single rate source, Commerce should use a multiple route data base with such adjustments as are necessary and possible.

For the forgoing reasons, the court **GRANTS** the motion to remand.

Dated: December 12, 2023
New York, New York

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

Slip Op. 23–175

PT. ASIA PACIFIC FIBERS TBK, Plaintiff v. UNITED STATES, Defendant, and UNIFI MANUFACTURING, INC. AND NAN YA PLASTICS CORPORATION, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 22–00007

[Commerce's Final Determination is remanded.]

Dated: December 12, 2023

Lizbeth R. Levinson, Fox Rothschild LLP, of Washington, D.C., argued for Plaintiff PT. Asia Pacific Fibers Tbk. With her on the brief were *Ronald M. Wisla* and *Brittney R. Powell*.

Eric J. Singley, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *Leslie Mae Lewis*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Julia A. Kuelzow, Kelley Drye & Warren LLP, of Washington, D.C., argued for Defendant-Intervenors Unifi Manufacturing, Inc. and Nan Ya Plastics Corp. With her on the brief were *Paul C. Rosenthal, David C. Smith*, and *Melissa M. Brewer*.

MEMORANDUM AND ORDER

Eaton, Judge:

This case involves the U.S. Department of Commerce's ("Commerce" or the "Department") final affirmative antidumping determination in the investigation of polyester textured yarn from Indonesia. *See Polyester Textured Yarn From Indonesia*, 86 Fed. Reg. 58,875 (Dep't of Commerce Oct. 25, 2021) ("Final Determination") and accompanying Issues and Decision Mem. (Oct. 18, 2021) ("Final IDM"), PR 240; *see also Polyester Textured Yarn From Indonesia, Malaysia, Thailand, and the Socialist Republic of Vietnam*, 86 Fed. Reg. 71,031 (Dep't of Commerce Dec. 14, 2021) (order).

By its motion for judgment on the agency record, Plaintiff PT. Asia Pacific Fibers Tbk ("Plaintiff" or "Asia Pacific"), a manufacturer of the subject yarn and a mandatory respondent in the investigation, challenges the Final Determination, which resulted in Plaintiff being assigned a rate of 26.07%. *See* Pl.'s Mem. Supp. Mot. J. Agency R. ("Pl.'s Br."), ECF No. 24; Pl.'s Reply Br., ECF No. 37. In particular, Plaintiff disputes Commerce's use of "total adverse facts available"[1] when determining its final antidumping rate—a change from the preliminary determination, in which Commerce used Asia Pacific's reported information. Plaintiff contends that Commerce's use of adverse facts available in the Final Determination was unlawful because it was based on the results of an unreasonable verification procedure. Plaintiff asks the court to remand this case to Commerce "with instructions to conduct an on-site or remote verification and to revise its final determination consistent with this Court's opinion." Pl.'s Reply Br. at 10.

Defendant the United States ("Defendant"), on behalf of Commerce, opposes Plaintiff's motion. *See* Def.'s Resp. Pl.'s Mot. J. Agency R. ("Def.'s Br."), ECF No. 32. Defendant-Intervenors Unifi Manufacturing, Inc. and Nan Ya Plastics Corporation ("Defendant-Intervenors"), U.S. manufacturers of polyester textured yarn and petitioners in the underlying investigation, also oppose the motion. *See* Def.-Ints.' Resp. Opp'n Pl.'s Mot. J. Agency R. ("Def.-Ints.' Br."), ECF No. 34.

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[1] "'Total adverse facts available' is not defined by statute or agency regulation. Commerce uses this term 'to refer to [its] application of adverse facts available . . . to the facts respecting all of [a respondent's] production and sales information that the Department concludes is needed for an investigation or review.'" *BlueScope Steel Ltd. v. United States*, 45 CIT __, __, 548 F. Supp. 3d 1351, 1354 n.2 (2021) (emphasis omitted) (quoting *Nat'l Nail Corp. v. United States*, 43 CIT __, __, 390 F. Supp. 3d 1356, 1374 (2019)). In other words, Commerce assigns an antidumping rate based entirely on facts selected using an adverse inference, ignoring all of a respondent's information.

The court's jurisdiction lies under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2018). For the following reasons, the Final Determination is remanded to Commerce for further action in accordance with this Memorandum and Order.

BACKGROUND

The facts of this case unfolded against the backdrop of the COVID-19 global pandemic. On November 17, 2020, Commerce initiated an antidumping duty investigation of polyester textured yarn from Indonesia, covering the period from October 1, 2019, to September 30, 2020. *See Polyester Textured Yarn From Indonesia, Malaysia, Thailand, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 85 Fed. Reg. 74,680, 74,681 (Dep't of Commerce Nov. 23, 2020). Asia Pacific was selected as a mandatory respondent.

On December 7, 2020, Commerce issued its initial antidumping questionnaire to Asia Pacific. *See* Asia Pacific Initial Questionnaire (Dec. 7, 2020), PR 38. Section A of the questionnaire included questions about Asia Pacific's organization, accounting practices, markets, and merchandise. *Id.* at G-1. Sections B and C covered, respectively, the company's sales in the home market, i.e., Indonesia, and its sales in the United States. *Id.* at G-2. Section D asked for information regarding the company's cost of production, including its production process, financial accounting, and cost accounting. *Id.* at G-2, D-2.

Between December 2020 and February 2021, Asia Pacific filed four requests to extend the time to respond to Sections A, B, C, and D,[2] citing challenges presented by the pandemic. *See, e.g.*, Asia Pacific's Secs. B-D Extension Request (Jan. 11, 2021) at 2, PR 62 ("Preparation of the response is further complicated by the COVID-19 pandemic."); Asia Pacific's Third Sec. D Extension Request (Feb. 1, 2021) at 2, PR 77 ("Asia Pacific's chief accountant was out of the office for several weeks after contracting the COVID-19 virus, and was unable to assist with preparation of the Section D Response."). Commerce granted each of the requests, and the company filed its responses by the extended deadlines.[3]

Upon review of Asia Pacific's initial questionnaire responses, Commerce found that additional information was required to support the company's reported cost and sales data, including missing source

[2] *See* Asia Pacific's Sec. A Extension Request (Dec. 23, 2020), PR 51; Asia Pacific's Secs. B-D Extension Request (Jan. 11, 2021), PR 62; Asia Pacific's Second Sec. D Extension Request (Jan. 26, 2021), PR 72; Asia Pacific's Third Sec. D Extension Request (Feb. 1, 2021), PR 77.

[3] *See* Asia Pacific's Sec. A Quest. Resp. (Jan. 5, 2021), PR 57 & 58; Asia Pacific's Secs. B & C Quest. Resp. (Jan. 28, 2021), PR 76; Asia Pacific's Sec. D Quest. Resp. (Feb. 9, 2021), PR 81.

documentation. Commerce provided Asia Pacific with notice of the nature of these deficiencies and an opportunity to remedy or explain them by issuing supplemental questionnaires, pursuant to 19 U.S.C. § 1677m(d).[4] In total, Commerce issued six supplemental questionnaires.

Between February and May 2021, Asia Pacific sought six extensions of time to file responses to the supplemental questionnaires, again citing challenges presented by the pandemic.[5] *See, e.g.*, Asia Pacific's Extension Request (May 5, 2021) at 2, PR 156 ("[T]he top two company officials at [Asia Pacific] responsible for overseeing the company's responses to Commerce's questionnaires are currently stuck in India with no means to return to Indonesia. Due to the worsening COVID-19 pandemic in India, there are no outbound flights from India to Indonesia. Consequently, the company officials must also work and communicate remotely with their staff, which complicates the process to finalize the response."). Commerce granted each of the requests, and the company filed its responses by the extended deadlines.[6]

On May 26, 2021, Commerce issued its preliminary determination that subject merchandise was sold during the period of investigation at less than fair value. *See Polyester Textured Yarn From Indonesia*, 86 Fed. Reg. 29,742 (Dep't of Commerce June 3, 2021) ("Preliminary Determination") and accompanying Preliminary Decision Mem. (May 26, 2021) ("PDM"), PR 170. For the Preliminary Determination, Commerce relied on the information reported by Asia Pacific in its initial

[4] Section 1677m(d) states:

> If [Commerce] . . . determines that a response to a request for information . . . does not comply with the request, [Commerce] . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations . . . under this subtitle. If that person submits further information in response to such deficiency and either—
>
> (1) [Commerce] . . . finds that such response is not satisfactory, or
>
> (2) such response is not submitted within the applicable time limits,
>
> then [Commerce] . . . may, subject to subsection (e), disregard all or part of the original and subsequent responses.

19 U.S.C. § 1677m(d).

[5] *See* Asia Pacific's Extension Request (Feb. 22, 2021), PR 89; Asia Pacific's Extension Request (Mar. 17, 2021), PR 105; Asia Pacific's Extension Request (Mar. 23, 2021), PR 107; Asia Pacific's Extension Request (Apr. 15, 2021), PR 130; Asia Pacific's Extension Request (May 5, 2021), PR 156; Asia Pacific's Extension Request (May 14, 2021), PR 165.

[6] *See* Asia Pacific's First Suppl. Secs. A-C Quest. Resp. (Mar. 3, 2021), PR 95 & 96; Asia Pacific's Second Suppl. Secs. A-C Quest. Resp. (Apr. 26, 2021), PR 144; Asia Pacific's Third Suppl. Secs. A-C Quest. Resp. (May 19, 2021), PR 167; Asia Pacific's First Suppl. Sec. D Quest. Resp. (Mar. 30, 2021), PR 111; Asia Pacific's Second Suppl. Sec. D Quest. Resp. (May 11, 2021), PR 162; Asia Pacific's Third Suppl. Sec. D Quest. Resp. (June 22, 2021), PR 203.

and supplemental questionnaire responses that had been filed through May 19, 2021.[7] Based on the information placed on the record by Asia Pacific, Commerce calculated an individual preliminary antidumping margin for the company of 9.20%. *See* Preliminary Determination, 86 Fed. Reg. at 29,743.

Following the Preliminary Determination, Commerce conducted verification of the information on which it would rely to make its Final Determination. *See* 19 U.S.C. § 1677m(i)(1) (requiring that Commerce "shall verify all information relied upon in making . . . a final determination in an investigation"). Because of pandemic travel restrictions, verification did not take place on-site at Asia Pacific's offices in Indonesia, but rather by way of questionnaire. *See* Revised Quest. in Lieu of On-Site Verification (Aug. 4, 2021) ("Verification Questionnaire"), PR 217.

In the Verification Questionnaire, Commerce asked Asia Pacific to provide information and documents, including source documents, that would allow the Department to verify the company's reported sales and costs. For example, in the sales section, the questionnaire instructed Asia Pacific to perform traces of five reported home market sales and five reported U.S. sales. For each sale, Commerce asked for a sales-trace package, which included sales-related documents such as invoices, records of payments, and general ledger pages, as well as a detailed narrative explanation. *See* Verification Questionnaire at 4–5 ("Commerce officials should be able to follow the sales trace through from one page to the next, guided by annotations to the actual documents submitted and a thoroughly detailed narrative description."). Asia Pacific was asked to explain how each component of the reported sales information, e.g., in its sales databases, linked to source documents that were maintained in the normal course of the company's business. *Id.* Similarly, in the cost section of the Verification Questionnaire, Commerce instructed that "[a]ll worksheets and supporting documentation must be submitted with narrative responses that will allow the Commerce reviewer to follow the flow of supporting documentation to a worksheet and any adjustments necessary to calculate the submitted costs." *Id.* at 6.

Asia Pacific requested an extension to file its response to the Verification Questionnaire. *See* Asia Pacific's Extension Request (Aug. 10, 2021) at 2, PR 219 ("The continuation of the lockdown in Indonesia does not mean that the companies cannot respond to the questionnaire, but it does mean that it is a slow and laborious challenge that

[7] The third and final supplemental Section D questionnaire was issued after the publication of the Preliminary Determination. *See* Third Suppl. Sec. D Quest. (June 15, 2021), PR 197. Asia Pacific timely filed its response on June 22, 2021. *See* Asia Pacific's Third Suppl. Sec. D Quest. Resp. (June 22, 2021), PR 203.

requires more time than would ordinarily be the case."). Commerce extended Asia Pacific's deadline by one day.

On August 12, 2021, Asia Pacific timely filed its verification response. *See* Asia Pacific's Resp. Revised Quest. in Lieu of On-Site Verification (Aug. 13, 2021) ("Verification Response"), PR 221.

On August 31, 2021, three weeks after the Verification Response was filed, Commerce issued a briefing schedule for administrative case briefs. *See* Briefing Schedule (Aug. 31, 2021), PR 223; *see also* 19 C.F.R. § 351.309(c)(1)-(2) ("Any interested party or U.S. Government agency may submit a 'case brief,'" and "[t]he case brief must present all arguments that continue in the *submitter's view* to be relevant to the Secretary's final determination." (emphasis added)). Affirmative case briefs were due on September 7, 2021.

The September 7 deadline came and went, and Asia Pacific did not submit an affirmative case brief. It is important to note that, by that point in the proceeding, Commerce had not reported its verification results by way of a verification report, phone call, or any other method.[8] *See* 19 C.F.R. § 351.307(c) ("The Secretary will report the methods, procedures, and results of a verification under this section prior to making a final determination in an investigation or issuing final results in a review."). Indeed, Commerce never produced a verification report. Thus, news of the deficiencies and results of verification would come only in the Final Determination, i.e., well after the deadline for filing affirmative case briefs. *See id.* § 351.309(c)(2) ("The case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's *final determination*." (emphasis added)).

On October 18, 2021, Commerce issued the Final Determination. Based on deficiencies in Asia Pacific's Verification Response, Commerce found, for the first time, that the use of facts available was required under 19 U.S.C. § 1677e(a). *See* Final AFA and Selection of AFA Rate for PT. Asia Pacific Fibers Tbk (Oct. 18, 2021), PR 238, CR 284. This was a departure from the Preliminary Determination, in which Commerce had used Asia Pacific's reported information to calculate an antidumping rate for the company.

[8] Defendant-Intervenors filed an affirmative case brief, urging Commerce to apply adverse facts available in the Final Determination. They argued that Asia Pacific had failed to provide requested sales and cost information in its Verification Response. *See* Pet'rs' Admin. Case Br. (Sept. 10, 2021), PR 228. They did not argue for adverse facts available based on verification failures as reported by Commerce. Defendant-Intervenors, of course, were as unaware as Plaintiff that Plaintiff had failed verification. Asia Pacific filed a rebuttal to Defendant-Intervenors' case brief, in which the company argued that the use of adverse facts available, based solely on its Verification Questionnaire answers, was not warranted. *See* Asia Pacific's Admin. Rebuttal Br. (Sept. 21, 2021), PR 235.

In particular, Commerce found deficiencies in the sales and costs sections of Asia Pacific's Verification Response, regarding source documents. Regarding sales, Commerce found that the company: "(1) submitted untranslated documents, (2) submitted illegible documents, (3) failed to provide documentation to support its spreadsheets used in the calculation of inventory carrying costs, and (4) provided supporting documentation for packing expenses that did not reconcile with the reported packing expenses." Final IDM at 6–7.

Regarding Asia Pacific's cost verification response, Commerce found that Asia Pacific:

> (1) failed to provide necessary supporting information, from its production and accounting systems, for the cost of intermediate raw material inputs detailed on its "cost allocation summary" worksheet, the reported per-unit chip[9] costs, and the reported machine speeds, (2) failed to account for cost differences associated with four of the product characteristics defined by Commerce, and (3) failed to provide various other requested cost data related to its reported per-unit costs.

Id. at 7. In other words, for Commerce, because of flaws in the Verification Response regarding both sales and costs, neither Asia Pacific's sales nor its costs could be verified. Thus, "[b]ecause Asia Pacific did not provide complete, reliable, and verifiable information in its verification questionnaire response," the Department found, it "must use facts available to determine Asia Pacific's dumping margin." *Id*.

In the Final IDM, Commerce cited the statutory triggers for the use of facts otherwise available, including § 1677e(a)(2)(D), which provides that if an interested party or any other person "provides . . . information [requested by Commerce] but the information cannot be verified," Commerce shall use "facts otherwise available." 19 U.S.C. § 1677e(a)(2)(D); *see* Final IDM at 7 (citing 19 U.S.C. § 1677e(a)(1), (2)(A)-(D)).

Additionally, Commerce found, again for the first time, that the use of adverse inferences under 19 U.S.C. § 1677e(b) was justified because Asia Pacific had not cooperated "to the best of its ability" to provide the information requested in the Verification Questionnaire. Based on the flaws Commerce found in the Verification Response, the Department found "that Asia Pacific's failures have led us to conclude that the company failed to cooperate to the best of its ability and thus

[9] Polyester "chips" are the main raw material in "partially oriented yarn" and "spin drawn yarn," which in turn are used to make "drawn textured yarn," the subject merchandise here. *See* Asia Pacific's First Suppl. Secs. A-C Quest. Resp. (Mar. 3, 2021) at 15, PR 95.

[the Department would] use an adverse inference in selecting from among the facts otherwise available." Final IDM at 7.

Ultimately, Commerce disregarded all of Asia Pacific's sales and cost information, using in its place adverse facts available, and assigned the company an antidumping rate of 26.07%, the highest rate in the petition. *Id.* at 8.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Verification procedures are reviewed for an abuse of discretion. *See Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997) ("[W]e review verification procedures employed by Commerce in an investigation for abuse of discretion.").

LEGAL FRAMEWORK

Under the antidumping statute, Commerce determines if goods are being sold, or are likely to be sold, in the United States at less than fair value by finding the amount by which normal value exceeds export price or constructed export price. *See* 19 U.S.C. § 1673. The margin between the two is used to calculate an antidumping duty rate. *Id.* § 1677(35)(A).

Subsection 1677m(i) of the statute requires that Commerce "shall verify all information relied upon in making . . . a final determination in an investigation." 19 U.S.C. § 1677m(i)(1); *see also* 19 C.F.R. § 351.307(b)(1)(i) ("[T]he Secretary will verify factual information upon which the Secretary relies in: . . . [a] final determination in a[n] . . . antidumping investigation."). "The purpose of verification is 'to test information provided by a party for accuracy and completeness.'" *Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1343–44 (Fed. Cir. 2021) (quoting *Micron Tech.*, 117 F.3d at 1396).

Commerce has established some verification procedures by regulation, among them the issuance of a verification report. *See* 19 C.F.R. § 351.307(a) ("This section clarifies when verification will occur, the contents of a verification report, and the procedures for verification."). "Pursuant to 19 C.F.R. § 351.307(c), whenever Commerce conducts verification it is required to prepare a verification report, which must contain 'the methods, procedures, and results of a verification.'" *Since Hardware (Guangzhou) Co. v. United States*, 35 CIT 1670, 1680 (2011) (not reported in Federal Supplement) (quoting 19 C.F.R. § 351.307(c)).

The regulations do not set a specific deadline for the verification report, but Commerce must issue the report "prior to making a final

determination in an investigation." 19 C.F.R. § 351.307(c) ("The Secretary will report the methods, procedures, and results of a verification under this section prior to making a final determination in an investigation . . . ."); *see also Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,338 (Dep't of Commerce May 19, 1997) (notice of final rule) ("Because the Department's standard practice is to issue verification reports and require service of verification exhibits as soon as possible after verification, the Department does not believe that specific regulatory deadlines are necessary.").

Issuance of the report before Commerce has made its final determination allows an interested party to consider and comment on the report when preparing its administrative case brief, which "must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination." 19 C.F.R. § 351.309(c)(2). In other words, the timing of the report is important because it gives the petitioner and the respondent the opportunity, by way of a case brief, to make their final arguments on "the methods, procedures, and results of a verification." *Id.* § 351.307(c).

Verification failures have real consequences for a party in an antidumping investigation. For example, if "information cannot be verified as provided in section 1677m(i)," or one of the other enumerated statutory triggers occurs, Commerce must use "facts otherwise available" when determining the party's antidumping duty rate:

> If—
>
> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person—
>
> (A) withholds information that has been requested by [Commerce] . . . ,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, . . .
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) *provides such information but the information cannot be verified as provided in section 1677m(i) of this title*,
>
> [Commerce] . . . shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a) (emphasis added). Thus, where there are factual gaps in the administrative record, for example because a party withholds information, or information cannot be verified, Commerce must fill that gap with facts otherwise available on the record.

Additionally, where Commerce determines that the use of facts available is warranted, it may apply adverse inferences to those facts when selecting from among the facts available, if it makes the requisite additional finding that that party "has failed to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* § 1677e(b)(1).

The application of adverse facts available, then, is a two-step process. "The focus of subsection (a) is respondent's *failure to provide information*," creating a gap in the administrative record. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). "The reason for the failure is of no moment." *Id.* "As a separate matter, subsection (b) permits Commerce to 'use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available,' *only if* Commerce makes the separate determination that the respondent 'has failed to cooperate by not acting to the best of its ability to comply.'" *Id.* (alteration in original) (emphasis added). "The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability,* not its failure to provide requested information." *Id.* That is, only after Commerce has determined that there is information missing, creating a gap in the record, can it apply an adverse inference when selecting from among the facts otherwise available.

At all times, the purpose of the statute is to determine an accurate antidumping margin for a respondent when one is warranted. *See Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1224, 1234 (2021) (citing *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) ("An overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible.")).

DISCUSSION

For purposes of this Memorandum and Order, it is useful to keep in mind that all activity having to do with verification took place during the COVID-19 global pandemic. It is with this in mind that the court will consider both the legality and the reasonableness of the actions of both Plaintiff and Commerce.

Plaintiff's main argument is that Commerce's chosen verification procedure—to use solely the Verification Questionnaire to verify Asia Pacific's reported information—is unreasonable. Plaintiff points to Commerce's failure to comply with its own regulatory obligation to "report the methods, procedures, and results" of verification prior to the Final Determination, and argues that "[h]ad Commerce issued a

verification report, Asia Pacific would have had an opportunity to comment on the agency's findings and this appeal may have not been necessary." Pl.'s Br. at 17; *see* 19 C.F.R. § 351.307(c) ("The Secretary will report the methods, procedures, and results of a verification under this section prior to making a final determination in an investigation or issuing final results in a review."). In addition, Plaintiff argues that Commerce failed, under § 1677m(d), to provide Asia Pacific with notice of the nature of the deficiencies in its Verification Response, and an opportunity to remedy or explain those deficiencies, prior to using adverse facts available in the Final Determination. *See* Pl.'s Br. at 13 ("Commerce did not comply with 19 U.S.C. § 1677m(d), which requires it to provide a respondent with notice of deficient responses (the [Verification Questionnaire] constitutes a questionnaire like any other), and an opportunity to remediate the record, before deciding to rely on facts available.").

Commerce argues that the court should not consider Plaintiff's claims because Asia Pacific failed to exhaust its administrative remedies regarding its verification arguments. *See* Def.'s Br. at 13, 21; *see also* Def.-Ints.' Br. at 10. For Commerce, by failing to raise its objection to the verification procedure at the agency level, including by failing to file an affirmative case brief, Asia Pacific deprived the Department of an opportunity to consider and address it in the Final Determination. *See* Def.'s Br. at 15–17 ("[Asia Pacific] failed to raise its newly found objection to Commerce's verification during the investigation even though it had many opportunities to do so.").

Commerce further argues that even if the court were to consider Plaintiff's arguments regarding the verification procedure, the court must reject them. For Commerce, the failure to issue a verification report was a permissible exercise of discretion, arguing that "[a] formal verification report is not necessary when all verification questionnaires and responses were placed directly on the record." Def.'s Br. at 17. In other words, for Commerce, there was "no substantial prejudice to any party" because "[t]he verification questionnaire, [Asia Pacific]'s responses, and the detailed final determination addressing these responses were reported on the administrative record and were transparent." *Id.* Commerce also argues that Plaintiff's § 1677m(d) argument lacks merit, citing a recent ruling by this Court:

> To the extent that [Asia Pacific] argues that it was unfairly denied an opportunity to cure verification deficiencies with further explanation or corrective information, this Court has construed 19 U.S.C. § 1677m(d), providing for an opportunity to cure deficiencies, as inapplicable to deficiencies discovered at verification, and that "[v]erification represents a point of no

> return" – that is, verification is not intended as an opportunity to submit new factual information.

Def.'s Br. at 20 (first citing *Hung Vuong Corp. v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1321, 1355 (2020); and then citing *Goodluck India*, 11 F.4th at 1343–44).

The court finds that the doctrine of exhaustion of administrative remedies does not bar it from considering whether Commerce's verification procedure was reasonable. By statute, this Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). Normally, the failure to include an "argument in a case brief is a failure to exhaust administrative remedies with respect to that argument because it 'deprives [Commerce] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.'" *Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT 533, 546, 616 F. Supp. 2d 1354, 1366 (2009) (quoting *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946))).

Where, however, Commerce does not address an issue until its final determination, or fails to follow legal requirements intended to put parties on notice of Commerce's findings prior to making its final determination, this Court has found that Commerce unreasonably deprived the parties of a fair opportunity to raise their objections or comments, and thus, that the exhaustion doctrine did not bar the parties from making their arguments for the first time before the Court.

For example, in *Qingdao Taifa Group Co. v. United States*, Taifa, the mandatory respondent in an administrative review, received an individual rate of 3.82% in the preliminary results, only later to learn, for the first time in the final results, that it was being assigned the China-wide rate of 383.60% based on adverse facts available. *See* 33 CIT 1090, 1093, 637 F. Supp. 2d 1231, 1236 (2009). In that case, Commerce issued a verification report, the information in which ultimately formed the basis of the Department's decision to apply adverse facts available to Taifa. But the report itself did not conclude that Commerce would apply adverse facts available or assign Taifa the China-wide rate. *Id.* at 1093 n.1, 637 F. Supp. 2d at 1236 n.1. Although Taifa did not file an affirmative or rebuttal case brief, the *Qingdao Taifa* Court held that Taifa was not barred by the exhaustion doctrine from challenging the use of adverse facts available: "Because the *Preliminary Results* were favorable to Taifa, and Commerce did not address the [adverse facts available] issue until after the deadline for case briefs or the [China]-wide rate issue until the

Final Results, Taifa did not have a fair opportunity to challenge these issues at the administrative level." *Id.* at 1093, 637 F. Supp. 2d at 1236–37 ("A party . . . may seek judicial review of an issue that it did not raise in a case brief if Commerce did not address the issue until its final decision, because in such a circumstance the party would not have had a full and fair opportunity to raise the issue at the administrative level.").

Likewise, the Court in *Jacobi Carbons AB v. United States* found that the exhaustion doctrine did not preclude judicial review where, in the final results, after case briefs were filed, Commerce changed the primary surrogate country from Thailand to the Philippines, reasoning that the plaintiffs could not have predicted that change and thus "had no realistic opportunity to present their arguments before the Department." 38 CIT __, __, 992 F. Supp. 2d 1360, 1367 (2014), *aff'd*, 619 F. App'x 992 (Fed. Cir. 2015).

These cases are instructive with respect to what happened here. Commerce conducted verification by issuing a single Verification Questionnaire on August 4, 2021, and receiving the Verification Response from Plaintiff on August 12, 2021. As noted, Commerce did not issue a verification report after verification was complete. Affirmative case briefs were due on September 7, 2021, but in the absence of a verification report, Plaintiff was unaware that it had failed verification by that date or that adverse facts available would be used in place of all of the information it had reported.

Indeed, it was not until the Final Determination was issued on October 18, 2021, that Commerce announced its finding that Asia Pacific's Verification Response was deficient and that the Department would use adverse facts available in place of the company's reported information—a change from its Preliminary Determination. *See* Pl.'s Reply Br. at 4 ("[Asia Pacific] had no inkling until issuance of the final determination that Commerce would view its [Verification Response] as deficient. [The company] could neither have anticipated the issuance of adverse facts available nor the reasons that Commerce would state in support thereof."). Put another way, Asia Pacific's counsel did not learn, until the Final Determination was published, that its client had failed verification and would be subject to an adverse facts available rate that raised the company's preliminary rate of 9.20% to the final rate of 26.07%. Under the circumstances, it was not unreasonable for counsel to decline to put its client to the expense of filing an affirmative case brief that could not have discussed matters of which they were unaware.

Commerce gives no real explanation in its papers for why it did not follow the regulation and provide the parties with a verification re-

port. In the absence of the verification report, Asia Pacific did not have a "full and fair opportunity to raise the issue [of the reasonableness of Commerce's verification procedure] at the administrative level." *Qingdao Taifa*, 33 CIT at 1093, 637 F. Supp. 2d at 1236 (citation omitted). Thus, the court finds that Asia Pacific's failure to raise its verification argument in a case brief does not bar judicial review.

Next, the court finds that the failure to produce a verification report was unlawful and that the verification procedure employed in this case was unreasonable and an abuse of discretion. *See Micron Tech., Inc.*, 117 F.3d at 1396. Thus, remand is appropriate.

Here, the COVID-19 global pandemic both prevented Commerce from conducting an on-site verification and hindered Plaintiff from accessing the information needed to answer the Verification Questionnaire. The reasonableness of each party's actions must be judged taking into account the extraordinary circumstances resulting from the pandemic. As noted, Commerce gave no real reason in its papers for not producing a verification report. Even taking into account the pandemic, Commerce's failure to issue a verification report prior to the Final Determination, pursuant to 19 C.F.R. § 351.307(c), was a violation of law because it violated its own regulations and unfair because it did not give Plaintiff a reasonable opportunity to address Commerce's findings in its case brief. *See Since Hardware*, 35 CIT at 1682 ("It is a familiar rule of administrative law that an agency must abide by its own regulations." (quoting *Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 654 (1990))). Had Commerce followed its regulations and issued a verification report, Asia Pacific would have been apprised of the deficiencies that Commerce found in the Verification Response and could have commented on Commerce's verification findings. *See SKF USA Inc. v. United States*, 29 CIT 969, 979–80, 391 F. Supp. 2d 1327, 1336 (2005) ("Part of Commerce's responsibility in making accurate antidumping determinations is to ensure that the parties[] have notice of Commerce's decisions and be permitted to comment on its methodology and analysis." (citing *NEC Corp. v. United States*, 151 F.3d 1361, 1374 (Fed. Cir. 1998))).

While not precisely on point, a recent Federal Circuit case found that fairness may require that a respondent be afforded a reasonable opportunity to address deficiencies turned up by Commerce at verification. *See Hitachi Energy USA Inc. v. United States*, 34 F.4th 1375, 1384–85 (Fed. Cir. 2022), *modified on denial of reh'g*, No. 20–2114, 2022 WL 17175134 (Fed. Cir. Nov. 23, 2022). This case demonstrates that, at least under some circumstances, a respondent must be given the opportunity to address claimed verification failings.

In the absence of a verification report, Plaintiff was blindsided by the adverse facts available finding in the Final Determination. Asia Pacific could not have predicted that Commerce would change its position from the Preliminary Determination to the Final Determination with respect to using the company's reported information, and thus was not in a position to "present all arguments that continue[d] in [Asia Pacific]'s view to be relevant to the Secretary's final determination." 19 C.F.R. § 351.309(c)(2).

Moreover, Commerce's other actions were unreasonable under the circumstances. When Commerce conducts an on-site verification, it normally gives the respondent an opportunity to go to its file cabinets and produce some information—e.g., backup invoices. Because Commerce neither prepared a verification report nor sent a supplemental verification questionnaire, it is impossible to know whether Plaintiff could have addressed Commerce's questions in its case brief or produced the kind of evidence normally produced at on-site verification, and thus avoid the application of adverse facts available. The special circumstances of the pandemic prevented an on-site verification. The circumstances did not, though, prevent the sending of a supplemental verification questionnaire.

As previous cases have held, prior to any final determination a respondent must be given a fair opportunity to comment on a change in Commerce's position of which it was not aware, particularly when the change in position results in a wholesale change in the outcome. *See Jacobi Carbons*, 38 CIT at __, 992 F. Supp. 2d at 1367 ("[A] party 'is not required to predict that Commerce would accept other parties' arguments and change its decision.'" (quoting *Qingdao Taifa*, 33 CIT at 1093, 637 F. Supp. 2d at 1237)). This is true particularly taking into account the extraordinary circumstances presented by the pandemic.

The result of Commerce's finding that Plaintiff failed verification and the application of adverse facts available was an increase in Asia Pacific's final antidumping rate by nearly 200% of the rate determined in the Preliminary Determination—not an insignificant increase. Though Plaintiff asks the court to remand this case to Commerce with instructions to conduct an on-site or remote verification, this remedy is not necessary. All that is necessary here is that, on remand, Commerce report the "methods, procedures, and results" of verification as provided under 19 C.F.R. § 351.307(c) and provide (1) Asia Pacific a reasonable opportunity to place information on the record addressing any deficiencies found by Commerce; and (2) all parties the opportunity to file case briefs that "present all arguments that continue," in the party's view, "to be relevant to the Secretary's

final determination," as provided under 19 C.F.R. § 351.309(c)(2). Commerce shall then reconsider its Final Determination accordingly.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that this case is remanded for Commerce to comply in all respects with this Memorandum and Order and to support and explain its findings with substantial evidence on the record; it is further

ORDERED that, on remand, Commerce must prepare a verification report of the "methods, procedures, and results" of verification as provided under 19 C.F.R. § 351.307(c), and provide (1) Asia Pacific a reasonable opportunity to place information on the record addressing any deficiencies found by Commerce; and (2) all parties the opportunity to file case briefs that "present all arguments that continue," in the party's view, "to be relevant to the Secretary's final determination," as provided under 19 C.F.R. § 351.309(c)(2); it is further

ORDERED that, on remand, Commerce shall reconsider its Final Determination, including its finding that the use of adverse facts available was warranted, taking into account any information and arguments that the parties present as relevant to Commerce's Final Determination; it is further

ORDERED that the remand results are due ninety (90) days after Commerce has received the parties' information and case briefs; any comments on the remand results shall be due thirty (30) days following the filing of the remand results; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments; and it is further

ORDERED that Commerce shall file a status report with the court on or before March 12, 2024.

Dated: December 12, 2023
New York, New York

/*s*/ *Richard K. Eaton*
JUDGE

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