U.S. Customs and Border Protection

19 CFR PART 177

REVOCATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF SODIUM BICARBONATE CARTRIDGES/BAGS

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

ACTION: Notice of revocation of two ruling letters, and of revocation of treatment relating to the tariff classification of sodium bicarbonate cartridges/bags.

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 revoking two ruling letters concerning tariff classification of sodium bicarbonate cartridges/bags under the Harmonized Tariff Schedule of the United States (HTSUS). 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. 55, No. 47, on December 1, 2021. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 20, 2023.

FOR FURTHER INFORMATION CONTACT: Michele A. Boyd, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0136.

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. 55, No. 47, on December 1, 2021, proposing to revoke two ruling letters pertaining to the tariff classification of sodium bicarbonate cartridges/bags. 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 New York Ruling Letter ("NY") N276739, dated July 12, 2016, and Headquarters Ruling Letter ("HQ") 957022, dated January 24, 1995, CBP classified sodium bicarbonate cartridges/bags in heading 2836, HTSUS, specifically in subheading 2836.30.00, HTSUS, which provides for "Carbonates; peroxocarbonates (percarbonates); commercial ammonium carbonate contain." CBP has reviewed NY N276739 and HQ 957022 and has determined the ruling letters to be in error. It is now CBP's position that sodium bicarbonate cartridges/bags are properly classified in heading 3004, HTSUS, specifically in subheading 3004.90.92, HTSUS, which provides for "Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in the forms or packings for retail sale: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N276739 and HQ 957022 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ

H312631, set forth as an attachment 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*.

ANDREW M. LANGREICH
For:
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H312361
OT:RR:CTF:CPMMA H312361 MMM/MAB
CATEGORY: Classification
TARIFF NO.: 3004.90.92

MR. ROBERT SILVERMAN
GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN & KLESTADT, LLP
399 PARK AVENUE
25TH FLOOR
NEW YORK, NY 10022–4877

RE: Revocation of NY N276739 and HQ 957022; Classification of sodium bicarbonate cartridges/bags

DEAR MR. SILVERMAN:

This is in reference to New York Ruling Letter (NY) N276739, issued to you by U.S. Customs and Border Protection (CBP) on July 12, 2016, concerning classification of a "Bibag" from France, under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed that decision, and determined that it is incorrect, and for the reasons set forth below, are revoking your ruling.

We have also reviewed Headquarters Ruling (HQ) 957022, dated January 24, 1995, and for similar reasons set forth below, are revoking that ruling.

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. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the *Customs Bulletin*, Volume 55, No. 47, on December 1, 2021. One comment, which is addressed below, was received in response to this notice.

FACTS:

In NY N276739, CBP described the subject merchandise, a "Bibag," as follows:

> [T]he product at issue consists of a polyamide/polyethylene bag filled with sodium bicarbonate powder. The "Bibag" is secured to a "Bibag" connector for use with a hemodialysis machine. The sodium bicarbonate is automatically mixed with water to produce a saturated solution, which is used for hemodialysis. The "Bibag" is available in both 650 gram and 900 gram sizes. Your submission indicates that sodium bicarbonate power is the only substance contained in the disposable polyamide/polyethylene bag.

Additionally, in HQ 957022, CBP described the subject merchandise as follows:

> The merchandise consists of "BiCart Column" cartridges, designed for use solely with dialysis machines. The cartridges are comprised of a specially shaped polypropylene cartridge containing 650 grams of sodium bicarbonate powder. They are imported in packages of ten units and are designed for one time use only. When attached to a special holder affixed to the kidney dialysis machine, the cartridge allows "online" production of the liquid bicarbonate concentrate required for dialysis.

In both rulings, CBP classified the merchandise in heading 2836, HTSUS, as a carbonate.

ISSUE:

Whether the bicarbonate cartridges/bags are classified in heading 2836, HTSUS, as a "carbonate," heading 3004, HTSUS, as "Medicaments."

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 2(a) provides, in relevant part, that "[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished articles has the essential character of the complete or finished article."

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The 2023 HTSUS provisions under consideration are as follows:

2836: Carbonates; peroxocarbonates (percarbonates); commercial ammonium carbonate containing ammonium carbamate:

3004: Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale[.]

Note 2 to Section VI provides as follows:

> Subject to Note 1 above, goods classifiable in heading 30.04, 30.05, 30.06, 32.12, 33.03, 33.04, 33.05, 33.06, 33.07, 35.06, 35.07 or 38.08 by reason of being put up in measured doses or for retail sale are to be classified in those headings and in no other heading of the Nomenclature.

Note 3 to Chapter 30 provides as follows:

> 3. For the purposes of headings 3003 and 3004 and of note 4(d) to this chapter the following are to be treated—
>
> (a) As unmixed products:
>
> (2) All goods of chapter 28 or 29; and

Explanatory Notes 30.04 provides as follows:

> This heading covers medicaments consisting of mixed or unmixed products, provided they are:
>
> (a) Put up in measured doses or in forms such as tablets, ampoules, capsules, cachets, drops or pastilles, medicaments in the form of transdermal administration systems, or small quantities of powder, ready for taking as single doses for therapeutic or prophylactic use.
>
> (b) In packings for retail sale for therapeutic or prophylactic use. This refers to products (for example, sodium bicarbonate and tamarind powder) which, because of their packing and, in particular, the presence of appropriate indications (statement of disease or condition for which they are to be used, method of use or application, statement of dose, etc.) are clearly intended for sale directly to users (private persons, hospitals, etc.) without repacking, for the above purposes.
>
> These indications (in any language) may be given by label, literature or otherwise. However, the mere indication of pharmaceutical or other degree of purity is not alone sufficient to justify classification in this heading.

There is no question that the sodium bicarbonate is a medicament consisting of unmixed products for therapeutic or prophylactic uses, therefore the issue is to determine within which heading it is properly classified. The subject merchandise is *prima facie*, classifiable in heading 2836.30, HTSUS, as sodium bicarbonate. However, as described in the EN 30.04, when used for therapeutic or prophylactic purposes and packed in a way that indicates such use, an unmixed product like sodium bicarbonate can be *prima facie*, classifiable in heading 3004, HTSUS.

When merchandise is *prima facie* classifiable under two or more headings or subheadings of the HTSUS, we apply GRI 3 to resolve the classification. *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1251 (Fed. Cir. 2004). GRI 3(a) states that "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description."[1] "Under this so-called rule of relative specificity, we look to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998).

Additionally, in determining which of the two headings at issue is more specific, courts have held that the general rule of customs jurisprudence is that "in the absence of legislative intent to the contrary, a product described by both a use provision and an *eo nomine* provision is generally more specifically provided for under the use provision." *Orlando Food Corp., 140 F. 3d at 1441* (quoting *United States v. Siemens Am., Inc.*, 653 F. 2d 471, 477 (C.C.P.A. 1981)). However, this rule is not mandatory, and only provides a "convenient rule of thumb for resolving issues where the competing provisions are otherwise in balance." *United States v. Carl Zeiss*, 195 F. 3d 1375, 1380 (Fed. Cir. 1999) (quoting *United States v. Siemens Am., Inc.*, 653 F.2d at 478 n. 6); see also *Totes Inc. v. United States*, 69 F. 3d 495, 500 (Fed. Cir. 1995). This rule of thumb was only applicable where the alternative competing provisions were "in balance" or equally descriptive of the article being classified. Orlando Food Corp., 140 F. 3d at 1441.

[1] General Rules of Interpretation (GRI) 3(a).

Following *Orlando*, *supra*, the subject merchandise is more specifically classified in heading 3004, HTSUS. The subject merchandise is more intricate than general use sodium bicarbonate and heading 3004, HTSUS, describes the merchandise with the most accuracy, as it not only describes the "components," but provides for the use and packing of the merchandise. As a use provision, heading 3004, HTSUS, is more specific for sodium bicarbonate packaged for direct use in the dialysate solution which will correct metabolic acidosis in the treatment of kidney failure.

While NY N276739 and HQ 957022 reference GRI 5(b) as follows, GRI 5(b) is irrelevant to the subject merchandise.[2]:

> The polyamide/polyethylene bags are merely single-use, disposable containers for the conveyance and storage of the sodium bicarbonate powder, even if they are specially shaped to be connected for use with a hemodialysis machine, it does not alter the classification of the good pursuant to GRI 1. *See* NY N276739, dated July 12, 2016.
>
> The cartridge themselves are merely containers for the conveyance and storage of the sodium bicarbonate, even if they are specially shaped in order to be incorporated in a dialysis machine. Goods are almost always transported in some form of container or package. However, even if that package is specially shaped, it does not alter the classification of the good pursuant to GRI 1. *See* HQ 957022, dated January 24, 1995.

The subject merchandise is classifiable under heading 3004, HTSUS, by application of GRI 1. The language in heading 3004, HTSUS, as well as the ENs to heading 3004, HTSUS, provide guidance to the type of specific packaging required by heading 3004, HTSUS.

In the comment we received, the commenter agreed with CBP's GRI 1 and 3(a) analysis and CBP proposed revocation of NY N276739 and HQ 957022.

Thus, subject merchandise is classified in heading 3004, HTSUS.

HOLDING:

By application of GRIs 1 and 3(a) the sodium bicarbonate bags/cartridges are classified in heading 3004, HTSUS, specifically in subheading 3004.90.92, HTSUS, which provides for: "Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale: Other: Other." The 2023 column one general rate of duty for subheading 3004.90.92, HTSUS, is Free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at https://hts.usitc.gov/current.

EFFECT ON OTHER RULINGS:

NY N276739, dated July 12, 2016, and HQ 957022, dated January 24, 1995, are hereby REVOKED in accordance with the above analysis.

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

---

[2] NY N276739, dated July 12, 2016, and HQ 957022, dated January 24, 1995, did not consider classification under heading 3004.

Sincerely,

ANDREW M. LANGREICH
For:

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 23–84

JIANGSU ZHONGJI LAMINATION MATERIALS CO., (HK) LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, and ALUMINUM ASSOCIATION TRADE ENFORCEMENT WORKING GROUP AND ITS INDIVIDUAL MEMBERS, et al., Defendant-Intervenors.

Court No. 21–00138
Before: M. Miller Baker, Judge

[The court denies Plaintiffs' motion for judgment on the agency record, sustains the Department of Commerce's determination, and grants judgment on the agency record to Defendant and Defendant-Intervenors.]

Dated: June 7, 2023

Jeffrey S. Grimson, *Sarah M. Wyss*, *Bryan P. Cenko*, and *Wenhui "Flora" Ji*, Mowry & Grimson, PLLC, of Washington, DC, on the papers for Plaintiffs.

Brian M. Boynton, Acting Assistant Attorney General; *Patricia M. McCarthy*, Director; *Reginald T. Blades, Jr.*, Assistant Director; and *Catharine M. Parnell*, Trial Attorney, Civil Division, U.S. Department of Justice of Washington, DC, on the papers for Defendant. Of counsel for Defendant was *JonZachary Forbes*, Staff Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

John M. Herrmann, *Paul C. Rosenthal*, *Joshua R. Morey*, and *Grace W. Kim*, Kelley Drye & Warren LLP of Washington, DC, on the papers for Defendant-Intervenors.

OPINION

Baker, Judge:

A Chinese aluminum foil producer challenges the Department of Commerce's imposition of antidumping duties in an administrative review based on the Department's calculation of surrogate values, denial of a double remedies adjustment, and liquidation instructions. Finding it supported by substantial evidence, the court sustains the determination.

I

A

An antidumping duty represents the amount by which the "normal value" of subject merchandise exceeds its "export price." 19 U.S.C. § 1673. If an investigation involves a non-market economy such as China, then Commerce determines normal value using surrogate

values for "the factors of production utilized in producing the merchandise," along with "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* § 1677b(c)(1).

"In selecting surrogate values, Commerce 'attempts to construct a hypothetical market value of [the subject merchandise] in the [nonmarket economy].' " *Changzhou Trina Solar Energy Co. v. United States*, 975 F.3d 1318, 1330 (Fed. Cir. 2020) (first alteration in original) (quoting *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1375 (Fed. Cir. 2015)). The Department values factors of production, "to the extent possible," using data from surrogate countries that have market economies and that are (A) "at a level of economic development comparable to that of the nonmarket economy country," and (B) "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4)(A)–(B).

By statute, the Department must value factors of production using the "best available information regarding the values of such factors in a market economy country or countries considered" appropriate. *Id.* § 1677b(c)(1); *see also Seah Steel VINA Corp. v. United States*, 950 F.3d 833, 842 (Fed. Cir. 2020); *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1268 (CIT 2006). Because the statute is silent about what constitutes the "best available information," Commerce has "broad discretion" in deciding what record evidence meets the criteria. *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011); *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). "Commerce's analysis when selecting the 'best available information' on the record inherently involves a comparison of the competing data sources to identify what available information is 'best' to value factors of production . . . ." *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1367 (Fed. Cir. 2019) (citing 19 U.S.C. § 1677b(c)(1)); *see also Ass'n of Am. Sch. Paper Suppliers v. United States*, 716 F. Supp. 2d 1329, 1334 (CIT 2010).

In practice, the Department selects surrogate values that are product-specific, representative of a broad market average, publicly available, contemporaneous with the review period, and exclusive of tax and duty. *See* Import Administration Policy Bulletin 04.1, *Non-Market Surrogate Country Selection Process* at 4 (Mar. 1, 2004) (Policy Bulletin);[1] *Jiaxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1294 (Fed. Cir. 2016) (citing 19 C.F.R. § 351.408(c)(2)); *see also Changzhou Trina Solar*, 975 F.3d at 1331.

[1] http://enforcement.trade.gov/policy/bull04–1.html. The pincite above is to a .PDF printout of the Policy Bulletin webpage.

Commerce's data need not be perfect. *Jiaxing*, 822 F.3d at 1301. And the Department need not duplicate a manufacturer's precise experience. *See Nation Ford*, 166 F.3d at 1377. Instead, it seeks information that "most accurately represents the fair market value." *Id.* at 1377.

B

The antidumping statute requires the Department to avoid imposing a double remedy when it simultaneously imposes countervailing duties and antidumping duties based on its non-market economy calculation methodology. *See* 19 U.S.C. § 1677f-1(f). This issue arises in non-market economy cases because the use of surrogate values—that is, values from countries other than the non-market economy country at issue—means that a countervailable subsidy "is not embedded in the price used as normal value. Consequently, the subsidy could potentially be remedied both by the [countervailing duty] and by the [antidumping duty]." *Vicentin S.A.I.C. v. United States*, 404 F. Supp. 3d 1323, 1339 n.26 (CIT 2019).

In applying § 1677f-1(f), the Department examines (1) whether a countervailable subsidy has been provided; (2) whether that subsidy has been shown to have reduced the average price of imports during the relevant period; and (3) whether Commerce can reasonably estimate the extent to which that countervailable subsidy, in combination with the use of normal value determined under 19 U.S.C. § 1677b(c), has increased the weighted-average dumping margin for the class or kind of merchandise. Appx02468 (citing 19 U.S.C. § 1677f-1(f)(1)(A)–(C)). For a subsidy meeting these criteria, the statute requires the Department to reduce the antidumping rate by the estimated amount of the increase in the weighted-average dumping margin, subject to a specified cap. *Id*. (citing 19 U.S.C. § 1677f-1(f)(1)–(2)).

II

A

In 2019, Commerce opened the first administrative review of duties on aluminum foil from China covering November 2, 2017, through March 31, 2019. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 27,587, 27,589 (Dep't Commerce June 13, 2019), Appx25964, Appx25966. The Department selected two mandatory respondents: (1) Jiangsu Zhongji Lamination Materials Co., (HK) LTD (Zhongji); and (2) Xiamen Xiashun Aluminum Foil Co. *See* Appx02464.

Zhongji submitted surrogate value comments recommending that the aluminum dross/ash produced as a byproduct in its aluminum foil production process should be classified under Harmonized Tariff Schedule (HTS) heading 7602.00.19. Appx28870. It also recommended classifying rolling oil and rolling oil additive it uses in its production of aluminum foil under HTS 2710.12.21. Appx28868. Finally, the company suggested using information from Xeneta AS, a Norwegian shipping company, or the Descartes Group, a Canadian logistics company, to calculate international freight costs. Appx01026; Appx02483.

As to double remedies, Zhongji argued that its material inputs are subsidized according to a countervailing duty determination by the Department, and that those subsidies lower its costs. Appx02489–02490. In connection with the second part of the statutory double remedy test, the company explained that the price of all its aluminum materials—inputs bought and foil sold—is directly related to the London Metal Exchange ingot price, which the company contends further showed that its aluminum prices declined during the review period. *See* Appx02490.

Zhongji then asked Commerce to modify its liquidation instructions. *See generally* Appx02488–02489. The company explained that some of its customers re-invoiced sales prior to import and thus the importer of record could differ from the final customer. *Id.* Consequently, it worried that U.S. Customs and Border Protection might liquidate its imports at the China-wide rate. *Id.* To avoid this, Zhongji requested that the Department insert the words "resold or imported" into the instructions. Appx02488.

B

Commerce published the preliminary results in June 2020 and calculated a dumping margin of zero percent for Zhongji. *See* Appx02465.

In the final determination, however, that rate changed to 23.62 percent. See *Certain Aluminum Foil from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; Final Determination of No Shipments; 2017–2019*, 86 Fed. Reg. 11,499, 11,500 (Dep't Commerce Feb. 25, 2021), Appx3640. The final determination measured Zhongji's aluminum ash byproduct using the four-digit HTS code 2620. See Appx02485–02486. Commerce rejected the company's proposed HTS code 7602.00.19, concluding that at the four digit-level HTS 7602 correctly covers scrap, cuttings, and other byproducts, but not ash, and emphasized that because Zhongji

reported its byproduct as "dross/ash," HTS 7602 was not the most specific category available. Appx02486.

The Department used HTS 3403.99 and HTS 3811.90 to value Zhongji's rolling oil and rolling oil additive, finding that the company's "description of these inputs available on the record is not sufficiently detailed to support selection of the eight-digit HTS categories" Zhongji recommended using instead. Appx02487; *see also* Appx01241, Appx01039. Commerce used Maersk data for international freight rather than data from Xeneta[2] or Descartes. Appx02487.

The Department also found that evidence submitted by Zhongji in its double remedies response was insufficient to establish a subsidy-to-cost link or a cost-to-price link. Appx02490. Commerce therefore did not make a double remedies adjustment to the company's purchases of primary aluminum, aluminum plate, and electricity. Appx02490–02492. Finally, the Department rejected Zhongji's request to modify its liquidation instructions, finding it unnecessary. Appx02489.

The company then commenced this litigation seeking relief under 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and 1516a(a)(2)(B)(iii). ECF 8, ¶ 2 (complaint).[3] The Aluminum Association Trade Enforcement Working Group intervened to support the government. ECF 20. Zhongji then moved for judgment on the agency record. *See* USCIT R. 56.2; *see also* ECF 25 (motion), ECF 47 (public brief), ECF 49 (confidential brief). The government (ECF 30) and the Association (ECF 31, confidential; ECF 32, public) opposed and the company replied (ECF 48, public; ECF 50, confidential). Zhongji later requested, with the consent of the other parties, that the court decide the case without oral argument, and the court obliges that request. ECF 51.

III

The court has subject-matter jurisdiction under 28 U.S.C. § 1581(c).

In 19 U.S.C. § 1516a(a)(2) actions such as this, "[t]he 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). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record, taken as a whole, permits the Department's conclusion.

---

[2] Commerce rejected the Xeneta data mainly because it determined that the source is not publicly available. *See* Appx02487.

[3] Three days later, Commerce published an amended final determination to correct "ministerial errors" relating to other companies. Zhongji's margin remained the same. *See* Appx04450–04452.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

Specifically for surrogate value calculations, the "court's duty is 'not to evaluate whether the information Commerce used was [actually] the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.' " *Zhejiang*, 652 F.3d at 1341 (quoting *Goldlink Indus. Co. v. United States*, 431 F. Supp. 2d 1323, 1327 (CIT 2006)). Affirming the Department's determination "requires a reasoned explanation from Commerce that is supported by the administrative record." *Dorbest*, 462 F. Supp. 2d at 1269–70; *see also Longkou Haimeng Mach. Co. v. United States*, 617 F. Supp. 2d 1363, 1369 (CIT 2009).

In addition, Commerce's exercise of discretion in § 1516a(a)(2) cases is subject to the default standard of the Administrative Procedure Act, which authorizes a reviewing court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Solar World Americas, Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020) (explaining that in § 1516a cases, i.e., cases brought under section 516A of the Tariff Act of 1930, APA "section 706 review applies since no law provides otherwise") (citing 28 U.S.C. § 2640(b)). "[I]t is well-established that an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (cleaned up).

IV

Zhongji's challenges to the final determination fall into three broad categories: (a) challenges to the calculation of surrogate values, (b) a challenge to the denial of a double remedies adjustment, and (c) a challenge to the liquidation instructions. The court considers these in turn.

A

Zhongji argues that Commerce's selection of surrogate values for its aluminum ash, rolling oil and rolling oil additive, and international

freight is unsupported by substantial evidence because the selections did not reflect the best available information on the record. ECF 47, at 2.

Specifically, the company argues that the Department selected an overly broad HTS code that was not specific to the aluminum ash it used; that Commerce failed to provide a reasoned explanation for selecting data to value Zhongji's rolling oil and rolling oil additive that differed from evidence the company submitted; and that the Department failed to provide a reasoned explanation for valuing the company's international freight using Maersk data rather than the Descartes or Xeneta datasets. *Id.* at 2–3.

In all three surrogate value calculations Zhongji challenges, imperfect data forced the Department to make compromises. For aluminum ash, it reasonably selected a second-best category that emphasized ash rather than aluminum. As to rolling oil, it reasonably chose a broader code rather than a narrower code because the company's data did not compel a narrower choice. Finally, the Department reasonably selected the Maersk database for shipping cost comparisons, because on at least some of the criteria outlined in Commerce's Policy Bulletin the Maersk dataset was superior. All these decisions met the substantial evidence standard for the reasons stated below. Therefore, this court sustains the agency's surrogate value calculations for rolling oil, rolling oil additive, and commercial shipping.

In its final determination, Commerce relied on Bulgarian data from the Global Trade Atlas for HTS 2620 to value Zhongji's aluminum ash byproduct. *See* Appx02505; *see also* Appx01248. The company argues that data it submitted show that the Department should instead have used the more specific HTS code 7602.00.19. *See* Appx28870, Appx28983.

The tariff schedule applicable to Bulgaria includes an HTS code (subheading 2620.40) that provides for aluminum ash—the exact material Zhongji reported as a byproduct. *See* Appx28287, Appx28290, Appx28327–28332; Appx28992–28994. During the applicable period of review, however, there were no Bulgarian imports classified under HTS subheading 2620.40. *See* Appx28330.

So the Department was faced with a choice between two imperfect options: (1) Bulgarian import statistics for merchandise classified under HTS 2620, which provides for "ash and residues (other than from the manufacture of iron or steel), containing metals, arsenic or their compounds," including aluminum ash, but also ash comprised of other metals; or (2) Bulgarian import statistics for merchandise classified under HTS subheading 7602.00.19, which provides for aluminum waste and scrap other than "turnings, shavings, chips, milling

waste, sawdust and filings; waste of coloured, coated or bonded sheets and foil, of a thickness (excluding any backing) not exceeding 0.2 mm," but does not provide for aluminum ash (or any ash for that matter). *See* ECF 47, at 21; Appx28290, Appx28327–28332; Appx28992–28994, Appx29116–29121.

Zhongji argues that HTS code 2620 was unrepresentative of its aluminum ash because it is not specific to aluminum and instead includes slag, ash, and other residues. ECF 47, at 13. In contrast, it argues that HTS 7602.00.19 matched its product very well. *Id.* at 25–26. The Global Trade Atlas data covering HTS 7602.00.19 are, according to the company, specific to its aluminum waste. *Id.* (citing Appx28867–28875, Appx28983, Appx29116–29118).

In response, the government argues that Commerce reasonably determined that the tariff heading associated with ash, although not specific to aluminum, was more appropriate than the tariff subheading associated with other non-ash aluminum waste products. ECF 30, at 6. The Department objected to HTS code 7602.00.19 because "the broader HTS category 7602 under which it falls describes scrap, cuttings, and other such by-products, not ash," Appx02486,[4] and explained that "metallurgic content is not the sole factor in determining the value of a by-product," *id*. The government also contends that "[a] tariff subcategory that includes merchandise such as scrap coils of flat-rolled aluminum products is inconsistent with the physical characteristics of ash, which . . . should be mostly comprised of the chemical residues from fluxing agents that remove impurities from the melt." ECF 30, at 16–17.

Commerce regularly rejects overly broad datasets. *See Polyethylene Retail Carrier Bag Comm. v. United States*, 29 CIT 1418, 1444 (2005). For instance, in *Jiangsu Jiasheng Photovoltaic Technology Co. v. United States*, 28 F. Supp. 3d 1317 (CIT 2014), the court upheld the Department's decision to value Trina Solar's aluminum frames in its antidumping duty investigation using an eleven-digit HTS code instead of a six-digit HTS code, HTS 7616.99, in part because "7616.99 is a catch-all category that covers many diverse aluminum products . . . whose value is not reasonably comparable to that of respondent's aluminum solar panel frames." *Id*. at 1338.[5]

[4] Zhongji argues that this is a "misstatement of the HTS schedule as 7602.00.90 includes scrap," ECF 47, at 25, and asserts that "7602.00.11 includes other types of aluminum waste such as 'shavings, chips, milling, sawdust and filings,'" *id.* at 26 (citing Appx29116–29118). "By selecting [a] more detailed eight-digit HTS code—here, 7602.00.19"—the company sought "to exclude the type of materials that Commerce determined were not representative of its input." *Id.*

[5] Zhongji argues that here, unlike in *Jiangsu Jiasheng*, Commerce selected a broad four-digit HTS code that was not specific to the aluminum ash and therefore cannot represent the best available information. ECF 47, at 23.

However, if reasonable minds could differ, that suffices to sustain Commerce's conclusion. *See Pastificio Lucio Garofalo, S.p.A. v. United States*, 783 F. Supp. 2d 1230, 1233 (CIT 2011) ("[I]f a reasonable mind could accept the connection presented between the facts found and the conclusion reached, an alternative judgment may not be substituted for that of the agency.") (citing *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 513 (2009)).

B

Zhongji concedes that the HTS code the Department used describes ash. ECF 47, at 22–23. The company argues, however, that its recommended code is also specific to ash, *see id.* at 25, and is therefore strictly better, since the government concedes that Zhongji's code is specific to aluminum, *see* ECF 30, at 15–16.

But a review of the codes and the record undermines that argument. The plain language of the HTS states that subheading 2620.40 provides for aluminum ash, and that subheading 7602.00.19 does not. *See* Appx28992–28994, Appx29116–29121. Thus, ultimately, this dispute boils down to a technical judgment by Commerce over whether to prioritize "aluminum" or "ash" in selecting between two imperfect categories.

This sort of decision is a technical judgment for the Department to make. Even if reasonable minds might differ, the substantial evidence standard is met. *See Jacobi Carbons AB v. United States*, 313 F. Supp. 3d 1344, 1352 (CIT 2018) ("The court may not 'reweigh the evidence or . . . reconsider questions of fact anew.' ") (ellipsis in original) (quoting *Downhole Pipe*, 776 F.3d at 1377).

The court therefore concludes that the Department's choice was reasonable and thus supported by substantial evidence.

1

In its final determination, Commerce valued Zhongji's rolling oil using Bulgarian Global Trade Atlas data under HTS 3403.99 and rolling oil additive under 3811.90. *See* Appx02505; Appx02487; *see also* Appx01248.[6] The company instead urged the Department to use

[6] Chapter 34 covers "Soap, organic surface-active agents, washing preparations . . ." and Chapter 38 covers "miscellaneous chemical products." *See* Appx29053–29064; Appx12791–12794.

code 2710.12.21 to value its rolling oil and rolling oil additive.[7] *See* Appx28868, Appx28882–28884. Zhongji argues that Commerce's determinations to value its rolling oil under HTS 3403.99 and its rolling oil additive under HTS 3811.90 were unsupported by substantial evidence and otherwise not in accordance with law. ECF 47, at 13, 27.

a

Zhongji argues that HTS 2710.12.21 is more specific to the rolling oil and rolling oil additive it used because its oil is made from petroleum and has a flash point that meets the specification in the EU tariff schedule notes covering white spirits. ECF 47, at 29. The company acknowledges that "the law does not require Commerce to build the record on the plaintiffs' behalf," *id.* (quoting *Linyi City Kangfa Foodstuff Drinkable Co. v. United States*, Ct. No. 15–00184, Slip Op. 16–89, at 8–9, 2016 WL 5122648, at *3 (CIT Sept. 21, 2016)), but argues that a specification sheet for its rolling oil and rolling oil additive was enough to compel the use of Chapter 27, *id.* (citing Appx12804–12814).[8]

Zhongji therefore argues that Commerce failed to provide a "reasoned explanation" for rejecting its proposal. ECF 47, at 31 (citing *Dorbest*, 462 F. Supp. 2d at 1269). The company seeks either a reversal of that decision or a remand for the Department to examine the specification sheet Zhongji submitted and provide a reasoned explanation for why it does not establish that the inputs fall under HTS 2710.12.21. *Id.*

---

[7] Chapter 27 covers "mineral fuels, mineral oils and products of their distillation . . . ." Appx28995–29004. The specific HTS code Zhongji submitted, HTS 2710.12.21, covers:

> Petroleum oils and oils obtained from bituminous minerals (other than crude) and preparations not elsewhere specified or included, containing by weight 70% or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations, other than those containing biodiesel and other than waste oils: Light oils and preparations: For other purposes: Special spirits: White spirit.

Appx28999.

[8] The company argues that the Department failed to address this record evidence and "merely found 'unpersuasive Zhongji's argument that the eight-digit HTS classifications that it has offered to value refining oils and additives . . . are more specific to Zhongji's inputs used in its production process than the four- or six-digit HTS classifications that Commerce selected . . . .' " *Id.* at 30 (quoting Appx02487 and citing Appx01241). Thus, according to the company, the Department failed to consider information that "fairly detracts from [the] weight" of its conclusion. *Id.* at 30–31 (brackets in original) (quoting *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006)). But Commerce did consider this evidence—it found that the evidence in the specification sheet did not sufficiently show why HTS 2710.12.21 would be the most appropriate subheading to value these products. Appx02487. Specifically, it determined that Zhongji's "description of [its additives] available on the record is not sufficiently detailed to support selection of the eight-digit HTS categories for these inputs in this case." *Id.*

b

As noted, *see above* note 8, Commerce found that the company did not sufficiently describe the relevant inputs on the record to support selection of the eight-digit HTS categories rather than the six-digit categories that the Department selected. Appx02487. In choosing the six-digit category, Commerce cited the Association's rebuttal brief and the Department's original determination as supporting its conclusion. *Id*. & nn.50, 52.

The Association asserted that Zhongji's information confirms that the rolling oil consumed in its operations is not a raw oil (i.e., a product typically classified under Chapter 27 of the tariff schedule). *See* Appx25849.[9] Thus, the Association contends, although the rolling oil Zhongji used is made of white spirit, it has undergone sufficient refining to become a purified oil. *Id*. Commerce used the value under HTS 3403.99 covering "lubricating preparations not containing petroleum oils or oils obtained from bituminous minerals," finding that it "best matched [the company's] description of the input." Appx01241 (title case removed). The government argues that "HTS 3811.90 specifically references additives" like Zhongji's rolling oil additive but the HTS code the company used, 2710.12.21, "does not reference additives." ECF 30, at 21–22. The government also notes that, "in the original investigation, the mandatory respondent identified HTS subheading 3811.90 as the proper provision for rolling oil additive." *Id.* at 22 (citing Appx31361). Because of these characteristics, and because other mandatory respondents identified Commerce's subheading as proper, the government argues that the Department's selection of HTS 3811.90 was based on the best information available and therefore meets the substantial evidence burden. *Id.* at 22–23.

The government has the better of this argument. Zhongji raises legitimate points about why its HTS code was superior. But a reasonable mind could easily conclude that the agency was right about the technical details and right to privilege the original HTS code. Despite the company's objections, the record shows that Commerce did consider its evidence—the Department just rejected it. The court therefore finds that Commerce's classification of the company's rolling oil and rolling oil additive products was based on substantial evidence.

---

[9] The Association also argued that Zhongji submitted information confirming that the rolling oil used in its operations must meet FDA, Kosher, and Halal requirements followed by the mill, and is thus purified, not raw. *Id.*

2

Zhongji also argues that the Department failed to provide a reasonable explanation for rejecting the Descartes shipping data the company submitted. ECF 47, at 13–14. It argues that Commerce's decision to instead use Maersk data was unsupported by substantial evidence. *Id.* at 14, 32.

In response, the government argues that the Department selected the Maersk data because they are publicly available and do not incorporate non-market economy state-owned shipping data, as distinguished from Xeneta and Descartes. ECF 30, at 6–7. The government argues that this decision was reasonable and supported by substantial evidence. *Id.*

As a matter of policy, Commerce tries to select surrogate values that are product-specific, representative of a broad market average, publicly available, contemporaneous with the review period, and tax/duty exclusive. *See* Policy Bulletin at 4. Its practice is to use publicly available data. *Id.*

In this case, there were three datasets available on the record for the Department to consider. The first was Descartes, which had the advantage of being based on real rates and being publicly available—but had the disadvantage of including impermissible data from Chinese shipping[10] and had other technical disadvantages. The second option was Xeneta. That dataset shared with Descartes the advantage of drawing from real rates and other technical advantages. But Commerce reasonably concluded that the Xeneta set was proprietary—a critical disadvantage based on Department policy. The Xeneta set, like Descartes, also included shipping data from China. The third option was Maersk. Maersk had two major advantages: it was publicly available, and it excluded rates from China. But it also had one key disadvantage: The Maersk data are based on freight *quotes*, not freight *prices paid*.

In its final determination, Commerce valued Zhongji's international freight using Maersk data. *See* Appx02487, Appx02506. The Department considered the Xeneta data as a potential source to value the company's international freight, Appx02487, but found "Maersk to be a superior [surrogate value] source as compared to Xeneta" because of its "public availability" and because "the Xeneta data can reflect shipping data from China which is an impermissible source for [surrogate valuation]." *Id.* (citing Appx25863–25868).

[10] The problem with using Chinese data is that Zhongji's goods were themselves shipped from China, meaning a dataset containing Chinese data could contain the very subsidy that Commerce is trying to identify through this entire investigation.

a

Zhongji argues that Commerce's selection of the Maersk data was unsupported by substantial evidence because it failed to "compar[e] . . . the competing data sources to identify what available information is 'best' to value factors of production." ECF 47, at 33 (alterations in original) (quoting *Weishan*, 917 F.3d at 1367). The company argues that the Maersk data "are fundamentally flawed" because they are based on "mere quotes that have not been finalized." *See id.* at 38 (citing Appx28387, Appx28415–28738). These "estimates do not necessarily identify, or include[,] all relevant charges, and do not reflect consummated transactions." *Id*. at 39. "By comparison, the Xeneta data consist of 'several hundred thousand rates per month.' " *Id.* (quoting Appx12828). Zhongji argues that these shortcomings it contends mar the Maersk data are "even more egregious considering that the Court upheld Commerce's selection of Descartes data to value [the company's] international freight in the underlying investigation."[11] ECF 47, at 34–35 (citing *Jiangsu Zhongji Lamination Materials Co. v. United States*, [3]96 F. Supp. 3d 1[3]34, 1353 (CIT 2019)).

The company argues in the alternative that Commerce's selection of the Maersk data to value its international freight was unsupported by substantial evidence and otherwise not in accordance with law because the Xeneta data are clearly the best available information on the record. *Id.* at 35–36 (citing Appx12827–12846).[12]

In response, the government argues that the Department reasonably determined that the Maersk data were the best available for two reasons. ECF 30, at 23. First, Commerce determined that the Xeneta data are proprietary, but the Maersk data are publicly available. *Id.* at 24 (citing Appx02487). Second, as discussed above, the Department noted that the Xeneta data "can reflect shipping data from China, which is an impermissible source." *Id.* at 26 (citing Appx02487).[13]

Zhongji disputes that the Xeneta data are not publicly available. It acknowledges that this court previously held otherwise, ECF 47, at

[11] The government points out that, in the underlying investigation, "the only available surrogate values on the record were from Xeneta and Descartes, not Maersk." ECF 30, at 27.

[12] Relatedly, and in reply to the final determination, Zhongji argues that the Department provided no support for its assertion that the Xeneta data reflect shipping data from China and instead merely referred to the Association's rebuttal brief. ECF 47, at 38 (citing Appx02487). The company argues that in so doing Commerce failed to provide a reasoned explanation for its finding. *Id.* (citing *Dorbest*, 462 F. Supp. 2d at 1269–70).

[13] The Association argued that Xeneta's and Descartes's sampling of freight rates involving the movement of merchandise from China to the United States captures Chinese non-market economy ocean carriers, including state-owned entities. Appx25865. The Association also identified specific evidence showing that certain rate sheets showed use of a state-owned shipping line, COSCO. Appx25866.

36 (citing *Jiangsu Zhongji*, 396 F. Supp. 3d at 135[4]),[14] but argues that, in a separate recent countervailing duty investigation, Commerce found that data obtained from a pay-for-subscription service were public in nature because "any party [could] access the information if they pay for the service." ECF 47, at 36–37 (alteration in original) (citing *Certain Glass Containers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 85 Fed. Reg. 31,141 (Dep't Commerce May 22, 2020) and accompanying I&D Memo at Cmt. 9, p. 44).[15] Zhongji further notes that while *Glass Containers* involved countervailing, rather than antidumping, duties, "Commerce interpreted the definition of 'publicly available' under 19 CFR § 351.102(b)(21)(iii), which is applicable to the dumping context." *Id.*[16]

The company also rightly notes that the alternative Descartes database has been used before. But the government argues that this has generally occurred when Descartes was the only information available and contends that where the Department "has relied on the Descartes data, Commerce recognized the inclusion of rates from non-market economy carriers and explained: '[f]or any rate that the Department determined was from a non-market economy carrier, the Department has not included that rate in the period-average international freight calculation.'" ECF 30, at 27–28 (brackets in original) (quoting *Certain Steel Wheels from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 76 Fed. Reg. 67,703, 67,713 (Dep't Commerce Nov. 2, 2011)).[17]

---

[14] "Commerce's determination that the Xeneta data were not publicly available was . . . within its discretion and consistent with its past practice." 396 F. Supp. 3d at 1353.

[15] Zhongji quotes Commerce as having said: "With regard to whether Xeneta data is proprietary, we disagree. Xeneta data is a pay for service subscription service, meaning any party can access the information if they pay for the service. In this respect Xeneta is not proprietary but public in nature." *Id.* (quoting the *Glass Containers* I&D Memo at 44, which in turn cited 19 C.F.R. § 351.102(b)(21)(iii) for the definition of "publicly available").

[16] In response, the government points out that Maersk information was not on the record in that case for comparison with Xeneta and Descartes data. ECF 30, at 25. "Further, other factual concerns presented in this review with respect to the Xeneta and Descartes data . . . were not raised in *Certain Glass Containers*." *Id.* (citing *Certain Glass Containers* I&D Memo at 44–46).

[17] The government also explains that no such adjustment was possible here, because the information Zhongji submitted did not permit the identification of non-market economy carrier rates included in the Descartes data. *Id.* at 28 (citing Appx25867).

b

This court recently addressed the issue here at some length. In two cases, we remanded Commerce's reliance on Maersk data where the Department failed to explain why it found it reasonable "to choose price quotes over broad data sets." *Changzhou Trina Solar Energy Co. v. United States*, 492 F. Supp. 3d 1322, 1330 (CIT 2021) (*Trina I*); *see also Changzhou Trina Solar Energy Co. v. United States*, 532 F. Supp. 3d 1333, 1336–37 (CIT 2021) (*Trina II*). Zhongji argues that the reasoning in *Trina I* and *Trina II* is persuasive because the facts are analogous.[18] ECF 47, at 39. But we also stated that "it is reasonable for Commerce to choose price quotes over broad data sets in some circumstances." *Trina I*, 492 F. Supp. 3d at 1330.

Similarly, in *Trina II* we upheld Commerce's determination upon remand to rely on Xeneta data, instead of Maersk data, to calculate its surrogate value for international freight. 532 F. Supp. 3d at 1337. But we did so under the substantial evidence standard. Under that forgiving standard, it seems possible that *either* deciding the Xeneta evidence was admissible *or* deciding it was not would *both* be supported by substantial evidence.[19]

The Maersk data were not dominated by either the Xeneta or the Descartes. On the criteria identified by the Policy Bulletin (completeness, quality of data, public availability, and permissibility of data sources) the Maersk database beat both the Xeneta source (on public availability and permissibility) and the Descartes source (on permissibility). Because weighting each aspect of the Policy Bulletin is within Commerce's discretion, the Department met the burden required by the substantial evidence standard.

B

Zhongji argues that Commerce's determination not to grant it a double remedies adjustment was unsupported by substantial evidence because it established that (1) there is a link between the countervailable subsidies it received and its cost of manufacturing and (2) there is a link between its cost of manufacturing and its

[18] In response, the government seeks to distinguish this case by arguing that the facts presented in *Trina II* differ in meaningful ways. ECF 30, at 26. The government notes that the parties to the administrative review in *Trina II* never raised the question of whether the freight data Commerce used were publicly available. *Id.* (citing *Solar Cells from China* I&D Memo at 27–32). The government also notes that in *Trina I*, the parties never raised whether the freight data included Chinese non-market carrier information—the case was about specificity. *Id.* (citing *Trina I*, 492 F. Supp. 3d at 1327–32). The government argues that the court should not rely on *Trina I* here because the facts underlying that matter "differ substantially from those present in this case." *Id.*

[19] Zhongji does not appear to have considered this possibility.

selling price of aluminum foil. ECF 47, at 3, 41–43. The company also argues that Commerce could reasonably estimate the extent to which the assigned dumping margin increased as the result of subsidies. *Id.* at 15.

In response, the government argues that the Department's denial was based on substantial evidence because Zhongji failed to demonstrate (1) a "subsidy-to-cost link" and (2) a "cost-to-price link" as required by Commerce's interpretation of 19 U.S.C. § 1677f-1(f)(1)(B). ECF 30, at 7.

1

The first statutory requirement is whether "a countervailable subsidy (other than an export subsidy . . .) has been provided with respect to the class or kind of merchandise." 19 U.S.C. § 1677f-1(f)(1)(A). Zhongji reported that certain inputs were simultaneously subject to countervailable subsidies in the form of primary aluminum, aluminum plate, and strip/electricity provided for less than adequate remuneration. *See* Appx16029; *see also* ECF 47, at 46 (arguing that the company satisfied the first statutory element). The government does not dispute that the company established this point. *See* ECF 30, at 30–36 (addressing other statutory elements but not the first one).

The second consideration is whether the subsidies identified have "been demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period." 19 U.S.C. § 1677f-1(f)(1)(B). Commerce looks for a subsidies-to-cost link and a cost-to-price link. *See* Appx02490–02492. Failure to show either of these elements allows the Department to deny the double-remedy adjustment. *See Vicentin S.A.I.C. v. United States*, 503 F. Supp. 3d 1255, 1263 (CIT 2021) (discussing Commerce's interpretation that § 1677f-1(f)(1) requires the producer/exporter to show both a "subsidies-to-cost link" and a "cost-to-price link").

In its final determination, Commerce found that Zhongji "failed to establish either a 'subsidy-to-cost link' or a 'cost-to-price link.' " Appx02490. The company disputes that finding and argues that it demonstrated how the pricing of each direct input was incorporated directly into its cost-of-manufacturing ledgers, and further showed that its input prices and its cost of manufacturing both trended down during the period of review. *See* ECF 47, at 47–48 (citing Appx16025, Appx16049–16050).

As for subsidy-to-cost, in this case, the majority of the cost of manufacturing comes from foil stock. *See* Appx16025. Zhongji told the Department that the price of foil stock is lowered by subsidies on

other aluminum materials. *See* Appx16029.[20] Since aluminum ingot, strip, and stock constitute much of the cost of manufacturing the subject merchandise here, the company argues that any decrease in the cost of inputs necessarily decreased the cost of manufacturing. ECF 47, at 50. Zhongji asserts that it submitted subledgers showing how its electricity expense ties back to its overall cost of manufacturing. *Id.* (citing Appx16063–16066). The company says it provided expense records rather than an accounting of subsidies because the aluminum and electricity subsidies are not recognized as subsidies in China and are therefore not reflected in the company's financial statements.[21] *Id.* at 51.

Zhongji argues that the facts related to subsidy-to-cost are substantively identical to other recent cases in which Commerce has ruled that a respondent met the requirements of 19 U.S.C. § 1677f-1(f)(1)(B). *Id.* at 52–54.[22] The company argues that, because the Department provided no reasoning permitting parties to discern why it treated this case differently from a case like *Certain Quartz*, its decision was not based on substantial evidence.[23] ECF 47, at 52–55.

In response, the government argues that "Zhongji did not offer a sufficient explanation of how quoted London Metal Exchange prices for primary aluminum ingot establish a monthly decline in the prices of aluminum jumbo rolls, a distinct product and not of the same class or kind of merchandise as called for under 19 U.S.C. § 1677f-

---

[20] Two of the company's foil stock suppliers, Jiangsu Huafeng Aluminum Industry and Anhui Maximum Aluminum Industries, both produce foil stock, subject to the subsidy on primary aluminum and aluminum strip. Both Huafeng's and Maximum's aluminum inputs account for most of their production costs. *Id.*

[21] Zhongji argues that, in other recent and similar cases, the Department has not required a line-item accounting. For instance, in a recent investigation of quartz surface products from China, Commerce found basic expense information sufficient. *Id.* at 52–53 (citing *Certain Quartz* I&D Memo at 12 and *Certain Corrosion Inhibitors from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 7,532 (Dep't Commerce Jan. 29, 2021) and accompanying Mem. on Final Double Remedy Calc. at 2).

[22] As in *Certain Quartz*, Zhongji asserts that it reported here that it consumes countervailed inputs that flow into its cost of manufacturing, *see id.* at 53 (citing Appx16029), and that the subsidy programs affected its cost of manufacturing, *see id.* (citing Appx16025). Indeed, it claims to have further reinforced the subsidies-to-cost link by showing that its aluminum inputs constitute a significant portion of the merchandise cost of manufacturing. *See id.* (citing Appx16049–16050).

[23] Zhongji adds that Commerce's decision is arbitrary because it treated a similar situation differently "without adequate explanation and factual support on the record." ECF 47, at 55 (quoting *Thai Plastic Bags Indus. Co. v. United States*, 949 F. Supp. 2d 1298, 1302 (CIT 2013), and citing *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)).

1(f)(1)(B)." ECF 30, at 32 (citing Appx02491). Commerce's final determination gave that same explanation.[24] Appx02491.

The Department found unpersuasive Zhongji's claim that London Metal Exchange prices establish the existence of a "subsidy-to-cost link" for its aluminum inputs. *Id.*[25] The government states that the London Market Exchange is "a published price index that nearly all aluminum contracts throughout the world incorporate in pricing." ECF 30, at 33. Commerce determined that the company failed to sufficiently show how incorporating this global index element into its purchases established a "subsidy-to-cost link" for its aluminum inputs. Appx02491.

The government argues that the Department reasonably determined that Zhongji failed to establish a subsidy-to-cost link because it "did not provide additional documents to demonstrate a connection between subsidies received and cost of manufacture beyond showing how the cost of materials and electricity are accounted for in its records." ECF 30, at 34.

2

Commerce's second requirement as it interprets 19 U.S.C. § 1677f-1(f)(1)(B) is cost-to-price. According to Zhongji, "[a]luminum pricing generally consists of two components: (1) a conversion premium, negotiated and agreed by the parties and (2) the price of the metal component that is based on the [London Metal Exchange] ingot price." ECF 47, at 59 (citing Appx16024–16025). The company asserts that under this pricing structure, price fluctuation "is automatically translated to aluminum strip, foil stock, and foil," such that all changes in the export prices of subject merchandise "are largely driven by fluctuations of the aluminum input cost."[26] *Id.* (citing Appx16025–16026).

To show that those statements are accurate here, Zhongji reported that the head of the sales department "monitors the [London Metal Exchange] ingot price and checks with the purchase manager and financial manager regarding the cost of the domestic purchase prices of foil stock, aluminum strip, aluminum ingot, electricity and other elements of the cost of manufacturing periodically to consider the

[24] The government also notes that, when determining whether there has been a monthly decline in prices, "Commerce typically looks to average unit value data rather than to specific proprietary price data" as provided by a respondent. ECF 30, at 32.

[25] Commerce based its analysis on the information that Zhongji provided; there is no dispute here of material fact. Appx02491.

[26] Zhongji's submission to Commerce stated that "[w]hen setting and changing the prices of exports to the United States, the primary factor . . . is the overall cost of manufacturing, including the costs of the main inputs such as foil stock, aluminum strip, aluminum ingot, and the cost of electricity, labor, overheads etc." Appx16025.

prices quoted to the customers." Appx16026. The company argues that this evidence directly responds to Commerce's requests for information about internal processes, showing how price changes are realized and how cost of manufacturing is incorporated directly into pricing.[27] ECF 47, at 58 (citing Appx16024–16027).

In reply, the government notes that, for the "cost-to-price link," "a company must demonstrate a connection between subsidies received and cost of manufacture, and how a change in the cost of manufacture is transferred to the price of the subject merchandise." ECF 30, at 35 (citing Appx02491–02492). According to the government, Zhongji's accounting records established only how it tracks its usage of these three inputs. *Id.* (citing Appx02492). As a result, the government argues, this information failed to establish a link between the cost of manufacture and the price of the merchandise. *Id*.

The company also spends some time trying to show that (f)(1)(C) is met. ECF 47, at 63–66. The third element of the double remedies test is whether the Department "can reasonably estimate the extent to which the countervailable subsidy . . . , in combination with the use of [normal value] determined pursuant to [19 U.S.C. § 1677b(c)], has increased the weighted average dumping margin for the class or kind of merchandise." 19 U.S.C. § 1677f-1(f)(1)(C). By again applying and analyzing *Certain Quartz*, Zhongji argues that Commerce could have used similar methodology to properly estimate the appropriate reduction here. ECF 47, at 65–66.

Finally, the company argues that if the Department found its information deficient, then the agency should have given it a chance to remedy any deficiency, but did not. ECF 47, at 57 (citing 19 U.S.C. § 1677m(d)). But "[t]he interested party that is in possession of the relevant information has the burden of establishing . . . the amount and nature of a particular adjustment." 19 C.F.R. § 351.401(b)(1); *see also NTN Corp. v. United States*, 306 F. Supp. 2d 1319, 1328 (CIT 2004) (same).

3

The question is whether Zhongji "demonstrated" to the Department that the Chinese countervailable subsidy "reduced the average price of imports of the class or kind of merchandise during the relevant period." 19 U.S.C. § 1677f-1(f)(1)(B). The company argues that it did; the government argues it did not.

[27] Zhongji analyzes two cases at length to support the claim that in prior cases the record would suffice to establish a cost-to-price link and argues that Commerce varied from a recent case with similar facts when it should not have (*Certain Quartz*) and instead analogized this case to another investigation with dissimilar facts. ECF 47, at 61–62.

In its preliminary determination, Commerce explained that (1) a "subsidy to cost link" exists where there is a "subsidy effect" to the merchandise's cost of manufacture and (2) a "cost to price link" exists where a change in the cost of manufacture results in a change to the price charged to customers. Appx02468 (citing *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures*, 84 Fed. Reg. 54,106 (Dep't Commerce Oct. 9, 2019), and accompanying preliminary memorandum at 48). The Department explained that Zhongji had "failed to demonstrate that the programs discussed in [its] double remedies questionnaire[ ] have led to a decrease to either input costs or" cost of manufacturing. Appx02469. Commerce also stated that the company had failed to provide sufficient responses to the questions about "cost and price changes during the relevant period." *Id.* In the final determination, the Department reiterated its preliminary findings and concluded that Zhongji had provided "no convincing explanation" and "failed to establish" the results it urged the Department to reach. Appx02491.

The company cites its questionnaire responses and argues that they show that Commerce's decision was incorrect. *See* ECF 47, at 43–44 (citing Appx16029–16030 and stating that they establish a link between input prices, cost of manufacture, and sales prices). The cited pages, however, state that (1) Zhongji "does not have a formal threshold for changes in the cost item that would lead to adjustment of prices" because any price adjustments result from management discussions and (2) "[t]he price charged to the customer changes based on an agreed reference to the LME ingot price, usually monthly." Appx16030.

The two admissions cited above are enough to support the Department's conclusion. First, the company admits that it does not necessarily adjust prices when the inputs' costs change. Second, the company admits that its pricing changes based on the London Market Exchange ingot price, which presumably has nothing to do with any countervailable subsidies provided by the Chinese government. In other words, whether "the average price of imports" to the United States was reduced is apparently a matter of whether Zhongji's management decides to adjust prices. The Department's conclusion that the company failed to demonstrate eligibility for a double remedies adjustment is therefore supported by substantial evidence.

C

Finally, Zhongji argues that Commerce's decision not to modify its liquidation instructions to include the phrase "resold or imported" where the company's merchandise was re-invoiced before importation was unsupported by substantial evidence because these instructions will lead to inaccurate and overly punitive liquidation. ECF 47, at 3–4. Zhongji also argues that the Department ignored its concerns about the inappropriate application of the China-wide rate. *Id*. at 15.

The company argues that Commerce erred by not modifying its liquidation instructions because some U.S. customers re-invoiced the company's sales to third parties before importation. *Id.* at 67 (citing Appx24809–24816). As a result of this sales arrangement sometimes a different importer of record appears on the entry documents than the initial customer. *Id.*

Zhongji thus argues that when the Department issued liquidation instructions, the sales subject to the re-sale arrangement would not be assessed duties commensurate with the company's review-specific rate because the importer of record would differ from the initial customer as identified in the sales database. *Id.* at 69 (citing Appx09862–09870). According to the company, this means that, when the re-seller does not appear in the customer database, Commerce's default language would cause these sales to liquidate at the China-wide rate instead of the company's rate. *Id.* at 70. Zhongji therefore argues that the default liquidation language will result in an inaccurate, punitive assessment of duties. *Id*.

In response, the government argues that the Department did not modify its standard liquidation instructions to Customs because Zhongji did not demonstrate how re-invoicing merchandise was unique and warranted a specific deviation in Commerce's standard practice. ECF 30, at 7.

Antidumping laws are "remedial[,] not punitive." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (citing *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–04 (Fed. Cir. 1990)). The function of antidumping law is to "reduc[e] or eliminat[e] discrepancies in pricing . . . ." *U.S. Steel Grp. v. United States*, 177 F. Supp. 2d 1325, 1330 (CIT 2001); *see also C.J. Tower & Sons v. United States*, 71 F.2d 438, 445 (CCPA 1934) (noting Congress's expressed purpose in the Anti-Dumping Act of 1921 was to impose "an amount of duty sufficient to equalize competitive conditions"). Also, "[t]he purpose of the antidumping law, as its name implies, is to discourage the practice of selling in the United States at [less than fair value] by the imposition of appropriately increased duties." *Melamine Chems., Inc. v. United States*, 732 F.2d 924, 933 (Fed. Cir. 1984).

Zhongji cites these cases to argue that Commerce was obliged to tailor its liquidation instructions to ensure that the duties imposed are "appropriately increased" solely to equalize market conditions. ECF 47, at 70–71. While the company tries to explain why that follows on the facts here, *id.* at 72–73, the Department said, "Because the importer of record is information that is available to [Customs], our practice is to issue liquidation instructions on the basis of entered value rather than by U.S. customer." Appx02489. Commerce said it could find no reason to depart from that practice here because the importer of record was unknown to Zhongji. *Id.*

In this case, the Department made its calculation using the reported sales from Zhongji to its listed U.S. customers. Neither Commerce nor the company knows the specifics of the sales information between those U.S. customers and third-party companies, and the Department's margin calculations did not reflect such information. *See* 19 U.S.C. § 1677a(a) (" '[E]xport price' means the price at which the subject merchandise is first sold . . . before the date of importation by the producer or exporter . . . to an unaffiliated purchaser in the United States . . . .") Because this is general policy and because Zhongji failed—in the agency's eyes—to show why that general policy should not apply here, Commerce adhered to its standard instructions, a decision the government argues is supported by substantial evidence.

After reviewing the record, this court sustains the Department. It is not entirely clear what argument Zhongji is trying to make on this record. The company makes some very general points about the purpose of antidumping law that are correct. But it seems to vacillate between arguing either (i) that some specific aspect of its business makes Commerce's standard liquidation instructions problematic here, or (ii) that, based on the general points the company raised, those liquidation instructions are unlawful as a general matter.

If Zhongji is trying to argue for (ii)—that, in general, the liquidation instructions are unlawfully punitive—it needs to produce far more evidence than a few pages of case analysis. If it is trying to argue instead for (i)—that special circumstances justify an exception—then it needs to explain more thoroughly what those circumstances are and how they differ from other cases. By not clearly taking either path, the company fails to provide a clear reason why the Department's instructions ought to vary. The court therefore concludes that Commerce's decision was based on substantial evidence.

* * *

For the reasons provided above, the court denies Zhongji's motion for judgment on the agency record, grants judgment on the agency

record to the government and the Association, *see* USCIT R. 56.2(b), and sustains the Department of Commerce's final determination. A separate judgment will enter. *See* USCIT R. 58(a).

Dated: June 7, 2023
New York, NY

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

Slip Op. 23–85

NEXCO S.A., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION and SIOUX HONEY ASSOCIATION, Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 22–00203

[Sustaining in part and remanding in part the results of the U.S. Department of Commerce's less-than-fair-value investigation of raw honey from Argentina.]

Dated: June 7, 2023

Julie C. Mendoza, *Edward J. Thomas III*, and *R. Will Planert*, Morris, Manning & Martin, LLP, of Washington, D.C., argued for plaintiff Nexco, S.A. On the brief were *Donald B. Cameron*, *Brady W. Mills*, *Mary S. Hodgins*, *Eugene Degnan*, *Jordan L. Fleischer*, and *Nicholas C. Duffey*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. On the brief were *Patricia M. McCarthy*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Brian M. Boynton*, Principle Deputy Assistant Attorney General. Of Counsel was *Savannah Maxwell*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Melissa M. Brewer, Kelley Drye & Warren LLP, of Washington, D.C., argued for defendant-intervenors American Honey Producers Association and Sioux Honey Association. On the brief was *R. Alan Luberda*.

OPINION AND ORDER

Kelly, Judge:

Before the court is Nexco, S.A.'s ("Nexco") motion for judgment on the agency record challenging the U.S. Department of Commerce's ("Commerce") final determination in its 2020–2021 less-than-fair-value investigation of raw honey from Argentina. Nexco challenges Commerce's decision to (1) use Nexco's acquisition costs as a proxy for costs of production, (2) apply a monthly inflation index when conducting the sales-below-cost test, and (3) restrict price comparisons of U.S. sales and third-country sales to Germany to the same month. For the following reasons, the court sustains Commerce's determination in part, and remands in part for further explanation or reconsideration.

BACKGROUND

On May 18, 2021, Commerce initiated an antidumping duty investigation of raw honey from Argentina. *See* Raw Honey from Argentina, Brazil, India, Ukraine, and the Socialist Republic of Vietnam, 86 Fed. Reg. 26,897 (Dep't Commerce May 18, 2021) (initiation of less-than-fair-value investigation). Commerce selected Nexco as a man-

datory respondent. *See* Selection of Additional Mandatory Respondent, A-357–823, PD 101, bar 4136282–01 (June 24, 2021). Nexco indicated that it does not produce raw honey, but rather exports raw honey which it purchases from numerous small suppliers. *See* Nexco's Request for Information Response, A-357–823, PD 89, bar 4135011–01 (June 17, 2021) ("Nexco RFI Resp."). At this stage, both Nexco and the Government of Argentina argued in favor of using Nexco's acquisition costs for raw honey, rather than having Commerce solicit this information from individual beekeepers, citing concerns over the sophistication of the beekeepers' recordkeeping.[1] *Id.* at 3–6; Letter from the Government of Argentina at 3–4, A-357–823, PD 69, bar 4127047–01 (June 2, 2021) ("GOA Ltr.").

On November 23, 2021, Commerce published the preliminary determination of its antidumping investigation. *See* Decision Memo. for Prelim. Affirm. Determ. in the Less-Than-Fair-Value Investigation of Raw Honey from Argentina, A-357–823, PD 365, bar 4183570–02 (Nov. 17, 2021) ("Prelim. Results"). Commerce found that the beekeepers, not Nexco, were the producers of honey, and issued questionnaires to two of Nexco's beekeepers suppliers and one middleman.[2] *Id.* at 26. Based on the questionnaire responses, Commerce determined that the beekeepers were not selling to Nexco below cost, and it would be reasonable to use Nexco's acquisition costs as a "proxy" for the beekeepers' costs of production ("COPs"). *Id.* Commerce thus used Nexco's acquisition costs to calculate its COPs, rather than the costs of the beekeepers, for the purposes of the sales-below-cost test. *Id.* at 25–27. Commerce also found that, for certain products, Nexco's home market sales were below cost of production, and excluded these sales pursuant to 19 U.S.C. § 1677b(b)(1). *Id.* at 28. Commerce also determined that certain of Nexco's home market sales of foreign like product were less than five percent of its

[1] Nexco concedes that it initially proposed that Commerce treat it as the producer of honey, *see* Nexco RFI Resp. at 3–6, but explains that if Commerce decided to follow its policy of treating Nexco's beekeepers as the producers, it should have based COP on the beekeepers' costs. *See* Oral Argument at 0:02:31–0:03:42, May 15, 2023, ECF No. 41. Nexco further explains that it was initially concerned that its beekeepers and middlemen would not respond to Commerce in a verifiable manner, which is why it argued that Commerce should use acquisition prices as COP. *See* Nexco's Case Brief to Commerce at 6–7, A-357–823, CD 801, bar 4202114–01 (Jan. 18, 2022).

[2] *See* [Beekeeper 1] Ltr., A-357–823, CD 130, bar 4151234–01 (Aug. 10, 2021); [Middleman] Ltr., A-357–823, CD 131, bar 4151238–01 (Aug. 10, 2021); [Beekeeper 2] Ltr., A-357–823, CD 166, bar 4153538–01 (Aug. 19, 2021).

aggregate sales, and pursuant to 19 U.S.C. § 1677b(a)(1)(C), based normal value on Nexco's sales to Germany.[3] *Id.* at 22.

On April 14, 2022, Commerce issued its final determination, and calculated a 9.17 percent dumping margin for Nexco.[4] *See Raw Honey from Argentina: Final Determination of Sales at Less than Fair Value and Final Affirmative Determination of Critical Circumstances*, 87 Fed. Reg. 22,179 (Dep't Commerce April 14, 2022) and accompanying issues and decision memo. ("Final Decision Memo."). Commerce did not change its COP methodology from the Preliminary Determination, and again found that it was appropriate to use Nexco's acquisition costs as a "reasonable proxy" for the beekeepers' COPs. Final Decision Memo. at 8–13.

Commerce also determined that it was appropriate to apply its high inflation and alternative cost methodologies to Nexco's COPs. *Id.* at 15. Commerce found that the alternative costs methodology was appropriate because (1) Nexco's direct material costs varied more than 25 percent during the period of investigation in real, inflation-adjusted terms, and (2) Commerce found evidence of a linkage between Nexco's sales prices and material costs. *Id.* at 17; Prelim. Results at 24. Commerce employed its high inflation methodology because Argentina experienced more than 25 percent inflation during the period of investigation. Final Decision Memo. at 17, 26; Prelim. Results at 20. Applying both methodologies, Commerce determined that more than 20 percent of Nexco's home market sales of certain products were made below cost. Prelim. Results at 28. Further determining that these sales did not provide for the recovery of costs during a reasonable period of time, Commerce excluded these sales from its normal value calculations. *Id.* Nexco moves for judgment on the agency record, and the court heard oral argument on May 15, 2023. *See* [Nexco's] Mot. J. Agency Rec., Nov. 18, 2022, ECF No. 25.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2018), which grants the court authority to review actions initiated under 19 U.S.C. § 1516a(a)(2)(B)(i)[5] contesting the final determination in an

[3] When Commerce determines that no contemporaneous sales of foreign like product are available, it bases normal value on constructed value. *See* 19 U.S.C. § 1677b(b)(1); 19 C.F.R. § 351.405. Here, Commerce used constructed value as normal value for some of Nexco's sales. *See* Preliminary Margin Calculation Memorandum at 623–633, A-357–823, CD 639, bar 4183846–01 (Nov. 17, 2021).

[4] A dumping margin is "the total amount by which the price charged for the subject merchandise in the home market (the 'normal value') exceeds the price charged in the United States." Koyo Seiko Co. v. United States, 258 F.3d 1340, 1342 (Fed. Cir. 2001).

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

antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Nexco argues that Commerce's decisions to (1) use acquisition prices as production costs, (2) average production costs on a monthly basis, and (3) compare third-country German sales with U.S. sales on a monthly basis, are unsupported by substantial evidence and otherwise not in accordance with law. *See* [Nexco's] Br. Supp. Mot. J. Agency R. at 1, 7–45, Nov. 18, 2022, ECF No. 25–1 ("Pl. Br.").[6] Defendant and Defendant-Intervenor argue that Commerce adequately supported both its COP calculations and sales averaging periods. *See* Def.'s Resp. Opp. Pl.'s Mot. J. Agency R. at 15–21, 32–36, March 3, 2023, ECF No. 30 ("Def. Br."); Def.-Int.'s Resp. Opp. Pl.'s Mot. J. Agency R. at 11–19, 36–46, March 6, 2023, ECF No. 32 ("Def.-Int. Br."). Commerce's decision to use monthly averaging for Nexco's costs is supported by substantial evidence. However, Commerce must either reconsider or further explain its decisions to use Nexco's acquisition costs as COP, and compare U.S. and German sales on a monthly basis.

Cost of Production Calculation

Nexco claims that Commerce erred by using Nexco's acquisition costs as a proxy for COP. Pl. Br. at 7–28. Specifically, Nexco argues that (1) Commerce deviated from its longstanding practice of using producers' COPs in "raw" agricultural products cases without adequate explanation, (2) Commerce had no basis for rejecting the investigated beekeepers' and middleman's verified costs, and (3) acquisition costs were not a reasonable proxy for COPs, because they impermissibly included the beekeepers' profits. *Id.* Defendant and Defendant-Intervenor counter that Commerce's decisions conform with applicable law and prior practice. Def. Br. at 15–21; Def.-Int. Br. at 11–19. Because Commerce did not adequately explain its decision to use acquisition costs as a proxy for COP, the court remands this issue for further explanation or reconsideration.

In order to determine if merchandise is being sold at less than fair value, a "comparison shall be made between the export price . . . and

[6] Nexco also argues that if the "Court finds that Commerce improperly relied on acquisition prices in place of beekeeper costs or failed to adjust acquisition prices for beekeeper profit, then quarterly costs are not justified as beekeepers' costs, after adjusting for inflation, did not increase by more than 25 percent." Pl. Br. at 36. Because Commerce must either reconsider or further explain its determination, the court does not reach this argument.

normal value." 19 U.S.C. § 1677b(a). When determining normal value, Commerce may disregard sales that are not made in the "ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). The statute defines "ordinary course of trade" to specifically exclude sales made below the cost of production.[7] 19 U.S.C. § 1677(15)(A). Cost of production includes an exporter or producer's material costs, amounts for selling and general expenses, and the cost of containers.[8] 19 U.S.C. § 1677b(b)(3). The statute does not specify the data upon which Commerce may rely in calculating these costs, but provides that Commerce should normally base its calculations on the records of the exporter or producer, if those records are kept in accordance with generally accepted accounting practices, and reasonably reflect the cost of merchandise.[9] *See* 19 U.S.C. § 1677b(f)(1)(A). The statute defines "exporter or producer" as either the exporter, producer, or both, "to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits."[10] 19 U.S.C. § 1677(28).

---

[7] The statute specifically provides that:

> Whenever the administering authority has reasonable grounds to believe or suspect that sales . . . have been made at prices which represent less than the cost of production of that product, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production. If the administering authority determines that sales made at less than the cost of production—
>
> (A) have been made within an extended period of time in substantial quantities, and
>
> (B) were not at prices which permit recovery of all costs within a reasonable period of time,
>
> such sales may be disregarded in the determination of normal value.

19 U.S.C. § 1677b(b)(1).

[8] The statute specifies that the cost of production equals the sum of:

> (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
>
> (B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and
>
> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

19 U.S.C. § 1677b(b)(3)(A)-(C).

[9] Commerce is not required to investigate all exporters or producers of a product. *See* 19 U.S.C. § 1677f-1(c)(2). Rather, Commerce may select a reasonable number of exporters or producers which either account for the largest volume of subject merchandise, or represent a statistically valid sample of such exporters or producers. *See id.*

[10] The Statement of Administrative Action to the Uruguay Round Agreements Act explains "the purpose of [§ 1677(28)] is to clarify that where different firms perform the production and selling functions, Commerce may include the costs, expenses, and profits of each firm in calculating cost of production and constructed value." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 835 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4178.

When a respondent sells unprocessed, raw agricultural products, Commerce's practice is to use the cost of producing the raw goods as the respondent's COP, even when the respondent is not the producer. *See, e.g.*, *Final Determination of Sales at Less than Fair Value: Fresh and Chilled Atlantic Salmon from Norway*, 56 Fed. Reg. 7,661, 7,672 (Dep't Commerce Feb. 25, 1991) (unaffiliated salmon farmers' costs used as COP for salmon exporter); *Final Determination of Sales at Less than Fair Value: Greenhouse Tomatoes from Canada*, 67 Fed. Reg. 8,781 (Dep't Commerce Feb. 26, 2002) and accompanying issues and decision memo. at Comment 7 (cost of farming tomatoes, rather than cost to exporter of purchasing tomatoes, used as exporter's COP).[11] Commerce has historically followed this "raw goods" COP methodology with respect to raw honey from Argentina. *See, e.g.*, *Raw Honey from Argentina: Preliminary Results of Antidumping Duty Administrative Review*, 76 Fed. Reg. 2,655 (Dep't Commerce Jan. 14, 2011) (independent beekeepers' cost of producing honey used as COP for raw honey exporters).

First, Nexco challenges Commerce's decision to depart from its practice in raw agricultural products cases of using the producers', i.e., the beekeepers', costs as Nexco's COP. Pl. Br. at 14–26. Although Commerce explains that it followed its normal practice for raw agricultural products by treating Nexco's beekeeper suppliers as the producers of honey, *see* Final Decision Memo. at 8, Commerce nonetheless departed from its practice when calculating the beekeeper's COP. To explain its departure from its practice of using the beekeepers actual COP, Commerce points to several problems encountered in previous reviews of raw honey antidumping orders which compelled it to modify this practice. *Id.* at 9. Specifically, Commerce finds that the fragmented nature of the Argentinian honey industry made it difficult to select producers representing a large percentage of market

[11] In contrast, for processed agricultural products, Commerce treats the amounts a respondent spends acquiring raw agricultural inputs as a material cost. *See, e.g., Final Determination of Sales at Less than Fair Value: Canned Pineapple Fruit from Thailand*, 60 Fed. Reg. 29,553, 29,561 (Dep't Commerce June 5, 1995) (pineapples treated as a material cost for producing canned pineapple); *Final Results of Antidumping Duty Administrative Review: Individually Quick Frozen Red Raspberries from Chile*, 70 Fed. Reg. 6,618 (Dep't Commerce Feb. 8, 2005) and accompanying issues and decision memo at 8–9 (raw raspberries a material cost for frozen raspberries) ("*Red Raspberries*"). Commerce has found that the acquisition price for a finished product is not the same as the product's cost of production. *Certain Pasta from Italy: Final Results of the Sixth Antidumping Administrative Review*, 69 Fed. Reg. 6,255 (Dep't Commerce Feb. 10, 2004) and accompanying issues and decision memo. at Comment 42. In a processed goods case, the profits of the raw product producers are included in the exporter's material costs. *See, e.g.*, *Red Raspberries* at 8–9 (in which Commerce used a respondent's purchase price for fresh raspberries as a material cost for frozen raspberries). However, unlike in *Red Raspberries*, here Commerce does not assert that the honey sold by Nexco is a processed product. *See* Final Decision Memo. at 8–9.

share. *Id.* It also finds that beekeepers' operations were typically small and unsophisticated, such that their records were unreliable and technology limited. *Id.* Thus, when Commerce received responses to its questionnaires at all, it notes that it was "still plagued with incomplete or unreliable cost data that needed to be supplemented with public studies to calculate certain costs such as labor, land rent, and bee feed." *Id.* at 10. Citing these reasons from its experience in previous reviews, Commerce explains it does not have the resources to examine a statistically valid sample of beekeepers, and that even the largest beekeepers will not be representative. *Id.* Therefore, although Nexco disagrees with the result of its decision, Commerce has not failed to provide "reasoned analysis" for changing its practice of collecting cost data directly from beekeepers. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

Separately, Nexco argues that Commerce's decision not to use the verified questionnaire responses of its beekeepers as producers' costs pursuant to 19 U.S.C. § 1677f-1(c)(2) was contrary to law. Pl. Br. at 20–26. Nexco claims that Commerce did not support its finding that Nexco's beekeepers were not representative, given that Commerce frequently proceeds with two or three respondents, considering this number to be sufficiently "representative" under the statute. *Id.* at 21–24. Again, Commerce explains that due to the small size and irregular accounting of even the largest beekeepers in Argentina, it was not possible to take a representative sample. Final Decision Memo. at 13. Specifically with reference to Nexco's suppliers, Commerce found that "our ultimate selection from the pool of the largest middlemen and beekeeper suppliers still only represents a small portion of each respondent's total raw honey consumption during the POI." *Id.* Therefore, in order to meet its statutory obligation of ensuring that "all costs have been captured," Commerce reasonably concludes that it could not use the beekeepers' reported COP. *Id.*

Nexco cites to § 1677f-1(c)(2), arguing that the statute does not allow Commerce to rely solely on "representativeness" to refuse to use the largest beekeepers' costs. Pl. Br. at 20–23. The relevant portion of the statute states that Commerce "may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination . . . ." 19 U.S.C. § 1677f-1(c)(2). Here, because Commerce is not determining dumping margins for the beekeepers, but rather using the beekeepers' COPs to confirm that Nexco's acquisition costs fully captured the costs of production, § 1677f-1(c)(2) is inapplicable. Thus, Nexco's argument fails.

Finally, Nexco challenges, and Commerce fails to explain why, Nexco's acquisition costs are a reasonable proxy for the beekeepers' COP. Indeed Commerce explains that when dealing with a raw agricultural product, like Nexco's honey, it does not use the exporter's acquisition price as COP. *Id.* at 9 (citing *Certain Pasta from Italy: Final Results of the Sixth Antidumping Administrative Review*, 69 Fed. Reg. 6,255 (Dep't Commerce Feb. 10, 2004) and accompanying issues and decision memo. at Comment 42. Commerce does not explain why it deviates from its practice or state that it is adopting a new practice for these circumstances. Commerce simply reasons that because "the use of acquisition costs ensures the capture of all costs, expenses, and profits of the beekeepers and middlemen involved in the production and collection of raw honey," it may use acquisition costs as a proxy. Final Decision Memo. at 13. This explanation fails to engage with the question of how Nexco's prices are a reasonable substitute for cost values which are much lower. As Commerce's cost memorandum reveals, the prices Nexco paid to the two examined beekeepers for raw honey were two to three times higher than the beekeepers' COP. *See* Preliminary Cost of Production Memorandum, A-357–823, CD 646, bar 4184004–01 (Nov. 17, 2021) at Attachments 1 & 3 ("Prelim. Cost Memo."). Nexco's acquisition costs were significantly higher even when Commerce built in an assumption that the beekeepers' labor and other costs shared with other farming operations (e.g. cattle raising) were all allocated to beekeeping activities. *Id.* at 2–3. Although Commerce's methodology might ensure that all of the costs of production are included, *see* Oral Argument at 0:16:31–0:19:31, 0:22:28–0:24:19, May 15, 2023, ECF No. 41; *see* Final Decision Memo. at 11–13, it is unclear from Commerce's explanation how its methodology is not overinclusive. A lack of missing costs alone does not render Commerce's choice of a proxy reasonable, and Commerce gives no other justification for its choice. Therefore, the court remands this issue for further explanation or reconsideration.

Sales-Below-Cost Test

Nexco claims that Commerce improperly used a monthly cost averaging period for the purposes of its sales-below-cost test. Pl. Br. at 29. Specifically, Nexco argues that Commerce's decision to use monthly, rather than quarterly averaging, is not supported by Commerce's high inflation methodology. *Id.* at 32. Defendant and Defendant-Intervenor counter that Commerce has discretion to choose the averaging period for respondents' costs, and that deflating Nexco's quarterly costs by month was supported by its high inflation methodology. Def. Br. at 32–36; Def.-Int. Br. at 30–35. Because Com-

merce has discretion to choose averaging periods for the sales-below-cost test, the court sustains Commerce's determination on this issue.

Pursuant to 19 U.S.C. § 1677b(b)(3), costs of production should be calculated "during a period which would ordinarily permit the production of that foreign like product." 19 U.S.C. § 1677b(b)(3)(A). The statute does not specify what time periods Commerce must use when weight averaging a respondent's costs and comparison market prices for the sales-below-cost test. *See Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1084 (Fed. Cir. 2001) (remanding to Commerce for failure to modify averaging period in light of significant cost and price changes). As a matter of practice, Commerce generally uses a weighted average COP for the entire period of investigation, in order to even out fluctuations in production costs. *See, e.g.*, *Certain Cold Rolled Steel Flat Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 84 Fed. Reg. 24,083 (Dep't Commerce May 24, 2019) and accompanying issues and decision memo. at Comment 3 ("Our normal practice is to calculate weighted-average costs for the period of investigation").

One significant exception to this practice is Commerce's "alternative cost" averaging methodology. Under the alternative cost methodology, Commerce shrinks the cost averaging periods for material costs in order to mitigate certain distortions during the period of investigation. *See, e.g.*, *Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 75,398 (Dep't Commerce Dec. 11, 2008) and accompanying issues and decision memo. at Comment 4 ("[Commerce] has also established a long-standing practice of applying alternative cost averaging methods in instances where the Department has determined that its normal annual average costs would lead to skewed data and inappropriate comparisons.") In deciding whether to apply the alternative cost methodology, Commerce considers (1) whether cost changes during the period of investigation were significant, and (2) whether there was a link between changing costs and sales prices during that period. *Id.* For the purposes of this determination, Commerce measures cost changes in real, inflation-adjusted terms. Final Decision Memo. at 16. If these criteria are met, Commerce's practice is to use quarterly, rather than yearly, averages for a respondent's material costs. *See, e.g.*, *Rubber Bands from Thailand: Final Determination of Sales at Less than Fair Value*, 84 Fed. Reg. 9,304 (Dep't Commerce March 7, 2019) and accompanying issues and decision memo. at Comment 7.

A second exception to Commerce's practice of using yearly cost averaging periods is Commerce's "high inflation" methodology. Com-

merce has recognized that in countries experiencing high inflation, increases in nominal costs could distort its sales-below-cost analysis, causing either excessive below-cost sales at the start of the period, or above-cost sales towards the end. *See Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 13,813 (Dep't Commerce March 24, 2004), and accompanying issues and decision memo. at Comment 4. Therefore, Commerce has developed a practice of indexing costs on a monthly basis, rather than a period-of-investigation basis, if annual inflation exceeds 25 percent. *See Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review*, 86 Fed. Reg. 15,190 (Dep't Commerce March 22, 2021) and accompanying issues and decision memo. at Comment 1 ("*Pipe Turkey*").

Section § 1677b(b)(3) gives Commerce discretion to determine cost averaging periods, *see Thai Pineapple Canning Indus. Corp.*, 273 F.3d at 1084–85, and Nexco fails to show that Commerce's choice is unreasonable. Nexco's challenge to Commerce's determination is narrow: it argues that Commerce should not have deflated Nexco's quarterly average costs by month for the purposes of the sales-below-cost test. Pl. Br. at 35 ("Nexco is not disputing Commerce's indexing methodology. Nexco is arguing that once Commerce had indexed costs to the month in accordance with its high inflation methodology, then it needed to average those costs to derive quarterly average costs for use in the sales-below cost test"). Nexco claims that deflating to monthly values is not supported by Commerce's past practice, and that Commerce's methodology failed to fully capture the "dramatic increase in costs and prices in between quarters." *Id.* at 31. Commerce admits that it has combined its alternative cost and high inflation methodologies, and that this simultaneous application adds complexity to its calculations. Final Decision Memo. at 15. However, it is not apparent upon examination of Commerce's calculations how using both methodologies at once breaks with past practice, or is unreasonable based on the agency record.

Nexco appears not to dispute that Commerce should have applied its alternative cost methodology, and applied quarterly averages. *See* Pl. Br. at 30–32. Therefore, the parties only contest Commerce's application of the high inflation methodology. Commerce explains that, in situations with high inflation, its normal practice is to instruct respondents to report costs on a monthly basis, rather than a

POI basis. Final Decision Memo. at 16–17. Commerce describes the remaining steps as follows:

> Commerce uses monthly inflation indices to restate the reported monthly costs into a constant inflation-index level (e.g., at the end-of-period inflation-index level). Once these costs reflect a constant inflation-index level, Commerce follows its normal practice of calculating an annual weighted-average cost for each CONNUM produced during the POI/POR. Commerce then restates the annual weighted-average production cost for each CONNUM into the respective inflation-index level for each month of the POI/POR.

Id. at 17; *see also Pipe Turkey* at Comment 1 (describing Commerce's practice). Commerce's cost calculation memo confirms that it followed its usual practice, as described, with respect to Nexco. *See* Prelim. Cost Memo. at Attachment 6.[12] Therefore, Nexco's argument that Commerce has departed from its practice fails, as Commerce's use of a quarterly rather than yearly average has not affected its high inflation calculations in this case.

Nexco also argues that Commerce's decision to use monthly comparisons is unsupported by substantial evidence. Pl. Br. at 29. Specifically, Nexco states that Commerce's effective use of monthly costs failed to capture "the dramatic increase in costs and prices between quarters." *Id.* at 31. It is not clear how a shorter comparison period could fail to capture a quarterly increase in prices. More importantly, however, Commerce has explained why using monthly comparisons was reasonable in light of inflation in Argentina during the POI. It is readily discernable that Commerce applies this methodology to reduce the impact of changing nominal costs on its sales-below-cost test. *See* Final Decision Memo. at 25 (citing *Pipe Turkey* issues and

[12] Commerce calculated Nexco's final, quarterly average acquisition costs deflated by month (F) using the following formulae: $F = QTR\ AVE * (C/D)$, where $QTR\ AVE = (\Sigma E/\Sigma A)$; C = monthly PPI; D = quarter end PPI; $E = G * (D/C)$; A = PRODQTY; $G = A * B$; and B = honey unit acquisition cost. *See* Prelim. Cost Memo. at Attachment 6 This final value was adjusted to calculate average consumption costs (also designated as G) with the following formula: $G = F * Acons/A$, where $Acons$ = monthly consumption quantities. *See id.*

decision memo. at Comment 1).[13] Therefore, because Commerce has reasonably explained why it used monthly comparisons for Nexco's costs, this determination is sustained.

Normal Value Comparison

Nexco claims that Commerce improperly compared its U.S. sales with third-country sales to Germany on a monthly basis, rather than a quarterly basis. Pl. Br. at 36–45. Specifically, Nexco argues that because both its U.S. sales and German sales were denominated in dollars, Commerce should not have applied its high-inflation methodology to Nexco's sales.[14] *Id.* Defendant and Defendant-Intervenor counter that Commerce properly compared sales in accord with its high inflation methodology, because Nexco's sales prices were affected by changing costs. Def. Br. at 32–39; Def.-Int. Br. at 36–46. Because Commerce has not adequately explained its use of month-to-month comparisons for Nexco's sales, the court remands this issue for further explanation or reconsideration.

Pursuant to 19 U.S.C. § 1677f-1(d)(1), Commerce normally determines whether merchandise is being sold at less than fair value in an investigation "by comparing the weighted average of the normal values to the weighted average of the export prices." 19 U.S.C. § 1677f-1(d)(1). The statute does not specify during what time period normal value and export price should be averaged for the purposes of com-

---

[13] In *Pipe Turkey*, Commerce explained that:

> In countries experiencing high inflation, the nominal value of production costs increases over time, even where such costs, expressed in real terms, remain constant. We recognize that this would cause distortions in the antidumping analysis because of our practice of comparing period-average COP and CV amounts to transaction-specific prices during the POR. As an illustration of this distortion, consider a sales-below-cost analysis where real production costs remain constant but, because of high inflation, nominal costs rise throughout the POR. Under this scenario, a period-average COP figure based on monthly nominal cost amounts would tend to be higher than the individual home-market sale prices at the beginning of the period but lower than the prices at the end of the period. Depending on the timing of the home-market sales, this could result in an excessive quantity of below-cost sales at the beginning of the period or, conversely, an overstatement of the number of above-cost sales at the end of the period.

Pipe Turkey issues and decision memo. at Comment 1 (quoting *Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 13,813 (March 24, 2004), and accompanying issues and decision memo. at Comment 4).

[14] Nexco's argument appears to address only dollar-denominated third-country sales comparisons, and does not pertain to comparisons with peso-denominated constructed value home market sales. *See* Pl. Br. at 32–33, 35–43 (stating that "comparisons of U.S. dollar-denominated sales" by month are unsupported, and exclusively discussing third-country sales to Germany). Therefore, the court limits its analysis to the appropriate comparison period for dollar-denominated sales to Germany.

parison. *Cf.* SAA at 4178 (only specifying periods for average-to-transaction comparisons). However, 19 C.F.R. § 351.414(d)(3) expresses a preference for period-of-investigation averaging, stating:

> When applying the average-to-average method in an investigation, the Secretary normally will calculate weighted averages for the entire period of investigation. However, when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate.

19 C.F.R. § 351.414(d)(3).

As a matter of practice, Commerce makes month-to-month comparisons of normal value and export prices during periods of high inflation. As with its practice in comparing costs, Commerce resorts to its high inflation practice in price comparisons if inflation exceeds 25 percent during the period of investigation. *See Pipe Turkey* issues and decision memo. at Comment 1; *see also Notice of Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from Indonesia*, 64 Fed. Reg. 73,164, 73,170 (Dep't Commerce Dec. 29, 1999) (Commerce "make[s] sales comparisons on a monthly average basis, rather than on a POI average basis, in order to minimize the effects of inflation on our analysis").

Here, Commerce justifies its use of monthly comparisons for Nexco's prices on the same grounds it invoked for Nexco's costs: high inflation during the POI. *See* Final Decision Memo. at 24–28. However, Commerce's discretion to choose averaging periods for price comparisons is circumscribed by regulation. *See* 19 C.F.R. § 351.414(d)(3) (providing that Commerce "may calculate weighted averages for such shorter period as the Secretary deems appropriate" when normal values "differ significantly over the course of the period of investigation"). Commerce argues that it has "statutory discretion to determine the time periods over which to calculate weight-average U.S. prices and normal values," citing to 19 U.S.C. § 1677f-1(d)(1). Final Decision Memo. at 24. Section 1677f-1(d)(1) states that Commerce shall "compar[e] the weighted average of normal values to the weighted average of export prices . . . for comparable merchandise." 19 U.S.C. § 1677f-1(d)(1)(A)(i). Commerce also argues that, according to regulation, it "may calculate weight-averages over shorter periods when normal values or U.S. prices change significantly over the course of the POI," and that a country experiencing high inflation would satisfy this requirement. Final Decision Memo. at 24–25. Com-

merce does not explain, and it is not reasonably discernable, that either the normal value of sales to Germany or U.S. prices underwent a significant change during the POI. If Nexco's sales to Germany had been denominated in Argentine pesos, it is evident that Nexco's normal value prices would change significantly as a result of high peso inflation, which Commerce found existed during the POI. *See id.* at 17. However, Commerce does not assert that Nexco's German sales were denominated in pesos, and does not explain how Nexco's prices "differ significantly" by pointing to evidence on the record. Rather, Commerce argues that Nexco's sales prices were "impacted" by high inflation "due to the impact on the respondents' COP," and that this impact resulted in significant changes. *Id.* at 26. However, Commerce does not specify what changes occurred in either German prices or U.S. prices, e.g., whether the prices increased, and these changes are not discernable from the record. *See id.* (citing Prelim. Cost Memo.); *see also* Preliminary Margin Calculation Memorandum at 221, 222, 234, 235, 585, A-357–823, CD 639, bar 4183846–01 (Nov. 17, 2021).

Commerce explains that it is following its ordinary high-inflation methodology, which is well-supported by administrative precedent. *Id.* at 25. The administrative precedent referenced by Commerce supports using shorter averaging periods when sales are denominated in local currencies, not U.S. dollars. *See id.* at 25 n.122 (listing determinations). Commerce also attempts to defend its choice of averaging period by discussing the impact of inflation on Nexco's costs. *Id.* at 26–27. It states that:

> Even though both the comparison market and the U.S. market sales were conducted in U.S. dollars, the sales prices of both mandatory respondents were impacted by high inflation during the POI due to the impact on the respondents' COP. Because Argentina experienced high inflation during the POI, Commerce adjusted the respondents' COP by employing high inflation methodology, which requires that respondents report monthly replacement costs for direct materials costs and monthly averages for conversion costs. Commerce indexes these monthly costs to the end of the POI to calculate a constant currency annual weighted-average COP that is then restated in the respective POI monthly currency levels. As we stated in the Preliminary Determination in this case, record evidence supports that even after the restatement of ACA's and NEXCO's costs into a constant currency level, both ACA and NEXCO experienced significant cost changes when measured by the difference between the highest quarterly COM and the lowest quarterly COM during the POI. Thus, while sale prices may have been

> conducted in U.S. dollars, record evidence shows that the costs that ACA and NEXCO incurred in operating in a high inflation economy were still impacted by inflation.

Id. It is unclear how Commerce's discussion of Nexco's costs, and its own COP methodology, leads to its conclusion that Nexco's prices differed significantly. The regulation provides that when normal values or export prices differ significantly shorter comparison periods may be appropriate. *See* 19 C.F.R. § 351.414(d)(3). It is unclear whether or why Commerce believes Nexco's "significant cost changes," resulted in significant price changes. Commerce also states that:

> While we do not base our decision to use monthly sales prices on our decision regarding beekeeper or acquisition costs, we find that our analysis of the significant changes in both the costs and prices of raw honey is informative and provides additional support for comparing prices within shorter time periods.

Id. Commerce offers no further explanation as to how exactly cost analysis "provides additional support" for price comparisons.[15] *Id.* Finally, Commerce argues that its "standard margin calculation converts any foreign currency prices to USD on the date of the U.S. sale when performing comparisons, and therefore, the basic premise of Commerce's high inflation practice is that U.S. dollar sales prices do not neutralize the impact of inflation." *Id.* at 26. Whether or not U.S. dollar sales "neutralize" inflation, this argument does not explain how Nexco's prices differed significantly over the POI, and it is not reasonably discernable from Commerce's explanation why a shorter averaging period would be appropriate pursuant to 19 C.F.R. § 351.414(d)(3). Therefore, the court remands this issue for further explanation or reconsideration.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determination to compare Nexco's costs on a monthly basis for the purposes of the sales-below cost test. Commerce's determination to use Nexco's acquisition costs as a proxy for the beekeepers' COP, and Commerce's determination to compare Nexco's third-country sales and U.S. sales

[15] Commerce also discusses how Nexco's costs and prices were "reasonably linked" during the POI, but stops short of asserting that Nexco's prices increased significantly. Final Decision Memo. at 27. Moreover, whether there is a "link" between costs and sales appears to be the analysis Commerce undertakes when deciding whether to apply its alternative cost test—which is not in dispute. *See* Prelim. Results at 24.

on a monthly basis, are remanded for further explanation or reconsideration. In accordance with the foregoing, it is

ORDERED that the final results, *see* ECF No. 20–1, are remanded for further explanation or reconsideration consistent with this opinion; and it is further

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

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

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

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

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

Dated: June 7, 2023
New York, New York

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

Index

Customs Bulletin and Decisions
Vol. 57, No. 24, June 21, 2023

U.S. Customs and Border Protection

General Notices

U.S. Court of International Trade

Slip Opinions

GPO U.S. G.P.O.: 2023—423-106/30029