U.S. Customs and Border Protection

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS OF CUSTOMS DUTIES

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

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will increase from the previous quarter. For the calendar quarter beginning October 1, 2023, the interest rates for underpayments will be 8 percent for both corporations and non-corporations. The interest rate for overpayments will be 8 percent for non-corporations and 7 percent for corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of October 1, 2023.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298–1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the

Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2023–17, the IRS determined the rates of interest for the calendar quarter beginning October 1, 2023, and ending on December 31, 2023. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (5%) plus three percentage points (3%) for a total of eight percent (8%) for both corporations and non-corporations. For overpayments made by non-corporations, the rate is the Federal short-term rate (5%) plus three percentage points (3%) for a total of eight percent (8%). For corporate overpayments, the rate is the Federal short-term rate (5%) plus two percentage points (2%) for a total of seven percent (7%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties increased from the previous quarter. These interest rates are subject to change for the calendar quarter beginning January 1, 2024, and ending on March 31, 2024.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpay-ments (eff. 1–1–99) (percent)
070174	063075	6	6	....
070175	013176	9	9	....
020176	013178	7	7	....
020178	013180	6	6	....
020180	013182	12	12	....
020182	123182	20	20	....
010183	063083	16	16	....
070183	123184	11	11	....
010185	063085	13	13	....
070185	123185	11	11	....
010186	063086	10	10	....
070186	123186	9	9	....
010187	093087	9	8	....
100187	123187	10	9	....
010188	033188	11	10	....

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpay-ments (eff. 1–1–99) (percent)
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	033118	4	4	3

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpay-ments (eff. 1–1–99) (percent)
040118	123118	5	5	4
010119	063019	6	6	5
070119	063020	5	5	4
070120	033122	3	3	2
040122	063022	4	4	3
070122	093022	5	5	4
100122	123122	6	6	5
010123	093023	7	7	6
100123	123123	8	8	7

Dated: October 4, 2023.

JEFFREY CAINE,
Chief Financial Officer,

[Published in the Federal Register, October 10, 2023 (88 FR 69937)]

RECEIPT OF APPLICATION FOR "LEVER-RULE" PROTECTION

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

ACTION: Notice of receipt of application for "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from The Procter & Gamble Co., ("Procter & Gamble") seeking "Lever-Rule" protection against importations of certain electronic replacement toothbrush heads that bear the federally registered and recorded "ORAL-B" trademark.

FOR FURTHER INFORMATION CONTACT: Amanda Stevenson, Intellectual Property Enforcement Branch, Regulations & Rulings, (202) 325-0065.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Procter & Gamble seeking "Lever-Rule" protection. Protection is sought against importations of electric toothbrush replacement heads manufactured in Germany, intended for sale in countries outside the United States, that bear the "ORAL-B" (U.S. Trademark Registration No. 2,910,847/ CBP Recordation No. TMK 08-01198) trademark, including the iO model replacement heads. In the event that CBP determines that the electric toothbrush replacement heads under consideration are physically and materially different from the electric toothbrush replacement heads authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2 (f), indicating that the above-referenced trademark is entitled to "Lever-Rule" protection with respect to those physically and materially different electric toothbrush replacement heads.

Dated: October 12, 2023

ALAINA L VAN HORN

U.S. Court of International Trade

Slip Op. 23–146

SOUTHERN CROSS SEAFOODS, LLC, Plaintiff, v. UNITED STATES, and NATIONAL MARINE FISHERIES SERVICE, Defendants.

Before: Timothy M. Reif, Judge
Court No. 22–00299
PUBLIC VERSION

[Denying in part plaintiff's Motion to Supplement the Administrative Record concerning five categories of documents and ordering defendants to provide an explanation concerning the remaining category.]

Dated: October 5, 2023

David E. Bond, *Earl W. Comstock*, *Lucius B. Lau*, *Cristina M. Cornejo*, White & Case, LLP, of Washington, D.C., for plaintiff Southern Cross Seafoods, LLC.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *L. Misha Preheim*, Assistant Director.

Keith A. Hagg, Attorney-Advisor, National Oceanic Atmospheric Administration, Office of General Counsel of Silver Spring, M.D. for defendant National Marine Fisheries Service.

OPINION AND ORDER

Reif, Judge:

Before the court is the motion to supplement the administrative record of plaintiff Southern Cross Seafoods, LLC ("plaintiff" or "Southern Cross") subsequent to the motion to dismiss by defendants the United States ("the government") and the National Marine Fisheries Services ("NMFS")[1] (collectively, "defendants") of plaintiff's complaint concerning the denial of its preapproval application for imports of *Dissostichus eleginoides,* commonly referred to as Patagonian toothfish ("toothfish") harvested from the Food and Agricultural Organization of the United Nations Statistical Subarea 48.3 in the South Georgia fishery ("Subarea 48.3") in the Atlantic Ocean north of Antarctica.

For the reasons outlined below, the court denies plaintiff's motion to supplement the administrative record for Document Categories 1, 3,

[1] NMFS is a federal agency within the National Oceanic and Atmospheric Administration ("NOAA"). Corrected Compl. ¶ 15. NOAA is situated within the U.S. Department of Commerce ("Commerce"). *Id.*

4, 5 and 6 and orders defendants to file an explanation of their position concerning Document Category 2.

BACKGROUND

Plaintiff seeks a declaratory judgment against the denial of future applications for preapproval of its imports of toothfish from Subarea 48.3 due to the lack of a conservation measure ("CM") in force for the Convention on the Conservation of Antarctic Marine Living Resources ("CAMLR Convention"). Corrected Compl. ¶¶ 9, 12, 54, ECF No. 14. Plaintiff challenges also the actions of NMFS under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). *Id.* ¶¶ 8–9, 56, 58. In defendants' motion to dismiss, defendants argue that plaintiff's action does not arise out of a law providing for an "embargo" or other "quantitative restriction" under 28 U.S.C. § 1581(i) and that, even if it did, the Court lacks subject matter jurisdiction because the district courts have exclusive jurisdiction pursuant to 16 U.S.C. § 2440. Defs.' Mot. Dismiss ("Defs. Mot. Dismiss") at 1, ECF No. 25. Plaintiff opposes the motion to dismiss. Pl.'s Resp. in Opp'n to Defs.' Mot. Dismiss ("Pl. Resp."), ECF No. 26.

On June 20, 2023, plaintiff filed a motion to supplement the administrative record. Pl.'s Mot. Supp. Admin. R. ("Pl. Mot. Supp."), ECF No. 37. In its motion to supplement the administrative record, plaintiff delineates six categories of documents that plaintiff alleges are missing from the administrative record; plaintiff argues that the absence of these documents from the administrative record renders the administrative record before the court incomplete. *Id.* at 2. On July 24, 2023, defendants filed their response in opposition to plaintiff's motion to supplement the administrative record, arguing that NMFS did not directly or indirectly rely on the categories of documents requested by plaintiff, the documents requested are not in possession of NMFS and they are pre-decisional or privileged and are not properly part of the administrative record. Defs.' Resp. Opp'n. Pl.'s Mot. Supp. Admin. R. ("Defs. Resp. Mot. Supp."), ECF No. 42.

LEGAL FRAMEWORK

Under section 706 of the APA, a court "review[s] the whole record or those parts of it cited by a party. . . ." 5 U.S.C. § 706. The Supreme Court has defined "whole record" for an APA action under 5 U.S.C. § 706 as "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971). A whole administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the

agency's position." *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 32 (N.D. Tex. 1981). This includes "all materials that might have influenced the agency's decision. . . ." *Amfac Resorts LLC v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (internal quotation marks omitted); *see also Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The court notes that the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has identified three narrow instances in which supplementation of an administrative record may be appropriate before reaching the merits of an APA challenge to agency action: "(1) if the agency 'deliberately or negligently excluded documents that may have been adverse to its decision,' (2) if background information was needed 'to determine whether the agency considered all the relevant factors,' or (3) if the 'agency failed to explain administrative action so as to frustrate judicial review[.]'" *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) (quoting *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)).

"An agency enjoys a presumption of regularity as to the record it prepares, because the agency, as the decision-maker, is generally in the best position to identify and compile those materials it considered." *JSW Steel (USA) Inc. v. United States*, 44 CIT, __, __, 466 F. Supp. 3d 1320, 1328 (2020) (citing *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 55–57 (D.C. Cir. 2003); *Pacific Shores Subd. v. U.S. Army Corps of Eng.*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006)). "Where an agency presents a certified copy of the complete administrative record, as was done in this case, 'the court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary.'" *Defenders of Wildlife v. Dalton*, 24 CIT 1116, 1119 (2000) (quoting *Ammex, Inc. v. United States*, 23 CIT 549, 549, 62 F. Supp. 2d 1148, 1156 (1999)). "In an administrative review case, it is rare that a federal court will consider information outside of the [administrative] record submitted" by the agency. *Giorgio Foods, Inc. v. United States*, 35 CIT 297, 299–300, 755 F. Supp. 2d 1342, 1346 (2011) (citing *Advanced Tech. & Materials Co. v. United States*, 34 CIT 598, 603 (2010)).

Supplementing the administrative record with additional documents is distinct from supplementing the record "upon a showing that the administrative record is not complete." *Advanced Tech.*, 34 CIT at 604. "Although record supplementation on these grounds is often viewed as one of the 'exceptions' to the record rule . . . it is described more accurately as 'completing' the record because the material sought to be included is only that which (allegedly) should have been

a part of the record to begin with." *Id.* (citing *Pacific Shores,* 448 F. Supp. 2d at 4).

"[C]ompleting the [administrative] record requires only that the moving party show that the record filed is not complete, supplementing the record requires the further burden of showing bad faith by the agency." *Invenergy Renewables LLC v. United States*, 44 CIT, __, __, 476 F. Supp. 3d 1323, 1354–55 (2020) (citations omitted).

"In a motion to complete the administrative record, a party must do more than simply allege that the record is incomplete. Rather, a party must provide the [c]ourt with reasonable, non-speculative grounds to believe that materials considered in the decision-making process are not included in the record." *Defenders of Wildlife,* 24 CIT at 1119 (citations omitted) (internal quotation marks omitted).

"Privileged and deliberative documents reflecting an agency's internal deliberations do not form part of the administrative record, and, generally, are not discoverable so as to merit a privilege log, unless there is a showing of bad faith or improper behavior." *JSW Steel*, at 466 F. Supp. 3d at 1328 (citing *Stand Up for California! v. U.S. Dep't of Interior*, 71 F. Supp. 3d 109, 122–23 (D.D.C. 2014); *Oceana, Inc. v. Ross*, 440 U.S. App. D.C. 237, 247, 920 F.3d 855, 865 (2019)).

DISCUSSION

I. Motion to supplement or complete the administrative record

A. Positions of the parties

Plaintiff in the instant action characterizes its motion to supplement the administrative record as "not seeking to *supplement* the record with additional documents that were not previously before the agency." Pl. Mot. Supp. at 1 (emphasis supplied). Rather, plaintiff asserts that it "is asking the [c]ourt to order [d]efendants to *complete* the record." *Id.* (emphasis supplied). Plaintiff argues that the administrative record as it currently exists is not complete and "does not include certain documents that were directly or indirectly considered by decisionmakers at the NMFS when it decided to deny Southern Cross's application for pre-approval to import frozen toothfish from Subarea 48.3." *Id.* at 3. As the basis for this assertion, plaintiff states that the supplemental requested documents "were directly or indirectly referenced by documents already included in the administrative record, demonstrating that they were considered directly or indirectly by the NMFS in its decision. . . ." *Id.* at 3–4.

Defendants allege that plaintiff's argument "lacks any logical basis or legal support" and that "taking Southern Cross's unsupported

statement as true would result in an absurd situation where the record would never be considered complete, as every document referenced (even indirectly) in the documents included in the record because of reference by other documents would then need to be added as well, without end." Defs. Resp. Mot. Supp. at 3. Defendants argue that they "have already included the documents properly part of the administrative record" and that all other documents requested by plaintiff are "either: 1) documents not directly or indirectly relied on by NMFS in rendering the decision at issue in this case; 2) not within the possession of NMFS; [or] 3) pre-decisional or privileged and therefore not properly part of the administrative record." *Id.* at 1.

B. Analysis

Parties in the instant action categorize supplemental documents to complete the administrative record (Categories 1–6). The court accepts these categories for purposes of deciding the instant motion and considers each in turn.[2]

Plaintiff does not allege that defendants acted in bad faith in filing the administrative record. *See* Pl. Mot. Supp. Accordingly, the court decides the instant motion under the standard of completing the record. *See Invenergy*, 44 CIT __, 476 F. Supp. 3d at 1355 (deciding the motion to supplement under the standard of completing the record because plaintiff made no allegations of bad faith on the part of the government). Under this standard, the court examines whether plaintiff provides the "[c]ourt with reasonable, non-speculative grounds to believe that materials considered in the decision-making process [were] not included in the record." *Defenders of Wildlife,* 24 CIT at 1119 (citations omitted) (internal quotation marks omitted).

1. Document Category 1

Category 1 consists of a single document requested by plaintiff. Pl. Mot. Supp. at 4. Defendants included the document in their response to plaintiff's motion to supplement. *See* Supp. to Admin. R. Paper, Delegations of Australia and the United States, Conservation at CCAMLR: Understanding Article II of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR-XXXV/BG/28) (Sep. 17, 2016), PR 115. Accordingly, the court concludes that plaintiff's request for this document has been satisfied and, accordingly, the court denies plaintiff's motion.

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[2] The court notes that defendants included additional documents in the administrative record in their response in opposition to plaintiff's motion to supplement. These documents are responsive to certain of plaintiff's requests to complete the administrative record. *See* Defs. Resp. Mot. Supp., Ex. B ("Supp. to Admin. R.") PR 113–38, ECF No. 42.

2. Document Category 2

Plaintiff's requests in Category 2 comprise two types of documents: (1) "any information or supporting communications to indicate how the NMFS obtained the outside legal opinions included in the administrative record" and (2) "any information or supporting communications identifying who authored the legal opinion titled 'Legal Opinion in relation to the toothfish fishing licenses granted by the Government of South Georgia for the 2022 season in the 48.3 area of CCMALR.'" Pl. Mot. Supp. at 4 (citing Legal Opinion in Relation to the Toothfish Fishing Licences Granted by the Government of South Georgia for the 2022 Season in the 48.3 area of CCMALR ("Legal Opinion"), PR 104).

As to the first type of documents requested, defendants state that "the legal opinions were not solicited by NMFS in any manner, but rather simply submitted unsolicited by certain external groups." Defs. Resp. Mot. Supp. at 4 (citing Defs. Resp. Mot. Supp., Declaration of Janet Coit,[3] Ex. A ("Coit Decl.") ¶ 13); *see* Legal Opinion, PR 104. Defendants argue that, because such legal opinions were unsolicited, "there is no reasonable basis to conclude that NMFS decisionmakers relied on the obtaining of the outside legal opinions in rendering the decision, and any such documents would not properly be part of the administrative record." *Id.*

Concerning the second type of supplemental information requested — the name of the author of the Legal Opinion — defendants submit an additional document in response to plaintiff's request. *Id.*; Email forwarded by Kimberly Dawson[4] to Meggan Engelke-Ros and Mi Ae Kim[5] (Aug. 21, 2022), originally sent by Ignacio Arocena to Kimberly Dawson and Lori Robinson (Aug. 19, 2022) ("August 2022 Email")), PR 125. Coit iterates that records were searched for the author of the opinion to no avail but defendants included in the administrative record in response to plaintiff's motion to supplement "one email regarding the genesis of the legal opinion." Coit Decl. ¶ 14.

The court notes that the substance of the email to which the "Legal Opinion" is attached states "Interesting, from COLTO via Ignaci-

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[3] Janet Coit ("Coit") serves as the Assistant Administrator for NMFS within NOAA. Coit's responsibilities include overseeing the work of the Office of International Affairs, Trade and Commerce within NMFS and administering the agency's responsibilities under the AMLRCA. Coit Decl. ¶ 1.

[4] Kimberly Dawson is a Fisheries Biologist/NOAA Fisheries within the Office of International Affairs, Trade and Commerce. *See* Kimberly Dawson's Email signature line, PR 12.

[5] Both Meggan Engelke-Ros and Mi Ae Kim have emails ending in "noaa.gov." *See* August 2022 Email. Without drawing conclusions about their respective roles and titles within NOAA without such descriptions in the administrative record, the court notes that both recipients hold positions within NOAA.

o..[sic].” August 2022 Email. The court identifies a potential inconsistency in the original inclusion by NMFS of the Legal Opinion in the administrative record and defendants’ assertion that NMFS did not consider unsolicited outside legal opinions. *Compare* Legal Opinion, PR 104 *with* Defs. Resp. Mot. Supp. at 4 (stating “there is no reasonable basis to conclude that NMFS decisionmakers relied on the obtaining of the outside legal opinions in rendering the decision, and any such documents would not properly be part of the administrative record.”) Defendants have not sufficiently explained why, if NMFS did not in fact consider directly or indirectly any outside legal opinions in rendering its decision, NMFS included the Legal Opinion in the administrative record. Further, defendants have not sufficiently explained the reason that the “unsolicited” nature of the external legal opinions necessarily equates to NMFS disregarding the unsolicited legal opinions in its decision-making. *See* Defs. Resp. Mot. Supp. at 4. In light of the foregoing, the court directs defendants to explain with reference to each point noted above the apparent inconsistencies in (1) their assertion as quoted above at page 4 of their Response in the instant action with their inclusion of the Legal Opinion in the administrative record, and (2) the comment in the email from Kimberly Dawson, quoted above, that the Legal Opinion was “interesting.”

3. Document Category 3

Documents in Categories 3, 4 and 5 relate to a letter of December 17, 2021, from Alexa Cole of NOAA to Constance Arvis of the U.S. Department of State[6], stating that “NMFS has determined that the importation of [toothfish from subarea 48.3] . . . would be prohibited . . . until such time that CCAMLR adopts a conservation measure to set catch limits for that area.” Pl. Mot. Supp. at 5 (citing Letter from Alex Cole to Constance Arvis (Dec. 17, 2021) (“Letter of December 17”), PR 21).

Category 3 documents are “emails, notes, or correspondence prior to December 17, 2021 relating to the NMFS determination that the importation of toothfish from CCAMLR Subarea 48.3 would be prohibited.” Pl. Mot. Supp. at 5–6 (citing Email from Alexa Cole to Seth Sykora-Bodie (Jan. 10, 2022), PR 3 (“There were a number of State/NOAA conversations that preceded our letter. . . .”) (emphasis omitted); Letter of December 17, PR 21).

Plaintiff states that the administrative record is incomplete because it does not include the documents or notes leading up to the

[6] Parties refer to the U.S. Department of State (“State Department”) as the State Department, DOS or State in their briefs and within the record interchangeably. *E.g.*, Pl. Mot. Supp. at 5–6; *e.g.*, Defs. Resp. Mot. Supp. at 6.

email from Alex Cole to Constance Arvis. Pl. Mot. Supp. at 6. Plaintiff argues that emails, notes and conversations related to the consultations between NOAA and State "were at the very least indirectly considered by the agency decision-makers when they denied Southern Cross's application." *Id.*

Citing to the Declaration of Janet Coit, defendants respond that "the administrative record already contains all non-privileged and non-pre-decisional documents relating to the NMFS decision at issue." Defs. Resp. Mot. Supp. at 4 (citing Coit Decl. ¶ 15). Further, defendants note that plaintiff has not cited to any authority that "pre-decisional documents reflecting the mental processes of NMFS decisionmakers are properly part of the administrative record." *Id.* at 5.

Absent a showing of bad faith and improper behavior, the court "assumes the record is complete where it has been certified by the agency." *Invenergy*, 476 F. Supp. 3d at 1355 (citing *Giorgio Foods*, 35 CIT at 300, 755 F. Supp. 2d at 1346). Plaintiff has not presented the court with sufficient evidence to conclude that NMFS acted in bad faith by not including in the administrative record documents that are pre-decisional or privileged. *See JSW Steel*, 466 F. Supp. 3d at 1328 (citing *Stand Up*, 71 F. Supp. 3d at 122–23; *Oceana*, 920 F.3d at 865). As such, the court denies plaintiff's motion to complete the record concerning documents in Category 3.

4. Document Category 4

Category 4 documents consist of "any communications between the State Department, the NMFS and other CCAMLR member Commissioners informing them of the NMFS decision to prohibit the importation of toothfish caught in Subarea 48.3 during periods where there is no CCAMLR catch limit in place." Pl. Mot. Supp. at 6. Citing to the Letter of December 17, plaintiff asserts that there was an express request that "'State coordinate with NMFS to inform other CCAMLR member Commissioners and U.S. fish dealers' about the decision, PR 22, yet no record of such communications other than the email to the U.K. CCAMLR Commissioner Jane Rumble, *see* PR 1, are included in the administrative record." *Id.* (citing to Letter of December 17, PR 22; Email from Constance Arvis to Jane Rumble, Elizabeth Phelps, David Goddard re: 48.3 – Importation issue, PR 1).

Defendants assert that the administrative record already contains all non-privileged and non-pre-decisional documents relating to the NMFS decision. Defs. Resp. Mot. Supp. at 4 (citing Coit Decl. ¶ 15). Defendants state also that "Southern Cross has not alleged any impropriety or bad faith on the part of NMFS (and cannot credibly do

so)." *Id.* at 5. Citing to the Declaration of Janet Coit, defendants state that "because the documents described in [C]ategory 4 'merely relayed the position taken by NMFS in the Cole letter, NMFS did not directly or indirectly consider them in making' the decision at issue in this case." *Id.* (citing Coit Decl. ¶ 20). Further, defendants state that "[t]o the extent that any documents responsive to [C]ategory 4 are within the possession of DOS rather than NMFS, they would not be properly part of the administrative record, as they are not in the possession of NMFS and therefore would not have been considered by NMFS in rendering *its* decision." *Id.* at 6.

There is no basis for the court to conclude that documents in Category 4 should be part of the administrative record in the instant action. According to defendants and the Declaration of Janet Coit, the documents requested by plaintiff were not prepared by the NMFS decisionmaker and were not relied upon in the instant action. *See Defenders of Wildlife,* 24 CIT at 1123 (concluding that requested reports were not properly part of the administrative record because they were not prepared or considered by the relevant agency decisionmaker). As such, the court denies plaintiff's motion to complete the record concerning documents in Category 4.

5. Document Category 5

Category 5 documents are "initial exchanges between representatives of the State Department and other delegations (namely the European Union and the U.K.) regarding fishing in Subarea 48.3 in the absence of a catch limit adopted by the CCAMLR." Pl. Mot. Supp. at 6–7. Plaintiff argues that the initial exchanges between the State Department and other delegations should be part of the administrative record because they were at least indirectly considered by NMFS. *Id.* (citing Email from Luis Molledo of the European Commission to Elizabeth Phelps of the State Department, PR 111 (referring to "initial exchanges on 48.3 with [Phelps'] delegations[,]")).

Concerning documents in Category 5, defendants state that "NMFS has no documents in its possession that are responsive to this request." Defs. Resp. Mot. Supp. at 6 (citing Coit Decl. ¶ 21). Defendants reiterate that such documents should not be part of the administrative record. *Id.*

Plaintiff provides no evidence that NMFS reviewed or relied on the exchanges to which Luis Molledo referred in his email to Elizabeth Phelps. *See* Email from Luis Molledo of the European Commission to Elizabeth Phelps of the State Department, PR 111 (referring to Molledo's "initial exchanges on 48.3 with [Phelps'] delegations[,]"). Consis-

tent with *JSW Steel* and the deference to which agencies are entitled in forming an administrative record, plaintiff does not show that NMFS acted in bad faith in not including any documents that might comprise Category 5. As the Court has stated previously, "[t]he purpose of limiting review to the record actually before the agency is to guard against courts using new evidence to convert the arbitrary and capricious standard into effectively de novo review." *JSW Steel*, 44 CIT at __, 466 F. Supp. 3d at 1328 (internal quotation marks omitted) (quoting *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009)).

For the foregoing reasons, the court denies plaintiff's motion to complete the record concerning documents in Category 5.

6. Document Category 6

Finally, plaintiff motions to supplement the administrative record with "any communications from non-governmental organizations ("NGOs") and other governments regarding whether the importation of toothfish from Subarea 48.3 requires a CCAMLR catch limit or contravenes any CCAMLR conservation measure, including any CCAMLR circulars and any communications that the State Department received from the European Union, the U.K. or other governments in response to Luis Molledo's March 4, 2022 email[.]" Pl. Mot. Supp. at 7 (citing Email from Luis Molledo of the European Commission to Elizabeth Phelps of the State Department, PR 111).

In response, defendants stated that "without conceding that NMFS *actually* indirectly considered the documents, [NMFS] will agree to include materials reflecting the communications that were in NMFS's possession prior to the time of the decision[.]" Defs. Resp. Mot. Supp. at 7 (citations omitted).

Upon review of defendants' attachments and explanation thereof, the court determines that defendants' additions are responsive to plaintiff's motion to complete the record and plaintiff's request for documents in Category 6 has been satisfied. *See* Supp. to Admin. R. Letter from the Russian Federation (May 23, 2022), PR 128; Letter from Argentina (June 17, 2022), PR 133; Aide-Memoire (March 28, 2022), PR 136.

CONCLUSION

The court concludes that defendants' supplemental attachments in the form of the Declaration of Janet Coit and documents attached as supplements to the administrative record fulfill plaintiff's motion to supplement the administrative record with respect to Document Categories 1 and 6. Defendants provide adequate explanation for the absence of documents in the administrative record comprising Cat-

egories 3 through 5. Plaintiff has not demonstrated that the agency acted in bad faith and plaintiff has not demonstrated improper behavior in the agency's compilation of an administrative record. For Document Category 2, the court identifies a potential inconsistency between the inclusion by NMFS of the Legal Opinion in the initial administrative record and defendants' assertion that unsolicited external legal opinions were not relied upon in issuing the NMFS decision to deny preapproval of importation of toothfish. Defendants have not sufficiently explained why, if NMFS did not in fact consider directly or indirectly any outside legal opinions in rendering its decision, NMFS included the Legal Opinion in the administrative record. The court directs defendants to explain, with reference to the points identified by the court at Section I.B.2 *supra*, the potential inconsistency between NMFS' action and defendants' subsequent explanation thereof.

For the reasons discussed, the court concludes that plaintiff's request to supplement the administrative record has been satisfied for Categories 1 and 6 and denies plaintiff's motion to supplement the administrative record concerning Categories 3–5. With respect to Category 2, the court directs defendants to explain their position regarding the Legal Opinion and the foregoing inconsistency in the original administrative record and defendants' subsequent position.

Accordingly, it is hereby

ORDERED that plaintiff's motion to supplement the record is denied for Document Categories 1 and 6 on the ground that plaintiff's request to supplement the administrative record has been satisfied by defendants, and plaintiff's motion to supplement the administrative record is denied for Document Categories 3, 4 and 5.

ORDERED that defendants explain their position as to Document Category 2 within 30 days of this order. Defendants' supplemental explanation should not exceed 1,000 words and should address the aforementioned apparent inconsistency.

ORDERED that plaintiff respond to defendants' supplemental explanation within 21 days. Plaintiff's response to defendants' explanation should not exceed 1,000 words.

Dated: October 5, 2023
New York, New York

/s/ Timothy M. Reif
Timothy M. Reif, Judge

Slip Op. 23–147

LINYI CHENGEN IMPORT AND EXPORT CO., LTD., Plaintiff, and CELTIC CO., LTD., et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR FAIR TRADE IN HARDWOOD PLYWOOD, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00002

[Sustaining the fifth remand redetermination of the U.S. Department of Commerce, following the final determination in the antidumping duty investigation of certain hardwood plywood products from the People's Republic of China.]

Dated: October 10, 2023

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, D.C., for Plaintiff Linyi Chengen Import and Export Co., Ltd., Consolidated Plaintiffs Far East American, Inc. and Shandong Dongfang Bayley Wood Co., Ltd., and Consolidated Plaintiffs and Plaintiff-Intervenors Celtic Co., Ltd., Jiaxing Gsun Import & Export Co., Ltd., Anhui Hoda Wood Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Linyi Evergreen Wood Co., Ltd., Linyi Glary Plywood Co., Ltd., Linyi Hengsheng Wood Industry Co., Ltd., Linyi Huasheng Yongbin Wood Co., Ltd., Linyi Jiahe Wood Industry Co., Ltd., Linyi Linhai Wood Co., Ltd., Linyi Mingzhu Wood Co., Ltd., Linyi Sanfortune Wood Co., Ltd., Qingdao Good Faith Import and Export Co., Ltd., Shandong Qishan International Trading Co., Ltd., Shanghai Futuwood Trading Co., Ltd., Suining Pengxiang Wood Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., Xuzhou Andefu Wood Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Xuzhou Pinlin International Trade Co., Ltd., Xuzhou Shengping Import and Export Co., Ltd., and Xuzhou Timber International Trade Co., Ltd.

Jeffrey S. Neeley and *Stephen W. Brophy*, Husch Blackwell LLP, of Washington, D.C., for Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co., Ltd., Highland Industries Inc., Jiashan Dalin Wood Industry Co., Ltd., Happy Wood Industrial Group Co., Ltd., Jiangsu High Hope Arser Co., Ltd., Suqian Yaorun Trade Co., Ltd., Yangzhou Hanov International Co., Ltd., G.D. Enterprise Limited, Deqing China-Africa Foreign Trade Port Co., Ltd., Pizhou Jin Sheng Yuan International Trade Co., Ltd., Xuzhou Shuiwangxing Trading Co., Ltd., Cosco Star International Co., Ltd., Linyi City Dongfang Jinxin Economic & Trade Co., Ltd., Linyi City Shenrui International Trade Co., Ltd., Jiangsu Qianjiuren International Trading Co., Ltd., and Qingdao Top P&Q International Corp.

Jeffrey S. Grimson and *Jill A. Cramer*, Mowry & Grimson, PLLC, of Washington, D.C., for Consolidated Plaintiffs Taraca Pacific, Inc., Canusa Wood Products, Ltd., Concannon Corporation d/b/a Concannon Lumber Company, Fabuwood Cabinetry Corporation, Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, and USPLY LLC.

Tara K. Hogan, Assistant Director, and *Sosun Bae*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel was *Savannah R. Maxwell*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Timothy C. Brightbill, *Jeffrey O. Frank*, *Stephanie M. Bell*, and *Elizabeth S. Lee*, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor Coalition for Fair Trade in Hardwood Plywood.

OPINION AND ORDER

Choe-Groves, Judge:

In the Court's sixth opinion in this litigation that has spanned nearly six years, the Court finally sustains Commerce's determinations concerning the import of hardwood and decorative plywood and certain veneered panels into the United States from the People's Republic of China ("China"), subject to the final affirmative determination in an antidumping duty investigation by the U.S. Department of Commerce ("Commerce"), including an issue of first impression regarding the inclusion of certain voluntary-review firms in an antidumping duty order. *See Certain Hardwood Plywood Products from the People's Republic of China*, 82 Fed. Reg. 53,460 (Dep't of Commerce Nov. 16, 2017) (final determination of sales at less than fair value, and final affirmative determination of critical circumstances, in part), *as amended*, 83 Fed. Reg. 504 (Dep't of Commerce Jan. 4, 2018) (amended final determination of sales at less than fair value and antidumping order) ("Order") (collectively, "*Final Determination*"); see also Issues and Decision Mem. for the Final Determination of the Antidumping Duty Investigation of Certain Hardwood Plywood Products from People's Republic of China ("Final IDM"), ECF No. 25–7.

Before the Court are the Final Results of Redetermination Pursuant to Court Remand ("*Fifth Remand Redetermination*"), ECF No. 221–1, which the Court ordered in *Linyi Chengen Imp. & Exp. Co. v. United States* ("*Linyi Chengen V*"), 46 CIT _, 609 F. Supp. 3d 1392 (2022). Plaintiff Linyi Chengen Import & Export Co. ("Linyi Chengen") did not file comments in response to the *Fifth Remand Redetermination*. Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co. ("Dehua TB"), Taraca Pacific, Inc. ("Taraca"), and Celtic Co. ("Celtic") filed their comments in support of the *Fifth Remand Redetermination*.

Dehua TB filed comments collectively on behalf of itself and Highland Industries, Inc., Jiashan Dalin Wood Industry Co., Happy Wood Industrial Group Co., Jiangsu High Hope Arser Co., Suqian Yaorun Trade Co., Yangzhou Hanov International Co., G.D. Enterprise Ltd., Deqing China-Africa Foreign Trade Port Co., Pizhou Jin Sheng Yuan International Trade Co., Xuzhou Shuiwangxing Trading Co., Cosco Star International Co., Linyi City Dongfang Jinxin Economic & Trade Co., Linyi City Shenrui International Trade Co., Jiangsu Qianjiuren

International Trading Co., and Qingdao Top P&Q International Corp. Cmts. Supp. Remand Determination Behalf Consol. Pls. [Dehua TB et al.] ("the Dehua TB Comments" or "Dehua TB's Cmts."), ECF No. 226.

Taraca filed comments collectively on behalf of itself and Canusa Wood Products, Ltd., Concannon Corp. d/b/a Concannon Lumber Co., Fabuwood Cabinetry Corp., Holland Southwest International, Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, and USPLY LLC. Consol. Pls.' [Taraca et al.] Cmts. Supp. Fifth Remand Redetermination ("the Taraca Comments" or "Taraca's Cmts."), ECF No. 229.

Celtic filed comments collectively on behalf of itself and Anhui Hoda Wood Co., Far East American, Inc., Jiaxing Gsun Import & Export Co., Jiaxing Hengtong Wood Co., Linyi Evergreen Wood Co., Linyi Glary Plywood Co., Linyi Jiahe Wood Industry Co., Linyi Linhai Wood Co., Linyi Hengsheng Wood Industry Co., Linyi Huasheng Yongbin Wood Co., Linyi Mingzhu Wood Co., Linyi Sanfortune Wood Co., Qingdao Good Faith Import & Export Co., Shanghai Futuwood Trading Co., Shandong Qishan International Trading Co., Suining Pengxiang Wood Co., Suqian Hopeway International Trade Co., Suzhou Oriental Dragon Import & Export Co., Xuzhou Andefu Wood Co., Xuzhou Jiangyang Wood Industries Co., Xuzhou Longyuan Wood Industry Co., Xuzhou Pinlin International Trade Co., Xuzhou Shengping Import & Export Co., and Xuzhou Timber International Trade Co. Consol. Separate Rate Pls.' Reply Cmts. Supp. Fifth Remand Redetermination ("the Celtic Comments" or "Celtic's Cmts."), ECF Nos. 230, 231.

The Court refers collectively to the non-examined parties that filed the Dehua TB Comments, the Taraca Comments, and the Celtic Comments as the "Separate Rate Plaintiffs."

Consolidated Plaintiffs Linyi Sanfortune Wood Co., Ltd. ("Sanfortune Wood") and Xuzhou Longyuan Wood Industry Co., Ltd. ("Longyuan Wood") filed separate comments in opposition to the *Fifth Remand Redetermination*. [Sanfortune Wood's and Longyuan Wood's] Cmts. Opp'n Fifth Remand Redetermination ("Sanfortune Wood's and Longyuan Wood's Cmts."), ECF No. 223.

Defendant United States ("Defendant") filed its comments in support of the *Fifth Remand Redetermination*. Def's Cmts. Supp. Remand Redetermination ("Def.'s Cmts."), ECF No. 227.

Defendant-Intervenor Coalition for Fair Trade in Hardwood Plywood ("Defendant-Intervenor" or "the Coalition") filed comments in opposition to and in support of the *Fifth Remand Redetermination*.

[Def.-Interv.'s] Cmts. Opp'n Commerce's *Fifth Remand Redetermination* ("Def.-Interv.'s Opp'n Cmts."), ECF No. 224; [Def.-Interv.'s] Cmts. Supp. Commerce's Fifth Remand Redetermination ("Def.-Interv.'s Supp. Cmts."), ECF No. 228.

After oral argument was held on July 12, 2023, the Court invited the Parties to file post-oral argument letters addressing the issue of reopening the record. Oral Argument (July 12, 2023), ECF No. 237; Order (July 13, 2023), ECF No. 238. Plaintiff, Defendant-Intervenor, and Consolidated Plaintiffs Dehua TB, Taraca, and Celtic filed their post-oral argument letters. [Consol. Pls. Dehua TB's] Resp. Court's Invitation Submit Post-Argument Letter ("Dehua TB's Suppl. Letter"), ECF No. 240; [Pl.'s and Consol. Pls. Celtic's] Post Oral Argument Letter ("Celtic's Suppl. Letter"), ECF No. 241; [Consol. Pls. Taraca's] Resp. Court's Invitation Submit Post-Argument Letter ("Taraca's Suppl. Letter"), ECF No. 242; Def.-Interv.'s Suppl. Cmts. ("Def.-Interv.'s Suppl. Letter"), ECF No. 243. Defendant did not file a post-oral argument letter. Sanfortune Wood and Longyuan Wood did not file separate post-argument letters but were included in Celtic's post-argument letter. *See* Celtic's Suppl. Letter. at 1 n.1.

For the reasons discussed below, the Court sustains Commerce's *Fifth Remand Redetermination*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's separate rate for the non-examined companies that were granted separate rate status is in accordance with law; and
2. Whether Commerce's determinations to exclude Dehua TB and Jiangyang Wood from the Order and to include Sanfortune Wood and Longyuan Wood in the Order are in accordance with law.

BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the Court's review of the *Fifth Remand Redetermination*. *See Linyi Chengen Imp. & Exp. Co. v. United States* ("*Linyi Chengen I*"), 43 CIT_, _, 391 F. Supp. 3d 1283, 1288–92 (2019); *Linyi Chengen Imp. & Exp. Co. v. United States* ("*Linyi Chengen II*"), 44 CIT_, _, 433 F. Supp. 3d 1278, 1281–83 (2020); *Linyi Chengen Imp. & Exp. Co. v. United States* ("*Linyi Chengen III*"), 44 CIT_, _, 487 F. Supp. 3d 1349, 1353–54 (2020); *Linyi Chengen Imp. & Exp. Co. v. United States* ("*Linyi Chen-*

gen IV"), 45 CIT_, _, 539 F. Supp. 3d 1269, 1273–74 (2021); *Linyi Chengen V*, 46 CIT at _, 609 F. Supp. 3d at 1395–97.

Commerce initiated an antidumping investigation after reviewing an antidumping duty petition submitted by Defendant-Intervenor. *See Certain Hardwood Plywood Products from the People's Republic of China*, 81 Fed. Reg. 91,125 (Dep't of Commerce Dec. 16, 2016) (initiation of less-than-fair-value investigation); Def.-Interv.'s Pets. Imposition Antidumping Countervailing Duties ("Petition") (Nov. 18, 2016), PR 1–9, CR 1. The Petition contained price quotes, *i.e.,*"two offers for sale for hardwood plywood produced in [China] from a Chinese exporter," as the basis for its estimated dumping margins ranging from 104.06% to 114.72%. *See id.* at 91,128–29. Commerce accepted applications from exporters and producers seeking to obtain separate rate status in the investigation ("separate rate applications") to avoid the country-wide dumping margin because the investigation involved products from China, a non-market economy. *See id.* at 91,129.

In the *Preliminary Determination*, Commerce selected Consolidated Plaintiff Shandong Dongfang Bayley Wood ("Bayley") and Linyi Chengen as the only mandatory respondents in the investigation. *See Certain Hardwood Plywood Products from the People's Republic of China*, 82 Fed. Reg. 28,629 (Dep't of Commerce June 23, 2017) (preliminary affirmative determination of sales at less than fair value, preliminary affirmative determination of critical circumstances, in part), *as amended*, 82 Fed. Reg. 32,683 (Dep't of Commerce July 17, 2017) (amended preliminary determination of sales at less than fair value) (collectively, "*Preliminary Determination*"); *see also* Decision Mem. Prelim. Determination Antidumping Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China ("Prelim. DM") at 4, PR 734.[1] Seven companies filed requests for treatment as voluntary respondents, but Commerce did not select any voluntary respondents. *See* Prelim. DM at 4; Final IDM at 34–37; Selection of Voluntary Respondent Mem. (Apr. 4, 2017), PR 451.

In the *Final Determination*, Commerce applied its intermediate input methodology to value Linyi Chengen's log inputs after determining that Linyi Chengen's log volume reporting methods were inherently imprecise. *Final Determination*, 82 Fed. Reg. at 53,461; Final IDM at 23, 25 (valuing veneers, instead of logs, as the input used to produce hardwood plywood). Commerce stated that it was unable to verify Linyi Chengen's reported log consumption against

[1] Citations are to the public record ("PR"), confidential record ("CR"), public fifth remand record ("PRR"), and confidential fifth remand record ("CRR") document numbers filed in this case. ECF Nos. 52, 53, 103, 104, 130, 131, 199, 200, 217, 218, 234, 235.

any third-party sources, such as supplier invoices. Final IDM at 25. Based on Commerce's application of the intermediate input methodology, Commerce calculated a dumping margin rate of 183.36% for Linyi Chengen. *Final Determination*, 82 Fed. Reg. at 53,462. Commerce applied Linyi Chengen's margin of 183.36% as the separate rate for the non-examined companies that were granted separate rate status ("all-others separate rate"), which was assigned to the Separate Rate Plaintiffs. *Id.*; Final IDM at 48.

In *Linyi Chengen I*, this Court upheld the application of adverse facts available against Bayley and remanded with respect to Commerce's calculation of Linyi Chengen's dumping margin rate, instructing Commerce to reconsider the accuracy of Linyi Chengen's log consumption calculations and the all-others separate rate applied to the Separate Rate Plaintiffs based on any changes to Linyi Chengen's margin on remand. *Linyi Chengen I*, 43 CIT at _, 391 F. Supp. 3d at 1297.

In *Linyi Chengen II*, this Court remanded for Commerce to accept documents offered by Linyi Chengen in order to provide a more complete record on which to base Commerce's reasoning. *Linyi Chengen II*, 44 CIT at _, 433 F. Supp. 3d at 1285. The Court noted in *Linyi Chengen II* that Commerce should reconsider its application of the intermediate input methodology, accept the previously rejected documents that Linyi Chengen presented at verification, and make appropriate adjustments to the separate rates of other parties if Commerce made changes to Linyi Chengen's dumping margin on remand. *Id.* at __, 433 F. Supp. 3d at 1286.

In the *Second Remand Redetermination*, Commerce accepted Linyi Chengen's verification documents, determined that Linyi Chengen's reported log volumes were accurate, and did not apply the intermediate input methodology to calculate Linyi Chengen's dumping margins. *Linyi Chengen III*, 44 CIT at_, 487 F. Supp. 3d at 1354; *see also* Final Results of Redetermination Pursuant to Court Remand Order [for Slip Op. 20–22] ("*Second Remand Redetermination*"), ECF No. 113–1, 114–1. Commerce applied its normal methodology to value all factors of production used in each stage of production, did not apply adverse facts available to Linyi Chengen, and revised Linyi Chengen's dumping margin from 183.36% to 0%. 44 CIT at _, 487 F. Supp. 3d at 1356. Commerce applied adverse facts available to Bayley after determining that it was a China-wide entity and imposed an adverse facts available dumping margin rate ("AFA dumping margin rate" or

"AFA rate") of 114.72% for Bayley. *Id.* Commerce recalculated the Separate Rate Plaintiffs' dumping margin rate by averaging Linyi Chengen's 0% rate and Bayley's 114.72% AFA rate, resulting in a revised dumping margin of 57.36% for the Separate Rate Plaintiffs. *Id.* at _, 487 F. Supp. 3d at 1354.

In Linyi Chengen III, the Court sustained as reasonable and supported by substantial evidence Commerce's determination that Linyi Chengen's dumping margin was 0%, but remanded for Commerce to reconsider the all-others separate rate of 57.36%. *See id.* at _, 487 F. Supp. 3d at 1359. This Court relied on *Yangzhou Bestpak Gifts & Crafts Co. v. United States* ("*Yangzhou Bestpak*"), 716 F.3d 1370 (Fed. Cir. 2013), holding that Commerce's determination of the all-others separate rate of 57.36% for the voluntary, fully cooperating Separate Rate Plaintiffs by using the simple average of Linyi Chengen's 0% rate and Bayley's AFA rate of 114.72% was unreasonable as applied, and remanded for Commerce to reconsider or provide additional evidence. *Id.* at _, 487 F. Supp. 3d at 1358–59. The Court noted that Commerce created its own problem when it selected only two mandatory respondents, which resulted in minimal information on the record to support its assertions regarding the potential dumping margins of the Separate Rate Plaintiffs. *Id.* at _, 487 F. Supp. 3d at 1358. The Court also found that the margins of 114.72% and 104.06% contained in the Petition did not provide support for the assertion that the Separate Rate Plaintiffs' dumping margins are different than Linyi Chengen's 0% rate because the margins in the Petition are "untethered" to the actual dumping margins of the Separate Rate Plaintiffs. *Id.* The Court concluded that Commerce failed to cite any credible economic evidence on the record showing that the Separate Rate Plaintiffs' dumping margins are different than Linyi Chengen's 0% rate or connecting the Separate Rate Plaintiffs' dumping margins with the rate of 57.36% that was derived from the average of Linyi Chengen's 0% and Bayley's AFA rate of 114.72%. *Id.* at _, 487 F. Supp. 3d at 1359.

In the *Third Remand Redetermination*, Commerce again applied "any reasonable method" and calculated the all-others separate rate of 57.36% by using the simple average of Linyi Chengen's 0% rate and Bayley's AFA rate of 114.72%. *Linyi Chengen IV*, 45 CIT at _, 539 F. Supp. 3d at 1276; *see also* Final Results of Redetermination to Court Remand Order [for Slip Op. 20–183] ("*Third Remand Redetermination*"), ECF No. 143–1, 144–1. Commerce reviewed a single commercial invoice and determined that the approximately 20% difference between the prices of the Petition Separate Rate Application and

Linyi Chengen supported Commerce's application of a 57.36% all-others separate rate to the Separate Rate Plaintiffs. 45 CIT at _, 539 F. Supp. 3d at 1277.

In *Linyi Chengen IV*, the Court concluded that Commerce reasonably supported its determination to depart from the expected method in determining the all-others separate rate because Linyi Chengen's 0% rate would not be reflective of the potential dumping margins, but remanded for Commerce to reconsider the all-others separate rate of 57.36%. *Id.* at _, 539 F. Supp. 3d at 1276. The Court again relied on *Yangzhou Bestpak* and concluded that the 57.36% rate, based on the simple average of Linyi Chengen's 0% and Bayley's AFA rate of 114.72%, applied to the voluntary, fully cooperating Separate Rate Plaintiffs was unreasonable as applied. *Id.* at _, 539 F. Supp. 3d at 1277–78. The Court noted that Commerce was still required to assign dumping margins as accurately as possible, and that Commerce cited as record evidence only one commercial invoice showing the price difference of 20% between the prices of the Petition Separate Rate Application and Linyi Chengen. *Id.* This Court stated that Commerce acknowledged that the record provided no opportunity for Commerce to know or to calculate the actual dumping margins of the Separate Rate Plaintiffs. *Id.* The only substantiated and calculated basis for a dumping margin on the record was Linyi Chengen's 0% margin. *Id.* The Court remanded again because Commerce cited as record evidence only one commercial invoice showing an approximately 20% price difference, and concluded that Commerce's 57.36% all-others separate rate assigned to the voluntary, fully cooperating Separate Rate Plaintiffs was not reasonable or supported by substantial evidence. *Id.*

In the *Fourth Remand Redetermination*, Commerce applied "any reasonable method" and again calculated the all-others separate rate of 57.36% by using the simple average of Linyi Chengen's 0% rate and Bayley's AFA rate of 114.72%. *Linyi Chengen V*, 46 CIT at _, 609 F. Supp. 3d at 1397; *see also* Final Results of Redetermination Pursuant to Court Remand Order [for Slip Op. 21–127] ("*Fourth Remand Redetermination*"), ECF No. 205–1, 206–1.

In *Linyi Chengen V*, the Court remanded for Commerce to reconsider its calculation of an all-others separate rate of 57.36%. 46 CIT at _, 609 F. Supp. 3d at 1404. The Court again relied on *Yangzhou Bestpak*, in which Commerce calculated the all-others separate rate margin of Yangzhou Bestpak Gifts & Crafts Co. ("Bestpak") by using the simple average of an AFA rate and a *de minimis* rate, similar to the facts in this case. *Id.* at _, 609 F. Supp. 3d at 1401–02. This Court

found similarities between this case and *Yangzhou Bestpak*, in which the U.S. Court of Appeals for the Federal Circuit ("CAFC") held that substantial evidence did not support Commerce's all-others separate rate calculation and that the simple averaging of an AFA rate and a *de minimis* rate were unreasonable as applied to fully cooperating separate rate respondents. *Id.* at _, 609 F. Supp. 3d at 1402. This Court noted that the CAFC found in *Yangzhou Bestpak* that it was unfair and perhaps punitive to assign a fully cooperating separate rate respondent a margin that was one half of the China-wide entity rate–a rate reserved for those entities presumed to be under foreign government control. *Id.* This Court also stated that the CAFC in *Yangzhou Bestpak* rejected Commerce's claim that time constraints precluded it from investigating more thoroughly, and the CAFC found no statutory or caselaw support for the proposition that limited resources or statutory time constraints can override fairness and accuracy. *Id.* at _, 609 F. Supp. 3d at 1402–03. This Court concluded that the separate rate assigned to the voluntary, fully cooperating Separate Rate Plaintiffs was unreasonable as applied because it was one half of the AFA rate, making it unfair and unduly punitive, and the Court instructed Commerce to reconsider the all-others separate rate consistent with its opinion, including whether other evidence on the record supported a lower rate. *Id.* at _, 609 F. Supp. 3d at 1403–04. The Court also concluded that because Commerce selectively analyzed the invoice data while ignoring other potentially contrary record evidence, Commerce's determination was not supported by substantial evidence. *Id.* at _, 609 F. Supp. 3d at 1404. The Court advised Commerce to not submit the same 57.36% all-others separate rate for review without new, substantial evidence in support, as this rate was unreasonable as applied to fully cooperating respondents. *Id.*

In the *Fifth Remand Redetermination*, Commerce assigned Linyi Chengen's antidumping duty margin of 0% to the Separate Rate Plaintiffs under protest and explained that Commerce would exclude from the Order voluntary applicants who submitted all initial responses, while including in the Order voluntary applicants who failed to submit all initial responses on time. *Fifth Remand Redetermination* at 21–22.

JURISDICTION AND STANDARD OF REVIEW

The U.S. Court of International Trade has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an antidumping duty order. The Court shall hold unlawful any determination found to be unsupported by sub-

stantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(l)(B)(i). The Court reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Legal Framework

Commerce is authorized by statute to calculate and impose a dumping margin on imported subject merchandise after determining that it is sold in the United States at less than fair value. 19 U.S.C. § 1673. Commerce determines an estimated weighted average dumping margin for each individually examined exporter and producer and one all-others separate rate for non-examined companies. 19 U.S.C. § 1673d(c)(l)(B). The CAFC has upheld Commerce's reliance on this method for determining the estimated all-others separate rate in § 1673d(c)(5) when "determining the separate rate for exporters and producers from [non-market] economies that demonstrate their independence from the government but that are not individually investigated." *Changzhou Hawd Flooring Co. v. United States* ("*Changzhou Hawd IV*"), 848 F.3d 1006, 1011–12 (Fed. Cir. 2017) (citing *Albemarle Corp. & Subsidiaries v. United States* ("*Albemarle Corp.*"), 821 F.3d 1345, 1348 (Fed. Cir. 2016)).

The general statutory rule for calculating the all-others separate rate is to weight-average the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely on the basis of facts available, including adverse facts available. 19 U.S.C. § 1673d(c)(5)(A). If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or *de minimis,* or are determined entirely under 19 U.S.C. § 1677e, Commerce may invoke an exception to the general rule. *Id.* § 1673d(c)(5)(B).

The Statement of Administrative Action provides guidance that when the dumping margins for all individually examined respondents are determined entirely on the basis of the facts available or are zero or *de minimis,* the "expected method" of determining the all-others separate rate is to weight-average the margins determined pursuant to the facts available and the zero and *de minimis* margins, provided that volume data is available. Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), H.R. Doc. No.

103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201.

Commerce may depart from the "expected method" and use "any reasonable method" if it reasonably concludes that the expected method is not feasible or results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers. *See* 19 U.S.C. § 1673d(c)(5)(B); *Navneet Publ'ns (India) Ltd. v. United States*, 38 CIT _, _, 999 F. Supp. 2d 1354, 1358 (2014) ("[T]he following hierarchy [is applied] when calculating all-others rates—(1) the '[g]eneral rule' set forth in [19 U.S.C.] § 1673d(c)(5)(A), (2) the alternative 'expected method' under [19 U.S.C.] § 1673d(c)(5)(B), and (3) any other reasonable method when the 'expected method' is not feasible or does not reasonably reflect potential dumping margins."); *see also* SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201; *Albemarle Corp.*, 821 F.3d at 1351–52 (quoting SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201). Any reasonable method may include averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated. 19 U.S.C. § 1673d(c)(5)(B).

While Commerce is permitted to use various methodologies, "it is possible for the application of a particular methodology to be unreasonable in a given case." *Yangzhou Bestpak*, 716 F.3d at 1378 (quoting *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1085 (Fed. Cir. 2001)). Separate rate calculations for non-mandatory, cooperating separate rate respondents must bear some relationship to the respondents' actual dumping margins despite a thin record. *See generally id.* at 1379–80; *see also F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("[T]he purpose of [19 U.S.C. § 1677e] is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins."). A speculative dumping margin using the average of a *de minimis* rate and an AFA rate cannot be upheld based on weak record evidence, particularly when Commerce itself created the scarcity of evidence. *See Bosun Tools Co. v. United States* ("*Bosun Tools*"), No. 2021–1930, 2022 WL 94172, at *4 (Fed. Cir. 2022) (comparing *Yangzhou Bestpak* where "the record was 'so thin' that Commerce could not have reasonably 'found evidence to support [its] determination'" to *Bosun Tools* where "in contrast, there was no such lack of data").

II. The All-Others Separate Rate

Defendant-Intervenor argues that Commerce's determination to assign Linyi Chengen's rate of 0% to the Separate Rate Plaintiffs

should be remanded because it is not supported by substantial evidence or otherwise in accordance with law, and requests that the Court remand for Commerce to either reopen the record or issue a determination that is consistent with the Court's prior rulings. Def.-Interv.'s Opp'n Cmts. at 6–11; Def.-Interv.'s Suppl. Letter at 2.

Consolidated Plaintiffs assert that Commerce's determination to assign the Separate Rate Plaintiffs a 0% margin rate is reasonable and that the Court should not order Commerce to reopen the record on remand to collect additional information to recalculate a separate rate above zero.[2] *See* Dehua TB's Cmts. at 17; Taraca's Cmts. at 2–6; Celtic's Cmts. at 2–7; Dehua TB's Suppl. Letter; Taraca's Suppl. Letter; Celtic's Suppl. Letter.

Defendant contends that Commerce's calculation of the separate rate is in accordance with the Court's remand order. Def.'s Cmts. at 6–10. Defendant did not file a post-argument letter regarding the issue of re-opening the record.

A. Alternative Margin Calculation Options

Commerce had at least six alternatives to consider in determining the dumping margin for the Separate Rate Plaintiffs: 0%, 57.36%, and four additional options proposed by Defendant-Intervenor during the fifth remand. Commerce considered all of these options and ultimately selected 0% in the *Fifth Remand Redetermination*, explaining that, "[a]fter weighing all options and considering the views of the Court, we find, under protest, that assigning the rate calculated for [Linyi Chengen], *i.e.,* zero percent, is the only remaining alternative on the record." *Fifth Remand Redetermination* at 2.

Defendant-Intervenor contends that Commerce ignored other viable alternatives, arguing that Commerce failed to evaluate the alternative options because there is "no rational connection between the facts found *(i.e.,* the Coalition's methodologies are less preferable than the 57.36[%]) and the choices made *(i.e.,* assigning [Linyi] Chengen's [0%] margin)." Def.-Interv.'s Opp'n Cmts. at 8–11; *see also* Petitioner, Cmts. Draft Results Redetermination (Mar. 1, 2023) ("Coalition's Comments on Draft Results") at 6–11, PRR 7, CRR 1. Defendant-Intervenor claims that Commerce did not address whether these methodologies constituted "reasonable methods" but only explained why these alternatives are less preferable than the

[2] Consolidated Plaintiffs Dehua TB and Taraca also incorporate by reference the arguments of the other Parties in support of Commerce's determination to assign a zero margin to Separate Rate Plaintiffs. *See* Dehua TB's Cmts. at 8 ("Consolidated Plaintiffs join in and incorporate by reference the arguments of the other parties in support of Commerce's [Fifth] Remand Redetermination."); Taraca's Cmts. at 7 ("Taraca et al also hereby adopt and incorporate by reference the comments being filed on the Fifth Remand Redetermination regarding the recalculation of the separate rate.").

57.36% margin. Def.-Interv.'s Opp'n Cmts. at 8–11. Defendant-Intervenor challenges Commerce's rejection of the fourth alternative option as a "fallacy," arguing that Commerce relied in part on Plaintiff's data in rejecting this option, yet it ultimately relied on Plaintiff's data to apply a margin. *Id.* at 9–10.

Commerce considered the four alternatives proposed by Defendant-Intervenor in the Coalition's Comments on Draft Results, but determined that the 0% rate calculated for Linyi Chengen was the only remaining alternative on the record. *Fifth Remand Redetermination* at 15–16. This Court previously concluded that a calculation of the all-others separate rate of 5 7 .3 6% assigned to the voluntary, fully cooperating Separate Rate Plaintiffs was unreasonable as applied pursuant to *Yangzhou Bestpak*.

Defendant-Intervenor's proposed alternatives result in margins that are neither 0% nor 57.36%. The first option proposed by Defendant-Intervenor suggests that Commerce should calculate normal value with a simple average of the Petition normal value and Linyi Chengen's normal value, and U.S. price with "weight-average unit values" ("AUVs") reported in quantity and value ("Q & V") submissions from all separate applicants, adjusted by the weighted selling expense adjustments reported by Linyi Chengen, for a margin of 10.06%. Coalition's Comments on Draft Results at 8–10.

The second option proposed by Defendant-Intervenor suggests that Commerce should calculate normal value based on the Petition normal value only and U.S. price based on Q&V AUVs, without selling expense adjustments, for a margin of 57.08%. *Id.* at 10.

The third option proposed by Defendant-Intervenor suggests that Commerce should weight-average the "bookend margins" by assigning a 0% rate to separate rate applicants with a Q & V AUV above Linyi Chengen's weighted average sale price, and the Petition margin of 114. 72% to separate rate applicants with Q & V AUVs below Linyi Chengen's weighted average sale price, for a margin of 44.15%. *Id.* at l0–11.

The fourth option proposed by Defendant-Intervenor suggests that Commerce should calculate normal value based on product-specific normal values for Linyi Chengen and from the Petition, and U.S. price based on sales documentation provided by all separate rate applicants with two sub-options: (1) Commerce should match specific products with product-specific normal values for Linyi Chengen and the Petition when there are specific products; and (2) Commerce should use an average of the matching models for normal value from Linyi Chengen and the Petition for when there are products that

include some, but not all, matching details, for a margin of 10.52%. *Id.*

Commerce explained that, "[a]lthough we appreciate the [Coalition's] creative attempts to determine other methodologies to calculate a separate rate, we disagree that these methodologies are more appropriate than the 57.36% margin, which we maintain is the appropriate alternative to the accurate margin calculated in the underlying investigation." *Fifth Remand Redetermination* at 15. Commerce stated that a methodology relying on Q&V AUVs as the basis for U.S. price is not superior to the methodologies that it applied in the *Third Remand Redetermination* and the *Fourth Remand Redetermination*. *Id.*; *see Third Remand Redetermination*; *Fourth Remand Redetermination*. Commerce acknowledged that Q & V data provide a global average view of a company's selling behavior, but rejected such methodology because such data do not consider product mix, which can be significant in some cases. *Fifth Remand Redetermination* at 15. Commerce stated that in prior remand determinations, it compared the Petition data and the separate rate applicants' actual selling behavior during the period of investigation and intentionally compared prices and costs for products that could be identified as identical products due to significant differences in pricing behaviors with such products. *Id.*; *see Third Remand Redetermination*; *Fourth Remand Redetermination*.

Even though the fourth option addressed the specificity issue (matching similar products to the corresponding normal values), Commerce rejected the fourth option because the proposed methodology did not consider the differences between Plaintiffs and the Separate Rate Plaintiffs' companies. *Fifth Remand Redetermination* at 15–16. Commerce explained that due to differences between these two types of companies, such as a difference in cost structure, the comparisons between the selling price of these companies and normal value based on Plaintiffs data would be unreliable and likely unrepresentative of the Separate Rate Plaintiffs' potential dumping. *Id.* Commerce stated that Plaintiffs selling behavior would not be reflective of the Separate Rate Plaintiffs', and in turn, not reflective of the Separate Rate Plaintiffs' estimated dumping margin during the period of investigation. *Id.*

The Court concludes that Commerce properly considered and rejected Defendant-Intervenor's proposed alternatives because Commerce articulated its reasons for rejecting the methodologies based on Q&V data and its review of record evidence. The Court will uphold the agency's determination if the agency has examined the relevant data, articulated a satisfactory explanation, and accounted for de-

tracting evidence. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983); *Universal Camera Corp. v. NLRB*, 340 U.S. 474,477 (1951). In the fifth remand, Commerce explained that it considered six possibilities for the all-others separate rate: the 0% rate, the 57.36% rate, and the four alternative rates proposed by Defendant-Intervenor. Commerce articulated its reasons for rejecting the four options proposed by Defendant-Intervenor based on Commerce's analysis of economic evidence on the record showing differences between Linyi Chengen and the Separate Rate Plaintiffs, such as their selling, cost structure, and pricing that could not be adequately addressed by Defendant-Intervenor's proposed methodologies. This Court in *Linyi V* instructed Commerce to not resubmit the unreasonable as applied 57.36% rate without new evidence in Commerce's *Fifth Remand Redetermination*. *Linyi V*, 46 CIT at _, 609 F. Supp. 3d at 1404. Commerce could not cite new evidence in support of its 57.36% rate, and thus determined that the 0% rate was the only remaining option available to Commerce.

Accordingly, because Commerce articulated its reasoning sufficiently, the Court sustains Commerce's determination to assign an anti dumping duty margin rate of 0% to the Separate Rate Plaintiffs.

B. Reopening the Record

Defendant-Intervenor requests that the Court direct Commerce to either calculate a margin other than 0% or 57.36%, or to remand with a request that Commerce reopen the administrative record to calculate a margin other than 0% or 57.36%. Def.-Interv.'s Suppl. Letter at 1–5. Defendant-Intervenor contends that remand is appropriate for Commerce to reopen the record to collect additional information to calculate a different separate rate. *Id.* at 6.

Plaintiff and Consolidated Plaintiffs assert that the Court should not require Commerce to reopen the record. *See* Dehua TB's Suppl. Letter; Celtic's Suppl. Letter; Taraca's Suppl. Letter. Consolidated Plaintiffs Dehua TB and Celtic also raise the issues of fairness, finality, and judicial economy if Commerce were to reopen the record for a sixth remand redetermination. Dehua TB's Suppl. Letter at 4; Celtic's Suppl. Letter at 5–6.

Judicial compulsion to reopen the record is limited to unusual circumstances, such as fraud or record inaccuracies. *Essar Steel Ltd. V. United States*, 678 F.3d 1268, 1277–78 (Fed. Cir. 2012); *see Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1376, 1381 (Fed. Cir. 2011); *Gold East Paper (Jiangsu) Co. v. United States*, 38 CIT _, _, 991 F. Supp. 2d 1357, 1361–65 (2014); *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012).

This case does not present facts such as fraud or inaccuracies in the record that fall under the limited exceptions to justify the Court remanding for Commerce to reopen the record. Although the Court has noted several times that the paucity of the record is Commerce's own making due to its selection of only two mandatory respondents, similar to the facts in *Yangzhou Bestpak*, the Court concludes that Commerce's decision to not reopen the record at this time after nearly six years of litigation is not arbitrary and capricious. The Court will not remand to request Commerce to reopen or supplement the record.

III. Exclusion and Inclusion of Voluntary Applicant Firms

Commerce determined that voluntary applicant firms (or voluntary-review firms) who submitted timely complete responses would be excluded from the Order, but firms who submitted only incomplete voluntary applicant requests without full responses would continue to be included in the Order. *See Fifth Remand Redetermination* at 18–21.

Defendant-Intervenor challenges Commerce's determination to exclude Jiangyang Wood and Dehua TB (voluntary applicant firms who submitted full responses) from the Order but supports Commerce's determination to include Sanfortune Wood and Longyuan Wood (voluntary applicant firms who submitted shorter two-page requests) in the Order. Def.-Interv.'s Opp'n Cmts. at 11–16; Def.-Interv.'s Supp. Cmts. at 2–6. Defendant-Intervenor contends that Jiangyang Wood, Dehua TB, Sanfortune Wood, and Longyuan Wood should all be included in the Order based on the CAFC's holding in *Changzhou Hawd Flooring Co. v. United States* ("*Changzhou Hawd VI*"), 947 F.3d 781, 790 (Fed. Cir. 2020), and Commerce's administrative determination in *Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam*, 86 Fed. Reg. 28,559 (Dep't of Commerce May 27, 2021) (final affirmative determination of sales at less than fair value), and accompanying Issues and Decision Memorandum. *Id.* Sanfortune Wood and Longyuan Wood argue that they should be excluded from the Order, but do not challenge Commerce's exclusion of Jiangyang Wood and Dehua TB from the Order. Sanfortune Wood's and Longyuan Wood's Cmts. at 1. Defendant asserts that Commerce correctly proposed to exclude certain companies from the Order. Def.'s Cmts. at 10–14. Consolidated Plaintiffs neither challenge Commerce's exclusion of Jiangyang Wood and Dehua TB from the Order nor comment on the inclusion of Sanfortune Wood and Longyuan Wood in the Order. *See* Dehua TB's Cmts. at 7; Celtic's Cmts. at 7–11; Taraca's Cmts. at 6–7. Consolidated Plaintiff Dehua TB incorporates by reference the arguments of the other Parties in support of Com-

merce's determination to exclude Dehua TB and Jiangyang Wood. *See* Dehua TB's Cmts. at 8.

A. Commerce's Exclusion Regulation

Commerce has provided that it will exclude from an affirmative final determination "any exporter or producer for which [Commerce] determines an individual weighted-average dumping margin ... of zero or *de minimis.*" 19 C.F.R. § 351.204(e)(l); *see also* 19 U.S.C. § 1673d(a)(4) ("In making a determination under this subsection, the administering authority shall disregard any weighted average dumping margin that is *de minimis* as defined in section 1673b(b)(3) of this title"). The CAFC has stated that "it is clear that individually reviewed firms with *de minimis* dumping margins must be excluded from all obligations under an antidumping duty order, [but] the statute does not speak with any clarity to conferring the same benefit on non-individually reviewed firms assigned a *de minimis* dumping margin or zero rate." *Changzhou Hawd VI*, 947 F.3d at 790; *see also Changzhou Hawd Flooring Co. v. United States* ("*Changzhou Hawd V*"), 42 CIT _, _, 324 F. Supp. 3d 1317, 1325–26 (2018), aff'd, 947 F.3d 781 (Fed. Cir. 2020) (finding the statutory language ambiguous when discussing "whether that [0%] 'all-others rate,' 19 U.S.C. §§ 1673d(c)(l)(B)(i)(II), 1673d(c)(5), constitutes 'any' *de minimis* weighted average dumping margin that Commerce must 'disregard' pursuant to 19 U.S.C. § 1673d(a)(4)").

The Court finds guidance in *Changzhou Hawd V*, which explained:

> What does give the court pause, however, is Commerce's application of the exclusion regulation to the Voluntary Applicants. Given the history of the exclusion regulation in which concerns about limiting exclusion to selected/mandatory respondents were mitigated through the availability of voluntary examination, there is an inherent arbitrariness in Commerce (1) issuing a blanket refusal to entertain voluntary examination requests, and (2) subsequently denying exclusion to the Voluntary Applicants that were assigned a "representative" separate rate of zero (which again, is just a proxy for the individual weighted average dumping margins Commerce should theoretically calculate for all respondents).

Changzhou Hawd V, 42 CIT at _, 324 F. Supp. 3d at 1326–27. The court reasoned that:

> Commerce's application of its exclusion regulation to the Voluntary Applicants it assigned "representative" [0%] margins has two insurmountable problems. The first is Commerce's refusal

> to conduct any voluntary examinations, preventing the Voluntary Applicants from demonstrating directly their own evidence of fair trading. The second is Commerce's continuing assumption or inference that Voluntary Applicants denied individual examination and ultimately assigned a "representative" [0%] margin were nevertheless unfairly trading, precluding exclusion. The court questions how a reasonable mind could maintain such an assumption or inference against the Voluntary Applicants.

Id. at _, 324 F. Supp. 3d at 1327.

The CAFC affirmed the conclusion that Commerce did not adequately support its determination to include voluntary applicants in the Order but provided two caveats to its ruling:

> [First,] we say nothing about [the U.S. Court of International Trade's] reversal of Commerce rather than remand for further explanation ... [and second,] we understand [the court's decision to exclude voluntary review firms from the antidumping duty order] as not going beyond holding that Commerce has not in this proceeding provided a sufficient rationale for continuing to include the voluntary-review firms in the [antidumping duty order], and we rely on that understanding in affirming the [court's] judgment. It remains open to Commerce in the future, should the issue arise, to address this issue more fully than it has done in this investigation. We do not prejudge the reasonableness of any justification Commerce might yet articulate for deciding to include voluntary-review firms in an antidumping-duty order.

Changzhou Hawd VI, 947 F.3d at 794. Commerce interpreted the *Changzhou Hawd VI* holding to allow Commerce to determine its position on when to grant exclusions to voluntary-review firms. *See Fifth Remand Redetermination* at 18–19 ("[*Changzhou Hawd VI*] does not compel Commerce to exclude all companies that requested voluntary status but that it would review any further explanation provided by Commerce at that time.").

B. Analysis

Commerce distinguished between the two types of voluntary applicants in the fifth remand—Dehua TB and Jiangyang Wood, who submitted requests for voluntary respondent treatment with hundreds of pages of questionnaire responses and supporting documen-

tation, and Sanfortune Wood and Longyuan Wood, who submitted two-page requests with no questionnaire responses or supporting documentation. *Fifth Remand Redetermination* at 20; *see* Jiangyang Wood's Sec. A Resp. (Feb. 13, 2017), PR 308–10, CR 245–47; Jiangyang Wood's Sec. C Resp. (Feb. 28, 2017), PR 351, CR 289–92; Jiangyang Wood's Sec. D Resp. (Feb. 28, 2017), PR 352, CR 293–304; Longyuan Wood Letter, "Request for Treatment as Mandatory Respondent or Request for Voluntary Respondent Treatment as an Alternative" (Dec. 9, 2016), PR 44; Sanfortune Wood Letter, "Request for Treatment as Mandatory Respondent or Request for Voluntary Respondent Treatment as an Alternative" (Dec. 9, 2016), PR 43.[3] Commerce explained that Jiangyang Wood and Dehua TB should be excluded from the Order because they met the first requirement to be considered for voluntary respondent status under 19 U.S.C. § 1677m(a), filing the same information expected from mandatory respondents by the same deadline. *Fifth Remand Redetermination* at 19–20. In contrast, Commerce noted that Sanfortune Wood's and Longyuan Wood's two-page requests were "virtually identical in content and required no commitment or effort on behalf of these companies" and were not certified, compared to the "hundreds of pages of questionnaire responses and supporting documentation, as well as sales and factor of production databases" from Jiangyang Wood and Dehua TB. Id. at 20. Commerce reasoned that:

> [T]here is a significant difference between those companies that merely submit a brief statement requesting to be selected as a voluntary respondent and those companies that provide complete questionnaire responses by the deadlines established for the mandatory respondents, such that Commerce has the information before it to potentially select them as voluntary respondents and still complete the investigation without undue delay.

Id. at 20–21.

Pursuant to 19 U.S.C. § 1677m(a), upon limiting the number of respondents under 19 U.S.C. § 1677f-l(c), Commerce "shall establish an ... individual weighted average dumping margin for [a company] not initially selected for individual examination" if: (1) the company seeking individual examination submits *"the information requested from exporters or producers selected for examination"* by the same deadlines that apply to the selected respondents; and (2) the number of such companies is not so large to burden or delay investigation of

[3] Dehua TB's responses to Sections A, C, and D were not included in the administrative record.

the individually examined companies. *See* 19 U.S.C. § 1677m(a) (emphasis added). A voluntary respondent accepted for individual examination is subject to the same requirements as a company initially selected by Commerce for individual examination under 19 U.S.C. § 1677f-l(c)(2) or 19 U.S.C. § 1677f-l(e)(2)(A), including the requirements of 19 U.S.C. § 1677m(a). *See* 19 C.F.R. § 351.204(d)(2).

The Court agrees with Defendant's argument that, "[c]rucially, the relevant portion of the statute only applies to a party 'who submits to the administering authority the information requested from exporters or producers selected for examination.'" Def.'s Cmts. at 13 (citing 19 U.S.C. § 1677m(a)). The Court also finds the Coalition's argument persuasive when it states that:

> Indeed, even if Commerce had selected voluntary respondents, [Sanfortune Wood and Longyuan Wood] would not have been eligible to be selected as they did not satisfy the requirements to be treated as a voluntary respondent. . . . In other words, even if Commerce had accepted companies as voluntary respondents and calculated individual margins for these companies, no such margins would have been calculated for [Sanfortune Wood and Longyuan Wood].

Def.-Interv.'s Supp. Cmts. at 3 (citing *Fifth Remand Redetermination* at 19–20 (explaining that a company must submit responses to the questionnaires by the deadline established for the mandatory respondents to be considered for voluntary respondent status)).

This case involves the situation contemplated by the CAFC in *Changzhou Hawd VI* when the court stated that:

> It remains open to Commerce in the future, should the issue arise, to address this issue more fully than it has done in this investigation. We do not prejudge the reasonableness of any justification Commerce might yet articulate for deciding to include voluntary-review firms in an antidumping-duty order.

Changzhou Hawd VI, 947 F.3d at 794.

The Court concludes that Commerce's distinction between the voluntary applicants based on whether "full questionnaire responses" were submitted in accordance with 19 U.S.C. § 1677m(a) is a reasonable justification to exclude from the Order the voluntary applicants who submitted timely full questionnaire responses because they submitted the same information required of mandatory respondents by the same deadline that would allow Commerce to select them as voluntary respondents, if Commerce had chosen to select any voluntary respondents in this case.

In an issue of first impression before the U.S. Court of International Trade, the Court also concludes that Commerce's determination to include in the Order voluntary applicants who failed to submit the full responses expected of mandatory respondents under 19 U.S.C. § 1677m(a) is reasonable because those voluntary applicants could not be selected as voluntary respondents due to incomplete and untimely information filed. In a case such as this, when voluntary applicants submit only a two-page request for voluntary respondent treatment without timely submitting any of the information required of mandatory respondents pursuant to 19 U.S.C. § 1677m(a), the Court concludes that it is reasonable for Commerce to include those voluntary applicants in the Order. By submitting only a cursory request for voluntary respondent treatment without satisfying the statutory criteria under 19 U.S.C. § 1677m(a), those voluntary applicants would not be eligible for individually calculated margins even if they had been selected by Commerce as voluntary respondents. Sanfortune Wood and Longyuan Wood argue that they were not given a chance to directly demonstrate their own evidence of fair trading because Commerce refused to conduct voluntary examinations, but they did not satisfy the statutory criteria by filing timely information required of mandatory respondents that would enable them to prove their fair trading if selected as voluntary respondents. *See* Sanfortune Wood's and Longyuan Wood's Cmts. at 4.

The Court concludes that Commerce provided a reasonable explanation to justify its exclusion from the Order the voluntary applicants who submitted timely requests for voluntary respondent treatment with hundreds of pages of questionnaire responses and supporting documentation, providing the same information that mandatory respondents submitted by the same deadline in accordance with 19 U.S.C. § 1677m(a). The Court also holds that Commerce was reasonable in continuing to include those voluntary applicants in the Order who did not submit timely information providing the same information that mandatory respondents submitted by the same deadline in accordance with 19 U.S.C. § 1677m(a).

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the Court sustains Commerce's all-others separate rate assigned to the Separate Rate Plaintiffs; and it is further

ORDERED that the Court sustains Commerce's determination to exclude Dehua TB and Jiangyang Wood from the Order; and it is further

ORDERED that the Court sustains Commerce's determination to include Sanfortune Wood and Longyuan Wood in the Order; and it is further

ORDERED that the Court sustains Commerce's *Fifth Remand Redetermination*.

Judgment shall issue accordingly.

Dated: October 10, 2023
New York, New York

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

Slip Op. 23–148

RISEN ENERGY CO., LTD., Plaintiff, JA SOLAR TECHNOLOGY YANGHOU CO. LTD., et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Consol. Court No. 22–00231

[Commerce's Final Results in the Eighth Administrative Review of Commerce's countervailing duty order on crystalline silicon photovoltaic cells from the People's Republic of China are partially sustained and partially remanded for reconsideration consistent with this opinion.]

Dated: October 11, 2023

Gregory Stephen Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, argued for Plaintiffs. With them on the brief were *James Kevin Horgan*, and *Vivien Jinghui Wang*.

Bryan Patrick Cenko and *Yixin (Cleo) Li*, Mowry & Grimson, PLLC, of Washington, DC, argued for Consolidated Plaintiffs. With them on the brief were *Sarah Marie Wyss*, *Ronalda G. Smith, Jacob Max Reiskin*, *Jacob E. Spegal*, *Jeffrey Sheldon Grimson*, *Jill A. Cramer*, *and Kristin Heim Mowry*.

Joshua Ethan Kurland, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, argued for Defendant. With him on the brief were *Brian M. Boynton*, *Patricia M. McCarthy*, and *Reginald T. Blades, Jr.* Of counsel on the brief was *Spencer Neff*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Restani, Judge:

This action is a challenge to the final determination made by the United States Department of Commerce ("Commerce") in the Eighth Administrative Review of the countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells"), from the People's Republic of China ("China") covering the period from January 1, 2019, to December 31, 2019. Plaintiffs and Consolidated Plaintiffs request that the court hold aspects of Commerce's final determination unsupported by substantial evidence or otherwise not in accordance with law. The United States ("Government") asks that the court sustain Commerce's final determination.

BACKGROUND

Commerce published a countervailing duty order on solar cells from China on December 7, 2012. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012). In February 2021, Commerce began its Eighth Administrative Review of the order for this countervailing duty order, covering the period from January 1, 2019, to December 31,

2019. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. 8,166 (Dep't Commerce Feb. 4, 2021). In March 2021, Commerce selected Risen Energy Co, Ltd. ("Risen") and JA Solar Co., Ltd. ("JA Solar") as mandatory respondents in this review. *See Respondent Selection Memorandum*, P.R. 46 (Mar. 29, 2021).

Commerce published its preliminary results on January 6, 2022, *see Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2019*, 87 Fed. Reg. 748 (Dep't Commerce Jan. 6, 2022), along with the accompanying Preliminary Issues and Decision Memorandum, *Decision Memorandum for the Preliminary Results of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, C-570–980, POR 01/01/2019–12/31/2019 (Dep't Commerce Dec. 30, 2021) ("*PDM*").

Commerce published its amended final determination on September 12, 2022. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2019*, 87 Fed. Reg. 55,782 (Dep't Commerce Sept. 12, 2022); *see also Issues and Decision Memorandum for Final Results of the Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, C-570–980, POR 01/01/2019–12/31/2019 (Dep't Commerce June 29, 2022) ("*IDM*").

JURISDICTION & STANDARD OF REVIEW

The court's jurisdiction continues pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The court sustains Commerce's final redetermination results unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(a)(2)(B)(i).

DISCUSSION

I. Export Buyer's Credit Program

The Government of China's ("GOC") Export Buyer's Credit Program ("EBCP") promotes exports by providing credit at preferential interest rates to qualifying foreign purchasers of GOC goods. *See Clearon Corp. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1344, 1347 (2019). As in prior reviews, in response to Commerce's requests, Risen and JA Solar reported that none of their customers used the

EBCP during the period of review ("POR") and confirmed that they had never been involved in assisting customers in obtaining loans under the program. *See Risen Initial Questionnaire Response* at 40–41, Exs. 19–20, P.R. 187–190, C.R. 211–216 (June 21, 2021); *JA Solar Initial Questionnaire Response* at 47–49, Ex. 22, P.R. 213–216, C.R. 330–362 (June 29, 2021). Commerce's questionnaire asked Risen and JA Solar what steps each "took to determine that no customer used" the EBCP. *See Risen Initial Questionnaire Response* at 40–41; *JA Solar Initial Questionnaire Response* at 47–49. In response, JA Solar provided customer declarations certifying non-use of the EBCP from its sole U.S. importer customer as well as multiple, but not all, of the importer's downstream unaffiliated customers. *JA Solar Initial Questionnaire Response* at 47–49, Ex. 22. At the same time, Risen provided non-use certifications for three of its four non-affiliated customers. *See Risen Initial Questionnaire Response* at 41, Ex. 20. Later, on December 13, 2021, Risen submitted the non-use certification for the fourth customer. *Commerce Rejection Memorandum* at 1, P.R. 342 (Dec. 20, 2021). Commerce rejected the submission as untimely filed because it was unsolicited, did not comply with 19 C.F.R. § 351.301(c)(5), and was not submitted at least thirty days before the scheduled preliminary results. *Commerce Rejection Memorandum* at 1.

In its own response, the GOC deemed that some of Commerce's questions about the EBCP were inapplicable because "the GOC believes that none of the respondents under review applied for, used, or benefitted from the alleged program." *GOC Initial Questionnaire Response* at 135, P.R. 192–204, C.R. 235–255 (June 22, 2021). Consistent with the provided certifications, the GOC, by searching the China Ex-Im Bank's loan database, corroborated that Risen, JA Solar, and their customers did not use the EBCP during the POR. *Id.* at 136. The GOC also noted that normally "the Chinese exporter is aware of the buyer's receipt of the loans and is involved in the loan evaluation proceeding . . . ." *Id.* at 136; *see also id.* at Ex. F-2. Because of this, the GOC concluded that Risen and JA Solar would be "in a position to verify and confirm the existence, if any, of sales contracts that were supported by the export buyer's credits of the EX-IM Bank." *Id.* at 136, 138. Further, the provided Administrative Measures of Export Buyer's Credit indicated that the EBCP "is mainly used for supporting the export of capital goods, (such as Chinese electromechanical products, complete sets of large-scale equipment) and High-tech products and services." *Id.* at Ex. F-2. Although Commerce asked the GOC to provide a list of "all partner/correspondent banks involved in dis-

bursement of funds under the" EBCP, the GOC declined to provide it because, as stated by the GOC, none of the respondents benefited from the program. *Id.* at 136.

In its final determination, Commerce applied an adverse factual inference to find that Risen and JA Solar used the EBCP. *IDM* at 29–32. Specifically, Commerce found that the GOC failed to adequately respond to Commerce's request for a list of all partner banks involved in the disbursement of funds under the EBCP. *Id.* at 30–31. Without this information, Commerce reasoned that it could not fully verify the non-use certifications because Commerce would not know the names of banks that might appear in customers' books that disbursed the EBCP. *IDM* at 31. Further, Commerce also found that Risen and JA Solar failed to provide non-use certifications from all of their U.S. customers. *Id.* at 23. Accordingly, Commerce applied adverse facts available ("AFA") because the GOC was the only party able to provide the requested information, the GOC did not cooperate to the best of its ability, and the information was necessary to verify non-use. *Id.* at 31–32.

If "necessary information is not available on the record" or if a responding party "withholds information" requested by Commerce, Commerce shall "use the facts otherwise available in reaching the applicable determination[.]" 19 U.S.C § 1677e(a). Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" when information is missing from the record because a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information" from Commerce. 19 U.S.C. § 1677e(b). This is described as "AFA."

The application of adverse facts that collaterally impact a cooperating party is disfavored. *Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1212 n.10, 865 F. Supp. 2d 1254, 1262 n.10 (2012), *aff'd*, 748 F.3d 1365 (Fed. Cir. 2014). "When Commerce has access to information on the record to fill in the gaps created by the lack of cooperation by the government, as opposed to the exporter/producer, however, it is expected to consider such evidence." *GPX Int'l Tire Corp. v. United States*, 37 CIT 19, 58–59, 893 F. Supp. 2d 1296, 1332 (2013), *aff'd*, 780 F.3d 1136 (Fed. Cir. 2015); *see also Guizhou Tyre Co., Ltd. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1261, 1270 (2018) ("To apply AFA in circumstances where relevant information exists elsewhere on the record — that is, solely to deter non-cooperation or 'simply to punish' — . . . that is a fate this court should sidestep.") (citation omitted).

In the Government's brief, the Government requests a remand for Commerce to reconsider the application of AFA for JA Solar's use of the EBCP. Gov't Br. at 13–14. The Government explained that Commerce had refined its EBCP practice by requiring non-use certifications from only U.S. importer customers, not further downstream customers. *Id.* at 14. The Government stated that, if granted, Commerce will use the remand to reconsider its use of AFA and, if necessary, attempt to verify the non-use information that JA Solar provided. *Id.* at 15. The court grants the Government's request and remands this issue to Commerce to apply its new procedure.

As for Risen, the first step is to determine whether Risen provided sufficient information in the non-use certifications to fill the gap regarding potential use of the EBCP. When Commerce's questionnaire asked Risen what steps it took to determine its customers did not use the EBCP, Risen explained that it had contacted each of its U.S. customers and provided non-use certifications from three of its four customers.[1] *See Risen Initial Questionnaire Response* at 41, Ex. 20. Later, Risen attempted to submit the non-use certificate for the final customer, but Commerce rejected the submission as unsolicited and untimely. *See Commerce Rejection Memorandum* at 1. Commerce ultimately concluded that Risen failed to fill the gap by not providing non-use certifications for all customers, and applied AFA. *IDM* at 23. But it appears to the court that Risen filed the original non-use certifications as a response to Commerce's request. Commerce requested information from Risen about how it determined none of its customers used the EBCP, and Risen responded by providing documents from customers certifying that they did not use the program. *See Risen Initial Questionnaire Response* at 41, Ex. 20.

Section 1677m(d) requires that if Commerce "determines that a response to a request for information . . . does not comply with the request, [Commerce] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy . . . ." 19 U.S.C. § 1677m(d). Recently the court held that § 1677m(d) does not require Commerce to ask respondents for supplemental information when the GOC's response was deficient because § 1677m(d) only provides the deficient party with the opportunity to remedy, not affected third parties. *See Cooper (Kunshan) Tire Co. v. United States*, 46 CIT __, __, 610 F. Supp. 3d 1287, 1317 (2022). But the respondents in *Cooper* did not submit any non-use certifications or otherwise

[1] It is also unclear to the court based on this record why Risen would not know if its customers used the EBCP. The GOC clearly answered that typically Chinese exporters would be involved in a customer using the EBCP. *GOC Initial Questionnaire Response* at 136, *see also id.* at Ex. F-2. There is no record evidence undermining that statement.

attempt to demonstrate non-use of the EBCP. *Id.* at 1306. Here, though, Commerce requested proof from Risen and JA Solar of how they knew their customers did not use the EBCP, and Risen and JA Solar demonstrated their knowledge through the certifications. *Risen Initial Questionnaire Response* at 41, Ex. 20. When Commerce found that the non-use certifications did not fill the gap because they were incomplete, it essentially declared the responses deficient. Thus, Commerce was required under § 1677m(d) to provide Risen with an opportunity to supplement the record, which the court finds Risen likely could have done given the attempted December filing of the missing customer certification. Accordingly, the court remands for Commerce to consider Risen's rejected filing with the other accepted response as complete non-use certifications.

On remand, Commerce may choose to attempt to verify the customer certifications. Throughout the long history of EBCP litigation in the court there has been an absolute dearth of evidence that any U.S. customer has ever used the program. No party has ever demonstrated that a U.S. customer has received financing through the EBCP.[2] Thus, if Commerce chooses to attempt verification, the court expects that Commerce will not pursue onerous verification requirements. Commerce is attempting to verify non-use by U.S. companies that Commerce has no statutory right to investigate, many of whom are unaffiliated with respondents, and years after the customers conducted business with the respondents. If there were more evidence that Commerce would find anything relevant in the records of the non-affiliate customers, then perhaps rigorous verification would be necessary. Although why onsite visits would be helpful has not been explained. For now though, the court is unconvinced that Commerce would find any EBCP use. Commerce may attempt to verify but only to the extent it does not overly burden voluntary participants.

II. Article 26(2)

In June 2021, Risen reported that its cross-owned company, Risen Ningbo Electric Power Development Co., Ltd., received benefits during the POR from a program it referred to as "[i]ncome tax preference for dividends, bonuses and other equity investment income between eligible resident companies." *Risen Ningbo Questionnaire Response* at 8, P.R. 181 (June 17, 2021). According to Risen, it received a benefit under Article 26(2) of China's Enterprise Income Tax Law and Article 83 of the law's implementing regulations. *Id.* The GOC included the Enterprise Income Tax Law in its initial questionnaire response.

[2] Commerce verified at oral argument that no use of this program for exports to the United States has ever been uncovered.

GOC Initial Questionnaire Response at Ex. B-2. In its preliminary results, Commerce identified the program as potentially countervailable. *PDM* at 68. Commerce issued a supplemental questionnaire, which the GOC responded to by providing the text of the Enterprise Income Tax Law's implementing regulations. *GOC Post-Preliminary Questionnaire Response* at Ex. NSA-25, P.R. 372 (Feb. 14, 2022). In a supplemental questionnaire response, JA Solar also reported receiving benefits under Article 26(2), but explained that "[a]ll resident enterprises are entitled to this program." *JA Solar Post-Preliminary Questionnaire Response* at 3, P.R. 393, C.R. 538 (Apr. 25, 2022).

Commerce published a post-preliminary analysis memorandum where it determined that the Article 26(2) Tax Program is specific as a matter of law under 19 U.S.C. § 1677(5A)(D)(i) ("*de jure* specific"). *Post-Preliminary Analysis Memorandum* at 5–6, P.R. 394 (May 6, 2022). Article 26(2) makes the income that "enterprise[s]" earn tax-exempt so long as the income is from "investment gains derived by a resident enterprise through direct investment in another resident enterprise . . . ." *Id.* Article 83 clarifies that such income excludes "investment gains obtained for holding listed and circulating share issued by a resident enterprise for less than 12 months consecutively." *Id.* Commerce reasoned that because tax exemptions under Article 26(2) are limited to enterprises with investment gains derived from "direct investment in another resident enterprise," this program is *de jure* specific. *Id.* In the final results, Commerce continued to find that the Article 26(2) Program is *de jure* specific because the recipients are limited by law to certain enterprises. *IDM* at 77.

Now, JA Solar challenges Commerce's determination that the tax program is *de jure* specific. JA Solar Br. at 32. It argues that defining this tax program as specific violates § 1677(5A)(D)(i) because Article 26(2) is not limited to an enterprise type, industry, or geographic location. JA Solar Br. at 33–35. In response, the Government asserts that the Article 26(2) program is limited by law to certain enterprises, so Commerce's finding that the program is *de jure* specific is reasonable. Gov't Br. at 26. Commerce defined the allegedly specific enterprise as "enterprises with investment gains derived from direct investment in another resident enterprise, excluding investment gains obtained for holding listed and circulating shares issued by a resident enterprise for less than 12 months consecutively." *IDM* at 77. The Government relies on statutory language that provides that "any reference to an enterprise or industry . . . includes a group of such enterprises or industries" and argues that the Article 26(2) program expressly limits access to a group of enterprises. Gov't Br. at 25, 27–29 (citing 19 U.S.C. § 1677(5A)).

The court reviews Commerce's interpretation of a statute by applying the two-step test laid out in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). First, the court must ascertain whether Congress has "directly spoken to the precise question at issue." *Id.* at 842. If Congress's intent is clear then "that is the end of the matter," as the agency and the court must "give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. In determining whether this step is satisfied, the court looks to the statute's text and employs the "traditional tools of statutory construction." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (quoting *Chevron*, 467 U.S. at 843 n.9). If the statute is "silent or ambiguous with respect to the specific issue" then the court must determine whether the agency's interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Section 1677(5A)(D)(i) provides that a subsidy is *de jure* specific "where the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry." 19 U.S.C. § 1677(5A)(D)(i). The plain meaning of "enterprise" in this context is "a unit of economic organization or activity," especially "a business organization." Enterprise, Merriam-Webster, https://www.merriamwebster.com/dictionary/enterprise (last visited Sep. 15, 2023). This is underscored by the legislative history, which references "state-owned enterprises" throughout. H.R. REP. 103–826(I). Under the plain meaning of enterprise, to be *de jure* specific, a subsidy must be limited to a specific business organization or a limited group of businesses. Thus, a subsidy is *de jure* specific when the authority providing the subsidy, or its operating legislation, expressly limits access to the subsidy to a business or industry, or to a group of businesses or industries. *See* 19 U.S.C. § 1677(5A)(D)(i). There is no ambiguity in this provision.

Here, Commerce's *de jure* specificity finding for the Article 26(2) program is not supported by substantial evidence. Commerce has not identified an adequately specific enterprise or industry that the Article 26(2) program is limited to under § 1677(5A)(D)(i). Commerce stated that it was limited to "enterprises with investment gains derived from direct investment in another resident enterprise," but this is not a limit to specific enterprises or industries. *See BGH Edelstahl Siegen GmbH v. United States*, 46 CIT __, __, 600 F. Supp. 3d 1241, 1256 (2022) (holding a subsidy to be *de jure* specific because only industries identified in the text of each law were eligible for relief). Rather, the Article 26(2) program is open to all enterprises and industries who have investment gains derived from investing in other resident enterprises. Alternatively, a subsidy may be *de jure* specific

if it is limited to an express list of companies. *See id.* at 1264 (finding a subsidy program is *de jure* specific because it is expressly limited by law to companies on the carbon leakage list). The Article 26(2) program is also not expressly limited to a list of companies. Commerce's interpretation of the statute is unreasonable and not in accordance with law. The court therefore rejects Commerce's finding that the Article 26(2) program is *de jure* specific. The court remands for Commerce to remove the program as a countervailable subsidy.[3]

III. Land Benchmark

Also at issue in this case are countervailing duties associated with land leases obtained by JA Solar. JA Solar Br. at 2; Gov't Br. at 2. Commerce concluded that JA Solar received a recurring benefit from land leases in China and used data from the CB Richard Ellis for Thailand 2010 report ("2010 CBRE") to calculate the value of that benefit. *IDM* at 69–73. JA Solar argues that the 2010 CBRE data is stale and fails the substantial evidence test. JA Solar Br. at 29. Additionally, JA Solar requests that the court order Commerce to reopen its 2017 administrative review so that an allocated nonrecurring land benefit determined during that review can be recalculated as a recurring benefit expensed to 2017 alone. *Id.* at 25–31. Recalculating the 2017 land valuations as a recurring benefit and expensing the benefit to 2017 as requested would eliminate the 2017 benefit stream from the countervailing duties calculation for 2019. *Id.* Commerce argues that the 2017 administrative review is final and closed, and that a change to Commerce's calculation method in 2019 does not require Commerce to reopen the 2017 administrative review. Gov't Br. at 40. JA Solar did not contest Commerce's treatment of land as a nonrecurring benefit in 2017. *Id.*

The Government has asked for remand on the land benchmark issue, but not on the question of the finality of the 2017 administrative review.

A. The Land Benchmark Issue

Prior to finding a countervailable subsidy, Commerce must establish that an authority provided a financial contribution, and a benefit was thereby conferred. 19 U.S.C. § 1677(5)(B). A foreign government's provision of goods to a respondent for less than adequate remuneration constitutes a benefit. *Id.* § 1677(5)(E)(iv). In such circumstances, Commerce determines the amount of the subsidy by comparing remuneration actually paid with adequate renumeration with a

[3] There is no record evidence, and Commerce made no attempt to show, that the Article 26(2) program is a *de facto* specific subsidy under 19 U.S.C. § 1677(5A)(D)(iii).

market-determined price for the goods or services, under "a three-tiered hierarchy" employed by Commerce "to determine the appropriate remuneration benchmark." *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1332 (2018) ("*Changzhou Trina I*"); *see* 19 C.F.R. § 351.511(a)(2)(i)–(iii) (2021). Commerce derives a tier-one benchmark "by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i).

In the absence of such a benchmark, Commerce turns to a tier-two benchmark "by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." *Id.* § 351.511(a)(2)(ii). "If there is no world market price available to purchasers in the country in question," however, Commerce moves on to a tier-three analysis and "measures[s] the adequacy of remuneration by assessing whether the government price is consistent with market principles." *Id.* § 351.511(a)(2)(iii). If Commerce determines that the government price is not consistent with market principles it will look to construct an external benchmark. *Canadian Solar Inc. v. United States*, 45 CIT __, __, 537 F. Supp. 3d 1380, 1389 n.6 (2021).

A tier-three benchmark "measure[s] the adequacy of remuneration by assessing whether the government price is consistent with market principles." 19 C.F.R. § 351.511(a)(2)(iii). "If Commerce determines that the government price is not consistent with market principles it will look to construct an external benchmark." *Risen Energy Co. v. United States*, 570 F. Supp. 3d 1369, 1374 (CIT 2022) ("Risen I"). When Commerce has multiple datasets available, it "will average such prices to the extent practicable, making due allowance for factors affecting comparability." 19 C.F.R. § 351.511(a)(2)(ii). Commerce must ensure that all datasets averaged are individually good data sets, and not otherwise defective, as "[d]efects in data are not cured by averaging with better data." *Risen Energy Co. v. United States*, No. 20–03912, 2023 WL 2890019, at *9 (CIT Apr. 11, 2023) ("*Risen II*"). One of the factors that may make data inappropriate for use in a benchmark calculation is staleness. *See Risen I*, 570 F. Supp. 3d 1369, at 1375.

Here, JA Solar contests the use of the 2010 CBRE data in the tier-three benchmark calculation. *IDM* at 71. JA Solar argues that the 2010 CBRE Thailand data is stale and that Commerce should use the MIDA data alone. *Id.* Commerce asserts that averaging the MIDA and 2010 CBRE data creates a more robust data set. *Id.* As both parties have noted, this issue has been extensively addressed recently

by the court in *Risen I* and *Risen II*. *See Risen I*, 570 F. Supp. 3d; *Risen II*, 2023 WL 2890019. As requested, the court will remand, with the note that Commerce should particularly consider the holdings of this court in *Risen II*, in which, as JA Solar points out, the court has already remanded on this issue, finding that the use of the CBRE data is insufficiently explained to meet the substantial evidence standard. *See Risen II*, 2023 WL 2890019 at *9.

Accordingly, the court remands to Commerce for reconsideration of the land benchmark calculation.

B. *The 2017 Benefit Stream*

Courts will ordinarily not reopen matters that have been decided unless it would be "clearly erroneous and would work a manifest injustice" not to. *See Arizona v. California*, 460 U.S. 605, 618 n.8 (1983) (citation omitted). Here, JA Solar argues a decision regarding a benefit from the 2017 administrative review that was previously allocated to 2019 is clearly erroneous and should be reopened and reevaluated. JA Solar Br. at 25–31. Commerce disagrees, arguing for the importance of finality of the 2017 review.[4] Gov't Br. at 39–41.

A determination of amortization is a final decision. In *Toscelik Profil ve Sac Endustrisi A.S. v. United States*, the court encountered a similar request to reopen a nonrecurring benefit calculation, and declined to do so, finding that once a benchmark for the earlier period was established and the amortization schedule was in place, "use of that benchmark and schedule became final and unappealable." No. 13–00371, 2014 WL 5462542, at *4 (CIT Oct. 29, 2014). 19 C.F.R. § 351.504, which governs calculation of an amortized benefit, provides: "[i]n the case of a grant, a benefit exists in the amount of the grant." The use of the singular means that a grant has only a singular benefit amount, and in the absence of clear indication to the contrary, a singular benefit amount is not variable and subject to recalculation in successive reviews. *See also* 19 C.F.R. § 351.511(c) ("[i]n the case of the provision of infrastructure, the Secretary will normally treat the benefit as non-recurring and will allocate the benefit to a particular year in accordance with § 351.524(d)"). Had Commerce intended otherwise, there would have been no reason to create a multi-year benefit-stream formula. Yearly revaluation of the benefit would be

[4] JA Solar and Commerce agree that, for the 2019 administrative review, the leases at issue should properly be treated as a recurring benefit. *IDM* at 73. Agreement that a new method should be used does not necessarily mean that the old method was in error. Although it might be better to treat periodic reduced lease payments as a recurring benefit, it has not been demonstrated that very long term favorable leases cannot be treated as a non-recurring benefit.

inconsistent with the regulatory definition of the benefit of "'the' grant"; therefore, "absent a showing of manifest injustice or clear erroneousness, reopening that calculation was inappropriate." *Toscelik,* 2014 WL 5462542, at *4.

There is a strong interest in protecting the finality of the decision-making process absent a showing that leaving a matter closed will cause a manifest injustice or would be clearly erroneous. *Id.* In *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1361 (Fed. Cir. 2006), the Federal Circuit reviewed a Court of International Trade decision in which the court was asked to consider the reviewability of decisions made outside the POR. The federal circuit upheld Commerce's determination that the appropriate period of review was the POR as reasonable "because the statute contemplates annual reviews, and hence limiting § 1675 review to entries made during the POR in issue reasonably serves important goals of finality and efficiency." *Id.* The circuit further noted that,

> Given that Commerce undertakes annual reviews, it would be duplicative and wasteful for later reviews to revisit matters subject to review in prior PORs. Revisiting issues that were resolved in prior review proceedings would impair the finality of any one annual review, potentially prolonging a CVD dispute far beyond the year to which it relates. *The same potential exists with respect to issues relating to entries from a prior year that were not raised for Commerce review during the appropriate POR*. With respect to these issues there is also the risk that, owing to the passage of time, relevant evidence might be lost.

Id. (emphasis added). Absent a showing of manifest injustice or clear erroneousness, all interest points to protecting the finality of review.

Here, as in *Toscelik*, the benefit and amortization schedule established in the earlier administrative review is final.[5] The remaining question therefore is whether leaving the amortized benefit to coexist in the period of review with the recurring benefit Commerce has calculated is clearly erroneous or otherwise manifestly unjust.

Litigation is not an endless opportunity to rewrite the record. In 2017, JA Solar could have argued that its land rights were a recurring benefit, not a nonrecurring benefit. It chose not to. Requiring JA Solar to live with the result of that decision is neither clearly erroneous nor

[5] Of course, it would be remiss not to acknowledge the elephant in the room. Practically, the 2017 review is still before this court in *Risen II*. While the court acknowledges that the 2017 review remains before the court on remand on other matters, the court declines to hold that dragging out litigation in one period of review undermines the finality of the period of review as it relates to later legal issues that may arise in litigation surrounding subsequent periods of review.

manifestly unjust. In *Toscelik,* requiring Commerce to leave a prior amortization that it later felt undervalued a benefit received in place was not manifestly unjust nor clearly erroneous; so here, allowing Commerce to leave in place a prior amortization that JA Solar argues is unfavorable is neither manifestly unjust nor clearly erroneous. *See Toscelik*, 2014 WL 5462542, at *4. The finality of administrative review is critical whether the government wishes to reopen a prior review seeking more money, or a plaintiff wishes to reopen a prior review, seeking to pay less. In neither case is leaving the administrative review in place, alone, clearly erroneous nor manifestly unjust.[6]

JA Solar's argument for manifest injustice or clear erroneousness fundamentally boils down to, Commerce changed its mind in 2017 and so Commerce should be required to retroactively apply that change to alter prior decisions that JA Solar does not like. Commerce is allowed to change its mind—in fact, it is regularly required to do so, since, for example, it is required to use "the best available information" when making benchmark determinations for nonmarket economies. *SolarWorld Americas, Inc. v. United States*, 910 F.3d 1216, 1222 (Fed. Cir. 2018) (citing 19 U.S.C. § 1677(5)(b)(c)(1)). The best available information may change from year to year; when it does, Commerce must be able to take account of that fact without jeopardizing the integrity of previous administrative reviews that were themselves based on the best information available at the time they were made. The existence of new information alone cannot possibly be the basis for reopening a prior administrative review, or no review would ever be considered final. This is particularly true when the party that would benefit from the new information had the power to produce it previously, as is the case here.

JA Solar missed its opportunity to argue that land leases were recurring, and not nonrecurring, in 2017; the burden it now bears is one of its own making. That is not manifestly unjust. That Commerce has been sympathetic to JA Solar's 2019 arguments does not require it to now undo its 2017 decisions, and to hold otherwise would be to greatly endanger the interest in the finality of review. Accordingly, the court declines to order the 2017 review reopened and sustains Commerce's determination on this point.

[6] At oral argument, both Commerce and JA Solar confirmed that the leases calculated as a nonrecurring benefit in 2017 are not the same leases calculated as a recurring benefit in 2019. Likewise, both confirmed that there is no concern that a single benefit was double counted in the 2019 review as a result of the amortization of the 2017 benefit.

IV. Ocean Freight

At issue here is the benchmark set by Commerce in assessing the value of ocean freight. Risen argues that Commerce's use of a tier-two benchmark, sourced from the average of two freight datasets, was unsupported by substantial evidence because one of the datasets was sourced from a small sample. Risen Br. at 13–16. The government responds that the benchmark is a reasonable implementation of the regulations, which require Commerce to average world-market prices for a benchmark when it has multiple datasets available. Gov't Br. at 42–43.

As discussed above, Commerce applies a tier-two benchmark "by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(ii). "Where there is more than one commercially available world market price, [Commerce] will average such prices to the extent practicable, making due allowance for factors affecting comparability." *Id.* Commerce also "adjust[s] the comparison price to reflect the price that a firm actually paid or would pay if it imported the product." *Id.* § 351.511(a)(2)(iv).

Commerce's regulations for tier-two benchmarks do not require the comparable product and market be identical in order for a benchmark to appropriately represent the world market price. *See id.* § 351.511(a)(2)(ii); *see also Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 52 F. Supp. 3d 1351, 1369 (2015) ("[T]here is nothing that requires that [Commerce] use prices for merchandise that are identical.") (emphasis omitted). At the same time, "[a]n import benchmark's comparability means it must bear a reasonably realistic resemblance to the importing market's reality or it will not be in accordance with the statute." *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1306, 1341 (2015) (internal quotation marks omitted).

During the administrative proceeding, JA Solar and Risen submitted ocean freight price data for the benchmark calculation sourced from Xeneta. *See JA Solar's Benchmark Submission* at 4–5, Ex. 4B; *Risen's Benchmark Submission* at 1, Ex. 4. The Xeneta data reflected monthly ocean freight pricing data for shipping a 20-foot standard container to Shanghai and Tianjin from Antwerp, Barcelona, Buenos Aires, Busan, Cai Mep, Hamburg, Jakarta, Japan, Laem Chabang, Los Angeles, Mumbai, Rotterdam, Savannah, Tanjung Pelepas, and Tokyo. *JA Solar's Benchmark Submission* at 4–5, Ex. 4B; *Risen's Benchmark Submission* at 1, Ex. 4.

At the same time, the American Alliance for Solar Manufacturing submitted monthly freight quotes from Descartes for shipping rates to Shanghai for solar glass, aluminum extrusions, and polysilicon inputs. *See Alliance's Benchmark Submission* at 5–6, Ex. NFI-10. The Descartes data reflected the freight rate for shipping 40-foot containers from various American ports to Shanghai. *Id.* Each datapoint has an identical "tariff code." *Id.*

In the preliminary determination, Commerce calculated a tier-two benchmark for the price of ocean freight for bringing solar glass, polysilicon, and aluminum extrusions to China from various cities as a world market price, pursuant to 19 C.F.R. § 351.511(a)(2)(ii). *PDM* at 28–29. Commerce accepted the submissions from JA Solar, Risen, and the Alliance. *Id.* at 28. Commerce averaged the prices from the datasets to create a value for ocean freight for the tier-two benchmark for solar grade polysilicon, aluminum extrusions, and solar glass inputs. *Id.* Commerce also stated that it "adjusted the benchmark price . . . to reflect the price that a firm actually would pay if it imported the product." *Id.* at 29. In Commerce's final determination, Commerce stated that its methodology gave too much weight to the Descartes data when the Xeneta data consisted of "significantly more data points." *IDM* at 47. Thus, Commerce recalculated the benchmark by averaging the monthly rates for all routes. *Id.*

The Government has recently moved for a remand of Commerce's ocean freight calculations. *See Consent Motion to Remand Case* at 7, ECF No. 47 (Sept. 1, 2023). The Government stated that, in the most recent administrative review of the countervailing duty order on solar cells from China, Commerce found that materially similar Descartes data was not appropriate to develop a world market price. *See id.* The Government requests remand for Commerce to reconsider whether, in light of this recent administrative conclusion, it remains appropriate to use the Descartes data in this review. *See id.* The court grants the Government's request.

CONCLUSION

For the foregoing reasons, the court remands to Commerce for a determination consistent with this opinion on the issues. The remand determination shall be issued within 90 days hereof. Comments may be filed 30 days thereafter and any response 15 days thereafter.

Dated: October 11, 2023
New York, New York

/s/ Jane A. Restani
Jane A. Restani. Judge

Slip Op. 23–149

Siemens Gamesa Renewable Energy, Plaintiff, v. United States, Defendant, and Wind Tower Trade Coalition, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 21–00449

[Ordering a second remand in litigation contesting an agency determination concluding an antidumping duty investigation of wind towers from Spain]

Dated: October 11, 2023

Daniel J. Cannistra, Crowell & Moring LLP, of Washington, D.C., for plaintiff. With him on the briefs were *Pierce Lee* and *Simeon Yerokun*.

Sara E. Kramer, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Shelby M. Anderson*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Alan H. Price, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor. With him on the brief were *Robert E. DeFrancesco, III* and *Laura El-Sabaawi*.

OPINION AND ORDER

Stanceu, Judge:

In this litigation, plaintiff contested a “less-than-fair-value” (“LTFV”) determination by the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) concluding an antidumping duty (“AD”) investigation of certain wind towers from Spain. The court previously ordered Commerce to reconsider its final LTFV determination. *Siemens Gamesa Renewable Energy v. United States*, 47 CIT __, 621 F. Supp. 3d 1337 (2023) (“*Siemens Gamesa I*”).

Before the court is a decision (the “First Remand Redetermination”), which Commerce issued in response to the court’s opinion and order in *Siemens Gamesa I*. Final Results of Redetermination Pursuant to Court Remand (Int’l Trade Admin. June 16, 2023), ECF No. 53 (“*First Remand Redetermination*”). Concluding that the First Remand Redetermination does not comply with the court’s order in *Siemens Gamesa I* and is contrary to law, the court directs Commerce to issue a new decision in conformity with the instructions set forth herein.

I. BACKGROUND

Background for this case is presented in the court's prior opinion and is supplemented herein. *Siemens Gamesa I*, 47 CIT at __, 621 F. Supp. 3d at 1339–40.

A. The Parties

Plaintiff Siemens Gamesa Renewable Energy ("Siemens Gamesa" or "SGRE") is a Spanish exporter of utility scale wind towers (the "subject merchandise"). Defendant is the United States. Defendant-intervenor Wind Tower Trade Coalition is an association of U.S. producers of utility scale wind towers that was the petitioner in the underlying antidumping duty investigation.[1]

B. The Department's Final Less-Than-Fair-Value Determination

The agency decision contested in this litigation (the "Final LTFV Determination") was published as *Utility Scale Wind Towers From Spain: Final Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 33,656 (Int'l Trade Admin. June 25, 2021) ("*Final LTFV Determination*"). The period of investigation ("POI") was July 1, 2019, through June 30, 2020. *Id*. The Final LTFV Determination incorporated by reference an explanatory "Issues and Decision Memorandum." *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain* (Int'l Trade Admin. June 14, 2021), P.R. 149 ("*Final I&D Mem.*").[2]

The Final LTFV Determination concluded the Department's antidumping duty investigation of utility scale wind towers from Spain. In the course of its investigation, Commerce sent "Quantity and Value" ("Q&V") questionnaires to nineteen known exporters and producers of the subject merchandise, thirteen of which filed responses. *Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain* at 2 (Int'l Trade Admin. Mar. 29, 2021), P.R. 134. From among those thirteen companies, Commerce decided that it would "examine

[1] "The members of the Wind Tower Trade Coalition are Arcosa Wind Towers Inc. and Broadwind Towers, Inc." *Utility Scale Wind Towers From Spain: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 17,354, 17355 n.6. (Int'l Trade Admin. Apr. 2, 2021) ("*Prelim. Determination*").

[2] Documents in the Joint Appendix (May 26, 2022), ECF Nos. 41 (public), 42 (conf.) are cited as "P.R. __" (for public documents). Documents from the first remand proceeding, Remand Joint Appendix (Sept. 8, 2023), ECF Nos. 65 (public), 66 (conf.), are cited as "P.R.R. __" (for public documents). All information disclosed in this Opinion and Order is information for which there is no claim for confidential treatment.

individually only one respondent (i.e., a 'mandatory respondent')," for which Commerce selected the company with the largest export volume, Vestas Eolica S.A.U. ("Vestas Eolica"). *Siemens Gamesa I*, 47 CIT at __, 621 F. Supp. 3d at 1341 (citing *Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain: Respondent Selection* at 6 (Int'l Trade Admin. Dec. 23, 2020), P.R. 106 ("*Respondent Selection Mem.*") ("Based on our analysis of the Q&V questionnaire data submitted by exporters and producers, the exporter/producer with the largest value of entries of subject merchandise is Vestas Eolica.")).

When Vestas Eolica notified Commerce that it would not participate in the investigation, *Utility Scale Wind Towers from Spain: Notice of Decision to Not Participate in the Investigation* at 1 (Jan. 28, 2021), P.R. 124, Siemens Gamesa filed a request with Commerce to be investigated individually, along with its affiliated supplier Windar Renovables ("Windar"), as a mandatory respondent. *Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain: Request for Mandatory Respondent Selection* at 1 (Feb. 17, 2021), P.R. 128 ("*SGRE Request for Mandatory Respondent Selection*"). Despite the absence of any mandatory respondents other than Vestas Eolica, Commerce rejected this request. *Siemens Gamesa I*, 47 CIT at __, 621 F. Supp. 3d at 1342 (citing *Utility Scale Wind Towers from Spain: Request to Select Replacement Mandatory Respondent* (Int'l Trade Admin. Mar. 5, 2021), P.R. 132).

Commerce concluded that Vestas had "failed to cooperate by not acting to the best of its ability when it did not respond to the Department's antidumping duty questionnaire." *Siemens Gamesa I*, 47 CIT at __, 621 F. Supp. 3d at 1342 (citing *Utility Scale Wind Towers From Spain: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 17,354, 17,355 (Int'l Trade Admin. Apr. 2, 2021)). Relying on "facts otherwise available" under 19 U.S.C. § 1677e(a) and an "adverse inference" under 19 U.S.C. § 1677e(b) (collectively, "adverse facts available" or "AFA"), Commerce assigned Vestas Eolica a preliminary dumping margin of 73.00 percent *ad valorem*, a rate drawn from the petition. For the six companies, including Windar,[3] that failed to respond to the Department's initial Q&V questionnaire, Commerce also assigned a preliminary antidumping duty margin of 73.00 percent based on "total AFA." *Siemens Gamesa I*, 47 CIT at __, 621 F. Supp. 3d at 1343. Commerce, further,

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[3] These six companies were Acciona Windpower S.A., Gamesa Energy Transmission, Haizea Wind Group, Kuzar Systems S.L., Proyectos Integrales y Logisticos S.A.A. ("Proinlosa"), and Windar Renovables. *Prelim. Determination*, 86 Fed. Reg. at 17,355 n.5.

preliminarily assigned the 73.00 percent rate as an "all-others" rate to the exporters and producers of the subject merchandise that Commerce did not individually examine, including Siemens Gamesa. *Id.*

Commerce did not alter its analysis in issuing the Final LTFV Determination, which applied "total AFA" to assign the 73.00 percent dumping margin to the sole mandatory respondent, Vestas Eolica, and assigned that same rate to five of the six companies the Department preliminarily had determined not to have cooperated with the investigation by failing to respond to the Q&V questionnaires. *Id.* (citing *Final LTFV Determination*, 86 Fed. Reg. at 33,657 (explaining that one of those six companies attempted to cooperate with the investigation, and so "we no longer find that application of total AFA is appropriate with respect to Proinlosa.")). Commerce also made no change to its preliminary determination of an "all-others" rate of 73.00 percent. *Id.* Thus, Commerce assigned the 73.00 percent rate to every respondent in the investigation.

After receiving notice of an affirmative final determination of material injury by the U.S. International Trade Commission ("ITC"), *Utility Scale Wind Towers From Spain; Determination* (Int'l Trade Comm'n Aug. 13, 2021), 86 Fed. Reg. 44,748, Commerce published the antidumping duty order (the "Order"), *Utility Scale Wind Towers From Spain: Antidumping Duty Order*, 86 Fed. Reg. 45,707 (Int'l Trade Admin. Aug. 16, 2021). In the Order, Commerce directed U.S. Customs and Border Protection to collect 73.00 percent cash deposits on all imports of subject merchandise, "effective on the date of publication in the Federal Register of the ITC's final affirmative injury determination." *Id.*, 86 Fed. Reg. at 45,708.

C. Submission of the First Remand Redetermination and Comments

In response to the court's opinion and order in *Siemens Gamesa I*, Commerce submitted the First Remand Redetermination to the court on June 16, 2023. Plaintiff and defendant-intervenor filed comments on July 17, 2023. Plaintiff Siemens Gamesa Renewable Energy's Comments on Draft Remand Redetermination, ECF Nos. 55 (conf.), 56 (public) ("SGRE's Comments"); Defendant-Intervenor Wind Tower Trade Coalition's Comments on Remand Redetermination, ECF Nos. 58 (conf.), 59 (public) ("Def.-Int.'s Comments"). The government responded to those comments on July 31, 2023. Defendant's Response to Plaintiff's and Defendant-Intervenor's Comments on Commerce's Remand Redetermination, ECF No. 61 ("Def.'s Resp.").

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c),[4] pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping duty investigation.

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

B. The Court's Prior Opinion and Order

In *Siemens Gamesa I*, the court held that "[t]he assignment of the 73.00 percent rate to Siemens Gamesa was unlawful because it resulted from an unlawful respondent selection method, Commerce having limited its individual examination to a single respondent." 47 CIT at __, 621 F. Supp. 3d at 1348. The court ruled that the statute, in 19 U.S.C. § 1677f-1(c)(2), as interpreted by the Court of Appeals for the Federal Circuit ("Court of Appeals") in *YC Rubber Co. (North America) LLC v. United States*, No. 21–1489, 2022 WL 3711377 (Fed. Cir. Aug. 29, 2022) ("*YC Rubber*"), requires Commerce to "determine the weighted average dumping margins for *a reasonable number* of exporters or producers," where "a 'reasonable number' is generally more than one." *Siemens Gamesa I*, 47 CIT at __, 621 F. Supp. 3d at 1345 (quoting *YC Rubber*, 2022 WL 3711377, at *4). Noting that "Commerce announced its decision to examine individually only one respondent in the Respondent Selection Memorandum and never departed from that decision throughout the conduct of the entire investigation," the court held that "[t]he Department's assigning the 73.00 percent rate to Siemens Gamesa was a result of that unlawful decision, which, when viewed according to the holding *YC Rubber*, was not based on a permissible interpretation of 19 U.S.C. § 1677f-

[4] All citations to the United States Code herein are to the 2018 edition. All citations to the Code of Federal Regulations are to the 2023 edition.

1(c)(2)." *Id*. The court ruled, additionally, that the Department's assignment of the 73.00 percent rate to Siemens Gamesa as an "all others" rate did not satisfy the "reasonable method" requirement of the Tariff Act. *Id*., 47 CIT at __, 621 F. Supp. 3d at 1345–47.

Commerce earlier had determined that it would select its mandatory respondent based on "largest export volume under 19 U.S.C. § 1677f-1(c)(2)(B)," *id*., 47 CIT at __, 621 F. Supp. 3d at 1348 (citing *Respondent Selection Mem*. at 6), a decision not challenged in this litigation and therefore final. Accordingly, the court held that the Department's unlawful decision "not to examine Siemens Gamesa individually as the largest remaining exporter . . . must be remedied by an individual investigation of Siemens Gamesa during the remand proceeding the court is ordering." *Id*., 47 CIT at __, 621 F. Supp. 3d at 1349.

C. The First Remand Redetermination

In the First Remand Redetermination, Commerce reported to the court that it "has now individually investigated SGRE." *First Remand Redetermination* at 1. Commerce further informed the court that it conducted a "collapsing" analysis under 19 C.F.R. § 351.401(f), under which it decided to treat Siemens Gamesa and six other companies as a single entity for purposes of the remand proceeding. *Id*. at 1–2, 6 (citing *Remand for the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers: Preliminary Affiliation and Collapsing Memorandum for Siemens Gamesa Renewable Energy S.A. and Windar Renovables S.A.* (Int'l Trade Admin. Apr. 25, 2023), P.R.R. 69 ("*Collapsing Mem*.")). The six companies were Windar and five other companies Commerce described as wholly-owned subsidiaries of Windar: Tadarsa Eolica SL, Windar Offshore SL, Windar Wind Services SL, Aemsa Santana SA, and Apoyos Metalicos SA. *Id*. at 2 n.4. Commerce found that the seven companies were "affiliated" within the meaning of section 771(33) of the Tariff Act, 19 U.S.C. § 1677(33), and that "it is appropriate to treat SGRE and Windar (and certain Windar subsidiaries) as a single entity, because their operations with respect to the sale and production of subject merchandise are intertwined." *Id*. at 1–2 (citing *Collapsing Mem*.).

In the First Remand Redetermination, Commerce assigned the seven-company entity an estimated weighted average dumping margin of 73.00 percent. Commerce gave as its rationale: (1) that, following its finding that Windar failed to respond to the Q&V questionnaire in the underlying investigation, it had determined in the Final LTFV Determination to assign to one of the seven companies in the collapsed entity, Windar, a 73.00 percent rate as an adverse inference,

id. at 22; (2) that Windar's 73.00 percent rate was "final" because Windar did not challenge it in the Final LTFV Determination, *id.*; (3) that in *Siemens Gamesa I* "the Court did not require (or even permit) the agency to revisit its final/unchallenged decision applying AFA to Windar," *id.* at 26; and (4) that the assignment of the 73.00 rate to the entire seven-company entity "is consistent with extensive agency practice," *id.* at 22.

Because the decision Commerce reached in the First Remand Redetermination was unlawful, the court sets it aside and orders Commerce to conduct additional proceedings. The court concludes that the First Remand Redetermination was contrary to law in three major respects.

First, Commerce relied on a conclusion that the 73.00 percent adverse inference rate Commerce assigned Windar in the original investigation is final and controlling with respect to its decision. This was incorrect. Any decision the court might sustain that involves collapsing of the seven companies necessarily would render null and void the original assignment of the 73.00 percent rate to Windar and would supplant it on remand with a newly-determined rate for the combined entity.

Second, in using an inference adverse to Siemens Gamesa, the First Remand Redetermination does not comply with section 776 of the Tariff Act, 19 U.S.C. § 1677e. The record evidence does not support, and instead refutes, a finding that Commerce could resort to "facts otherwise available" under section 776(a) of the Tariff Act, 19 U.S.C. § 1677e(a). Substantial evidence on the record fails to support the Department's finding that the absence of a response by Windar to the Q&V questionnaire in the underlying investigation impaired the Department's ability to investigate Siemens Gamesa individually and assign it an estimated dumping margin in the remand proceeding, as the court directed it to do. To the contrary, Commerce reopened the record during that remand proceeding, conducted a questionnaire process, and did not find that Siemens Gamesa failed to provide the information it requested or otherwise failed to cooperate.

Third, Commerce repeated the error it made in the Final LTFV Determination with respect to an all-others rate. Noting that "we have assigned the SGRE/Windar entity a single dumping margin, *i.e.*, 73.00 percent," Commerce decided that "[b]ecause there are no other rates on the record of this proceeding from which to select a different 'all-others rate,' the 'all others' rate remains unchanged." *Id.* at 37–38.

1. Effect of the "Finality" that Attached to the Rate Commerce Assigned to Windar in the Final LTFV Determination

Commerce noted that Windar did not contest its assignment in the Final LTFV Determination of the 73.00 percent rate. *First Remand Redetermination* at 8. Defendant and defendant-intervenor also point out that Windar's 73.00 percent adverse inference rate, as assigned in the Final LTFV Determination, was final and unchallenged. Def.-Int.'s Comments 8; Def.'s Resp. 7. These conclusions are correct, as Windar is not a plaintiff in this case and did not otherwise contest the Final LTFV Determination before this Court.

Commerce misinterpreted the consequence of the finality that attached to Windar's adverse inference rate as a result of the Final LTFV Determination. The consequence of that finality is that any exports of subject merchandise by Windar that are occurring or may occur in the future will be subject to a 73.00 percent deposit rate, but only for so long as that rate is in effect.[5] The First Remand Redetermination would collapse Windar with six other companies and assign the combined entity a newly determined rate (which the First Remand Redetermination would set at 73.00 percent). Were the court to sustain a future determination by Commerce upon remand that assigns a rate to a collapsed entity that includes Windar, the court's sustaining of that remand redetermination necessarily would vacate the existing 73.00 percent rate for Windar, as determined by Commerce in the Final LTFV Determination, and supplant it with a newly determined rate. In its reasoning, Commerce overlooked that subject merchandise exports by Windar (were any to occur) could not be subject to the old rate and the newly determined rate at the same time. The First Remand Redetermination reasoned that the "finality" of Windar's rate supports the decision it reached in the First Remand Redetermination to subject Siemens Gamesa to a 73.00 percent rate. *See First Remand Redetermination* at 26. It does not.

Siemens Gamesa I, while directing Commerce to investigate plaintiff Siemens Gamesa individually, did not address the issue of whether on remand Commerce could collapse Siemens Gamesa with any other companies. The court neither requires nor prohibits Commerce, in going forward, from using a collapsing analysis. In the Second Remand Redetermination the court is ordering, Commerce has a choice between two options. Commerce may submit a new

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[5] Plaintiff states that, according to all record evidence, Windar provided wind tower components to Siemens Gamesa but did not itself export subject merchandise to the United States during the period of investigation. *See* Plaintiff Siemens Gamesa Renewable Energy's Comments on Draft Remand Redetermination 2, ECF Nos. 55 (conf.), 56 (public). As discussed later in this Opinion and Order, record evidence supports plaintiff's statement.

determination that would apply to Siemens Gamesa alone and allow to stand as "final" the uncontested, 73.00 percent rate it assigned to Windar in the Final LTFV Determination. This option necessarily would foreclose any collapsing of Siemens Gamesa with Windar. The other option open to Commerce is to substitute for Windar's existing rate a new rate that it would apply to a collapsed entity. But Commerce cannot repeat the internally inconsistent approach it took in the First Remand Redetermination, which in effect attempted to do both.

Defendant points out that plaintiff did not object to the decision in the First Remand Redetermination to collapse it with Windar and the Windar subsidiaries. Def.'s Resp. 4–7 (quoting *SGRE's Letter Regarding Collapsing* (May 1, 2023), P.R.R. 74 ("SGRE concurs with the Department's preliminary determination regarding collapsing in the instant investigation.")). That is true, but Siemens Gamesa *did* object to the outcome of the Department's collapsing analysis, which was to assign the 73.00 percent rate to all seven companies in the collapsed entity. SGRE's Comments 2. Because the determination to assign that rate was unlawful, the court must set it aside (along with its reasoning), and as a result it is up to Commerce to decide whether or not it will use a collapsing methodology in the second remand proceeding.

Defendant argues that "[n]either SGRE nor Windar challenged Windar's rate before Commerce during the investigation, and thus failed to exhaust their administrative remedies." Def.'s Resp. 7. Defendant-intervenor argues, similarly, that Siemens Gamesa "failed to exhaust its administrative remedies regarding Windar's AFA rate," Def.-Int.'s Comments 8, on the premise that Siemens Gamesa "did not raise the issue of Windar's rate until Commerce's remand proceeding," *id*. at 9. These arguments are meritless. Commerce decided to apply a 73.00 percent adverse inference rate to Siemens Gamesa (as a member of the collapsed entity) for the first time on remand, not in the Final LTFV Determination, and plaintiff has a right to contest that decision upon judicial review. The Final LTFV Determination had applied a 73.00 percent rate to Siemens Gamesa as an all-others rate (which Siemens Gamesa successfully contested before the court), not as an adverse inference rate. In this way, the First Remand Redetermination would adopt an approach different than the one Commerce took in the Final LTFV Determination. In its comments on the Department's draft version of the First Remand Redetermination, Siemens Gamesa exhausted its administrative remedies when it contested the assignment of Windar's adverse inference rate to the col-

lapsed entity. *See Antidumping Duty Investigation of Utility Scale Wind Towers from Spain: Comments on Draft Remand Determination* at 4–5, 7 (May 24, 2023), P.R.R. 80.

2. The Department's Use of an Adverse Inference Rate in the First Remand Redetermination

Section 776(b)(1) of the Tariff Act authorizes Commerce to use an inference "adverse to the interests" of an "interested party" that "has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1). Although they are affiliated, and despite a "collapsing" determination by Commerce, Siemens Gamesa, Windar, and Windar's subsidiaries remained separate entities. Commerce itself acknowledged this point. *First Remand Redetermination* at 31 ("[B]oth SGRE and Windar remain separate legal entities, even though collapsed for AD purposes.").

Courts have recognized limited situations in which an interested party's failure to cooperate can have an adverse collateral effect on a fully cooperative party. This case does not present one of them. The collapsing procedure is a creation of the Department's regulation, 19 C.F.R. § 351.401(f), that is not contained in any provision of the Tariff Act. From the perspective of 19 U.S.C. § 1677e(b)(1), which contains no exception broadening its scope in the situation presented by this case, Siemens Gamesa, Windar, and Windar's subsidiaries remained separate "interested parties." Nevertheless, Commerce applied an adverse inference to the prejudice of Siemens Gamesa (the sole plaintiff in this case) in the remand proceeding, based entirely on Windar's failure to submit a response to the Q&V questionnaire in the original investigation. Rather than allow Commerce to act punitively, § 1677e is intended to induce cooperation on the part of an interested party to a proceeding. According to the Department's own findings, Siemens Gamesa, the party Commerce was charged with investigating individually on remand, did not fail to cooperate, either in the investigation culminating in the Final LTFV Determination or in the remand proceeding. When an agency's regulation (in this case, 19 C.F.R. § 351.401(f)) conflicts with the intent and purpose of a statute (here, 19 U.S.C. § 1677e), the statute must prevail.

Applying an adverse inference rate to Siemens Gamesa in the remand proceeding also was unlawful because it was unsupported by valid factual findings as required by 19 U.S.C. § 1677e(a). Referring to subsection (a), subsection (b) of section 776 of the Tariff Act provides for the use of an adverse inference "in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). With respect to the "facts otherwise available," the First Remand Redetermination relied

on its findings that, due to Windar's failure to provide a response to the Q&V questionnaire, "relevant information remains missing from the record," that "the time to supply that information has long passed," and that "incomplete" information provided by SGRE in the remand proceeding did "not overcome Windar's failure to provide a timely Q&V questionnaire response." *First Remand Redetermination* at 34. These findings are contrary to the record evidence, which: (1) refutes the finding that the lack of a response to the Q&V questionnaire deprived Commerce of information it needed to examine Siemens Gamesa individually in the remand proceeding (as the court ordered it to do); and (2) shows that Commerce reopened the record during the remand proceeding to collect additional information, obtained the information it sought, and did not find that Siemens Gamesa withheld any information or was untimely in responding to the Department's requests. The Department's use of an adverse inference against Siemens Gamesa was not supported by valid findings for the use of facts otherwise available, as the court explains in further detail below.

Addressing the lack of a response from Windar to the Q&V questionnaire, Commerce found as follows in the First Remand Redetermination:

> Given Windar's failure to provide a response to the Q&V questionnaire, Windar effectively prevented itself from consideration as an individually examined respondent in the LTFV investigation. Nothing on the record remedies this deficiency. SGRE's section A response, in turn, only confirms that Windar was the source of SGRE's exports; it neither constitutes a timely Q&V response from Windar nor necessarily identifies the full extent of Windar's exports to the United States (through SGRE, or otherwise).

First Remand Redetermination at 33–34 (footnote omitted). The record evidence does not support, and instead refutes, the findings that "nothing on the record remedies this deficiency," that SGRE's Section A response does no more than "confirm that Windar was the source of SGRE's exports," and that this response did not identify "the full extent of Windar's exports to the United States (through SGRE, or otherwise)." Commerce overlooked the point that questionnaire responses Siemens Gamesa submitted during the remand proceeding remedied any deficiency that could have arisen from Windar's earlier failure to provide the Q&V response. They also provided information in addition to the fact that Windar was the source of SGRE's exports,

including the information that Windar had no exports to the United States during the POI, either directly or through a third country.

The Q&V questionnaire Commerce used in the underlying antidumping duty investigation contained the following instruction:

> Please include only sales exported by your company directly to the United States. However, if your company made sales to third countries for which you have knowledge that the merchandise was ultimately destined for the United States, please separately identify these sales quantities and the location (*i.e.*, countries) to which you made the sales.

Antidumping Duty Investigation of Utility Scale Wind Towers from Spain: Issuance of Quantity and Value Questionnaires at Attachment I (Int'l Trade Admin. Nov. 25, 2020), P.R. 49 ("*Q&V Questionnaire*"). In its Section A questionnaire response, SGRE identified the "distribution channels" through which Windar sold subject merchandise. *Antidumping Duty Investigation of Utility Scale Wind Towers from Spain: Siemens Gamesa Renewable Energy Section A Questionnaire Response* at 16–17 (Mar. 10, 2023), P.R.R. 8–40 ("*Section A Response*"). These channels were home market sales to its affiliate SGRE, sales to an unaffiliated home market customer, and sales to an unaffiliated company in a third country, for which the ultimate destinations of the subject merchandise did not include the United States. *Id.*; *see also id.* at 2–5 (explaining that "Windar has two methods of selling wind towers and wind tower sections to entities other than SGRE": sales to unaffiliated "non-SGRE customers in the Spanish market" and sales to one unaffiliated "third party customer" in a third country for final delivery in countries other than the United States). According to SGRE's Section A questionnaire response, Windar made no sales "exported . . . directly to the United States," nor did Windar make any "sales to third countries . . . ultimately destined for the United States." *Q&V Questionnaire* at Attachment I. The Q&V instructions and SGRE's Section A questionnaire response, read together, informed Commerce that no export sales of Windar were reportable in response to the Q&V questionnaire.

Despite the record evidence, Commerce reached the unsupported finding that the Section A response did not identify "the full extent of Windar's exports to the United States (through SGRE, or otherwise)." *First Remand Redetermination* at 33–34. Commerce further erred in finding that "where Windar was the first company in the chain of distribution with knowledge that the wind towers were destined for the United States, Windar should have reported these transactions in

its Q&V response, consistent with Commerce's practice." *Id.* at 34 n.144 (citation omitted). This finding is invalidated by the Department's instructions for the Q&V questionnaire, which expressly told respondents to report only direct sales to the United States except for sales in third countries for which the respondent has knowledge that the merchandise was ultimately destined for the United States. *Q&V Questionnaire* at Attachment I.

In summary, the Department's use in the First Remand Redetermination of facts otherwise available and an adverse inference under 19 U.S.C. § 1677e did not comply with the purpose and intent of that statutory provision and lacked an evidentiary basis. The various findings Commerce put forth in support of its use of facts otherwise available were refuted by the record information Commerce obtained during the remand proceeding.

3. The Department's Finding that the Record Did Not Allow It to Perform a Margin Calculation

In the context of discussing why "corroboration" for its adverse inference rate is not necessary or feasible, Commerce stated as follows in the First Remand Redetermination:

> While the record now contains additional information with respect to SGRE's U.S. prices and Windar's costs of production, none of this information is useable as the basis for a margin calculation. Of note, SGRE's U.S. prices are transfer prices from Windar (*i.e.*, an affiliated party), which are generally not used under section 772 of the Act [19 U.S.C. § 1677a] as the basis for a calculated dumping margin; Windar's costs consist of a single, aggregate figure, not differentiated by product or broken into its component elements. Further, Commerce did not analyze the reported prices or costs for accuracy or attempt to identify any deficiencies in them that needed correction. Finally, Commerce did not collect pricing information related to home market or third country sales (although Windar had viable third country markets), and Commerce did not establish a deadline for the petitioner to allege that the multinational corporation provision applied to those foreign market sales (although the petitioner requested that Commerce permit such an allegation). Thus, the information on the record with respect to SGRE/Windar's U.S. prices and normal values are potentially inaccurate, unusable, and/or incomplete.

First Remand Redetermination at 35–36. In this quoted passage from the First Remand Redetermination, Commerce indicates that it cannot determine an estimated weighted average dumping margin that

would apply to Siemens Gamesa (either individually or as part of collapsed entity). This rationale is unsatisfactory, in three respects.

First, the state of the record resulted in part from the inadequate "investigation" Commerce performed prior to the issuance of the Final LTFV Determination, during which Commerce, by its own choice, did not examine individually the export sales of any respondent and thereby failed to conduct what could be described as a valid antidumping duty investigation. Instead, Commerce assigned to every respondent in the investigation a 73.00 percent rate, which was derived from an adverse inference rate based solely on information in the petition. As the court concluded previously:

> Congress entrusted Commerce with the responsibility to conduct an antidumping duty investigation, and to assign individual and, if necessary, all-others rates, according to detailed requirements set forth in the Tariff Act. Here, it was not lawful for Commerce to evade that investigative responsibility by outsourcing the critical determination to the petitioner.

Siemens Gamesa I, 47 CIT at __, 621 F. Supp. 3d at 1347. In the original investigation, the absence of record information from which to calculate an individual estimated dumping margin for Siemens Gamesa (whether or not as part of a collapsed entity) also resulted from the Department's own rejection of the request of Siemens Gamesa, on behalf of itself and Windar, to be a mandatory respondent. After Vestas Eolica declined to participate in the investigation, Siemens Gamesa sent a letter to Commerce "[o]n behalf of Siemens Gamesa Renewable Energy (SGRE), an exporter of subject merchandise . . . and SGRE's affiliated supplier, Windar Renovables" requesting to be selected as "a mandatory respondent for individual investigation." *SGRE Request for Mandatory Respondent Selection* at 1. The reasons upon which Commerce unlawfully rejected that request had nothing to do with Windar's failure to respond to the Quantity and Value questionnaire. *Siemens Gamesa I*, 47 CIT at __, 621 F. Supp. 3d at 1342. That unlawful rejection left the court with no alternative but to remand the Final LTFV Determination to Commerce for correction of the Department's investigative error through an individual investigation of Siemens Gamesa—the only plaintiff in this litigation—that will satisfy the agency's statutory obligation.

Second, the state of the record also is the result of the information collection process Commerce employed in the remand proceeding. It appears that Commerce is now informing the court that it considers the record inadequate to allow it to determine an estimated weighted average dumping margin for Siemens Gamesa. If such is the case, the

problem is one of the Department's own making. In the remand proceeding, Commerce reopened the record, designed a questionnaire procedure for the purpose of obtaining the information it needed, and acknowledged that it had obtained the information it requested.

Third, Commerce included in its rationale a finding that is unsupported by the record evidence. Further to the Department's conclusion that record evidence did not allow it to calculate a dumping margin was the finding that "SGRE's U.S. prices are transfer prices from Windar (*i.e.*, an affiliated party), which are generally not used under section 772 of the Act [19 U.S.C. § 1677a] as the basis for a calculated dumping margin." *First Remand Redetermination* at 35. The record does not establish that SGRE's U.S. prices are transfer prices from Windar. *See Section A Response* at 16. Section 772 of the Tariff Act requires Commerce to determine U.S. price by one of various methods and to do so reasonably. *See* 19 U.S.C. § 1677a; *see also* 19 C.F.R. § 351.402. SGRE provided information pertinent to a determination of U.S. price. *Section A Response* at 16–17*; Antidumping Duty Investigation of Utility Scale Wind Towers from Spain: Siemens Gamesa Renewable Energy Section C Questionnaire Response* at 1–4 (Apr. 14, 2023), P.R.R. 58–66. It was impermissible for Commerce to ignore and misstate record evidence in an attempt to justify its use of AFA.

With respect to the current state of the record, Commerce rejected as "unsolicited," and thus excluded from the record, the "data sourced from Windar." *First Remand Redetermination* at 24–25. Commerce stated that it sent SGRE its standard antidumping duty questionnaire, that SGRE responded and also indicated that it would file a consolidated response on behalf of itself, Windar, and Windar's subsidiaries, and that Commerce requested additional information on March 28, 2023, which SGRE provided on March 30 and April 3, 2023. *Id.* at 4. Commerce added that "[o]n March 30, 2023, Commerce directed SGRE not to provide information sourced from Windar, and instructed SGRE to limit its reporting to the company's own information." *Id.* (citing *Utility Scale Wind Towers from Spain: Submission of Questionnaire Response* (Int'l Trade Admin. Mar. 30, 2023), P.R.R. 45 ("*Questionnaire Resp. Submission Mem.*")). "SGRE, nonetheless, filed a joint response to the remaining sections of Commerce's questionnaire." *Id.* (footnote omitted). Commerce stated, further, that "[b]ecause SGRE submitted an unsolicited questionnaire response containing extensive data sourced from Windar, we rejected SGRE's response and afforded SGRE an opportunity to resubmit it in the form and manner requested in our March 30, 2023, instruction." *Id.* (footnote omitted). Commerce added that "SGRE resubmitted this infor-

mation on April 14, 2023." *Id.* (footnote omitted).

The First Remand Redetermination reasoned that "[g]iven that SGRE's responses to these questionnaires revealed that SGRE was functioning as a single entity with Windar—a company that received a margin based on AFA in the LTFV investigation— Commerce immediately instructed SGRE not to provide data sourced from Windar." *Id.* at 24. Siemens Gamesa objected to the exclusion of the Windar data, arguing that it was not "unsolicited" because Commerce actually did request it. SGRE's Comments 3 (quoting *Antidumping Duty Investigation Initial Questionnaire* at G-10 (Int'l Trade Admin. Feb. 17, 2023), P.R.R. 1 (directing Siemens Gamesa to "[p]repare only a single response for you and your **affiliates** involved with the production or sale of the products under investigation . . . .")). The First Remand Redetermination acknowledged that Commerce initially requested the Windar-related information but insisted that "SGRE/ Windar misconstrues Commerce's practice, as well as the purpose behind what is, at best, a generic instruction given to all questionnaire respondents" that is "intended to cover routine, non-controversial situations." *First Remand Redetermination* at 25. The First Remand Redetermination further explained that "Commerce (as is its prerogative) instructed SGRE to exclude data sourced from Windar—an affiliate that received an AFA rate for failing to cooperate in the underlying LTFV investigation." *Id.*

From the statements in the First Remand Redetermination, it appears that the underlying reason for the rejection of the Windar-related data, which SGRE provided, stemmed from the Department's erroneous conclusion that "finality" attaching to the 73.00 percent rate Commerce assigned to Windar in the Final LTFV Determination would affect the rate to be assigned to the collapsed entity comprised of the seven companies. But any "finality" attaching to Windar's 73.00 percent rate, as assigned in the Final LTFV Determination, fails as a justification to support the rejection of the Windar-related data. As the court explained earlier in this Opinion and Order, the 73.00 percent Windar rate is "final" for only so long as it remains in effect, and if replaced by a rate determined for a collapsed entity, it no longer can be in effect. Further, it is reasonable to presume that an actual examination of the collapsed entity would require consideration of data of the members of that entity, including Windar. Accordingly, it is not apparent how the Department's decision to remove the Windar data from the record can be reconciled with an objective of calculating an estimated dumping margin for the entity Commerce identified when it collapsed Siemens Gamesa with Windar and the Windar subsidiaries.

The record does not give the court confidence that Commerce had the objective of investigating and giving Siemens Gamesa an estimated dumping margin, as the court directed it to do. The decision Commerce made on March 30, 2023, to instruct SGRE to exclude the Windar data from subsequent questionnaire responses, *Questionnaire Resp. Submission Mem.* at 1, in conjunction with the decision on April 25, 2023, to collapse Windar and its subsidiaries with SGRE, *Collapsing Mem.* at 1, reasonably indicates to the court that Commerce already had reached a tentative decision not to calculate an actual dumping margin for the collapsed entity, a decision Commerce never reversed during the remand proceeding, and to assign it the 73.00 percent rate instead. Nevertheless, defendant requested an extension of time for Commerce to submit the First Remand Redetermination. Motion For an Extension of Time for Department of Commerce to File its Remand Redetermination (May 11, 2023), ECF No. 48. Defendant explained in its request that:

> Good cause exists for granting this extension. Commerce has made progress in preparing its remand redetermination. Commerce issued its Section A questionnaire to Siemens Gamesa Renewable Energy (SGRE) the day after receiving the Court's order. Commerce received multiple requests for extensions from SGRE to file its questionnaire responses, observing in one request the "extremely time consuming" process an investigation requires. Commerce granted the requested extensions.

Id. at 1–2. Reasonably presuming Commerce was conducting the individual investigation of Siemens Gamesa that it had ordered Commerce to perform, the court granted defendant's request, enlarging the time for submission of a remand redetermination from 90 to 120 days, despite plaintiff's objection that the extension would unduly delay the proceeding. *See* Order 2–3 (May 17, 2023), ECF No. 52. The Department's decision to assign the collapsed entity the 73.00 percent adverse inference rate, based essentially on nothing more than its collapsing decision and what it described as its "practice," unfortunately has delayed this litigation even further.

Having itself designed its questionnaires and having chosen to pursue a collapsing analysis, it was implausible for Commerce to maintain that the lack of Windar's response to Commerce's Q&V questionnaire in the original investigation prevented it from determining an actual estimated dumping margin that would apply to Siemens Gamesa, which the court's order required it to do. If the Department's exercising its "prerogative" to reject the Windar-related information contributed to the Department's perceived inability to

calculate an estimated dumping margin for SGRE, Commerce will have the opportunity to address this problem by taking steps to supplement the record during the next remand proceeding.

4. The Reliance on a "Practice" of Assigning an Adverse Inference Rate of a Single Company to an Entire Collapsed Entity

The First Remand Redetermination puts forth its own administrative practice as a justification for subjecting Siemens Gamesa to a 73.00 percent adverse inference margin. *First Remand Redetermination* at 6, 31 ("Commerce's practice, when collapsing two companies, one of which has an existing AFA rate, into a single entity, is to assign the existing rate to the collapsed entity.") (footnote omitted). This justification is unavailing.

Whatever it may consider its practice to be, Commerce is not permitted to apply it contrary to a statute. With respect to 19 U.S.C. § 1677e, it has sought to do just that in the circumstance presented here. Citing *Zhaoqing New Zhongya Aluminum Co. v. United States*, 36 CIT 1390, 1399, 887 F. Supp. 2d 1301, 1310 (2012) ("*Zhaoqing New Zhongya Aluminum*"), Commerce also asserted that "CIT precedent" supports this practice. *Id.* at 31. This case is inapposite, for two reasons. First, Commerce determined in that case that "each of the three companies that makes up the collapsed entity failed to cooperate." *Zhaoqing New Zhongya Aluminum*, 36 CIT at 1394, 887 F. Supp. 2d at 1306. Therefore, the case did not present the issue of whether Commerce could apply an adverse inference rate to a fully cooperative interested party. Second, although the opinion in *Zhaoqing New Zhongya Aluminum* mentions the Department's practice "to apply AFA to the entire entity when one producer within it fails to cooperate," it did not hold that the practice was lawful, having also stated that the plaintiffs in the case did not challenge that practice. *Id.*, 36 CIT at 1399, 887 F. Supp. 2d at 1310–11.

In this litigation, defendant argues that Siemens Gamesa "does not challenge Commerce's practice of assigning the adverse facts available rate of one company in an entity to the entity as a whole," Def.'s Resp. 10, but acknowledges that Siemens Gamesa "disagrees with Commerce's application of its long-standing practice that resulted in Commerce [*sic*] applying Windar's adverse facts available rate to the entire collapsed entity," *id.* at 5. It is sufficient that plaintiff opposed the Department's applying its practice so as to assign it a 73.00 percent rate. The court need not, and does not, hold that Commerce will never face a circumstance allowing it to apply a company's adverse inference rate to an entire collapsed entity but holds that doing so was unlawful in the circumstance of this remand proceeding.

Defendant-intervenor argues that it was proper for Commerce to apply Windar's adverse inference rate to SGRE, "which forecloses Windar's ability to obtain a more favorable dumping rate by shipping towers to the United States through SGRE." Def.-Int.'s Comments 8. This argument is unconvincing. The record refutes any inference that Windar's failure to submit a response to the Q&V questionnaire was an attempt to obtain a more favorable dumping rate. To the contrary, the record shows that Windar joined Siemens Gamesa in the mandatory respondent request that Commerce unlawfully rejected in the original investigation. *SGRE Request for Mandatory Respondent Selection* at 1. The request is record evidence refuting any finding that Windar declined to participate in the investigation in order to obtain an advantage for itself or for any affiliate.

5. The First Remand Redetermination Unlawfully Determined an "All Others" Rate of 73.00 Percent

Siemens Gamesa I held that Commerce erred in selecting as an all-others rate the rate of 73.00 percent. One of the reasons the court gave was that assignment of the 73.00 percent "all others" rate did not satisfy the "reasonable method" requirement of the Tariff Act. *Siemens Gamesa I*, 47 CIT at __, 621 F. Supp. 3d at 1345–47 (citing 19 U.S.C. § 1673d(c)(5)(B)). Regardless, the First Remand Redetermination concluded that "[b]ecause there are no other rates on the record of this proceeding from which to select a different 'all-others rate,' the 'all-others' rate remains unchanged." *First Remand Redetermination* at 38. The court rejected this same rationale in *Siemens Gamesa I*. 47 CIT at __, 621 F. Supp. 3d at 1347. The court recognizes that Siemens Gamesa, although assigned an all-others rate in the Final LTFV Determination, was not assigned one in the First Remand Redetermination and therefore, at this stage of the proceedings, no longer has standing to object to the all-others rate. At the same time, the court also recognizes that the First Remand Redetermination, which unreasonably would adopt the 73.00 percent rate as an all-others rate, does not comply with the holding in *Siemens Gamesa I*.

III. CONCLUSION AND ORDER

The assignment of the 73.00 percent adverse inference rate to plaintiff Siemens Gamesa in the First Remand Redetermination was unlawful for the multiple reasons the court discussed above and has caused an unwarranted and unnecessary delay in the conduct of this judicial proceeding. Whether or not Commerce chooses to employ a collapsing analysis going forward, Commerce must prepare, as expeditiously as possible, a Second Remand Redetermination in accordance with this Opinion and Order.

Therefore, upon consideration of the First Remand Redetermination, the comments submitted thereon, and all other papers and proceedings had herein, and upon due diligence, it is hereby

ORDERED that Commerce shall submit a redetermination in accordance with this Opinion and Order (a "Second Remand Redetermination") within 90 days of the date of issuance of this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenor may submit comments on the Second Remand Redetermination within 30 days of the date of submission of the Remand Redetermination to the court; and it is further

ORDERED that defendant may submit a response to the comments of plaintiff and defendant-intervenor within 15 days of the date of the last comment submission.

Dated: October 11, 2023
New York, New York

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

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