U.S. Customs and Border Protection

MOBILE COLLECTIONS & RECEIPTS (MCR): IMPLEMENTATION OF PHASE TWO

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

ACTION: General notice.

SUMMARY: U.S. Customs and Border Protection (CBP) is conducting a test to allow for the payment of certain commercial vessel taxes and fees with electronic methods, including credit cards. Payment can be made through the existing Mobile Collections & Receipts (MCR) system's payment portal at eCBP (*https://e.cbp.dhs.gov*) or at the ports of entry for any commercial vessel arriving at a maritime port of entry. Participation in the test is voluntary. CBP will continue to accept payments by cash or check at the ports of entry. This notice describes the test and invites public comment on any aspect of the test.

DATES: The test will begin no earlier than January 16, 2024 and will continue for two years. Comments concerning this notice and all aspects of the test may be submitted at any time during the test to the address set forth below.

ADDRESSES: Written comments concerning any aspect of the test should be submitted to the CBP Revenue Modernization Office at *revmod@cbp.dhs.gov.* In the subject line of your email please indicate "Comment on Mobile Collections & Receipts Test."

FOR FURTHER INFORMATION CONTACT: Clint Kiehl, Rev Mod Program Manager, Office of Finance, U.S. Customs and Border Protection, via email at *clinton.kiehl@cbp.dhs.gov* or by telephone at (317) 677–4579.

SUPPLEMENTARY INFORMATION:

I. Background

A. Mobile Collections & Receipts (MCR) System

U.S. Customs and Border Protection (CBP) is committed to modernizing the payment and processing of various taxes and fees paid by

the public. In furtherance of this goal, CBP developed the Mobile Collections & Receipts (MCR) system.[1] The MCR system calculates the amount of taxes and fees due based on information pulled from other CBP databases electronically or entered by an authorized CBP employee. The MCR system then automatically populates an electronic receipt, which is a single, combined electronic equivalent of two separate paper forms—CBP Form 368 Collection Receipt (CBP Form 368) and CBP Form 1002 Certificate of Payment of Tonnage Tax (CBP Form 1002). This notice refers to this electronic receipt as the electronic Form 368/1002. The MCR system sends the electronic Form 368/1002 via email to the entity responsible for payment.

The MCR system also allows the public to pay applicable taxes and fees through electronic methods, such as online or through Europay, Mastercard and Visa (EMV) card readers, which enables contactless payments through various methods, including credit cards and digital wallets. For online payment, MCR's public-facing payment website is located at the eCBP portal (*https://e.cbp.dhs.gov*), which directs the entity making the payment to complete the transaction on *Pay.gov.*[2] Currently, the MCR system, through eCBP and its interface with *Pay.gov,* allows the public to make payments related to the Customs Broker License Exam and Triennial Status Report, with additional fees to be added in the future.

The MCR system largely replaced what is a paper-based, manual, and burdensome process for the calculation and processing of payments. Under the manual process, CBP officers (CBPOs) and other authorized CBP employees are required to manually calculate the amount due for a particular transaction, manually complete a paper version of CBP Forms 368 and 1002 (if applicable), and manually enter the payment information in CBP's systems after collecting payment.[3] *See, e.g.,* sections 4.23 and 24.2 of title 19 of the Code of Federal Regulations (19 CFR 4.23, 24.2). Since the implementation of MCR for the calculation and processing of certain maritime fees, maritime ports have adopted MCR and generally no longer use the manual method.

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[1] For more information on the Mobile Collections and Receipts initiative, visit: *https://www.cbp.gov/trade/priority-issues/revenue/revenue-modernization/automation-368-and-1002-receipts.*

[2] *Pay.gov* is a website managed by the Department of the Treasury that enables entities to make online payments to the federal government using various forms of payment.

[3] For additional details on the paper-based process for commercial vessel taxes and fees, see the notice published in the **Federal Register** (82 FR 58008) on December 8, 2017, announcing the 2017 MCR Pilot.

B. Phase One of the MCR Test

Phase One of the MCR test, the Mobile Collections and Receipts (MCR) Pilot, was announced on December 8, 2017, in the **Federal Register** (82 FR 58008) (2017 MCR Pilot). The 2017 MCR Pilot allowed for the electronic payment of and receipt generation for certain commercial vessel taxes and fees through the MCR system. 82 FR at 58008. Specifically, the 2017 MCR Pilot permitted online payment and developed electronic receipts for the following taxes and fees: regular and special tonnage tax; light money; Consolidated Omnibus Budget Reconciliation Act (COBRA) user fees, including the prepayment of the annual COBRA fee; Agriculture Quarantine and Inspection (AQI) Fees; and navigation fees. *See* 82 FR at 58010. However, when CBP began operating the MCR system and issuing electronic receipts, CBP was unable to begin accepting online payments for these specified commercial vessel taxes and fees.

The 2017 MCR Pilot was limited to commercial vessels arriving at one of four designated ports of entry: Los Angeles-Long Beach, California; New Orleans, Louisiana; Gulfport, Mississippi; and, Mobile, Alabama. *See* 82 FR at 58010. Any entity responsible for the payment of the taxes and fees for vessels arriving at one of the four designated ports of entry could participate in the 2017 MCR Pilot by providing the processing CBPO or other authorized CBP employee with an email address. 82 FR at 58009. The MCR system generated an electronic version of Forms 368 and 1002 and sent an electronic copy via email to the entity responsible for payment. 82 FR 58009. The 2017 MCR Pilot Notice was also the first time that CBP announced the implementation of the MCR system in the **Federal Register** and described the electronic receipt process, including the creation and issuance of electronic versions of Forms 368 and 1002, and the use of electronic devices that CBP employees could use to access the MCR system outside the port office. *See* 82 FR at 58009.

CBP is now able to accept online payments and is implementing Phase Two of the MCR test, which will authorize entities to pay commercial vessel taxes and fees online, in order to allow these entities to fully benefit from the efficiencies of the MCR system.

C. Purpose of the MCR Test: Phase Two

CBP regulations currently restrict the payment methods available for various taxes and fees. For example, in general, CBP will accept payment of Customs duties, taxes, fees, interest, and other charges with cash or check only. *See* 19 CFR 24.1 and 24.2. Payment with a credit or charge card is limited to non-commercial entries. 19 CFR 24.1(a)(7). Additionally, a CBPO who collects payment for an amount

over $100 in the form of a government check, personal check, traveler's check, or money order must obtain the approval and signature of the CBPO in charge in order to accept the payment. *See* 19 CFR 24.1(b)(2).

Phase Two of the MCR test will allow CBP to test the feasibility of accepting electronic payment options for five categories of commercial vessel taxes and fees that cannot be paid electronically under CBP's current regulations. The five categories of commercial vessel taxes and fees are: tonnage tax (regular and special) and light money (19 CFR 4.20), Consolidated Omnibus Budget Reconciliation Act (COBRA) user fees (19 CFR 24.22(b)), Agriculture Quarantine and Inspection (AQI) fees (7 CFR 354.3(b)), and navigation fees (19 CFR 4.98). By CBP's allowing for electronic payments of these commercial vessel taxes and fees, vessel owners/operators and vessel agents will be able to take full advantage of the MCR system. This will provide numerous benefits for CBP and the trade. For example, the MCR system reduces the number of mistakes in the calculation of taxes and fees due because the MCR system can implement any changes to the fee calculations quickly and efficiently for all ports. Additionally, the MCR system eliminates the need for CBP employees to manually enter information into CBP's systems or to perform other tasks necessary to maintain the security or inventory of the paper versions of CBP Forms 368 and 1002. This enables CBP employees to spend less time on administrative tasks and more time focusing on higher priority mission support activities.

II. MCR Test: Phase Two

Phase Two of the MCR test will allow for the electronic payment of certain vessel maritime taxes and fees for commercial vessels. Payment through electronic methods will be voluntary and CBP will continue to accept cash or check payments consistent with current requirements and practice. The collection of payments under Phase Two will operate largely the same as described in the initial 2017 MCR Pilot, except that Phase Two will allow for electronic payments for vessels arriving at any maritime port of entry (as opposed to the four ports of entry designated in the 2017 MCR Pilot) and will include online payments and using an EMV card reader at the port. Details of Phase Two of the MCR test are provided below.

A. Participation in the Test

Any commercial vessel agent or other entity responsible for payment of commercial vessel taxes and fees may participate in the test. No application is required to participate. However, in order to receive

notification emails from the MCR system, a commercial vessel agent or other entity submitting payment must register an email address with the CBPO or other authorized CBP employee processing the vessel arrival in the MCR system. When a commercial vessel arrives at a port of entry, the vessel's agent or other entity wishing to receive email notifications or receive the electronic Form 368/1002 will be able to confirm any email addresses with an authorized CBP employee and provide additional email addresses for receipt of electronic receipts.

B. Eligible Taxes and Fees

Phase Two allows for the electronic payment of the following commercial vessel taxes and fees: tonnage tax (regular and special) and light money (19 CFR 4.20), Consolidated Omnibus Budget Reconciliation Act (COBRA) user fees (19 CFR 24.22(b)), Agriculture Quarantine and Inspection (AQI) fees (7 CFR 354.3(b)), and navigation fees (19 CFR 4.98).

Additionally, CBPOs and other authorized CBP employees, at the time of inspection, will have the option to add applicable non-commercial fees and taxes for which credit or charge cards have been authorized by the Commissioner of CBP pursuant to 19 CFR 24.1(a)(7) to the vessel's overall transaction. Such non-commercial fees and taxes are not part of Phase Two of the MCR test.[4] However, for the convenience of the vessel owner/agent and CBP, all taxes and fees, whether authorized for electronic payment by this MCR test or by current regulations, can be combined for purposes of making a single payment and receipt.

CBP may further expand the MCR test in the future to allow for the electronic payment of additional commercial taxes and fees. Any expansion of Phase Two of the MCR test will be announced in the **Federal Register**.

C. Electronic Payment Process at the Ports of Entry

The MCR system will automatically identify the commercial vessels that are due to arrive at the designated ports of entry. The CBPO or other authorized CBP employee will use the MCR system to then determine whether the arrival information submitted to CBP through approved electronic data interchange systems is sufficient to calculate the applicable maritime taxes and fees due for each com-

[4] Examples of non-commercial fees that may be applicable to a particular vessel include duties for passenger or crew baggage, excise taxes imposed on crew and passengers, and immigration fees applicable to crew and passengers, such as fees for port of entry parole of crewmembers. A complete list of the eligible fees will be available at the MCR website (*https://www.cbp.gov/trade/priority-issues/revenue/revenue-modernization*).

mercial vessel. If there is not sufficient information, the CBPO or other authorized CBP employee can obtain the necessary information at the time of inspection or payment.

Once the CBPO has sufficient information, the vessel agent or carrier will be asked whether the agent or carrier wants to pay online or with the EMV card reader, which accepts various forms of payment, including credit cards and digital wallet payments at the point of collection. If online payment is selected, CBP will send a notification email to the relevant carrier or vessel agent at the email address they registered with eCBP. The notification email will state that the applicable taxes and fees have been calculated for a specific commercial vessel and payment can now be made on the eCBP payment portal. The entity responsible for payment will then have the opportunity to log on to the MCR system's customer-facing eCBP payment portal, review the calculated amount of taxes and fees due, and, through eCBP's interface with *Pay.gov,* submit payment online through *Pay.gov* with a credit or debit card, or any other payment option available on *Pay.gov* at the time of payment. Alternatively, the entity responsible for payment may pay using an EMV card reader. Additionally, for test participants who make payment online, through the EMV card reader, or by check or money order, CBPOs will not be required to obtain the signature of the CBPO in charge, as is otherwise required for payments over $100 made with a government check, personal check, traveler's check, or money order pursuant to 19 CFR 24.1(b)(2).

After payment is accepted, the MCR system will send an electronic Form 368/1002 to the email address/addresses provided by the entity that made the payment. Electronic payments will be accepted up to the time the vessel is cleared by CBP. Payments required for CBP clearance must be made before clearance is granted. In all situations, CBPOs and other authorized CBP employees will have the ability to review, amend, or add data as needed to accurately calculate applicable taxes and fees prior to entering or clearing a vessel.

Payment though electronic methods, including credit cards, is voluntary. Throughout the test, commercial vessel agents and other entities responsible for payment for commercial vessel taxes and fees will continue to be able to pay by cash or check in accordance with current requirements. CBP will provide the electronic Form 368/1002 as a receipt for all payments made by test participants, regardless of whether payment was made in person by cash or check, online, or in-person using a card reader. However, the port office will provide paper copies of electronic Form 368/1002 upon request.

This test will not affect the amount of taxes and fees due or the requirement that all applicable fees must be paid prior to CBP issuing a clearance certificate. Additionally, vessel operators will continue to be required to present paper copies of Forms 368 and 1002 as proof of payment at subsequent ports and entries. This means that vessel owners/operators must print out the electronic Form 368/1002 to present it to CBP.

D. Eligible Ports of Entry

Phase Two of the MCR test allows for electronic payments for commercial vessels arriving at any of the U.S. maritime ports of entry.

E. Duration of the Test

The test will begin no earlier than January 16, 2024 and will continue for two years.

III. Privacy

CBP will ensure that all Privacy Act requirements and applicable policies are adhered to during the implementation of this test.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget. There is no information collection associated with this test, so the provisions of the PRA do not apply.

V. Authorization for the Test

This test is being conducted in accordance with 19 CFR 101.9(a), which authorizes the Commissioner to impose requirements different from those specified in the CBP regulations for the purposes of conducting a test program or procedure designed to evaluate the effectiveness of new technology or operational procedures regarding the processing of passengers, vessels, or merchandise. Consequently, the regulatory provisions set forth in chapter 1 of title 19 of the CFR will be suspended to the extent that they conflict with the terms of this test. Such regulatory suspension will remain in effect for the duration of this test and will only apply to test participants; the regulatory provisions remain in effect for all non-test participants.

As explained above, for participants in this test, CBP will waive the requirements to pay commercial vessel taxes and fees with cash or check, as required by 19 CFR 24.1, at the time of arrival or when the applicable service is provided, if the participant has paid all applicable taxes and fees electronically pursuant the procedures of this test and prior to the time the vessel is cleared by CBP. The test also permits CBPOs to process the payment of over $100 made by check, money order, online, or through the EMV card reader without obtaining authorization from the CBP officer in charge.

JEFFREY CAINE,
CBP Chief Financial Officer and
Assistant Commissioner,
Office of Finance, U.S. Customs and
Border Protection.

U.S. Court of International Trade

Slip Op. 23–176

FAR EAST AMERICAN, INC. AND LIBERTY WOODS INTERNATIONAL, INC., Plaintiffs, and AMERICAN PACIFIC PLYWOOD, INC. AND INTERGLOBAL FOREST LLC, Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 22–00213

[Granting in part Defendant's motion for a voluntary remand for U.S. Customs and Border Protection to reconsider an evasion determination; denying in part Defendant's motion with respect to amending the judicial protective order.]

Dated: December 14, 2023

Gregory S. Menegaz, *Alexandra H. Salzman*, *J. Kevin Horgan*, and *Vivien J. Wang*, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiffs Far East American, Inc. and Liberty Woods International, Inc.

Frederic D. Van Arnam, Jr., and *Ashley J. Bodden*, Barnes, Richardson & Colburn, LLP, of Washington, DC, for Consolidated Plaintiff American Pacific Plywood, Inc.

Thomas H. Cadden, Cadden & Fuller LLP, of Irvine, CA, for Consolidated Plaintiff InterGlobal Forest LLC.

Elizabeth A. Speck, Senior Trial Counsel, and *Evan Wisser*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Jennifer L. Petelle*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection, of Washington, DC.

OPINION AND ORDER

Barnett, Chief Judge:

This consolidated case concerns U.S. Customs and Border Protection's ("CBP") final affirmative determination of evasion pursuant to the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517. *See, e.g.*, Compl. ¶ 1, ECF No. 6.[1] Before the court is Defendant United States' ("the Government") motion for a remand for CBP to reconsider or

[1] Pursuant to 19 U.S.C. § 1517(c) and (f), CBP issued an initial determination and a *de novo* administrative review. Those determinations are contained in the public and confidential administrative records filed with the court. *See* Public Admin. R. ("PR"), ECF Nos. 21–1 through 21–7; Confid. Admin. R. ("CR"), ECF Nos. 22–1 through 22–55; *see also* Notice of Determination as to Evasion (Jan. 28, 2022) ("Initial Determination"), CR 81, PR 136, ECF No. 22–35; Letter to Counsel from CBP Re: Enforce and Protect Act ("EAPA") Consol. Case Number 7252 (June 6, 2022) ("Admin. Review"), CR 94, PR 148, ECF No. 22–55; Suppl. Letter to Counsel from CBP Re: Enforce and Protect Act ("EAPA") Consol. Case Number 7252 (July 6, 2022) ("Suppl. Admin. Review"), CR 95, PR 151, ECF No. 22–55 (supplemental administrative review in response to an importer's request inadvertently overlooked by CBP). The court references the confidential versions of CBP's determinations.

further explain its evasion determination in light of the finality of *Far East American, Inc. v. United States*, 47 CIT __, 654 F. Supp. 3d 1308 (2023), and of the U.S. Court of Appeals for the Federal Circuit's ("Federal Circuit") opinion in *Royal Brush Manufacturing, Inc. v. United States*, 75 F.4th 1250 (Fed. Cir. 2023) ("*Royal Brush CAFC*"). Def.'s Mot. for a Voluntary Remand ("Def.'s Mot."), ECF No. 65. Plaintiffs[2] and Consolidated Plaintiffs[3] (collectively referred to as "Plaintiffs") oppose the motion. Am. Pac. Plywood, Inc.'s Opp'n to Def.'s Mot. for a Voluntary Remand ("APPI's Opp'n"), ECF No. 66; Consol. Pl. Interglobal Forest LLC's Opp'n to Def. United States' Mot. for a Voluntary Remand ("IGF's Opp'n"), ECF No. 67; Opp'n to Def.'s Mot. for Voluntary Remand ("FEA & LBW's Opp'n"), ECF No. 68.

For the reasons discussed herein, the court grants in part the Government's motion with respect to CBP's reconsideration of its evasion determination consistent with this opinion but denies the Government's motion insofar as it additionally requests the court to amend the judicial protective order to govern remand proceedings.

BACKGROUND

On August 15, 2018, CBP's Trade Remedy Law Enforcement Directorate initiated an EAPA investigation in response to an allegation filed in July 2018 by Plywood Source, LLC ("Plywood Source"). Initial Determination at 2. Plywood Source alleged that several importers (Plaintiffs herein) were evading the antidumping ("AD") and countervailing duty ("CVD") orders on hardwood plywood from China. *Id*.[4] In February and April 2019, CBP issued requests for information to Plaintiffs and the producer of the subject imports, Vietnam Finewood Company Limited ("Finewood"). *Id.* at 4 & n.18. In May 2019, CBP conducted onsite verification at Finewood's facility in Vietnam. *Id.* at

[2] Plaintiffs consist of importers Far East American, Inc. ("FEA") and Liberty Woods International, Inc. ("LBW").

[3] Consolidated Plaintiffs consist of American Pacific Plywood, Inc. ("APPI") and Interglobal Forest LLC ("IGF").

[4] On January 4, 2018, Commerce issued AD and CVD orders on certain hardwood plywood products from China. *Certain Hardwood Plywood Prods. From the People's Republic of China*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (am. final determination of sales at less than fair value, and antidumping duty order) ("*AD Order*"); *Certain Hardwood Plywood Prods. From the People's Republic of China*, 83 Fed. Reg. 513 (Dep't Commerce Jan. 4, 2018) (countervailing duty order) ("*CVD Order*") (together, "the *AD/CVD Orders*"). The merchandise subject to the AD/CVD Orders is described, inter alia, as:

> hardwood and decorative plywood, and certain veneered panels . . . . For purposes of this proceeding, hardwood and decorative plywood is defined as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo.

AD Order, 83 Fed. Reg. at 512; *CVD Order*, 83 Fed. Reg. at 515.

4 & n.20. Plaintiffs submitted written arguments in August 2019. *Id.* at 4 & n.21. Plywood Source did not further participate. *See id.*

CBP generally must issue its determination "not later than 300 calendar days after the date on which" CBP initiated the investigation. 19 U.S.C. § 1517(c)(1)(A). CBP may, however, extend this period by "not more than 60 calendar days" if CBP determines that "the investigation is extraordinarily complicated" and "additional time is necessary." *Id.* § 1517(c)(1)(B). The statutory 360-day period for the completion of the investigation would have ended on September 16, 2019. Confid. [FEA & LBW's] Rule 56.2 Mem. in Supp. of Mot. for J. Upon the Agency R. at 64, ECF No. 46–1.[5] Instead of issuing a determination, on that day, CBP submitted a covered merchandise referral to the U.S. Department of Commerce ("Commerce") pursuant to its authority under 19 U.S.C. § 1517(b)(4)(A). Initial Determination at 4–5. CBP explained that it "could not determine whether two-ply panels of Chinese origin, which are further processed in Vietnam to include the face and back veneers of non-coniferous wood, are covered by the scope of the [*AD/CVD Orders*]." *Id.*

On January 27, 2022, Commerce answered the question posed by CBP's covered merchandise referral in the affirmative. *See id.* at 5. Specifically, Commerce concluded that "two-ply panels are 'veneered panels' covered by the scope of the [*AD/CVD Orders*]" and that the hardwood plywood exported by Finewood was not substantially transformed in Vietnam and remained a product of China. *Id.* Armed with that information, on January 28, 2022, CBP issued an affirmative evasion determination. *See id.* at 9.

In response to Plaintiffs' request for *de novo* administrative review of the Initial Determination, CBP's Office of Regulations and Rulings affirmed its initial determination. Admin. Review at 28; *see also* Suppl. Admin. Review at 10. CBP explained that record evidence demonstrates that "Finewood did not have the production capacity to fulfill its sales orders; but instead, in addition to Vietnamese raw materials, it purchased and imported materials, including two-ply panels and single veneer sheets, from a Chinese supplier, which it subsequently sent to 'tollers' in Vietnam, to produce its finished hardwood plywood." Admin. Review at 16. CBP also affirmed its decision to obtain Commerce's clarification as to whether Finewood's two-ply panels imported from China were within the scope of the *AD/CVD Orders*. *See id.* at 17. CBP concluded that substantial evidence supported a finding that Finewood consumed "Chinese-origin two-ply in

[5] This time period accounts for the U.S. Government shutdown that tolled the deadline for 37 days. *Viet. Finewood Co. v. United States*, 45 CIT __, __ & n.4, 466 F. Supp. 3d 1273, 1279 & n.4 (2020) (noting the timeframe when dismissing for lack of subject matter jurisdiction the plaintiffs' challenge to CBP's allegedly untimely covered merchandise referral).

its hardwood plywood operations," *id.* at 20; the record did not allow CBP "to determine which, if any, of the [Plaintiffs'] entries did not contain Chinese-origin covered materials," *id.* at 25; and that because "Finewood sourced two-ply panels, cores, and veneers from China to use in the production of its finished hardwood," substantial evidence supported a finding that the subject entries "were made through false statements" when Plaintiffs failed to declare the entries as subject to the *AD/CVD Orders*, *id.* at 25–26.

Litigation ensued in parallel concerning both CBP's evasion determination and Commerce's scope ruling. However, in *Far East American*, the court sustained Commerce's determination on remand to reverse its original scope ruling and find that the scope of the *AD/CVD Orders* do not include two-ply panels. 654 F. Supp. 3d at 1310–11. No party appealed that decision, and it is now final. Accordingly, as a matter of law, the two-ply panels that Finewood imported from China into Vietnam to use in its hardwood plywood production are not covered merchandise.

Separately, in *Royal Brush CAFC*, and as relevant here, the Federal Circuit concluded that the absence of a statute or regulation authorizing CBP to establish a procedure concerning the issuance of administrative protective orders for purposes of providing the subject of an EAPA investigation with business proprietary information did not mean that such disclosure was barred by the Trade Secrets Act, 18 U.S.C. § 1905, when the "release of information is 'authorized by law' within the meaning of the Trade Secrets Act if that release is required as a matter of constitutional due process." 75 F.4th at 1260. *Royal Brush CAFC* indicates that CBP has inherent authority to fashion an administrative protective order for purposes of sharing confidential information with the importers subject to an EAPA investigation *during* the investigation. 75 F.4th at 1260–61 ("[B]ecause CBP has the inherent authority to issue protective orders, confidential business information released to [the importer] can be protected from public disclosure . . . .").

Meanwhile, in this case, Plaintiffs filed their Rule 56.2 motions for judgment on the agency record. Confid. Rule 56.2 Mot. for J. on the Agency R. on Behalf of Consol. Pl. [APPI], ECF No. 42; Confid. Consol. Pl.'s Mot. for J. on the Agency R., ECF No. 44; Confid. Pls.' Mot. for J. on the Agency R., ECF No. 46. The Government requested, and obtained, several extensions of the deadline to respond to those motions, based primarily on the court's resolution of *Far East American*.

See Orders (May 25, 2023; June 30, 2023), ECF Nos. 53, 57.[6] Based on a recent status conference, the court permitted the Government to file the instant motion for a voluntary remand in lieu of its response. Status Conf., ECF No. 64 (recording on file with the court).

LEGAL STANDARD

When an agency determination is challenged in the courts, the agency may "request a remand (without confessing error) in order to reconsider its previous position" and "the reviewing court has discretion over whether to remand." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (citations omitted). An agency may also request a remand based on "intervening events outside of the agency's control, for example, a new legal decision." *Id.* at 1028. Remand is appropriate "if the agency's concern is substantial and legitimate," but "may be refused if the agency's request is frivolous or in bad faith." *Id.* at 1029. "A concern is substantial and legitimate when (1) [the agency] has a compelling justification, (2) the need for finality does not outweigh that justification, and (3) the scope of the request is appropriate." *Changzhou Hawd Flooring Co. v. United States*, 38 CIT __, __, 6 F. Supp. 3d 1358, 1361 (2014) (citations omitted).

DISCUSSION

I. Parties' Contentions

The Government contends that remand is merited for CBP "to evaluate whether the entries at issue in the EAPA investigation in fact contain covered merchandise, . . . which may require CBP to reassess its final determination of evasion." Def.'s Mot. at 6. According to the Government, CBP's analysis on remand may obviate the need for the court to examine arguments relevant to the covered merchandise criterion and may, therefore, expedite Plaintiffs' relief. *Id.* at 6–7. The Government also contends that a "limited voluntary remand" is merited in light of *Royal Brush CAFC* to address "potential concerns with how it treated confidential information during the underlying review, and how that may have limited [P]laintiffs in responding to the alleger's transshipment allegations." *Id.* at 9.

[6] In various filings seeking either a stay in this litigation or, in the alternative, an extension of time, the Government represented that Commerce's covered merchandise "determination is 'potentially dispositive' of the instant case," Joint Mot. to Stay Proceedings at 4, ECF No. 29, and that the determination "accounts for CBP's finding with respect to one of the key elements of evasion – whether plaintiffs imported 'covered merchandise,'" such that finality of *Far East American* would mean that "a substantial amount of the merchandise at issue in this case cannot legally be construed as 'covered merchandise,'" Def.'s Renewed Mot. to Stay Proceedings and, in the Alternative, Mot. for an Extension of Time at 5–6, ECF No. 48.

Plaintiffs contend that the Government has not demonstrated a substantial and legitimate need for a remand. Specifically, APPI asserts that *Far East American* undermines the basis for CBP's covered merchandise finding and obviates any need for CBP to address arguments concerning CBP's inability to separate purportedly covered merchandise from non-covered merchandise in the investigation. APPI's Opp'n at 5–7. APPI further asserts that, given the lengthy proceedings to date, CBP "has had more than ample time to discuss internally and with its counsel whether it can continue to defend the record or whether confessing judgment is the appropriate option." *Id.* at 7. APPI also contends that any reconsideration pursuant to *Royal Brush CAFC* should occur, if necessary, on remand following the court's review of Plaintiffs' additional claims. *Id.* at 9.

IGF advances similar arguments. IGF's Opp'n at 4–6. IGF also contends that the disclosure of certain confidential information in the form of video evidence is unnecessary given CBP's lack of reliance on that evidence. *Id.* at 7–8.

FEA and LBW likewise contend that CBP is not "entitled to reconsider whether the entries at issue . . . contain covered merchandise." FEA & LBW's Opp'n at 9. They contend that CBP verified the factual information placed on the record by Finewood and a remand is unnecessary to decide whether entries incorporating Chinese two-ply constitute covered merchandise. *Id.* at 10–11. FEA and LBW additionally contend that, for entries that did not incorporate Chinese two-ply, CBP has addressed this issue and should either "confess judgment or respond to Plaintiffs' arguments in their [response] brief." *Id.* at 12. Lastly, FEA and LBW contend that remand is not needed to address *Royal Brush CAFC*. *Id.* at 13. They assert that the passage of time disfavors a remand because the Government's request comes almost five years after CBP imposed interim measures on the Plaintiffs; the exporter is no longer in business; and providing CBP with a "second chance" to issue a determination as to evasion would "significantly prejudice Plaintiffs." *Id.* at 15–16.

II. Analysis

"When, as here, the court is tasked with reviewing a decision based on an agency record, and that record does not support the contested decision, the court must remand for further proceedings." *Royal Brush Mfg., Inc. v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1294, 1304 (2020) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). "A voluntary remand gives the agency 'an opportunity to correct its own mistakes[.]'" *Ellwood City Forge Co. v. United States*, Slip Op. 23–110, 2023 WL 4703309, at *4 (CIT July 24, 2023) (altera-

tion in original) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)) (granting a voluntary remand).

The record before the court in this case indicates that CBP's evasion determination relied on Commerce's affirmative answer to the question whether the scope of the *AD/CVD Orders* covers two-ply panels, *see* Initial Determination at 9; Admin. Review at 28, but that answer has since been determined to be incorrect, *see Far East Am.*, 654 F. Supp. 3d at 1310. It is therefore appropriate for CBP to take account of Commerce's revised covered merchandise determination in the first instance. Accordingly, the court will grant the Government's motion for CBP to reconsider its covered merchandise determination.

The court will also grant the Government's motion for CBP to reconsider its determination consistent with the requirement to share confidential information in light of *Royal Brush CAFC*. However, compliance with *Royal Brush CAFC* is necessary only to the extent that Commerce's negative covered merchandise determination is not determinative based on the record before CBP.

The Government requests the court to enter an amended judicial protective order if the court grants its request for a voluntary remand. Def.'s Mot. at 10. While the court previously entered a judicial protective order for purposes of allowing the sharing of confidential information during litigation, *see* Protective Order, ECF No. 20, the Government seeks to amend that protective order so that it "shall also govern any remand proceedings before [CBP] resulting from this action," Def.'s Mot., Attach. 1 at 2 ¶ 2. The Government relies, in part, on a case in which, post-*Royal Brush CAFC*, the court entered an amended protective order to govern remand proceedings. *See id.* at 10 (citing, *inter alia*, *Newtrend USA Co. v. United States*, Court No. 22-cv-00347 (CIT)).[7] Amendment of the judicial protective order appears unnecessary, however, "because CBP has the inherent authority to issue [its own] protective order[]" for purposes of the remand proceeding. *Royal Brush CAFC*, 75 F.4th at 1260–62. Thus, the court will deny the Government's request. The court will do so without prejudice in the event circumstances require the Government to resubmit the request with additional support for its necessity.

[7] The Government also cites to *Ad Hoc Shrimp Trade Enforcement Committee v. United States*, Court No. 21-cv-00129 (CIT), Def.'s Mot. at 10, but in that case, the court entered an amended protective order to govern remand proceedings prior to the Federal Circuit's decision in *Royal Brush CAFC*, *see* Am. Protective Order, *Ad Hoc Shrimp Trade Enf't Comm. v. United States*, Court No. 21-cv-00129 (CIT June 9, 2022), ECF No. 63.

CONCLUSION AND ORDER

For the reasons discussed herein, it is hereby

ORDERED that the Government's motion for a voluntary remand (ECF No. 65) is **GRANTED IN PART**; it is further

ORDERED that CBP's evasion determination is remanded for CBP to reconsider its covered merchandise determination consistent with *Far East American, Inc. v. United States*, 47 CIT __, 654 F. Supp. 3d 1308 (2023), and, as necessary, *Royal Brush Manufacturing, Inc. v. United States*, 75 F.4th 1250 (Fed. Cir. 2023); it is further

ORDERED that CBP shall file its remand redetermination on or before March 1, 2024; it is further

ORDERED that, within 10 days of the filing of CBP's remand redetermination, the parties must file a joint status report including proposed deadlines for post-remand briefing, if any; it is further

ORDERED that, within 14 days of the date of filing of CBP's remand redetermination, CBP must file an index and copies of new administrative record documents, if any; it is further

ORDERED that the Government's motion for a voluntary remand (ECF No. 65) is **DENIED IN PART** without prejudice with respect to the Government's request for an amended judicial protective order; and it is further

ORDERED that briefing on Plaintiffs' Rule 56.2 motions is stayed pending resolution of CBP's remand redetermination.

Dated: December 14, 2023
New York, New York

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

Slip Op. 23–177

ROYAL BRUSH MANUFACTURING, INC., Plaintiff, v. UNITED STATES, Defendant, and DIXON TICONDEROGA CO., Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Court No. 19–00198

[Dismissing this action for lack of subject-matter jurisdiction.]

Dated: December 15, 2023

Ronald A. Oleynik, Holland & Knight LLP, of Washington, DC, for Plaintiff Royal Brush Manufacturing, Inc.

Antonia R. Soares, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Deputy Director. Of counsel on the brief was *Tamari J. Lagvilava*, Senior Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection, of Washington, DC.

Felicia L. Nowels, *Michael J. Larson*, and *Li X. Massie*, Akerman LLP, of Tallahassee, FL, for Defendant-Intervenor Dixon Ticonderoga Co.

OPINION

Barnett, Chief Judge:

This case concerns Plaintiff Royal Brush Manufacturing, Inc.'s ("Royal Brush") challenge to U.S. Customs and Border Protection's ("Customs" or "CBP") affirmative determination of evasion of the antidumping duty order on certain cased pencils from the People's Republic of China, issued pursuant to Customs' authority under the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517 (2018).[1] The matter returns to the U.S. Court of International Trade ("CIT") following the U.S. Court of Appeals for the Federal Circuit's ("Federal Circuit") decision vacating and remanding the case to this court. *See Royal Brush Mfg., Inc. v. United States*, 75 F.4th 1250, 1263 (Fed. Cir. 2023) ("*Royal Brush CAFC*");[2] Mandate, ECF No. 83. The Federal Circuit "remand[ed] this case to the CIT with instructions to remand to CBP" for further proceedings consistent with the Federal Circuit's

[1] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the U.S. Code are to the 2018 edition unless otherwise specified. EAPA was enacted as part of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 421, 130 Stat. 122, 161 (2016). "Evasion" is defined as "entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise." 19 U.S.C. § 1517(a)(5)(A).

[2] The Federal Circuit issued its decision on July 27, 2023, and entered judgment on August 1, 2023. Op. & J., *Royal Brush Mfg., Inc. v. United States*, Fed. Cir. 2022–1226 (July 27, 2023 & Aug. 1, 2023), ECF Nos. 77–78.

decision. *Royal Brush CAFC*, 75 F.4th at 1263. For the following reasons, the court concludes that it lacks subject-matter jurisdiction and must dismiss the action.

BACKGROUND

This court has issued two opinions summarizing the factual and procedural background in this case; familiarity with those opinions is presumed. *See Royal Brush Mfg., Inc. v. United States* ("*Royal Brush I*"), 44 CIT __, 483 F. Supp. 3d 1294 (2020); *Royal Brush Mfg., Inc. v. United States* ("*Royal Brush II*"), 45 CIT __, 545 F. Supp. 3d 1357 (2021), *vacated*, 75 F.4th 1250. The court summarizes herein the factual and procedural background relevant to this opinion.[3]

Royal Brush is a U.S. importer of pencils exported by a company located in the Republic of the Philippines ("the Philippines"). *Royal Brush I*, 483 F. Supp. 3d at 1298. "On March 27, 2018, CBP initiated an investigation in EAPA Case No. 7238." *Id.* (citing Initiation of Investigation in EAPA Case No. 7238 (Mar. 27, 2018), CR 4, PR 5, ECF No. 24–1). CBP informed Royal Brush that "the entries covered by this investigation are those that were entered for consumption, or withdrawn from a warehouse for consumption, from March 6, 2017 through the pendency of this investigation." *Id.* at 1298–99 (quoting Notice of Initiation of Investigation and Interim Measures (June 26, 2018) ("Initiation Notice") at 1, CR 8, PR 14, ECF No. 24–1).[4] CBP further stated that it had "suspended liquidation for any entries that entered on or after March 27, 2018, the date of initiation of this investigation, and extended liquidation for all unliquidated entries that entered before March 27, 2018." *Id.* at 1299 (citing Initiation Notice at 6). Section 1517(e)(1) provides statutory authority for CBP to impose the "interim measure[]" of suspension or extension of liquidation after finding "a reasonable suspicion" that the entries covered by the period of investigation were made through evasion. 19 U.S.C. § 1517(e)(1).

On May 6, 2019, CBP issued a determination in which the agency concluded that the subject imports "entered through evasion." Notice of Final Determination as to Evasion, EAPA Case No. 7238 (May 6, 2019) at 5, CR 131, PR 57, ECF No. 24–19. Royal Brush requested and obtained an administrative review of that determination. Decision on Request for Admin. Review, EAPA Case No. 7238 (Sept. 24,

[3] The administrative record for the underlying proceeding is contained in a Confidential Administrative Record ("CR"), ECF Nos. 24–1 through 24–19, and a Public Administrative Record ("PR"), ECF Nos. 23–1 through 23–3.

[4] Pursuant to 19 C.F.R. § 165.2, subject entries "are those entries of allegedly covered merchandise made within one year before the receipt of an allegation," but, "at its discretion, CBP may investigate other entries of such covered merchandise."

2019) ("Sept. 24 Determination"), PR 64, ECF No. 23–3; *see also* 19 U.S.C. § 1517(f) (providing for *de novo* administrative review of an initial determination). CBP affirmed its initial affirmative determination. Sept. 24 Determination at 11.

On November 6, 2019, Royal Brush commenced this case seeking judicial review of CBP's determination. Summons, ECF No. 1; Compl., ECF No. 2. On November 27, 2019, the court granted Royal Brush's consent motion for a preliminary injunction barring CBP from liquidating "any and all unliquidated entries of cased pencils" imported by Royal Brush "from [the Philippines] that were . . . subject to [CBP's evasion determination in EAPA Case No. 7238]" and were "entered, or withdrawn from warehouse, for consumption on or after March 6, 2017, up to and including the date a final and conclusive court decision, including all appeals and remand proceedings, is issued" and which "remain unliquidated as of 5:00 p.m. on the day the Court enters the order enjoining liquidation on the docket of this action." Order (Nov. 27, 2019), ECF No. 13. On December 10, 2019, the court granted the consent motion to intervene as a defendant-intervenor filed by Dixon Ticonderoga Company ("Dixon"). Order (Dec. 10, 2019), ECF No. 19.

After addressing Royal Brush's claims, the court sustained CBP's affirmative determination as modified on remand and entered judgment. *See Royal Brush II*, 545 F. Supp. 3d at 1374; J., ECF No. 73. Royal Brush appealed to the Federal Circuit. Notice of Appeal, ECF No. 74.

While the case was on appeal, the Government informed the Federal Circuit that CBP had liquidated all five Royal Brush entries subject to the evasion determination. *Royal Brush CAFC*, 75 F.4th at 1255. All liquidations occurred before this court entered the preliminary injunction referenced above, and CBP assessed antidumping duties on two of the five entries. *Id.* The other three entries were liquidated without antidumping duties. *Id*. The Government sought dismissal of the action for lack of subject-matter jurisdiction because Royal Brush had failed to protest the liquidations, rendering those liquidations "final and conclusive" pursuant to 19 U.S.C. § 1514(a). *Id.*

The Federal Circuit disagreed. The appellate court noted that the EAPA "statute does not require a liquidation protest as a condition of review," and that with respect to the three entries liquidated without the assessment of duties (referred to herein as the "duty-free entries"), "Royal Brush had nothing to protest . . . because Royal Brush was not assessed any antidumping duties." *Id.* at 1256. The Federal Circuit concluded that, "[a]t least as to [the duty-free entries] it is

clear that the case is not moot" because "CBP might successfully seek reliquidation of the entries" and "the evasion determination makes Royal Brush potentially liable for civil penalties" pursuant to 19 U.S.C. § 1517(h).[5] *Id.* (observing further that "[t]he [G]overnment has given no indication that it intends to forgo these remedies").

For the two entries liquidated inclusive of duties (referred to herein as the "duty assessed entries"), the Federal Circuit stated that it "need not determine for purposes of this case what remedies Royal Brush may have to recover the assessed duties . . . since Royal Brush, in this case, has not sought such relief." *Id.* at 1256–57. After finding that the case was not moot at least as to some of the entries, the appellate court addressed Royal Brush's claims and subsequently reversed this court's holdings with instructions to remand the matter to CBP. *Id.* at 1257–63.[6]

Royal Brush CAFC thus establishes that when CBP erroneously liquidates entries for which suspension applies pending an EAPA determination, filing a protest is not a precondition to obtaining judicial review of an evasion determination and that liquidation exclusive of potential duties does not moot the action when further government action in reliance on the evasion determination remains available. *Royal Brush CAFC* did not, however, decide whether failure to protest a liquidation inclusive of potential duties precludes an importer from obtaining a refund of those duties.

Prior to issuing a remand order, the court posed a series of questions to the parties "in order to determine how best to proceed in this case." Order (Nov. 3, 2023) ("Nov. 3 Order"), ECF No. 86. It is well established that "courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence

[5] Section 1517(h) provides a "rule of construction" that no evasion determination issued pursuant to 19 U.S.C. § 1517 "shall preclude any individual or entity from proceeding, or otherwise affect or limit the authority of any individual or entity to proceed, with any civil, criminal, or administrative investigation or proceeding pursuant to any other provision of Federal or State law, including sections 1592 of this title and 1595a of this title." 19 U.S.C. § 1517(h). Section 1517(d) further permits CBP, upon making an affirmative evasion determination, to "take such additional enforcement measures as the Commissioner determines appropriate, such as--(i) initiating proceedings under section 1592 or 1595a of this title." *Id.* § 1517(d)(1)(E)(i).

[6] The Federal Circuit concluded that the absence of a statute or regulation authorizing CBP to establish a procedure concerning the issuance of administrative protective orders for purposes of providing Royal Brush with business proprietary information did not mean that such disclosure was barred by the Trade Secrets Act, 18 U.S.C. § 1905, when, as in this case, the "release of information is 'authorized by law' within the meaning of the Trade Secrets Act if that release is required as a matter of constitutional due process," *Royal Brush CAFC*, 75 F.4th at 1260. The court also concluded that CBP's verification report contained new factual information that Royal Brush had the right to rebut. *Id.* at 1262.

of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). The reason for this is clear: "if the . . . court lack[s] jurisdiction, many months of work on the part of the attorneys and the court may be wasted." *ECC Int'l Constructors, LLC v. Sec'y of Army*, 79 F.4th 1364, 1368 (Fed. Cir. 2023) (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). In order to assess whether the bases for jurisdiction found by the Federal Circuit continue to exist, the court requested the parties to address whether: 1) 19 U.S.C. § 1501—or any other legal provision—authorizes CBP to reliquidate the duty-free entries, Nov. 3 Order at 1–2; 2) the Government intends to seek civil penalties pursuant to 19 U.S.C. § 1592 on any of the entries, *id.* at 2; 3) Royal Brush intends to seek refunds in connection with the duty-inclusive entries and, if so, the legal basis for reliquidation "absent a protest and in light of 19 U.S.C. § 1514(a), the Federal Circuit's decisions in *SKF USA, Inc. v. United States*, 512 F.3d 1326 (Fed. Cir. 2008), and *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983), and this court's exercise of jurisdiction pursuant to 28 U.S.C. § 1581(c)," *id.* at 2; and 4) the court should stay this case "pending the Federal Circuit's resolution of this question in *All One God Faith, Inc. v. United States*, [Fed. Cir.] Court No. 23–1078," *id.* at 2–3.

Parties filed their responses to the court's questions and replies to the response filings of other parties. Pl.'s Resp. to Ct.'s Order of Nov. 3, 2023 ("Pl.'s Resp."), ECF No. 89; Def.'s Resps. to the Ct.'s Nov. 3, 2023 Questions ("Def.'s Resp."), ECF No. 91; Def.-Int.'s Resp. to Ct.'s Order of Nov. 3, 2023 ("Def.-Int.'s Resp."), ECF No. 90; Pl.'s Reply to Def.'s Resps. to Ct.'s Order of Nov. 3, 2023 ("Pl.'s Reply"), ECF No. 92; Def.Int.'s Reply to Resps. to Ct.'s Order of Nov. 3, 2023 ("Def.-Int.'s Reply"), ECF No. 93; Def.'s Resps. to the Parties' Submission Pursuant to the Ct.'s Nov. 3, 2023 Order ("Def.'s Reply"), ECF No. 94.

JURISDICTION

To adjudicate a case, a court must have subject-matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). Royal Brush bears the burden of establishing subject-matter jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety." *Arbaugh*, 546 U.S. at 514.

While the court has statutory jurisdiction pursuant to 28 U.S.C. § 1581(c) to review CBP's evasion determination, Article III of the U.S. Constitution limits the court to resolving "legal questions only in the

context of actual 'Cases' or 'Controversies.'" *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (quoting U.S. Const. art. III, § 2). Thus, "[i]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed as moot." *Nasatka v. Delta Sci. Corp.*, 58 F.3d 1578, 1580 (Fed. Cir. 1995) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)). "Mootness is a jurisdictional question because the [c]ourt is not empowered to decide moot questions or abstract propositions." *North Carolina v. Rice* 404 U.S. 244, 246 (1971) (citations omitted).

DISCUSSION

I. Duty-Free Entries

With respect to the duty-free entries, the Federal Circuit relied on "the possibility that CBP might successfully seek reliquidation of the entries" and on the possibility of civil penalties to find that the case was not moot. *Royal Brush CAFC*, 75 F.4th at 1256. However, those remedies are not, or are no longer, available to the Government regardless of any possible affirmative evasion determination by CBP in another remand proceeding.

Royal Brush imported each of the duty-free entries respectively on March 27, 2017, August 8, 2017, and April 24, 2018. Def.'s Resp. at 2. The corresponding dates of liquidation are January 19, 2018, June 8, 2018, and January 4, 2019, respectively. *See id.* at 1.[7]

Notwithstanding CBP's failure to adhere to the statutory suspension of liquidation pursuant to 19 U.S.C. § 1517(e)(1), section 1500 of that title directs CBP to make certain decisions regarding appraisement and classification, to liquidate an entry, and to provide notice to the importer. 19 U.S.C. § 1500. Following "[a] liquidation made in accordance with section 1500," CBP has 90 days from the date of liquidation to *reliquidate* an entry. 19 U.S.C. § 1501. The Government concedes that, because of the passage of time, "CBP has no legal basis to voluntarily reliquidate these entries under 19 U.S.C. § 1501." Def.'s Resp. at 1. The Government further states that it "is unaware of any other available legal basis for CBP to seek reliquidation" and, thus, that "CBP does not intend to seek reliquidation of the three entries."

[7] The Government included a table with dates of entry and liquidation in the motion to dismiss filed at the Federal Circuit. *See* Def.-Appellee the United States' Mot. to Dismiss for Lack of Jurisdiction, *Royal Brush Mfg., Inc. v. United States*, Fed. Cir. 20221226 (Jan. 12, 2023), ECF No. 62–1 ("Def.'s Mot. to Dismiss (CAFC)"). The court has reviewed that filing to determine the dates of entry and liquidation that correspond to the duty-free and duty-assessed entries.

Id.; *see also* Def.'s Reply at 1.[8] Royal Brush and Dixon agree that voluntary reliquidation is no longer available. Pl.'s Resp. at 2; Def.-Int.'s Resp. at 1.

The inquiry does not end there. Dixon avers that 28 U.S.C. § 2643(c)(1) provides a basis for CBP to reliquidate the duty-free entries. Def.-Int.'s Resp. at 2. Section 2643 permits the CIT, with certain exceptions that are not relevant here, to "order any other form of relief" in addition to the relief listed in subsections (a) and (b) "that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition." 28 U.S.C. § 2643(c)(1).

The Government makes no claim for reliquidation pursuant to section 2643. Furthermore, while the court has construed this provision to provide for reliquidation in some circumstances in a case arising under 28 U.S.C. § 1581(i), *see, e.g.*, *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004),[9] the court has not interpreted the statute to authorize reliquidation in a case arising under 28 U.S.C. § 1581(c)—in a manner favorable to the Government or otherwise.[10] That is because section 1514 provides that "decisions of the Customs Service" as to "the classification and rate and amount of duties chargeable," "shall be final and conclusive upon *all persons (including the United States and any officer thereof)* unless a protest is filed in accordance with this section." 19 U.S.C. § 1514(a)(2) (emphasis added). While the voluntary reliquidation provision of 19 U.S.C. § 1501 constitutes an exception to the rule of finality set forth in 19 U.S.C. § 1514, sections 1514 and 1501 together indicate that

[8] CBP's regulations state that, "[f]or entries of covered merchandise that are already liquidated when an affirmative determination is made as to evasion under § 165.27, CBP will initiate or continue any *appropriate* actions separate from this proceeding." 19 C.F.R. § 165.28(a) (emphasis added). The regulation does not provide CBP with authority to circumvent the statutory constraints on reliquidation.

[9] *Shinyei* addressed a challenge to a set of erroneous U.S. Department of Commerce ("Commerce") instructions carried out by CBP, a challenge that the plaintiff was unable to bring pursuant to 28 U.S.C. § 1581(a) or (c). 355 F.3d at 1304.

[10] One exception to this rule arises when liquidation occurs in violation of a court-ordered injunction suspending liquidation. *See, e.g.*, *Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187, 1192 (Fed. Cir. 2009). In *Agro Dutch*, CBP liquidated the subject entries after the court entered an injunction but before the injunction went into effect five days after it was issued. *Id.* at 1189. The liquidations came to light after the CIT entered judgment in the case, and the court thereafter granted the plaintiff's motion to amend the judgment to require CBP to reliquidate the entries at the lower rate obtained in the litigation by bringing forward the effective date of the injunction. *See id.* at 1189–90. The Federal Circuit affirmed the CIT's order to reliquidate the entries based, in part, on effectuating the intent of the parties and the court. *See id.* at 1193–94. The appellate court contrasted its decision in *SKF USA, Inc. v. United States*, 512 F.3d 1326 (Fed. Cir. 2008) (per curiam), in which the court concluded that mootness foreclosed jurisdiction when the subject entries liquidated by operation of law *before* the CIT enjoined liquidation. *See id.* at 1191 (discussing *SKF*, 512 F.3d at 1328, 1332). Here, the liquidations predate the court's injunction, placing this case within the holding of *SKF*, not *Agro Dutch*.

Congress intended for liquidation to become final with respect to the Government and with respect to importers or others with statutory standing to file protests while providing for a limited amount of time for CBP to correct its errors.

Just as importers are held to the statutory constraints on relief from erroneous liquidations, discussed further in the next section, so too is the Government.[11] *Cf. Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1560 (Fed. Cir. 1988) (in a case in which the CIT erroneously assumed jurisdiction pursuant to 28 U.S.C. § 1581(i) instead of 28 U.S.C. § 1581(b), finding that the finality of liquidation pursuant to 19 U.S.C. § 1514 barred the CIT from "ordering payments" to the Government "without reliquidation").

The Government also concedes that the civil penalty provisions set forth in 19 U.S.C. § 1592 are now unavailable for the duty-free entries. *See* Def.'s Resp. at 2. The statute of limitations for an action pursuant to 19 U.S.C. § 1592(d) is five years from "the date of the alleged violation," 19 U.S.C. § 1621(1), which is generally considered to be the date of entry, *see, e.g.*, *United States v. Liu*, 47 CIT __, __, 625 F. Supp. 3d 1378, 1381 (2023). Thus, the statute of limitations for a penalty action for each of the duty-free entries lapsed on March 27, 2022, August 8, 2022, and April 24, 2023, respectively. Def.'s Resp. at 2.

Because there is no basis upon which the Government may pursue reliquidation of, or penalties for, the duty-free entries, and there being no other apparent form of relief available to Royal Brush, this case is moot with respect to the duty-free entries.

II. Duty-Assessed Entries

For the duty-assessed entries, the Federal Circuit indicated that judicial review over Royal Brush's claims was available because EAPA "does not require a liquidation protest as a condition of review." *Royal Brush CAFC*, 75 F.4th at 1256. Be that as it may, it does not answer the question of whether the court may grant "any effectual relief whatever" with respect to these particular entries. *See Church of Scientology*, 506 U.S. at 12. As noted, the appellate court did not

[11] This view of the statutory scheme finds further support in the "deemed liquidation" provision in 19 U.S.C. § 1504. Section 1504 states that unless CBP liquidates an entry "within [one] year from . . . the date of entry," that entry "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer of record." 19 U.S.C. § 1504(a)(1)(A). "The purpose of section 1504 was to bring finality to the duty assessment process" and "eliminate unanticipated requests for additional duties coming years after the original entry." *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1559 (Fed. Cir. 1997) (citation omitted). Allowing the Government to pursue additional duties on entries years after CBP erroneously liquidated the entries would violate the finality considerations embedded throughout the statutory provisions that govern the ascertainment and collection of duties.

determine "what remedies Royal Brush may have to recover the assessed duties with respect to their two entries that were subject to antidumping duties upon liquidation since Royal Brush, in this case, has not sought such relief." *Royal Brush CAFC*, 75 F.4th at 1256–57.

Royal Brush did not allege a standalone claim regarding the premature liquidations, nor did it seek to amend its filings at any time, although Royal Brush did request relief in the form of refunds of "any monies collected on its imports as a result of CBP's evasion investigation." Compl. at 12.[12] Royal Brush also argued before the Federal Circuit that reliquidation of the duty-assessed entries constitutes an available remedy in addition to other forms of relief notwithstanding its failure to file protests. *See* Pl.-Appellant's Opp'n to Def.-Appellee United States' Mot. to Dismiss, *Royal Brush Mfg., Inc. v. United States*, Fed. Cir. No. 2022–1226 (Jan. 23, 2023) at 8–11, ECF No. 63. Given the Federal Circuit's position that Royal Brush has not sought to recover antidumping duties, *Royal Brush CAFC*, 75 F.4th at 1256, the steps taken by Royal Brush would appear to be insufficient to preserve the availability of refunds.[13]

For the sake of clarity, however, the court here concludes that Royal Brush is precluded from obtaining refunds in connection with the duty-assessed entries based on Royal Brush's failure to protest the liquidations. In conjunction with the passing of the deadline for the

[12] It is unclear when Royal Brush first learned that CBP had liquidated its entries, though presumably that occurred after Royal Brush filed its complaint and requested this court to enjoin the liquidation of its entries. The Government represented to the Federal Circuit that notices of liquidation were posted on CBP's public website and that counsel for Defendant informed Royal Brush's counsel of the liquidations in or around December 2021, after this court had entered judgment. Def.'s Mot. to Dismiss (CAFC) at 7.

[13] The Federal Circuit's statement suggests that Royal Brush should have asserted a separate claim for reliquidation, potentially pursuant to a different jurisdictional basis. In *VoestAlpine USA Corp. v. United States*, 46 CIT __, __, 578 F. Supp. 3d 1263, 1273–75, 1276–79 (2022), the court discussed the availability of reliquidation and refunds not as a jurisdictional matter but as a claim that must be supported by a legal theory and relevant facts. That case, however, arose under the court's jurisdiction pursuant to 28 U.S.C. § 1581(i). *See id.* at 1272. The opinion addressed whether the availability of reliquidation pursuant to the court's remedial authority in 28 U.S.C. § 2643(c)(1) implicated the court's jurisdiction to hear the case or, as the court concluded, presented an issue to be decided in the context of whether plaintiffs had stated a claim for relief. *See id.* at 1277; *but cf. AM/NS Calvert LLC v. United States*, 47 CIT __, __, 654 F. Supp. 3d 1324, 1343 (2023) (finding that the issue of reliquidation in a case arising under 28 U.S.C. § 1581(i) is properly construed as a claim "for injunctive relief . . . subject to ordinary equitable principles"). In contrast to both *VoestAlpine* and *AM/NS Calvert*, however, this case arises under 28 U.S.C. § 1581(c).

Government to seek penalties,[14] this case is moot also with respect to these entries.[15]

While the EAPA statute is relatively new, Congress grounded judicial review of evasion determinations within 28 U.S.C. § 1581(c) for which there is a large body of precedential case law addressing the impact of liquidation on the court's jurisdiction. While that precedent primarily addresses the failure to protest erroneous liquidations in the context of judicial review of a determination by Commerce pursuant to 19 U.S.C. § 1516a, the circumstances surrounding an EAPA investigation pursuant to 19 U.S.C. § 1517 are sufficiently analogous that the reasoning set forth in those opinions, perforce, leads to the same result here. *Cf. All One God Faith, Inc. v. United States*, 46 CIT __, __, 589 F. Supp. 3d 1238, 1248 (2022), *appeal filed*, Fed. Cir. No. 2023–1078 (Oct. 25, 2022) (dismissing certain claims for lack of subject-matter jurisdiction when CBP liquidated entries subject to an EAPA investigation and the importer-plaintiffs protested the liquidations but failed to challenge the protest denials pursuant to 28 U.S.C. § 1581(a)).[16]

For more than 50 years, the Federal Circuit has consistently held that liquidation of entries subject to a Commerce determination pursuant to 19 U.S.C. § 1516a would "eliminate the only remedy available to [an interested party] for an incorrect review determination by depriving the trial court of the ability to assess dumping duties . . . in accordance with a correct margin on entries [subject to the] review period." *Zenith*, 710 F.2d at 810.[17] The appellate court explained that section 1516a "has no provision permitting reliquidation in this case or imposition of higher dumping duties after liquidation if [the plain-

[14] The Government concedes that the statute of limitations for commencing a penalty action for each of the duty-assessed entries lapsed on July 25, 2023, and August 10, 2023, respectively. Def.'s Resp. at 3.

[15] For the reasons discussed, the court also disagrees with Royal Brush's and Dixon's assertions that the court need not decide the issue of refunds because the issue is not yet ripe unless and until CBP issues a negative determination because their assertions overlook the jurisdictional impact of the finality of liquidation. *See* Pl.'s Resp. at 4; Pl.'s Reply at 2; Def.-Int.'s Resp. at 5; Def.-Int.'s Reply at 1–2.

[16] While the court may elect to stay the case pending the Federal Circuit's resolution of the jurisdictional issues presented in *All One God*, *see Seneca Nation of Indians v. U.S. Dep't of Health and Human Servs.*, 144 F. Supp. 3d 115, 119–20 (D.D.C., 2015) (stating that a court may decide whether to stay a case when jurisdiction is unclear because that decision "does not ask the [c]ourt to declare the substantive law"), the court disagrees with the Government that a stay is appropriate here, *see* Def.'s Resp. at 4; Def.'s Reply at 8. Staying the case at this point would not promote greater "economy of time and effort for [the court], for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The more efficient course, taken herein, is to resolve the jurisdictional uncertainties this case raises.

[17] Indeed, Royal Brush cited *Zenith* to support the need for a preliminary injunction in this case to avoid "mooting the present action." Consent Mot. for a Prelim. Inj. at 3, ECF No. 11.

tiff] is successful on the merits." *Id.* Thus, the court held, without an injunction to prevent liquidation, the plaintiff's "statutory right to obtain judicial review of the determination would be without meaning for the only entries permanently affected by that determination." *Id.*

The Federal Circuit has "consistently applied the *Zenith* rule, at least in the context of judicial review under section 1516a." *SKF*, 512 F.3d at 1329 (collecting cases). Thus, in *SKF*, the Federal Circuit relied on *stare decisis* to apply *Zenith* and foreclose judicial review of entries covered by a Commerce determination that liquidated as a matter of law pursuant to 19 U.S.C. § 1504(d). *Id.* The court noted that an importer could "obtain liquidation at the rate instructed in Commerce's final review results by timely protesting a deemed liquidation under 19 U.S.C. § 1514(c)." *Id.* at 1331 n.1 (citing *Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1241 (Fed. Cir. 2007)).

To be clear, there are differences between 19 U.S.C. §§ 1516a and 1517. Section 1516a provides for a court-ordered injunction on liquidation and for liquidation in accordance with the court's decision for entries covered by any such injunction. 19 U.S.C. § 1516a(c)(1)–(2). In contrast, section 1517 provides for the suspension of liquidation by CBP for entries that were made on or after the date of initiation of the investigation up until the date of a final affirmative determination and for the extension of liquidation for entries that were made prior to the date of initiation. 19 U.S.C. § 1517(d)(1)(A)–(B), (e)(1)–(2). When the final determination is affirmative, the statute directs CBP to obtain the appropriate assessment rates for the entries covered by the determination from Commerce, collect cash deposits, and assess duties on those entries in accordance with Commerce's instructions. *Id.* § 1517(d)(1)(C), (D). Section 1517 does not refer to court-ordered injunctions[18] or explicitly address the consequences of judicial review. *Cf.* 19 U.S.C. § 1516a(c)(2)–(3) (providing authority for statutory injunctions and, when necessary, remand to the relevant agency for disposition consistent with the court's opinion).

Like section 1516a, in section 1517 Congress specified the scope and standard of judicial review. In section 1516a, Congress conferred authority on the court to review a specified list of determinations pursuant to the identified standards of review, most often, for substantial evidence and accord with the law. 19 U.S.C. § 1516a(a)(2)(B), (b)(1). In section 1517, Congress conferred authority on the court to review CBP's determinations made pursuant to 19 U.S.C. § 1517(c)

[18] Royal Brush based its motion for a preliminary injunction, in part, on the court's authority to issue injunctions pursuant to 28 U.S.C. § 1585 and CIT Rule 65(a). Consent Mot. for a Prelim. Inj. at 1–2.

and (f) for procedural compliance *with those subsections* and to assess "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 1517(g)(1), (2). Neither section 1516a nor section 1517 provides explicit authority for the CIT to review liquidated entries or "has [any] provision permitting reliquidation"; thus, "[o]nce liquidation occurs, a subsequent decision by the trial court on the merits of [a plaintiff's] challenge can have no effect on the dumping duties assessed on [the subject] entries." *Zenith*, 710 F.2d at 810; *see also All One God*, 589 F. Supp. 3d at 1247 (finding that nothing in section 1517 grants the CIT jurisdiction to review challenges to erroneous liquidations).

Section 1517 does, however, contain several rules of construction, two of which are relevant here.

First, section 1517(h) provides:

> No determination under subsection (c), review under subsection (f), or action taken by the Commissioner pursuant to this section shall preclude any individual or entity from proceeding, or otherwise affect or limit the authority of any individual or entity to proceed, with any civil, criminal, or administrative investigation or proceeding pursuant to any other provision of Federal or State law, including sections 1592 of this title and 1595a of this title.

19 U.S.C. § 1517(h). This provision demonstrates that an evasion determination by CBP does not "affect or limit the authority of any individual or entity to proceed[] with" an "administrative . . . proceeding," which would include administratively protesting an allegedly erroneous liquidation by CBP. *See id.* Next, section 1517(g)(3) states that "[n]othing in this subsection shall affect the availability of judicial review to an interested party under any other provision of law." 19 U.S.C. § 1517(g)(3). Thus, judicial review of an EAPA determination does not preclude an importer from challenging a protest denial at the CIT pursuant to 28 U.S.C. § 1581(a). *See id.* Indeed, Congress was expressly aware of the possibility of parallel litigation stemming from an EAPA investigation because the statute also recognizes that Commerce determinations responsive to CBP covered merchandise referrals may give rise to separate litigation pursuant to 19 U.S.C. § 1516a(a)(2). *See id.* § 1517(b)(4)(D).

On this point, *Juice Farms* is instructive. There, liquidation of the plaintiff's entries was suspended by Commerce in connection with an antidumping duty investigation and subsequent administrative re-

views. *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995). Although the "suspension orders remained in effect, Customs erroneously liquidated twenty [of the plaintiff's] entries." *Id.* The suspension orders also resulted in the plaintiff's failure to monitor the bulletin notices of liquidation CBP posted at the customshouse through which the plaintiff made the majority of its entries. *Id.* After learning of the erroneous liquidations, the plaintiff filed untimely protests to obtain the benefit of the lower rate assessed by Commerce. *Id.* The Federal Circuit affirmed the CIT's decision to dismiss the case for lack of subject-matter jurisdiction, thereby denying relief to the plaintiff. *Id.* at 1346.

While the *Juice Farms* court framed the question as "whether th[e] time limit for protests applies to allegedly illegal liquidations," *id.* at 1345, the court held that the notices of liquidation triggered the time period within which the plaintiff must file its protests and because the plaintiff's protests were untimely, the CIT properly dismissed the case, *id.* at 1346.[19] The appellate court observed:

> Section 1514 of title 19 contemplates that both the legality and correctness of a liquidation be determined, at least initially, via the protest procedure. Thus, *all liquidations*, whether *legal or not*, are subject to the timely protest requirement. Without a timely protest, all liquidations become final and conclusive under 19 U.S.C. § 1514.

Id. (emphases added) (citations omitted).

The "effect of the 'final and conclusive' clause [in section 1514] is thus simply one of statutory construction": the phrase "indicates that Congress meant to foreclose unprotested issues from being raised in any context, not simply to impose a prerequisite to bringing suit." *Cherry Hill*, 112 F.3d at 1557 (holding that an importer was barred from raising an allegedly erroneous liquidation as a defense to an enforcement action for payment on a bond when the importer had failed to protest the liquidation). The Federal Circuit held that allowing a collateral attack on liquidations "would be inconsistent with the underlying policy of section 1514, which is to channel challenges to liquidations through the protest mechanism in the first instance." *Id.*

So too here. In order to forestall the finality of liquidation and preserve its ability to obtain refunds in connection with the duty-assessed entries, Royal Brush was required to protest those liquida-

[19] At the time of the Federal Circuit's opinion in *Juice Farms*, the statute required a protest to be filed within 90 days of the decision to be protested. 19 U.S.C. § 1514(c)(3) (1994). Congress amended the statute in 2004 to provide 180 days. Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108–429, 118 Stat. 2434, § 2103. As previously noted, this 180-day period has run with respect to all of Plaintiff's entries.

tions and to do so in a timely manner. 19 U.S.C. § 1514(a). Royal Brush makes no claim that the protest procedures set forth in 19 U.S.C. § 1514 were unavailable or manifestly inadequate. Because Royal Brush failed to adhere to the statutory requirements set forth in 19 U.S.C. § 1514, this court is without authority to order reliquidation under these circumstances.

Despite notice that the court was examining whether "this matter remains a live case or controversy or, instead, has become moot," Pl.'s Resp. at 2, Royal Brush makes no other arguments for finding a case or controversy to exist. At most, Royal Brush attempts to analogize the liquidations in this case to a liquidation in violation of a court order and argues that the court should utilize its remedial authority pursuant to 28 U.S.C. § 2643. *Id.* at 3–4. As discussed above, however, the liquidations in this case occurred prior to the court's entry of a preliminary injunction. *Supra* note 10. Moreover, Royal Brush fails to explain why the court should have any more authority to order reliquidation in a case arising under 19 U.S.C. § 1517 than it has in a case arising under 19 U.S.C. § 1516a, both of which are entertained pursuant to 28 U.S.C. § 1581(c), and in light of the judicial precedent discussed above.

There being no apparent relief the court can confer on Royal Brush with respect to the duty-assessed entries, this case also is moot with respect to those entries.

CONCLUSION

In accordance with the foregoing, the court finds that it lacks subject-matter jurisdiction to entertain further proceedings in this case and the case must be dismissed. Judgment will be entered accordingly.

Dated: December 15, 2023
New York, New York

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

Slip Op. 23–179

DALIAN HUALING WOOD CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN KITCHEN CABINET ALLIANCE, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 22–00334
Public Version

[Commerce's Final Results in the Administrative Review of Commerce's antidumping duty order on wooden cabinet and vanities and components thereof from the People's Republic of China are sustained.]

Dated: December 18, 2023

Michael S. Holton, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington DC, argued for plaintiff Dalian Hualing Wood Co., Ltd. With him on the brief was and *Jordan C. Kahn*.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for the defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Alexander P. Fried*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington DC.

Luke A. Meisner and *Michelle R. Avrutin*, Schagrin Associates, of Washington DC, argued for defendant-intervenor American Kitchen Cabinet Alliance. With them on the brief was *Roger B. Schagrin*.

OPINION AND ORDER

Restani, Judge:

Plaintiff Dalian Hualing Wood Co., Ltd. ("Hualing") challenges the decision of the United States Department of Commerce ("Commerce") in the administrative review of the antidumping duty ("AD") order on Wooden Cabinet and Vanities and Components Thereof ("WCV") from the People's Republic of China ("PRC"). *Wooden Cabinet and Vanities and Components Thereof from the People's Republic of China: Final Results and Partial Rescission of the Antidumping Duty Administrative Review; 2019–2021*, 87 Fed. Reg. 67,674 (Dep't Commerce Nov. 9, 2022) ("*Final Results*"). Hualing claims that Commerce improperly rejected its lone U.S. sale as not bona fide, contesting both the statutory and evidentiary basis for Commerce's bona fide analysis. The court concludes that Commerce's decision was in accordance with the law and supported by substantial evidence. Hualing's motion for judgment on the agency record is denied. Accordingly, Commerce's *Final Results* are sustained.

BACKGROUND

On April 21, 2020, Commerce issued an AD order covering WCV from the PRC. *Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Antidumping Duty Order*, 85 Fed. Reg. 22,126 (Dep't Commerce Apr. 21, 2020). Hualing made a single sale of alleged Americans with Disabilities Act ("ADA") compliant cabinets in June 2020. *See Dalian Hualing Wood Co., Ltd. Section A Questionnaire Response & Voluntary Response Request* at Attach. 1, 14–16, C.R. 67–71, P.R. 147 (Sept. 1, 2021). Hualing, as a manufacturer and exporter of WCV from the PRC, responded to Commerce's AD order in a few ways.

First, pursuant to 19 CFR § 351.214(b), Hualing requested a new shipper review ("NSR") for the period of review ("POR") of April 1, 2020, through September 30, 2020. *Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review*, 85 Fed. Reg. 77,162 (Dep't Commerce Dec. 1, 2020). Commerce initiated the NSR on December 1, 2020. *Id.*

A few months later, for the same sale Hualing requested an administrative review ("AR") of the AD order for the POR of October 9, 2019, through March 31, 2021, which Commerce also initiated. Letter from Grunfeld, Desiderio, Lebowitz, Silverman, & Klestadt LLP to U.S. Dep't of Commerce, ECF No. 35 (Apr. 30, 2021); *see also Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. 31,282 (Dep't Commerce June 11, 2021).

Lastly, Hualing submitted a separate rate application in the AD AR. *Dalian Hualing Wood Co., Ltd. Separate Rate Application*, C.R. 50–53, P.R. 105 (July 16, 2021).

Commerce responded with a preliminary decision to rescind Hualing's NSR. *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Preliminary Rescission of Antidumping Duty New Shipper Review; 2020*, 86 Fed. Reg. 46,178 (Dep't Commerce Aug. 18, 2021). Because Hualing shipped subject merchandise prior to the POR, Commerce ultimately rescinded the new shipper review on November 12, 2021. *Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Recission of Antidumping Duty New Shipper Review; 2020*, 86 Fed. Reg. 62,788 (Dep't Commerce Nov. 12, 2021), and accompanying *Issues and Decision Memorandum for the Rescission of the Antidumping Duty New Shipper Review of Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China; 2020*, A-570–106, POR 04/01/2020–09/30/2020 at Comment 1 (Dep't Commerce Nov. 12, 2021). This determination is not challenged here.

Meanwhile, Hualing continued to submit information to Commerce in the administrative review. *See Dalian Hualing Wood Co., Ltd. Voluntary Section C & D Questionnaire Response*, C.R. 74–76, P.R. 159–160 (Sept. 17, 2021); *Dalian Hualing Wood Co., Ltd. Voluntary Supplemental Response*, C.R. 118–122, P.R. 211 (Dec. 30, 2021). Based upon this information and the information Hualing submitted as part of the NSR, Commerce gave notice of its intent to rescind the AR with respect to Hualing, finding that its single sale was not bona fide. *Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Preliminary Results and Partial Recission of the Antidumping Duty Administrative Review; 2019–2021*, 87 Fed. Reg. 27,090, 27,092 (Dep't Commerce May 6, 2022); *see also U.S. Department of Commerce Memorandum: Preliminary Bona Fides Sale Analysis*, C.R. 127, P.R. 257 (May 2, 2022) ("*Preliminary Bona Fides Sales Analysis*").

That same day, Commerce issued its preliminary findings in the concurrent AR of the countervailing duty ("CVD") order, to which Hualing was a mandatory respondent. *Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review, Rescission and Intent To Rescind Administrative Review, in Part; 2019–2020*, 87 Fed. Reg. 27,099, 27,100 (Dep't Commerce May 6, 2022). In the CVD AR, Hualing was initially assigned a subsidy rate of 16.91% for 2020; Hualing's rate was lowered to 2.78% in the Final CVD Results. *Id.*; *Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2019–2020*, 87 Fed. Reg. 51,967, 51,968 (Dep't Commerce Aug. 24, 2022) ("*CVD Final Results*").

Hualing challenged Commerce's preliminary results in the AD AR in its administrative case brief. *Dalian Hualing Wood Co., Ltd. Administrative Case Brief*, C.R. 138–139, P.R. 281 (July 1, 2022). Namely, Hualing claimed Commerce's bona fide sales analysis was "not supported by practice, precedent, record evidence and was otherwise unlawful." *Id.* at 1. Commerce rejected Hualing's arguments, however, and published its *Final Results*, rescinding the AR with respect to Hualing based upon the determination that Hualing made no bona fide sales during the POR. *Final Results*, 87 Fed. Reg. at 67,675. Because Hualing had not previously qualified as independent of China, Hualing defaulted to the China-wide AD assessment rate of 251.65%. *See id.* at 67,675–76. Hualing appealed the *Final Results* to this court.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2). The court sustains Commerce's results of an administrative review of an AD duty order unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Hualing primarily challenges Commerce's *Final Results* on three grounds. First, Hualing notes that Commerce, in the parallel CVD AR, calculated an individual CVD rate based upon the same sale that Commerce found to be non-bona fide in the AD AR. This apparent inconsistency, Hualing claims, violates 19 U.S.C. § 1675(a)(2)(B)(iv) (2016)—"[s]tatutorily, the same sale cannot be bona fide in one proceeding and not the other . . . ." Pls. Mot. For J. on the Agency R. at 13, ECF No. 26 (June 22, 2023) ("Hualing Br."). Second, Hualing contests Commerce's decision to conduct a bona fide analysis of Hualing's sale in the AD AR. According to Hualing, Commerce arbitrarily departed from its "well-established practice" to not perform a bona fide analysis on sales made by separate rate applicants who are not mandatory respondents in an AR. *Id.* at 13. Last, Hualing challenges Commerce's bona fide analysis itself as unsupported by substantial evidence. *Id.* at 24.

The United States ("Government") argues that Hualing failed to exhaust its first two claims at the administrative level, and that this court should decline to hear them. Def.'s Resp. to Pls. R. 56.2 Mot. For J. on the Agency R. at 17–22, ECF No. 31 (Aug. 24, 2023) (quoting *Qingdao Sea-Line Trading Co., v. United States*, 766 F.3d 1378, 1388 (Fed. Cir. 2014) ("[A] party's failure to raise an argument before Commerce constitutes a failure to exhaust its administrative remedies."). Hualing replied that it properly contested Commerce's seemingly inconsistent results in the AD and CVD reviews, and Commerce's authority to conduct a bona fide analysis in the AR, respectively, in its administrative case brief. Pls. Reply Br. at 1, ECF No. 33 (Sept. 21, 2023) ("Hualing Reply Br.").

In an action challenging Commerce's final results in an unfair trade matter, the court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). In this context, whether a party is required to exhaust its administrative remedies is within the court's sound discretion.[1] Consistent with other courts, the

[1] *See, e.g.*, *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1332 (Fed. Cir. 2017); *Agro Dutch Indus., Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007).

Federal Circuit has recognized a "pure legal question" exception to the exhaustion doctrine. *See, e.g.*, *Agro Dutch Indus.*, 508 F.3d at 1029 (citations omitted). Thus, "where the issue for the court is a 'pure question of law' that can be addressed without further factual development or further agency exercise of discretion," as here, "requiring exhaustion may serve no agency or judicial interest, may cause harm from delay," and is often inappropriate. *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013). Because Hualing's arguments dispute Commerce's statutory authority, and no further factual development is required, the court concludes that any failure to completely exhaust these arguments before Commerce does not preclude the court's review under these circumstances.

I. Commerce's results were not legally inconsistent

Hualing argues that Commerce "violated its statutory mandate" when it found the same sale "bona fide in one proceeding and not the other." Hualing Br. at 13; *see* Compl. at 5, ECF No. 9 (Jan. 9, 2023). Here, Hualing refers to the *Final Results* in the AD AR, 87 Fed. Reg. 67,674, versus that of the CVD AR, 87 Fed. Reg. 51,967. Hualing is correct that in these separate yet concurrent administrative reviews, Commerce analyzed the same single sale Hualing made during the POR. In the CVD AR, Commerce selected Hualing as a mandatory respondent, treated the sale as bona fide, and assigned an individual countervailing duty rate. *CVD Final Results*, 87 Fed. Reg. at 51,968. In the parallel AD AR, Commerce rescinded the AR with respect to Hualing after finding its single sale to be not bona fide and therefore not reviewable. *Final Results*, 87 Fed. Reg. at 67,675; *see e.g.*, *Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1335 (CIT 2015) (concluding that Commerce properly rescinded an administrative review based upon a single sale where, because the sale was not bona fide, there were no sales within the POR for which Commerce could grant plaintiff a separate rate).

There is nothing in the NSR statute, 19 U.S.C. § 1675(a)(2)(B)(iv), which Hualing cites, that compels Commerce to reach the same conclusion in distinct administrative proceedings, even if based upon the same sale. Nor does Hualing cite to any other statute for support for this proposition. CVD and AD proceedings remedy different behaviors, and each of Commerce's reviews are treated "as independent proceedings with separate records [] which lead to independent determinations." *Tri Union Frozen Prods., Inc., v. United States*, 163 F. Supp. 3d 1255, 1274 n.14 (CIT 2016) (quoting *E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 19, 32 (1998)). Likewise, judicial

review of such determinations must be limited to the record before the agency that was compiled during that segment of the proceeding, excluding previous and subsequent proceedings. *Tri Union*, 163 F. Supp. 3d at 1274 n.14. Thus, as a legal proposition, Hualing's argument fails.

Moreover, factually, Commerce, in the two administrative reviews in question, had before it two different records. In the AD AR, Hualing requested a new shipper review and placed the applicable information on the record; in the CVD AR, Hualing did not. *See Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China; 2019–2021*, A-570–106, POR 10/09/2019–03/31/2021, at 5–9 (Dep't Commerce Nov. 2, 2022) ("*I&D Memo*"). In the AD AR, Hualing requested to be a voluntary respondent;[2] in the CVD AR, Commerce selected Hualing as a mandatory respondent. *Id.* And within the context of these two proceedings, Hualing submitted different questionnaire responses at different times regarding its business practices. *Id.* Even if based upon the same sale, Commerce must make its determinations based upon the record before it in each respective review. *See, e.g.*, *Echjay Forgings Private Ltd. v. United States*, 475 F. Supp. 3d 1350, 1377 (CIT 2020) (citing *Zhaoqing new Zhongya Aluminum Co., v. United States*, 70 F. Supp. 3d 1298, 1307 (CIT 2015) ("Different standards applied to the same facts may reasonably lead to different outcomes. Thus, there is no legally cognizable inconsistency between Commerce's decision to treat the companies as a single entity in the [AD] proceeding but not in the CVD investigation.")). Accordingly, Hualing's claim that Commerce violated its statutory mandate on this basis fails.

II. Commerce was not precluded by statute or prior practice from conducting a bona fide analysis

Next, Hualing argues that Commerce's decision to conduct a bona fide sales analysis of Hualing's sale renders Commerce's *Final Results* unsupported by substantial evidence. Hualing Br. at 22. Hualing is correct that as a separate rate applicant and not a mandatory respondent, Commerce did not need to calculate a specific rate for Hualing under 19 U.S.C. § 1677f-1. Next, citing the NSR statute, 19 U.S.C. §

[2] After the AR was rescinded as to Hualing, no action was taken on this request. Of course, in normal practice Commerce does not grant such requests. Whether that is a reasonable approach is a question not at issue here.

1675(a)(2)(B)(iv),[3] Hualing argues that therefore Commerce should have evaluated only whether Hualing had a suspended entry during the POR and proceeded to conduct a separate rate analysis on those grounds. Hualing Br. at 12–14. Hualing argues thus it was improper to examine the bona fides of Hualing's sale at this point in the review. *Id.*

Commerce agrees that it typically does not conduct bona fide sales analysis for separate rate applicants. Def.'s Resp. to Pl.'s Rule 56.2 Mot. For J. on the Agency R. at 10, ECF No. 31 (Aug. 24, 2023). This is due to a matter of resources—a bona fide analysis requires the collection and evaluation of extensive information, and doing so for every separate rate applicant would strain Commerce's resources. *Id.* at 11. Commerce claims it explained why "Hualing is not a typical separate rate respondent," in that Commerce had already collected relevant information regarding Hualing's sale in the NSR. *Id.* at 11–12 (referring to 19 U.S.C. § 1675(a)(2)(B)(iv)). As a result, Commerce was positioned to examine the bona fides of Hualing's sale in the context of AR, which ultimately led it to rescind the review because Hualing had no reviewable bona fide sales.

"Although Commerce is traditionally granted broad discretion in its selection of methodology to implement the [antidumping and countervailing duty statutes], Commerce may not abuse its discretion and its choice of methodology may not be arbitrary." *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 996–998, 834 F. Supp. 413, 418–19 (1993) (citing (*NTN Bearing Corp. of America v. United States*, 14 CIT 623, 634, 747 F. Supp. 726, 736 (1990)). Rather, "an agency must either conform itself to its prior decisions or explain the reasons for its departure." *Id.* at 418. If Commerce does decide to depart from its practice, it is required to provide a reasonable explanation for doing so. *See id.* at 419 (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)).

Section 1675(a)(2)(A) provides that, when conducting an administrative review of an AD order, Commerce shall determine "(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A). This directive reflects Commerce's authorization under 19 U.S.C. § 1673(1) to impose antidumping duties, in an amount equal to the amount by which normal

[3] Hualing cites particularly to the first sentence of this subsection which reads: "Any weighted average dumping margin or individual countervailing duty rate determined for an exporter or producer in a review conducted under clause (i) shall be based solely on the bona fide United States sales of an exporter or producer, as the case may be, made during the period covered by the review." 19 U.S.C. § 1675(a)(2)(B)(iv) (2018). The court need not decide what this means for a NSR, because it is not the decision as to Hualing's NSR that is before the court, as indicated.

value exceeds the export price (or constructed price), on "a class or kind of foreign merchandise" that it determines "is being, or is likely to be, sold in the United States at less than its fair value . . . ." 19 U.S.C. § 1673(1) (2018).

Section 1675(a)(2)(A) is broad enough to accommodate Commerce's authority to examine which sales it will consider for purposes of establishing a dumping margin in an administrative review in some circumstances. Given 19 U.S.C. §§ 1675(a)(2)(A) and 1677a's silence with respect to the issue of what constitutes a sale, it is permissible for Commerce to disregard sales that are not bona fide in an effort to provide a dumping margin that suitably approximates an exporter or producer's selling practices. *See* 19 U.S.C. §§ 1675, 1677a. Any limitation on Commerce's ability to analyze the bona fides of a sale in the context of a NSR does not, on its own, preclude Commerce's authority to do so in a basic administrative review. *See Novolipetsk Steel Pub. Joint Stock Co. v. United States*, 483 F. Supp. 3d 1281, 1287 (CIT 2020).[4] Moreover, "a single sale transaction may warrant further scrutiny because there are fewer transactions from which to draw inferences about the exporter or producer's selling practices." *Id.* at 1288. "Thus, given its authority to disregard transactions that do not constitute bona fide sales, Commerce's practice of examining a single sale transaction is reasonable in an administrative review." *Id.*

Here, Commerce permissibly evaluated the bona fides surrounding Hualing's sale. *See Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 29 CIT 603, 607–611, 374 F. Supp. 2d 1333, 1337–1340 (2005). Commerce had already analyzed Hualing's sale during the NSR. *See Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Recission of Antidumping Duty New Shipper Review; 2020*, 86 Fed. Reg. 62,788 (Dep't Commerce Nov. 12, 2021). Commerce had likewise gathered information regarding Hualing's sale via its questionnaire responses. *See Dalian Hualing Wood Co., Ltd. Section A Questionnaire Response & Voluntary Response Request*, C.R. 67–71, P.R. 147 (Sept. 1, 2021); *Dalian Hualing Wood Co., Ltd. Voluntary Section C & D Questionnaire Response*, C.R. 74–76, P.R. 159–160 (Sept. 17, 2021); *Dalian Hualing Wood Co., Ltd. Voluntary Supplemental Response*, C.R. 118–122, P.R. 211 (Dec. 30, 2021). Thus, it was permissible for Commerce to consider this

[4] The court continues to recognize the bona fide sale test as a valid exercise of Commerce's authority. *See, e.g.*, *Windmill Int'l Pte., Ltd. v. United States*, 26 CIT 221, 230, 193 F. Supp. 2d 1303, 1312 (2002); *Am. Silicon Techs. v. United States*, 24 CIT 612, 615–616, 110 F. Supp. 2d 992, 995 (2000).

information when reviewing Hualing's sale.[5] When Hualing filed a NSR, "it became subject to the potential negative impact of that review on the administrative review." *See Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1335 (CIT 2015) (citing 19 C.F.R. §§ 351.214(i), 351.213(h) (2014)). Assuming Commerce's determination is supported by substantial evidence, Commerce acted within its authority to rescind Hualing's AR when it found Hualing's only sale to be non-bona fide. *See id.* ("Commerce 'may rescind an administrative review . . . if [Commerce] concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise.'").

III. Commerce's bona fide analysis was supported by substantial evidence

The court will now turn to the merits of the bona fide sales analysis itself. Hualing asks that the court hold Commerce's bona fide analysis in the AD AR unsupported by substantial evidence and otherwise not in accordance with law. Hualing Br. at 24–46. Commerce's primary basis for finding Hualing's sale non-bona fide was that the ADA designation and purported higher purchase and sale prices rendered it "not representative of Hualing's future selling practices." *See I&D Memo* at 21.

In determining whether a company's sales are bona fide, Commerce weighs "the totality of circumstances," including such factors as (i) the prices of such sales; (ii) whether such sales were made in commercial quantities; (iii) the timing of such sales; (iv) the expenses arising from such sales; (v) whether the subject merchandise involved in such sales was resold in the United States at a profit; (vi) whether such sales were made on an arms-length basis; and (vii) any other factor the agency finds relevant. 19 U.S.C. § 1675(a)(2)(B)(iv).[6] Commerce uses the bona fide sales test to exclude sales that are distortive or not indicative of future commercial behavior. *Hebei*, 374 F. Supp. 2d at 1339, 1342. "[A] sale is excluded only when its inclusion would lead to an unrepresentative price comparison, thus frustrating the 'apples to apples' comparison goal of the antidumping laws.'" *FAG U.K. Ltd. v. United States*, 20 CIT 1277, 1282, 945 F. Supp. 260, 265 (1996).

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[5] Once Commerce has information concerning a company's sales, it cannot ignore that relevant information. *See Floral Trade Council of Davis v. United States*, 13 CIT 242, 242, 709 F. Supp. 229, 230 (1989).

[6] 19 U.S.C. § 1675(a)(2)(B)(iv) codifies these seven factors an administering authority considers in the context of a NSR. For general purposes, Commerce looks to this statute when conducting a bona fide sales analysis. *See Foshan Nanhai Jiujiang Quan Li Spring Hardware Factory v. United States*, 37 CIT 1023, 1024, 920 F. Supp. 2d 1350, 1353 (2013) (citation omitted).

Commerce found Hualing's single sale to be not bona fide and therefore rescinded Hualing's AR based upon an analysis of these seven factors. Beginning with price, Commerce examined several different sets of data. First, Commerce compared import data from U.S. Customs and Border Protection ("CBP") to Hualing's sale. *Preliminary Bona Fides Sale Analysis* at 4. Hualing's average unit value ("AUV") was multiple times[7] higher than the AUV of cabinets imported from China into the United States within the same Harmonized Tariff Schedule ("HTS") number. *Id.* at 4–5. Commerce acknowledged that although Hualing's sale price appeared atypical on this basis, import values are not necessarily the same as actual sale prices. *Id.* Thus, Commerce further compared Hualing's price to the mandatory respondents' reported quantity and value. *Id.* at 5. Where appropriate, Commerce compared the AUV on a per piece or per kilogram basis between Hualing and the other respondents, finding that "Hualing's price, when compared to other prices on the record . . . is [significantly higher]."[8] *Id.* "Specifically, [Commerce] chose the mandatory respondent's invoice that had the highest reported gross unit prices . . . and compared the average gross unit price of that invoice to Hualing's invoice . . . ." *Id.* Between the two invoices, Hualing's average gross unit price was found to be multiple times higher[9] than that of the mandatory respondent's average gross unit price. *Id.* at 5–6.

Hualing points to the "broad differences in the types of subject merchandise" used in Commerce's data sets and notes others with higher entry prices. Hualing Br. at 26–28; Hualing Reply Br. at 17–19. Specifically, Hualing argues against Commerce's use of broad-based AUV data averages when the subject merchandise is unique. Hualing Br. at 31. Additionally, Hualing claims its price being in the higher ranges[10] does not make the price commercially unreasonable. *Id.* at 32.

In response to claims of uniqueness, and to account for the cost difference between different types of wood, Commerce compared surrogate values placed on the record. *Preliminary Bona Fides Sale Analysis* at 6. The difference in wood types did not account for the "vast difference" in price between Hualing's goods and others'. *U.S. Department of Commerce Memorandum: Final Bona Fides Sale*

[7] Hualing's AUV was [[ ]] higher. *Id.*

[8] Commerce upheld its findings in *U.S. Department of Commerce Memorandum: Final Bona Fides Sale Analysis*, C.R. 142, P.R. 306 (Nov. 2, 2022).

[9] Hualing's average unit gross price was found to be [[ ]] higher. *Id.* at 5–6.

[10] Commerce found Hualing's price to be in the [[ ]]. *U.S. Department of Commerce Memorandum: Final Bona Fides Sale Analysis* at 2, C.R. 142, P.R. 306 (Nov. 2, 2022).

Analysis at 2–5, C.R. 142, P.R. 306 (Nov. 2, 2022) (stating that "Hualing's AUV is [within the highest ranges] of all entries within the POR," and that "[t]he price of Hualing's U.S. sale of cabinets . . . is many multiples the sales price of all other merchandise in other markets" and is thus "atypical"). The court concludes Commerce did not err in finding Hualing's sale price to be exceptionally high which, *inter alia*, raised concerns regarding the bona fide nature of Hualing's sale.

Next, Commerce analyzed the commercial quantity of Hualing's sale. In terms of quantity alone, Hualing's sale was not found to be atypical; however, the fact that Hualing did not make any subsequent sales of subject merchandise "call[ed] into question whether this single sale was made in commercial quantities" and therefore bona fide. *Id.* Hualing asserts that "the singularity of the sale does not evidence whether it was made in commercial quantities," and that the Government acknowledged Hualing's single sale as "not atypical when compared to other sale quantities on the record of this review." Hualing Br. at 37; Hualing Reply Br. at 19.

Extremely low quantity is one indication of a non-bona fide sale; there is no evidence of ongoing cabinet sales by Hualing. Although a single sale alone is not inherently unreasonable, Commerce did not err in finding the quantity of Hualing's sale not indicative of its normal commercial practice.

The timing of Hualing's sale also raised concern for Commerce. "[A] Chinese company that never produced kitchen cabinets before the imposition of the AD order, and made no additional sales since the July 2020 sale is not indicative of a bona fide sale." *Preliminary Bona Fides Sale Analysis* at 7. Hualing claims the timing of its sale was justified by the importer's needs. *See* Hualing Br. at 39. And, like quantity, timing alone does not indicate a sale is not bona fide.[11] *Id.* Hualing asserts that it pursued an opportunity to fulfill an order for ADA compliant kitchen cabinets during the height of the COVID-19 pandemic, when production was globally hampered. *See id.* at 6. Although the court does not necessarily find Hualing's explanation untenable, it was not unreasonable for Commerce to find the timing of the transaction to be indicative of a non-bona fide sale.

Further, Commerce noted that the "lack of profit and atypical sale and resale prices" were not indicative of future commercial selling practices. *Preliminary Bona Fides Sale Analysis* at 8. With the cash deposits included, the U.S. importer would incur a substantial loss.

[11] Apparently, Hualing made sales of wooden boards prior to the AR, but not of cabinets specifically. *See generally Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review*, 85 Fed. Reg. 77,162 (Dep't Commerce Dec. 1, 2020).

Id. The importer then increased the resale price significantly,[12] much beyond the average for subject merchandise. *Id.* Hualing asserts that, with the AD and CVD cash deposits excluded, the importer made a profit. Hualing Br. at 42. Hualing also stressed the increased production costs of specialty, ADA compliant cabinets, and the lack of competition during the pandemic. *Id.* at 43–44. Still, Commerce did not err in finding the likelihood of profit upon resale atypical and not indicative of future selling practices.

Commerce did not find evidence, such as affiliation, to show that the sale negotiations between Hualing and the U.S. importer were other than at arm's length.[13] *Preliminary Bona Fides Sale Analysis* at 9. Nevertheless, Hualing's lack of history of producing "cabinets or 'specialty' cabinets for the U.S. market," combined with the "artificially high price," and that Hualing and the importer "planned in advance of the sale to ship 'specialty' cabinets that purportedly cost 'two or three' times the price of other cabinets," suggested to Commerce that "Hualing's single sale [was] not based on the independent interests of the parties involved and [was] only made for the purpose of establishing an artificial antidumping deposit rate . . . ." *I&D Memo* at 21.

Finally, Commerce found that "Hualing and the U.S. importer were unable to substantiate the sales pricing and cost of production regarding Hualing's ADA cabinets."[14] *Preliminary Bona Fides Sale Analysis* at 10. In sum, Commerce concluded:

> [T]he high price and the low quantity; the timing of the sale; the excessive resale price and lack of profit; and other relevant factors such as the single sale made during the POR, and the "specialty" nature of the product . . . [indicate] that this sale is unlikely to be representative of Hualing's future sales to the U.S. importer or other customers.

Id. at 11. Accordingly, Commerce found Hualing's sale to be not bona fide.

The totality of the factors compels the court to conclude Commerce's analysis in the *Final Results* was reasonable. The unknown nature of Hualing's "specialty" cabinet sale, combined with the exceptionally

[12] The resale price was increased by [[ ]].

[13] That is, based upon the legitimate independent interests of the parties involved. *Novolipetsk*, 483 F. Supp. 3d at 1290.

[14] At oral argument, Hualing asserted Commerce should have notified Hualing regarding any deficient information so that Hualing may have supplemented the record. *See* 19 U.S.C. § 1677m(d). The Government claimed Hualing did not exhaust this argument. Whether or not 19 U.S.C. § 1677m(d) or an exhaustion failure apply, Hualing has not proffered any other information it would have supplied. Therefore, the court will not consider Hualing's argument.

high price and extremely low quantity, tends to support Commerce's conclusion that the transaction was atypical of Hualing's normal business practices. Commerce properly considered the totality of the circumstances surrounding Hualing's sale, including Hualing's contrary arguments, to find Hualing's transaction non-bona fide. Although there might be cause to conclude otherwise, the court cannot conclude that Commerce erred in its analysis. The recission of the AR with respect to Hualing was thereby warranted.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's *Final Results*. Judgment will enter accordingly.

Dated: December 18, 2023
New York, New York

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

Slip Op. 23–180

JING MEI AUTOMOTIVE (USA), Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 13–00321

[On classification of chrome-plated plastic automobile parts, Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted.]

Dated: December 18, 2023

M. Jason Cunningham, Sonnenberg & Cunningham PA, of Naples, FL, argued for Plaintiff Jing Mei Automotive (USA).

Edward F. Kenny, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant. With him on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office, and *Aimee Lee*, Assistant Director. Of counsel were *Michael Heydrich*, Attorney Advisor, and *Edward N. Maurer*, Deputy Assistant Chief Counsel, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Eaton, Judge:

Plaintiff Jing Mei Automotive (USA) ("Plaintiff" or "Jing Mei") moves for summary judgment pursuant to USCIT Rule 56 to determine the correct tariff duty classification under the Harmonized Tariff Schedule of the United States ("HTSUS")[1] for chrome-plated plastic automobile parts from the People's Republic of China ("China"). *See* 19 U.S.C. § 1202 (2018). Defendant the United States, on behalf of U.S. Customs and Border Protection ("Customs") cross-moves for summary judgment. *See* Pl.'s Mem. Supp. Mot. Summ. J. ("Pl.'s Br."), ECF No. 55; Def.'s Resp. Opp'n Pl.'s Mot. Summ. J. and Supp. Def.'s Cross-Mot. Summ. J. ("Def.'s Br."), ECF No. 61; Pl.'s Resp. Opp'n Def.'s Cross-Mot. Summ. J. ("Pl.'s Resp."), ECF No. 65; Def.'s Reply Supp. Def.'s Cross-Mot. Summ. J. ("Def.'s Reply"), ECF No. 68; Pl.'s Statement of Material Facts Not in Dispute ("Pl.'s SOF"), ECF No. 55–7; Def.'s Resp. Pl.'s Statement of Material Facts Not in Dispute ("Def.'s Resp. SOF"), ECF No. 61; Def.'s Statement of Material Facts Not in Dispute ("Def.'s SOF"), ECF No. 61; Pl.'s Resp. Def.'s Statement of Material Facts Not in Dispute ("Pl.'s Resp. SOF"), ECF No. 65–4.

[1] All citations to the HTSUS refer to the 2012 edition. *See* Summons, ECF No. 1 (indicating that Plaintiff's merchandise was entered in 2011 and 2012). The pertinent tariff provisions in the 2011 edition were unchanged in the 2012 edition.

This opinion concerns Jing Mei's remaining challenge to most[2] of Customs' classifications of the imported merchandise under various provisions of HTSUS chapter 39, which generally covers "plastics and articles thereof," with duties imposed by Customs ranging from 2.5% to 6.5%, *ad valorem*. Jing Mei seeks reliquidation under HTSUS chapter 87,[3] specifically heading 8708, subheading 8708.99.81, at 2.5% duty, *ad valorem*, plus interest. Customs maintains that its classifications were correct.

For the following reasons, Jing Mei's motion for summary judgment is denied, and Customs' cross-motion for summary judgment is granted.

BACKGROUND

At issue here is the proper classification of thirty-three chrome-plated plastic automobile parts imported by Jing Mei from China, as five separate entries, between December 2011 and February 2012. Def.'s Br. at 1; *see* Summons, ECF No. 1. In its complaint, Jing Mei identified each of the thirty-three articles as falling into one of five categories of chrome-plated plastic automobile parts: Category 1 (interior trim), Category 2 (door handles), Category 3 (exterior trim), Category 4 (mirror scalps), and Category 5 (emblems and wheel trim). *See* First Am. Compl. ¶¶ 12–16, ECF No. 39; *see also* Def.'s SOF ¶¶ 1–33; Pl.'s Resp. SOF ¶¶ 1–33. According to Customs' response to Jing Mei's statement of material facts not in dispute:

> The parties agree that the articles within each of the five categories can be properly described as: [Category] (1) knobs, trim rings, bezels, and chicklets designed for the interior of specific makes and models of automobiles, [Category] (2) automotive handles that serve as door opening and locking devices for specific makes and models of motor vehicles, [Category] (3) is a chrome-plated plastic exterior automotive grill, [Category] (4) automotive mirror scalps designed for specific makes and models of automobiles, and [Category] (5) chrome-plated plastic automotive emblems and axle drive covers.

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[2] During oral argument, the parties agreed that automotive emblems and axle drive covers, referred to in this Opinion as "Category 5" articles, are properly classified in chapter 39 ("Plastics and articles thereof"). *See infra* at 9. This opinion also concludes that the proper classification of the Category 4 (mirror scalp) articles is under subheading 8708.29.50.60.

[3] Chapter 87 covers "[v]ehicles other than railway or tramway rolling-stock, and parts and accessories thereof" and includes heading 8708 ("Parts and accessories of . . . motor vehicles"). Regarding the Category 4 (mirror scalps) articles, the dispute is between subheadings of heading 8708, without involving heading 8302 ("Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork" etc.).

Def.'s Resp. SOF ¶ 8.[4] It is evident that the parties agree on what the parts are in all material respects. For ease of explanation the court will generally adopt Plaintiff's shorthand terminology.[5]

Jing Mei entered the subject parts under HTSUS chapter 87, heading 8708, subheading 8708.99.81 as "Parts and accessories of . . . motor vehicles . . . Other . . . Other."[6] Customs, however, disagreed with Jing Mei's entered classification and instead classified most of the parts variously under HTSUS chapter 39 ("Plastics and articles thereof").

On February 22, 2013, Jing Mei filed a protest claiming the subject articles were classifiable as parts of motor vehicles in subheading 8708.99.81.80 and not in the subheadings of chapter 39 ("Plastics and articles thereof"). *See* Summons. Customs denied Jing Mei's protest, after which the company sued. Lengthy discovery followed. After oral argument, the parties submitted a joint stipulation dismissing Jing Mei's claims as to the Category 5 (emblems and wheel trim) articles. *See* Joint Stipulation (Nov. 8, 2022), ECF No. 76.

JURISDICTION AND STANDARD OF REVIEW

The court has subject matter jurisdiction under 28 U.S.C. § 1581(a) and reviews Customs' classification determination *de novo*. *See* 28 U.S.C. § 1581(a) (2018); *see also id.* § 2640(a)(1); *Telebrands Corp. v. United States*, 36 CIT 1231, 1234, 865 F. Supp. 2d 1277, 1279–80 (2012), *aff'd*, 522 F. App'x 915 (Fed. Cir. 2013).

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000) (citing *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999)). In the context of

[4] The imported Category 1–4 articles are manufactured as original equipment for a finished vehicle and are not intended for the aftermarket parts market. *See* Def.'s Br. at 40; Pl.'s Resp. at 1.

[5] The exception is Category 2, for which the court will use "Category 2 (door handles and door handle parts)" as more descriptive.

[6] Chapter 87 covers "[v]ehicles other than railway or tramway rolling-stock, and parts and accessories thereof." Ch. 87, HTSUS. The relevant portions of chapter 87 appear as follows:

8708 Parts and accessories of the motor vehicles of headings 8701 to 8705:

. . . .

8708.99 Other

. . . .

8708.99.81 Other

a customs classification case, summary judgment is appropriate when there is no factual dispute as to the nature of the merchandise in question. *See Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006).

LEGAL FRAMEWORK

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

Classification decisions involve a two-step process by which the court first "ascertain[s] the meaning of the specific terms in the tariff provision" and then "determine[s] whether the goods come within the description of those terms." *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644 (Fed. Cir. 2013) (citation omitted). The first step is a question of law; the second is a question of fact. *Id.* If there is no factual dispute regarding what the merchandise is—as is the case here—"the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions," and the issue collapses entirely into a question of law ripe for summary judgment.[7] *Faus Grp., Inc. v. United States*, 581 F.3d 1369, 1372 (Fed. Cir. 2009) (first citing *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999); and then citing *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998)); *see Cummins*, 454 F.3d at 1363.

The General Rules of Interpretation ("GRI") and the Additional United States Rules of Interpretation govern classifications of imported goods under the HTSUS. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). To determine the proper heading, most classification cases do not require the court to go beyond GRI 1.[8] As to the selection of the proper heading, "in every

[7] The parties do not dispute that the imported articles are chrome-plated parts, of plastic, for automobiles. Pl.'s SOF ¶ 12; Def.'s SOF ¶¶ 1–35.

[8] GRI 1 provides:

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

GRI 1, HTSUS.

case a product must first be classified to its appropriate [heading with] noaccount being taken of the terms of any lower-level subdivisions." *Better Home Plastics Corp. v. United States*, 20 CIT 221, 223, 916 F. Supp. 1265, 1267 (1996), *aff'd*, 119 F.3d 969 (Fed. Cir. 1997); s*ee also Telebrands Corp.*, 36 CIT at 1235, 865 F. Supp. 2d at 1280. If a good is not classifiable pursuant to GRI 1, and if the headings and notes do not require otherwise, then the other GRIs will be considered in numerical order. *See Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1163 (Fed. Cir. 2017) ("The GRI apply in numerical order, meaning that subsequent rules are inapplicable if a preceding rule provides proper classification." (citation omitted)); *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). In summary, a proper classification analysis starts with the terms of the headings, not the subheadings. *See Orlando Food*, 140 F.3d at 1440. In other words, a subheading cannot expand the plain meaning of the terms of a heading. *See Schlumberger Tech. Corp.*, 845 F.3d at 1163.

Under GRI 1, the court determines the appropriate classification of merchandise "according to the terms of the headings[9] and any relative section or chapter notes." GRI 1, HTSUS.[10]

For aid in interpretation, a court may rely on its own understanding of any terms undefined in the HTSUS or consult other reliable information sources to ascertain the common meaning of such terms. *See Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999). In such interpretation, the HTSUS section and chapter notes "are not optional interpretive rules" but instead have the force of statutory law. *Aves. in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005) (quoting *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 926 (Fed. Cir. 2003)). That is, the HTSUS section and chapter notes are legally binding. *See Home Depot U.S.A., Inc. v. United States*, 915 F.3d 1374, 1377 (Fed. Cir. 2019).

To determine the proper subheading, a court looks to GRI 6: "the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to [GRIs 1–5],

[9] ["The first four digits of an HTSUS provision constitute the heading, whereas the remaining digits reflect subheadings." *Schlumberger Tech. Corp.*, 845 F.3d at 1163 n.4.]

[10] "[T]he terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification." *Telebrands Corp.*, 36 CIT at 1235, 865 F. Supp. 2d at 1280.

on the understanding that only subheadings at the same level are comparable."[11] GRI 6, HTSUS.

In addition, "the court also may consider the Explanatory Notes to the Harmonized Commodity Description and Coding System [("HTS")], developed by the World Customs Organization." *Rubies Costume Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1145, 1154 (2017) (citation omitted), *aff'd*, 922 F.3d 1337 (Fed. Cir. 2019). The Explanatory Notes, unlike the section and chapter notes, are not legally binding or dispositive, but "may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *Aves. in Leather, Inc.*, 423 F.3d at 1334 (citing *JVC Co. of Am.*, 234 F.3d at 1352).

DISCUSSION

At entry, Customs classified the Category 1 (interior trim), Category 2 (door handles and door handle parts), and Category 3 (exterior trim) articles under chapter 39 ("Plastics and articles thereof"), heading 3926 ("Other articles of plastics"). The specific subheadings employed were 3926.30.50[12] for the Category 1 (interior trim) and Category 3 (exterior trim) articles, and 3926.30.10[13] for the Category 2 (door handles and door handle parts) articles. *See* Def.'s Reply Br. at 3. Customs also classified the Category 4 (mirror scalps) articles under subheading 8708.29.50. *Id.* at 2.

Jing Mei contests those classifications, arguing that all its entries should be classified within chapter 87 ("Vehicles other than railway or tramway rolling-stock, and parts and accessories thereof") in heading 8708 ("Parts and accessories of . . . motor vehicles"), subheading 8708.99.81 ("Other"). Pl.'s Br. at 12, 36.

With respect to the Category 4 (mirror scalps) articles, only the subheading level of classification remains in dispute. Jing Mei offers that it would accept Customs' preferred subheading 8708.29.50 ("Parts and accessories of . . . motor vehicles . . . Other parts and accessories of bodies (including cabs) . . . Other . . . Other"), Transcript of Oral Argument (Oct. 4, 2021) ("Tr.") at 6:14–18, ECF No. 73, but it

[11] In full, GRI 6 provides:

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

GRI 6, HTSUS.

[12] HTSUS subheading 3926.30.50 covers "Other articles of plastics . . . Fittings for . . . coachwork . . . Other."

[13] HTSUS subheading 3926.30.10 covers "Other articles of plastics . . . Fittings for . . . coachwork . . . Handles and knobs."

argues for subheading 8708.99.81.80 ("Parts and accessories of . . . motor vehicles . . . Other . . . Other . . . Other") as the proper classification, *see id.* at 6:18–20; Pl.'s Br. at 4, 24.

Regarding the Category 5 (emblems and wheel trim) articles, Jing Mei has conceded that the emblems were properly classified under chapter 39, heading 3923, subheading 3926.90.99 as liquidated. *See* Joint Stipulation; *see also* Tr. at 7:21–23. As for the wheel trim, Customs had classified them under subheading 8708.29.50 as "Parts and accessories of . . . motor vehicles . . . Other parts and accessories of bodies (including cabs) . . . Other . . . Other," and Jing Mei agreed to abandon its classification claim with respect to those articles. *See* Joint Stipulation. As such, classification of the Category 5 (emblems and wheel trim) articles is no longer at issue.

The nature of the merchandise is a question of fact, and the photographs and samples of the articles before the court act as a "potent witness" in that regard. *See Simod Am. Corp. v. United States*, 872 F.2d 1572, 1578 (Fed. Cir. 1989) ("[T]he merchandise itself is often a potent witness in classification cases."). The court has examined the articles and finds that they are a "potent witness" as to their respective classifications. *See, e.g.*, *id.*; *G.G. Marck & Assocs., Inc. v. United States*, 39 CIT __, __, No. 08–00306, 2015 WL 3757040, at *9 (June 17, 2015) (not reported in Federal Supplement); *Janex Corp. v. United States*, 80 Cust. Ct. 146, 148 (1978) (not reported in Federal Supplement) ("[S]amples are potent witnesses and have great probative effect respecting the purpose for which an article is designed.") (citations omitted).

I. Category 1 (Interior Trim) Articles

The Category 1 (interior trim) articles consist of fourteen items of interior trim parts: knobs,[14] trim rings,[15] cupholder bezels,[16] and

[14] The center chrome slide knob, outer chrome slide knob, and knob insert (center and outer) are small interior trim parts which function to (1) "fill in the surface gaps and join the separate surfaces of the air conditioning register vent tab (or knob)," and (2) "impart a decorative chrome trim which finishes the interior appearance of the cabin." Def.'s SOF ¶¶ 8–10. The knob insert additionally functions to "eliminate rattle between parts." *Id.* ¶ 8.

[15] The chrome trim ring with tape and trim ring console shifter are small interior trim parts that function to (1) "cover the gap between PRNDL [Park Reverse Neutral Drive Low] shifter assembly and the surrounding console surface," (2) "eliminate rattles between PRNDL and surrounding cover," and (3) "impart a decorative appearance." Def.'s SOF ¶¶ 1, 3. The escut console is an interior trim part that functions to "fill in the surface gaps and join the separate surfaces between the center console knob and the surrounding center console surface." *Id.* ¶ 5. They, too, are also intended to eliminate rattle between parts and provide a decorative chrome finish. *See id.*

[16] The cupholder chrome bezel and QW cupholder are interior trim parts that function to (1) "cover otherwise exposed edges of adjacent components," (2) "provide a border element for the console's cupholder assembly," and (3) "impart a decorative finished appearance to the

chicklets[17] designed for the interior of specific makes and models of automobiles. All the Category 1 (interior trim) articles, in one way or another, are designed to fill or cover gaps or join separate interior surfaces of an automobile or eliminate rattle between parts and impart a decorative chrome finish. Def.'s SOF ¶¶ 1–14; Pl.'s Resp. SOF ¶¶ 1–14 (stating that each of the listed interior trim articles "includes the functions described"). The parties agree as to the articles' decorative aspects (or functions) that are imparted to the articles, and courts have considered such decorative, or ornamental, or luxurious, or embellishing aspects to be distinct from practical functionality. *See, e.g.*, *Amcor Flexibles Kreuzlingen AG v. United States*, 46 CIT __, __, 560 F. Supp. 3d 1326, 1336 (2022).

Customs liquidated the Category 1 (interior trim) articles as articles of plastics under chapter 39 of section VII, subheading 3926.30.50 ("Other articles of plastics . . . Fittings for . . . coachwork or the like . . . Other").

Plaintiff Jing Mei maintains that its Category 1 (interior trim) articles should be classified under heading 8708 as "[p]arts and accessories of . . . motor vehicles." *See* Pl.'s Br. at 18. On the other hand, Customs claims that the Category 1 (interior trim) articles cannot be classified under heading 8708 because they are "parts of general use" that are precluded from classification under heading 8708 by the application of note 2(b) to section XVII. *See* Def.'s Br. at 12–13. Section XVII's note 2(b) specifies:

> [T]he expressions "*parts*" and "*parts and accessories*" [found in heading 8708] do not apply to the following articles, whether or not they are identifiable as for the goods of this section [XVII ("Vehicles, aircraft, vessels and associated transport equipment")[18]]: . . . *Parts of general use*, as defined in note 2 to section

cabin interior." Def.'s SOF ¶¶ 11–12. Similarly, the TFP trim bezel chrome functions to "impart a decorative chrome plated border trim to the cup holder assembly which finishes the interior appearance." *Id.* ¶ 4. The shifter chrome bezel is an interior trim part that functions to "cover the gap between PRNDL [Park Reverse Neutral Drive Low] shifter assembly and the surrounding console surface," as well as to "eliminate rattles between PRNDL" and "impart a decorative appearance." *Id.* ¶ 2. While the description of the cupholder bezels does not include the words "cover a gap," examination of the articles reveals that they do cover gaps.

[17] The outer chicklet insert and center chicklet insert are interior trim parts that function to (1) "fill in the surface gaps and join the separate surfaces of the air conditioning register vent tab (or knob)," (2) "eliminate rattle between parts," and (3) "impart a decorative chrome trim which finishes the interior appearance of the cabin." Def.'s SOF ¶¶ 6–7. The RHO trimplate and LHO trimplate are interior trim parts that serve the same function as the aforementioned "chicklets"; however, instead of "fill[ing] in the surface gaps and join-[ing] the separate surfaces of the air conditioning register *vent tab* (*or knob*)," they "fill in the surface gaps and join the separate surfaces of the air conditioning *vent assembly* and the *surrounding dashboard*." *Id.* ¶¶ 13–14 (emphasis added).

[18] Section XVII covers Jing Mei's preferred heading 8708 ("Parts and accessories of . . . motor vehicles").

> XV [("Base metals and articles of base metal")] . . . or *similar goods of plastics* (chapter 39).

Section XVII, Note 2(b), HTSUS (emphasis added).

According to Customs, because Plaintiff's articles are "parts of general use," then they cannot be "parts or accessories" of motor vehicles classifiable under heading 8708, as Jing Mei would wish. *See* Def.'s Br. at 15–30. This is because section XVII's note 2(b) covers all of chapter 87, including Jing Mei's preferred heading 8708. Put another way, to be classifiable under heading 8708, an article must be a specified "part" of a motor vehicle, but section XVII's note 2(b) directs that a "part of general use" cannot be classified as a motor vehicle "part."

"Parts of general use" are defined in section XV's[19] note 2. The definition provides that the term "parts of general use" includes "[a]rticles of heading . . . *8302* . . . ." Section XV, Note 2(c), HTSUS (emphasis added). Section XV's note 2(c) defines *as* "parts of general use" the base metal articles "of heading . . . 8302" and, in addition, section XVII's note 2(b) includes within that definition "*or similar goods of plastics*."

Heading 8302 provides for the classification of "Base metal *mountings, fittings* and *similar articles* suitable for furniture, doors, staircases, windows, blinds, *coachwork*, saddlery, trunks, chests, caskets or the like . . . ." Heading 8302, HTSUS (emphasis added).

It is Customs' position that the Category 1 (interior trim) articles are "fittings" because they "function to fit, join, adjust, or adapt other parts together, and are also something used in *fitting up* an automobile: *i.e*. an [automobile] accessory, adjunct, or attachment." Def.'s Br. at 24 (emphasis added). Consequently, for Customs, the Category 1 (interior trim) articles are "fittings" of heading 8302. *See id.* at 28–30. Customs further argues that the "fittings" function as "similar goods" of plastics as those of the base metal fittings and mountings found under heading 8302 ("fittings," "mountings," or "similar articles"). *See* Def.'s Reply at 19 ("[I]t is the qualities of [the] plastic component of the parts at issue here, i.e., [their] light weight and strength[,] that made plastic auto parts so important to the auto industry."). Because section XVII's note 2(b) defines such articles as "[p]arts of general use," Customs contends that the Category 1 (interior trim) articles, by virtue of being "parts of general use," are precluded from classification under Jing Mei's preferred chapter 87 by section XVII's note 2(b). *Id.* at 4.

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[19] Section XV covers "[b]ase metals and articles of base metal."

In addition, Customs seems to say that the Category 1 (interior trim) articles are also "like" mountings of heading 8302. *See*, *e.g.*, Def.'s Br. at 22 ("The Category 1 Plastic Trim Products Are Like Fittings *And Mountings* For Coachwork of Heading 8302" (emphasis added)). While it does not elaborate on that claim, it is apparent that Customs' contention is that at least some of the Category 1 (interior trim) articles are mountings, and thus also would fall under heading 8302, so the court will consider this claim too. That is because mountings, as "parts of general use," are excluded from classification under chapter 87.

For its part, Jing Mei responds: (1) that the Category 1 (interior trim) articles are properly classifiable under heading 8708 as "[p]arts and accessories of . . . motor vehicles . . ." and (2) that they cannot be "fittings" of the type described by heading 8302 because the Category 1 (interior trim) articles do not "fit" anything within the "plain" meaning of the term, and if they do not "fit" they cannot be fittings. *See* Pl.'s Br. at 19, 22. Jing Mei emphasizes that the Category 1 (interior trim) articles consist of knobs,[20] trim rings, cupholder bezels, chicklets and the like, and it claims that nothing in the record indicates that these articles function as fittings or as mountings. "They do not join or fit items together like a pipe fitting, and [although] they are 'mounted' into the vehicle, [they are] not a mounting or setting for another part of the vehicle." *See id.* at 23. Jing Mei further contends that articles included within the term "fittings" do not commonly or consistently include gap-filling or edge-joining articles. Pl.'s Resp. at 18. Therefore, Jing Mei reasons, Customs' argument that the articles are fittings of heading 8302—because they "fit" into spaces for which they are designed—is an argument that "goes too far." *Id.*

Similarly, Jing Mei contends that the Category 1 (interior trim) articles are not "mountings" of heading 8302 because "[t]hey do not serve the function of mounting, backing, supporting, or setting other parts." Pl.'s Br. at 19.

Jing Mei maintains that, because the Category 1 (interior trim) articles are neither fittings nor mountings, section XVII's note 2(b), precluding "[p]arts of general use" from classification under heading 8708, is inapplicable. *Id.* at 20–23.

At the outset of its arguments, Jing Mei addresses *Honda of America Manufacturing, Inc. v. United States*, 607 F.3d 771 (Fed. Cir.

[20] The "knobs" are not knobs as might be otherwise thought. They are small interior trim parts which function to (1) "fit onto and adjust the air conditioning register vents" and (2) "impart a decorative finished appearance to the cabin interior." *See* Def.'s SOF ¶¶ 9–10.

2010), which provides relevant guidance for determining when imported automotive parts should be classified under HTSUS chapter 87 or are excluded therefrom as "parts of general use." *See* Pl.'s Br. at 13–19. The issue in *Honda* was the classification of imported hollow oil bolts used in cars and motorcycles. The bolts "connect[ed] fluid lines to brake master cylinders or transmission cases, allowing fluid to flow through [the bolt] without leaking." *Honda*, 607 F.3d at 772. Like the present case, *Honda* focused on whether the imported bolts were precluded from classification under chapter 87 ("Vehicles . . . and parts and accessories thereof") by operation of section XV's note 2(a) as "parts of general use." *Id.* at 772–73. Section XV's note 2(a) defines as "parts of general use" articles of heading 7318, which parallels section XV's note 2(c)'s definition of heading 8302 articles as "parts of general use," as relevant in this case. The Federal Circuit concluded that the bolts were not properly classifiable under heading 8708 as "[p]arts and accessories of . . . motor vehicles" and instead directed classification of the articles as screws or bolts under subheading 7318.15.80, an *eo nomine* provision for "[s]crews, bolts, . . . and similar articles, of iron or steel . . . [t]hreaded articles . . . [h]aving shanks or threads with a diameter of 6 mm or more." *Id.* at 772, 776.

The *Honda* Court reached this conclusion by agreeing with the lower court that when section XVII's note 2(b) comes into play, the "initial test" is to determine whether the "parts of general use" provision(s) cover the imported articles. *See id.* at 774; *see also Honda of Am. Mfg., Inc. v. United States*, 33 CIT 649, 652, 625 F. Supp. 2d 1324, 1327 (2009). In other words, it should first be determined if the articles are "parts of general use" and thus excluded from classification under chapter 87. *Honda*, 607 F.3d at 774 ("If the oil bolts are parts of general use, then they cannot fall under Honda's proposed subheadings."). The articles in *Honda* were colorably classifiable under both headings 8708 and 7318, *id.* at 773, but there was no dispute that the bolts had the characteristics of "parts of general use." *Id.* at 775. Ultimately, the Federal Circuit concluded that, because the imported bolts were "parts of general use," they were excluded from classification under chapter 87. *Id.* at 776.

Jing Mei seeks to distinguish *Honda* from its own case. First, it argues that Customs' preferred HTSUS chapter 39, covering the heading and subheadings for the "articles of plastics," is subject to chapter 39's note 2(t).[21] *See* Pl.'s Resp. at 10. Chapter 39's note 2(t) specifically excludes from classification under chapter 39 "Parts of . .

[21] Note 2(t) provides: "This Chapter [chapter 39] does not cover . . . Parts of . . . vehicles of section XVII."

. *vehicles* of section XVII" ("Vehicles, aircraft, vessels and associated transport equipment"). Section XVII covers chapter 87 and heading 8708 ("Parts and accessories of . . . motor vehicles"). According to Jing Mei, because (1) the Category 1 (interior trim) articles are clearly parts of motor vehicles and (2) are not fittings or mountings, chapter 39's note 2(t) directs their classification under heading 8708:

> Importantly, a distinction between the GRI(1) analysis in *Honda* and the present case is that in "clarifying the relationship" between the competing provisions in the present case, the relationship is more clearly defined by note [2](t) of chapter 39 than it was in the *Honda* case. While HTSUS chapter 39's note [2](t) in the present case before the Court specifically excludes ["][p]arts of aircraft or vehicles of section XVII," and sends them back to Chapter 87, *Honda's* competing provision . . . had no such similar exclusionary note to send the analysis back to Chapter 87.
>
> . . . .
>
> With the guidance provided by key judicial precedent [, *Honda*], this Court may apply a GRI(1) analysis by applying the limit terms "mounting" and "fitting" of HTSUS 8302 to articles within categories 1 through 4 in this case, which results in classification under HTSUS 8708.99.8180. In the present case, the additional exclusionary language of Chapter 39's note [2](t) to exclude automotive parts of Chapter 87; and the additional words of limitation that apply to HTSUS heading 8302's "mountings" and "fittings" favor classification of categories 1 to 4 of the subject articles because . . . they are (1) not fittings nor mountings within the plain meaning of those terms, (2) even if they were mountings or fittings, they are not "accessory" fittings or mountings to which the definition of "parts of general use["]is limited, and (3) they are not of the same class or kind of accessory fittings or mountings that qualify as "parts of general use" under an ejusdem generis analysis required by applicable precedent.

Pl.'s Br. at 15, 18–19. In other words, for Jing Mei the application of chapter 39's exclusionary note 2(t), and the "limited" definition of fittings and mountings of heading 8302, in this instance results in classification under subheading 8708.99.81.80.[22]

[22] As noted, section XVII provides for the classification of "[v]ehicles, aircraft, vessels and associated transport equipment" and covers chapter 87 ("Vehicles other than railway or tramway rolling-stock, and parts and accessories thereof"), which includes heading 8708 ("Parts and accessories of . . . motor vehicles").

Second, Jing Mei insists that in *Honda*, heading 7318 provided *eo nomine* for "bolts" and "screws" without limitation. For Jing Mei, heading 8302 (the heading that is defined by section XV's note 2(c) as "parts of general use"), in the present case, provides *eo nomine* for "mountings and fittings" *with* limitation, i.e., heading 8302 ("Base metal mountings, fittings and similar articles") must be "*suitable* for furniture, doors, staircases, windows, blinds, *coachwork*, saddlery, trunks, chests, caskets or the like." Pl.'s Br. at 15–16 (emphasis added).

In making its argument, Jing Mei draws attention to what it calls the "limitation" expressed in Explanatory Note[23] 83.02:

> This heading [8302 ("Base metal mountings, fittings and similar articles," etc.)] covers general purpose classes of base metal *accessory* fittings and mountings, such as are used largely on furniture, doors, windows, *coachwork*, etc. Goods within such general classes remain in this heading even if they are designed for particular uses (e.g., door handles or hinges for automobiles). *The heading* ***does not****, however,* ***extend*** *to goods forming an essential part of the structure* of the article, such as window frames or swivel devices for revolving chairs.

4 EXPLANATORY NOTES (World Customs Org. 4th ed. 2007) Note 83.02, HTS (emphasis added). The court observes that the "body" or coachwork of an automobile is the main supporting structure of the vehicle, to which all other components are attached. *See, e.g.*, Def.'s Br. at 24 ("[T]he term 'coachwork' refers to the design or work related to the body of an automobile."); *cf. id.* at 40 (asserting that the rear drive axle cover "fits on the axle end and not on the body of the vehicle.").

According to Jing Mei, Explanatory Note 83.02 directs that heading 8302 only covers *accessory* fittings, and mountings, and since the Category 1 (interior trim) articles are not accessories, they are not properly classifiable under that heading. *See* Pl.'s Br. at 27. Jing Mei insists that because its articles consist of parts for automobiles, they cannot be considered mere "accessory" fittings of heading 8302:

> This is a peculiar oversight by [Customs to classifying its Category 1 (interior trim) articles] because, as an important side note, the term "accessory," as used in [Explanatory Note 83.02], . . . *further narrows* the interpretation of the terms, "mounting"

[23] Worth repeating here is that the Explanatory Notes (unlike the section and chapter notes) are not legally binding or dispositive, but "may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *Aves. in Leather*, 423 F.3d at 1334 (citation omitted).

> and "fitting." [Customs'] own Informed Compliance Publication[24] . . . confirms that the 8302 EN further narrows the meaning of "mountings" and "fittings" under HTSUS 8302 that those terms are limited to *accessory* fittings and *accessory* mountings.

Id. at 26 (emphasis added). As noted, articles classifiable under heading 8302 as "parts of general use" are precluded from classification under heading 8708. Jing Mei maintains that heading 8302 is not intended to cover *all* "fittings" and "mountings" and "similar articles," but only those that are *accessory* fittings and mountings and similar articles, and it claims that its Category 1 (interior trim) articles are not such "accessory" articles. Rather, for Jing Mei the Category 1 (interior trim) articles form an essential part of the structure of a motor vehicle. *See id.* at 28 ("[The articles] function to reflect light for drivers in low light situations, to reduce rattling inside the vehicle, to protect drivers and passengers from sharp surfaces."). Thus, Jing Mei claims that heading 8302 does not describe its Category 1 (interior trim) articles made of plastic. *See id.* at 25–26.

To bolster its case, Jing Mei directs the court's attention to Customs' own Informed Compliance Publication on the subject that requires "fittings" of heading 8302 must have a "secondary, supplementary, or subordinate function," and it asserts that even if the Category 1 (interior trim) articles could be considered a *type* of fitting or mounting, they do not have a "secondary, supplementary, or subordinate function." *See id.* at 26.

Rather, Jing Mei argues, a proper GRI 1 analysis would classify the Category 1 (interior trim) articles as "[p]arts and accessories of . . . motor vehicles" under heading 8708, because the articles are obviously motor vehicle parts by application of the various notes and are not "parts of general use." *See id.* at 18.

For its part, Customs offers its own perspective:

> Explanatory Note 83.02 is best discussed with an understanding of the meaning of the words "general purpose classes" in the phrase "general purpose classes of base metal accessory fittings and mountings. . ." The common meaning of the words "pur-

[24] *See* U.S. CUSTOMS & BORDER PROTECTION, WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: BASE METAL MOUNTINGS AND FITTINGS 12 (2010) ("In addition, the term 'accessory,' (as used in EN 8302) narrows the interpretation of the terms, 'mounting' and 'fitting.' 'Accessory' is defined as 'having a secondary, supplementary, or subordinate function.' *American Heritage Dictionary,* 2nd College Edition, (1982). Therefore, articles covered by heading 8302 must not form an essential part of the structure of an article. Examples of articles that do not fall in heading 8302 are window and door frames and swivel devices for revolving chairs.").

pose," "general purpose" and "class" used in Explanatory Note 83.02 has been defined as follows:

- *Merriam-Webster Lerner's Dictionary* . . . defines the term "purpose" as "the reason why something is done or used: the aim or intention of something. able to be used for many purposes: not limited to a single purpose"[;]
- *Merriam-Webster Lerner's Dictionary* . . . defines the term "general-purpose" as "able to be used for many purposes: not limited to a single purpose"[;]
- *Merriam-Webster Lerner's Dictionary* . . . defines the term "class" as: 4 a: a group of people or things that are similar in some way. - Do you have a license to drive this class of vehicle? - a new class [=kind, type] of nuclear submarine[.]

As the above definitions show, the phrase "general purpose classes" means a group of articles with some commonality which have more than one purpose or reason for being used. The Category 1 parts meet the definition of general purpose classes of goods as they are in the class of goods collectively identified as "Interior Trim," as discussed above, and they each have more than one use, *i.e.* 1) provide decoration or ornamentation, and 2) they fit, join, adjust, or adapt other parts or edges together to achieve a finished appearance and 3) eliminate rattling sounds.

Additionally, Explanatory Note 83.02 further provides "[t]he heading [83.02, HTS] does not, however, extend to goods forming an essential part of the structure of the article, such as window frames or swivel devices for revolving chairs." [Jing Mei]'s interpretation of an "accessory" as having a secondary supplementary or subordinate function, comports with the Explanatory Note. Further, the Federal Circuit in analyzing the wording from this same Explanatory Note 83.02 . . . stated the following:

> This provision draws a sharp distinction between "general purpose . . . accessory fittings and mountings," which fall within the scope of heading 8302 and "goods forming an essential part of the structure of [an] article," which do not.

Def.'s Br. at 27–28 (quoting *Container Store v. United States*, 864 F.3d 1326, 1331 (Fed. Cir. 2017)).

The court finds that Jing Mei's Category 1 (interior trim) articles are not classifiable under heading 8708 (as Jing Mei would wish). While an initial application of GRI 1's operative phrase "classification shall be determined according to the terms of the headings" would

appear to direct classification of the articles under heading 8708 as "Parts and accessories of . . . motor vehicles" of section XVII, the second phrase of GRI 1 prohibits classification under that heading. The second phrase of GRI 1 adds that, in addition to "the terms of the headings," classification shall be in accordance with "any relative section or chapter notes." Customs is correct to cite and quote section XVII's[25] ("Vehicles, aircraft, vessels and associated transport equipment") note 2(b) which eliminates from the definition of "parts" found in heading 8708 (i.e., "*Parts* and accessories of . . . motor vehicles") those that are "parts of general use." It is also correct to cite section XV's ("Base metals and articles of base metal") note 2(c), which defines as "parts of general use" articles of heading 8302 (and including "similar goods of plastics" of chapter 39 pursuant to section XVII's note 2(b)). Thus, even though it may at first appear that heading 8708 covers all "parts" for automobiles, section XVII's note 2(b) acts as a limitation on just what "parts" of motor vehicles that heading covers by eliminating "parts of general use."

Jing Mei insists that the main point on which the *Honda* case is distinguishable from this case is that *Honda* did not involve an exclusionary note, like chapter 39's note 2(t). Jing Mei claims that chapter 39's note 2(t) prevents characterization of its Category 1 (interior trim) articles as "parts of general use." *See* Pl.'s Br. at 18–24; Pl.'s Resp. at 10.

As an initial matter, it is important to note that the *Honda* Court concluded that "an article's specialization for vehicles does not preclude its classification as a part of general use." *Honda*, 607 F.3d at 774. Thus, the fact that the Category 1 (interior trim) articles are designed for specific makes and models of motor vehicles does not prevent them from being "parts of general use." *See id.*

The court observes that articles classifiable under heading 8302 include "fittings," "mountings," or "similar articles"[26] (in this case similar fittings and mountings) that are "suitable for . . . coachwork"—that is, suitable for automobile bodies. The "suitability" of fittings and mountings and similar articles for coachwork implies their functionality (i.e., what their purpose is). The Category 1 (inte-

[25] As noted, section XVII covers Jing Mei's preferred heading 8708.

[26] The phrase "similar articles" connotes *ejusdem generis*, a doctrine that ascribes the essential characteristics or purposes that unite a listing of specifics (*seriatim*) to a "catch all" wording or phrase. *See Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994); *see also Ejusdem Generis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *ejusdem generis* as a "canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed"). In this case, *ejusdem generis* implies overlap of functionality between heading 8302 fittings and heading 8302 mountings "and similar articles."

rior trim) articles were designed to be attached to coachwork and thus satisfy that portion of the definition.

Both parties cite many of the same dictionary definitions and prior Customs rulings relying on them to define the meaning of "fittings" and "mountings" under HTSUS heading 8302. Defendant summarizes those definitions of fittings as:

- *Webster's New World Dictionary*, Third College Edition, defining the term "fitting" as "a small part used to join, adjust, or adapt other parts, as in a system of pipes."
- In HQ 966001, dated October 14, 2003, [Customs] relied upon *Webster's Third New International Dictionary* [(unabridged, 1961)], which generally defines "fitting" as: ["]1 a. something used in fitting up : accessory, adjunct, attachment . . . b. a small often standardized part (as a coupling, valve, gauge)[."]
- "[F]itting" is "a small part used to join, adjust, or adapt other parts, as in a system of pipes 3. [pl.] *the fixtures, furnishings or decoration of* a house, office, *automobile*, etc." HQ W967544, dated June 24, 2005, HQ H025860, dated November 20, 2009, citing *Webster's New World Dictionary*, Second Edition, 1974.

Def.'s Br. at 22–23 (emphasis added). These definitions confirm that, among other things, a "fitting" is a part, usually small, used to join, adjust, or adapt other parts, or is a part used in fitting up a house, office, or automobile, such as an appropriate accessory, attachment, furnishing or decoration.

Both parties also cite many of the same dictionary definitions and prior Customs rulings relying on them to define mountings, for example:

- In HQ 958784, dated May 17, 1996, [Customs] addressed the general meaning of the term, "mounting:" The term "mounting" ("mount") is broadly defined as a frame or support, such as, 'an undercarriage or part on which a device (as a motor or an artillery piece) rests in service,' or '*an attachment for an accessory*.' *Webster's Ninth New Collegiate Dictionary*, pg. 775–776 (1990).
- In HQ 966458, dated June 19, 2003, [Customs] further noted ["]The term 'mounting' is described as 'something serving as a backing, support, setting etc. See *Webster's New World Dictionary of the American Language*, 2nd Edition, p.931 (1974). In addition, *The American Heritage Dictionary* [(4th ed. 2000)] defines 'mounting' as '. . . something that serves as a support setting or backing: mounting for a gem . . . .'"

Id. at 23 (emphasis added). A "mounting" is thus "[s]omething that serves as a mount, support, or setting to anything" and also "[t]hat which is or may be mounted for use or ornament." 10 OXFORD ENGLISH DICTIONARY 17 (2d ed. 1989).[27] "Setting" means "[t]he manner or position in which anything is set, fixed, or placed." 15 OXFORD ENGLISH DICTIONARY 80 (2d ed. 1989). These definitions provide the understanding that a "mounting" is something serving as a backing or support, including a part on which a device rests while in service.

It is important to note, however, that an independent meaning of mounting is an "embellishment." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1478 (1993). An "embellishment" is "[t]hat which embellishes or beautifies, . . . an ornament, decoration, [a] setting off." 5 OXFORD ENGLISH DICTIONARY 161 (2d ed. 1989).[28]

Examination of the submitted photographs depicting the articles installed within automobiles and samples of the Category 1 (interior trim) articles, together with an examination of the sample articles themselves, leads to the conclusion that they are indeed fittings and/or mountings in accordance the above meanings of the terms, though they are primarily fittings.

The Category 1 (interior trim) articles are fittings within the meaning of "fittings" in heading 8302 because they function to fit, join, adjust, or adapt other parts together, for example by filling in surface gaps and joining separate surfaces to eliminate rattle. They are also "fittings" because each chrome-plated plastic trim item of Category 1 is intended to "finish" an automobile from a visual aspect, i.e., a chrome-plated "luxury" accessory, adjunct, or attachment intended to make the vehicle interior more appealing. *See* Def.'s Br. at 24–26. The parties agree that "trim" is itself an industry term that is "common for either decoration or to fill gaps on interior panels In [sic] a vehicle," and that "chrome is thought of to give the appearance of a more high valued product," *see id.* at 25–26 (quoting Tubbs Dep. at 12:4–8, 44:13–19), which is consistent with the meaning of "fittings" as used in heading 8302. Because the Category 1 (interior trim) articles are fittings, they are described by heading 8302. Although Jing Mei argues that the Category 1 (interior trim) articles are not fittings because they are not like pipe fittings, it is apparent that the definition of the word is expansive enough to cover its imported articles. As to Jing Mei's claim that the Category 1 (interior trim)

[27] Since the British English "mountings" is what originated in the HTS, reference to the Oxford English Dictionary is appropriate. *See, e.g.*, *Victoria's Secret Direct, LLC v. United States*, 37 CIT 573, 585–86, 908 F. Supp. 2d 1332, 1345 (2013).

[28] Synonyms for "embellishment" include adornment, decoration, beautifier, garnish, and ornament. *See Embellishment*, MERRIAM-WEBSTER https://www.merriam-webster.com/dictionary/embellishment (last visited Dec. 18, 2023).

articles do not "fit" like a fitting, the examination of the samples of the articles and the parties' papers revealed the opposite. Too, an examination of the Category 1 (interior trim) articles confirms that they do indeed fill gaps although they provide no structural integrity to the body of the motor vehicle to which they are fitted.

To a lesser extent, the Category 1 (interior trim) articles also satisfy the heading 8302 description of "mountings," that serve as embellishments, because they function to provide chrome-plated "luxury" to a vehicle's interior cabin. They are not a "necessity," but (as possibly a subordinate function) they provide decoration and ornamentation—a chrome-plated "luxury" feel, intended to make the vehicle interior more appealing—and are therefore embellishments. Thus, Category 1 (interior trim) mountings are described by heading 8302 and likewise precluded from classification in heading 8708. The significance of the Category 1 (interior trim) articles being primarily described as fittings but to a lesser extent also mountings is that both terms are found in heading 8302, thus confirming that they are the kinds of articles the drafters intended to be covered there. *See Vecoplan, LLC v. United States*, 47 CIT __, Slip Op. 23–173 (Dec. 11, 2023).

As to Jing Mei's argument that Explanatory Note 83.02 and Customs' Informed Compliance Publication "limits" the terms "fittings" and "mountings" to those that are "accessories," the court is unconvinced that the argument supports Jing Mei's case. As Customs points out, the Federal Circuit, in *Container Store*, cited Explanatory Note 83.02 when concluding that heading 8302 "draws a sharp distinction between 'general purpose . . . *accessory* fittings and mountings,' which fall within the scope of heading 8302 and 'goods forming an *essential part* of the structure of [an] article,' which do not." *Container Store*, 864 F.3d at 1331 (emphasis added).[29]

Jing Mei argues that the "limitation" in heading 8302 that Customs acknowledged in its Informed Compliance Publication, to the effect that articles of heading 8302 have a "secondary, supplementary, or subordinate function," means that the Category 1 (interior trim) articles form an "essential" part of a vehicle whose function is in no way "secondary" or "supplementary" or "subordinate." *See* Pl.'s Br. at 26; Pl.'s Resp. at 13 ("[T]he vehicle may not be entered, operated, or exited without functioning door handles."); *see generally id*. at 12–14. The Category 1 (interior trim) articles, however, are accessories and

[29] *See also Peter J. Schweitzer, Inc. v. United States*, 16 Ct. Cust. 285, 292 (1928) ("[W]hether an article is an accessory or an integral part of a machine depends, to a considerable extent, upon its use. If its use is casual, auxiliary, or optional, it is an accessory. If, however, it is used as an essential part, and if the machine is incapable of performing its ordinary and proper functions without it, it will be considered, at least for tariff purposes, as an integral part of the machine.").

are thus non-essential parts of vehicles. While they are certainly useful, they are not essential. They are not a "necessity" of the motor vehicle nor do they provide any structural integrity to it. Examination of the interior trim parts confirms this conclusion, with the photographs and samples of the articles before the court acting as a "potent witness" in that regard. *See Simod Am. Corp.*, 872 F.2d at 1578.

Finally, "parts of general use" provided for in section XVII's note 2(b) include "similar goods of plastics" of chapter 39.

Honda instructs that on a claim for classification in chapter 87, a court must first determine whether the article is precluded from classification thereunder because the article is a "part[] of general use" under note 2 to section XV ("Base metals and articles of base metal"). *See Honda*, 607 F.3d at 773 ("[A]rticles that are 'parts of general use' . . . cannot be classified as 'parts' or 'parts and accessories' under Chapter 87."); *see also* Section XVII, Note 2, HTSUS. As instructed by *Honda*, the court concludes that the Category 1 (interior trim) articles are precluded from classification under heading 8708 by section XVII's note 2(b), because all of them would be classifiable as fittings under heading 8302, and they would be classifiable as mountings under that heading. The Category 1 (interior trim) articles are therefore "parts of general use" as described by note 2(c) to section XV (stating that "parts of general use" include "[a]rticles of heading . . . 8302"). The articles are thus precluded from classification under heading 8708.

Customs argues that the Category 1 (interior trim) articles are properly classifiable under heading 3926, subheading 3926.30 ("*Fittings* for . . . *coachwork* or the like"), because the Category 1 (interior trim) articles are "fittings" suitable for "coachwork." *See, e.g.*, Def.'s Br. at 25, 30. The court agrees.

Because the Category 1 interior trim parts are made up of molded plastic and are similar to fittings and (to a lesser extent) mountings as provided for in heading 8302, they are precluded from classification under heading 8708. Application of GRI 1 demonstrates that all of the Category 1 (interior trim) articles are described under chapter 39, heading 3926, which covers "Other articles of plastics." Moreover, application of GRI 6 demonstrates that the Category 1 (interior trim) articles are best described under subheading 3926.30.50, which covers "Fittings for furniture, coachwork or the like . . . Other."

As discussed above, these articles are "fittings" for "coachwork" as described by the six-digit subheading 3926.30 because they function to fit, join, adjust, or adapt other automobile parts together—for example, by filling in surface gaps and joining separate surfaces to eliminate rattle—and are intended to "finish" an automobile from a

visual aspect, i.e., a chrome-plated "luxury" accessory, adjunct, or attachment intended to make the vehicle interior more appealing. Finally, these Category 1 (interior trim) articles fall within the eight-digit basket subheading 3926.30.50 ("Other") for "Fittings for . . . coachwork" because they are not specifically described by the other eight-digit subheading found under six-digit subheading 3926.30 (e.g., "Handles and knobs"). Accordingly, the Category 1 (interior trim) articles are "similar goods of plastics" under chapter 39 as "fittings" of heading 8302 and are properly classified under HTSUS subheading 3926.30.50. *See* Section XVII, Note 2(b), HTSUS.

II. Category 2 (Door Handles and Door Handle Parts) Articles

The Category 2 (door handles and door handle parts) articles consist of thirteen items of automotive "door handles" or "door handle parts" that serve, or work together with other parts, as the door opening, closing, and latching devices for specific makes and models of motor vehicles.[30] Def.'s SOF ¶¶ 16–28. All the Category 2 (door handle and door handle parts) articles, in one way or another, are designed to form part of the larger door mechanism that works to open and close access to a vehicle. *See id.* Certain of these articles, when combined with other parts, aid in locking and unlocking the vehicle door. *See id.* ¶¶ 27–28. In addition, all the Category 2 articles provide a decorative component (i.e., the chrome-plated luxury look). *See id.* ¶¶ 16–28.

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[30] P415 handle LH, P415 handle RH, DS IS handle-LH, DS IS handle-RH, CD334/8 handle LH, and CD334/8 handle RH are "chrome-plated plastic lever handles" that are "one of a number of parts forming an interior door handle assembly for the interior doors of specific motor vehicles" that also "provide a decorative component for the cabin interior." Def.'s Br. at 5; *see also* Def.'s SOF ¶¶ 16–21.

GMT900 handle ASM-chrome-LH and GMT900 ASM-chrome-RH are "chrome-plated plastic lever handles" that are "one of a number of parts forming an exterior door handle assembly for the exterior doors of specific motor vehicles." Def.'s Br. at 5; *see also* Def.'s SOF ¶¶ 22–23. "When combined with other parts," these handles "form a complete door handle assembly which works to open and close vehicle doors." Def.'s Br. at 5; *see also* Def.'s SOF ¶¶ 22–23. These parts also "provide[] a decorative component for the motor vehicle exterior." Def.'s Br. at 5; *see also* Def.'s SOF ¶¶ 22–23.

GMT900 chassis-LH-RR chrome, GMT900 chassis-RH chrome without key, and GMT900 chassis-LHF chrome with key are "chrome-plated plastic exterior mountings for the exterior door of motor vehicles" and are "one part of the exterior door handle assembly." Def.'s Br. at 5; *see also* Def.'s SOF ¶¶ 24–26. "They are the exterior base structure into which the lever handles fit. When the exterior lever and base mounting are combined, [along with other parts], the whole door handle assembly works to open and close vehicle doors." Def.'s Br. at 5–6; *see also* Def.'s SOF ¶¶ 24–26. These parts also "provide a decorative component for the motor vehicle exterior." Def.'s Br. at 6; *see also* Def.'s SOF ¶¶ 24–26.

CD334/8 lock knob cover RH and CD334/8 lock knob cover LH are "chrome-plate[d] plastic locking lever covers [that] are incorporated into the interior door handle assembly." Def.'s Br. at 6; *see also* Def.'s SOF ¶¶ 27–28. "When installed and connected with other parts, [they] aid in locking the door." Def.'s Br. at 6; *see also* Def.'s SOF ¶¶ 27–28. These parts also "provide a decorative component." Def.'s Br. at 6; *see also* Def.'s SOF ¶¶ 27–28.

Customs classified the Category 2 (door handles and door handle parts) articles under subheading 3926.30.10, HTSUS, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914[31] . . . Fittings for furniture, coachwork or the like . . . Handles and knobs." Because, like the Category 1 (interior trim) articles, Customs found the Category 2 (door handles and door handle parts) articles to be "parts of general use," Customs determined that they too were excluded from classification under Jing Mei's preferred heading 8708 ("Parts and accessories of . . . motor vehicles") by the application of section XVII's note 2(b).

As with the Category 1 (interior trim) articles, Jing Mei argues that the Category 2 (door handles and door handle parts) articles should be classified in chapter 87 under heading 8708, subheading 8708.99.81 ("Parts and accessories of . . . motor vehicles . . . Other . . . Other"). Pl.'s Br. at 35 ("[T]he subject articles are not general use handles and are properly classified under HTSUS 8708.99.8180.").

The analysis for the Category 2 (door handles and door handle parts) articles is analogous to that of the above Category 1 (interior trim) articles. That is, whether the Category 2 (door handles and door handle parts) articles are classifiable under heading 8708 or Customs' preferred heading 3926 depends on whether the articles are "[p]arts and accessories of . . . motor vehicles" or are "parts of general use" provided by note 2(b) to section XVII ("Vehicles, aircraft, vessels and associated transport equipment") and note 2(c) to section XV ("Base metals and articles of base metal"). As with the Category 1 (interior trim) articles, they are "parts of general use" if they are "similar goods of plastics" to the "[b]ase metal mountings, fittings and similar articles suitable for . . . coachwork" described in heading 8302 ("Base metal mountings, fittings and similar articles . . . "). *See* Section XVII, Note 2(b), HTSUS; Section XV, Note 2(c), HTSUS.

Both parties rely on the first paragraph of Explanatory Note 83.02 to support their respective arguments. Explanatory Note 83.02 provides in relevant part:

> [Heading 8302] covers general purpose classes of base metal *accessory fittings* and mountings, such as are used largely on furniture, doors, windows, *coachwork*, etc. Goods within such general classes remain in this heading even if they are designed for particular uses (e.g., *door handles* or hinges *for automobiles*). The heading **does not**, however, **extend** to goods forming an

[31] Chapter 39's note 1 describes headings 3901 to 3914 plastics as covering "those materials . . . which are or have been capable, either at the moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by molding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence."

> essential part of the *structure* of the article, such as window frames or swivel devices for revolving chairs.

EXPLANATORY NOTES, Note 83.02; *see* Pl.'s Br. at 11; Def.'s Br. at 26.

For Customs, this paragraph of Explanatory Note 83.02 explicitly addresses "parts of general use" (i.e., articles described in heading 8302) by explaining that "[g]oods within such general classes [(i.e., parts with general uses)] remain in this heading *even if they are designed for particular uses (**e.g. door handles** or hinges **for automobiles**)*." Def.'s Br. at 32–33 (quoting Explanatory Note 83.02).

Such explicit identification in Explanatory Note 83.02, of "door handles . . . for automobiles," confirms, for Customs, that the Category 2 (door handles and door handle parts) articles are "parts of general use" precluded from classification in heading 8708 ("Parts and accessories of . . . motor vehicles") by section XVII's note 2(b).

For its part, Jing Mei contends that Customs misinterprets Explanatory Note 83.02 to mean that *all* types of handles on a door are "parts of general use" under heading 8302. Pl.'s Br. at 26–27. In arguing for classification in heading 8708, Jing Mei points to the language of Explanatory Note 83.02(C). *See id.* at 11. Explanatory Note 83.02(C) describes heading 8302 as covering:

> (C) **Mountings, fittings and similar articles suitable for motor vehicles** (e.g., motor cars, lorries or motor coaches), **not being** parts or accessories of **Section XVII**.[32] For example: made up ornamental beading strips; foot rests; *grip bars*, *rails and handles*; fittings for blinds (rods, brackets, fastening fittings, spring mechanisms, etc.); interior luggage racks; window opening mechanisms; specialised ash trays; tail-board fastening fittings.

EXPLANATORY NOTES, Note 83.02(C) (emphasis added). Jing Mei argues that Explanatory Note 83.02(C)'s explicit examples of "foot rests" and "grip bars, rails and handles" provide specific and limiting language as to just what constitutes "general purpose" handles classifiable under heading 8302. Pl.'s Resp. Br. at 4–6. Jing Mei argues that only "general purpose" handles with many general uses, such as interior "grip handles" that are typically used for holding or assisting the entering or exiting of the vehicle or hanging (e.g., dry cleaning), or handles attached to the door and do not form an essential part of the structure of an article or a part of the door opening, closing, and locking system, are thus considered "parts of general use" under

[32] Section XVII ("Vehicles, aircraft, vessels and associated transport equipment") covers chapter 87 ("Vehicles other than railway or tramway rolling-stock, and parts and accessories thereof"), within which is Jing Mei's preferred heading 8708.

heading 8302. *See* Pl.'s Br. at 30–31 ("They are general use handles, unlike the articles in this case. They do not act as a lever to engage with the vehicle's opening, closing, or locking mechanisms."); Pl.'s Resp. Br. at 5 ("Heading 8302 applies not to *all* fittings and mountings, not to all fittings and mountings of motor cars, and not to all handles, but only to 'accessory' fittings and mountings comprising a 'general purpose' class of article.").

In addition, Jing Mei cites the first paragraph of Explanatory Note 83.02 (the paragraph relied upon by Customs) as providing that "goods forming an essential part of the structure" are not "parts of general use." Pl.'s Br. at 27.

By comparison, Jing Mei contends the Category 2 (door handles and door handle parts) articles: (1) are "designed for and suitable for use solely with specific makes and models of passenger cars and similar vehicles" and do not have many general uses; (2) are "essential for drivers and passengers to enter the vehicle to drive it and exit the vehicle safely[;]" and (3) are "integrated as a part of the door opening, closing, and locking system." *Id.* at 34. Jing Mei thus contends that the Category 2 (door handles and door handle parts) articles are not "general purpose handles" because they are designed for specific automobiles, have a singular purpose and form an essential part of the structure of the automobile: they "act as a lever to engage with the vehicle's opening, closing, or locking mechanisms." *Id.* at 31.

The court finds Jing Mei's analysis wanting. First, as an initial matter the Federal Circuit has addressed the argument that articles are designed for specific makes and models of automobiles. *See Honda*, 607 F.3d at 774 ("[A]n article's specialization for vehicles does not preclude its classification as a part of general use."). In addition, Jing Mei's argument avoids explicit discussion of the statement in Explanatory Note 83.02 that "[g]oods within such general classes remain in this heading [8302 ("Base metal mountings, fittings and similar articles . . .")] *even if they are designed for particular uses (e.g., door handles or hinges for automobiles*)." *See* EXPLANATORY NOTES, Note 83.02.[33] Although Explanatory Note 83.02(C) references "*grip*" handles as one example of articles that constitute "mountings, fittings and similar articles suitable for motor vehicles" (as stated in subheading 8302.30), they are not the only type of handle referenced. The first paragraph of Explanatory Note 83.02 specifies "*door* handles" (and specifically those "for automobiles") as articles that are to be classified under heading 8302 and are thus "parts of general use." This reference demonstrates that more kinds of handles are

[33] *See also, e.g.*, *Honda*, 607 F.3d at 774 ("[A]n article's specialization for vehicles does not preclude its classification as a part of general use.").

"general purpose" handles that are properly classifiable as fittings and/or mountings under heading 8302 ("Base metal mountings, fittings and similar articles . . .") than Jing Mei believes. The specific reference to "door handles . . . for automobiles" in the first paragraph of Explanatory Note 83.02 confirms the conclusion that the Category 2 (door handles and door handle parts) articles are described by heading 8302.

This is the case despite Jing Mei's argument that the Category 2 (door handles and door handle parts) articles are "notably distinct" because "[t]hey are integrated as a part of the door opening, closing, and locking system, which would not function without [the] proper function of the subject Category 2 handles." Pl.'s Resp. at 8–9. In other words, Jing Mei argues that the Category 2 (door handles and door handle parts) articles are essential to a vehicle's structure and its operation. Because they are "essential," for Jing Mei, they may not be "parts of general use" of heading 8302 by operation of the first paragraph of Explanatory Note 83.02.

Jing Mei is right that one way for base metal "fittings and similar articles suitable for . . . coachwork" to avoid classification under heading 8302 ("Base metal mountings, fittings and similar articles . . .") is for them to form "an *essential* part of the *structure* of the article"—much like the *essential* part of a *structure* provided by "window frames or swivel devices for revolving chairs." EXPLANATORY NOTES, Note 83.02 (emphasis added). That is, to avoid being considered "parts of general use" under heading 8302 (and therefore, classifiable under Customs' preferred chapter 39, heading 3926), Jing Mei must show that the Category 2 (door handles and door handle parts) articles are an essential part of the *structure* of the automobile. Jing Mei cannot do this.

The Federal Circuit has observed that Explanatory Note 83.02 "draws a sharp distinction between 'general purpose . . . accessory fittings and mountings,' which fall within the scope of heading 8302 [("Base metal mountings, fittings and similar articles . . .")] and 'goods forming an essential part of the structure of [an] article,' which do not." *Container Store*, 864 F.3d at 1331. "While a hinge or a knob may be essential to the *operation* of a door, they are not essential parts of the *structure* of the door itself. Items such as hinges and knobs are attached to, or placed on, a door." *Id.* at 1332 (emphasis added).

The *Container Store* Court's holding is instructive here. While the Category 2 (door handles and door handle parts) articles may be essential to the operation of the doors to which they are fitted or mounted, they are not essential to the *structure* of the doors to which they are fitted or mounted. Nor does it matter that the Category 2

(door handles and door handle parts) articles' manufacture is "tightly controlled and subject to stringent safety testing." Pl.'s SOF ¶ 19. This tight control does not mean that the articles are essential to the structure of the doors to which they are fitted or mounted.

That court concludes that, as with the Category 1 (interior trim) articles, the Category 2 (door handles and door handle parts) articles are not classifiable as parts of motor vehicles under heading 8708 ("Parts and accessories of . . . motor vehicles") by operation of section XVII's note 2(b) and note 2(c) to section XV ("Base metals and articles of base metal") (defining as "parts of general use" the base metal articles "of heading . . . 8302"). This leads to the conclusion that the Category 2 (door handles and door handle parts) articles, for purposes of classification, are articles of plastics similar to the fittings and mountings of HTSUS heading 8302. They are therefore parts of general use and excluded from classification under Jing Mei's preferred heading 8708 ("Parts and accessories of . . . motor vehicles").

Because the Category 2 door handle parts are made of plastic and are similar to fittings of heading 8302, they are properly classified under the provision of chapter 39 in which they are best described. Application of GRI 1 shows that the Category 2 (door handles and door handle parts) articles are described under chapter 39, heading 3926, which covers "Other articles of plastics." This is because these articles are articles of plastic that are not specifically provided for elsewhere in the other headings under chapter 39. The Category 2 (door handles and door handle parts) articles are also best described under eight-digit subheading 3926.30.10, which covers "Fittings for . . . coachwork . . . Handles and knobs." Accordingly, the Category 2 (door handles and door handle parts) articles are properly classified under HTSUS subheading 3926.30.10.

III. Category 3 (Exterior Trim) Articles

The Category 3 (exterior trim) articles consist of a single exterior trim part, which is a decorative grill (or grille) surround used to finish the exterior appearance of the vehicle's front end.[34] Def.'s SOF ¶ 15; Pl.'s Resp. SOF ¶ 15. Customs classified the Category 3 (exterior trim) articles under heading 3923, subheading 3923.30.50 as a plastic fitting for coachwork. *See* Def.'s Br. at 31.

The analysis for the Category 3 (exterior trim) articles follows the analysis for the Category 1 (interior trim) articles and Category 2 (door handles and door handle parts) articles, above. Jing Mei's state-

[34] Surround FR grille is an exterior trim part consisting of a chrome-plated plastic decorative border or "surround" trim which finishes the exterior appearance of the vehicle's front end by "fill[ing] in the surface gaps and join[ing] the separate surfaces between the grill and the surface of the front end." Def.'s SOF ¶ 15; Pl.'s Resp. SOF ¶ 15.

ment of uncontested facts states that the grill surround "functions to filter air into the engine for cooling and is part of the vehicle's safety within the 'crumple zone,'" Pl.'s SOF ¶ 23, but these observations do not result in the grill surround being anything other than a fixture or mounting (or "similar article[]") within the meaning of heading 8302 and are thus precluded from classification in chapter 87 by means of section XVII's note 2(b).

Indeed, the Category 3 (exterior trim) articles are fittings because they "1) fill in the surface gaps and join the separate surfaces between the grill and the surface of the front end and 2) impart a decorative chrome appearance for the front end." Def.'s SOF ¶ 15; Pl.'s Resp. SOF ¶ 15. They are also accessory decorative "beading strips" that serve to "fit" up the body of an automobile.[35] *See* Explanatory Note 83.02. Like the Category 1 and 2 articles, it provides no structural integrity to the vehicle itself. It is not necessary to the operation of the vehicle, and it does not actually "filter" air moving towards the engine (it is not, itself, an engine "air filter" in the commonly understood sense of that article). The grill fills gaps and provides a decorative look to the vehicle. *Id.* Accordingly, for the same reasons provided in Section I above, the Category 3 (exterior trim) articles are likewise not classifiable as parts of motor vehicles under 8708 ("Parts and accessories of . . . motor vehicles"). This is because they are fittings and/or mountings within the meaning of heading 8302 and are therefore excluded from classification under heading 8708.

Instead, the Category 3 (exterior trim) articles are properly classified under heading 3926, subheading 3926.30.50 as "Other articles of plastics . . . Fittings for . . . coachwork . . . Other" and are not classifiable elsewhere in the HTSUS.

IV. Category 4 (Mirror Scalps) Articles

The Category 4 (mirror scalps) articles consist of two chrome-plated plastic automotive mirror scalps[36] designed to house electrical and motorized mechanical components of the side view mirrors. Def.'s SOF ¶¶ 29–30; Pl.'s Resp. SOF ¶¶ 29–30. Both parties agree that the

[35] In British English, on which the HTS is modeled, *see* n.27, a "beading" is typically "a narrow strip of some material used for edging or ornamentation." *Beading*, COLLINS DICTIONARY, https://www.collinsdictionary.com/dictionary/english/beading (last visited Dec. 18, 2023); *see also* 2 OXFORD ENGLISH DICTIONARY 12 (2d ed. 1989) ("A bead moulding or edge line. *spec.* in *Arch[itecture]* and *Joinery*, a bead."). Here, the grills are similar to such molding strips of wood, although they are made of plastic.

[36] DS chrome cover cap RH and DS chrome cover cap LH are "chrome-plated plastic side view mirror housing[s]" (known in the automotive supply industry as "scalps"), which "accommodate[] the electrical and motorized mechanical components of side view mirror assemblies and are attached to the side of the vehicle." Def.'s SOF ¶¶ 29–30; Pl.'s Resp. SOF ¶¶ 29–30.

Category 4 (mirror scalps) articles should be classified in chapter 87 under heading 8708 ("Parts and accessories of . . . motor vehicles").[37] During oral argument, they also agreed to stipulate to that effect, but there remained a difference of opinion as to the correct HTSUS subheading. Jing Mei's preferred subheading is 8708.99.81.80 ("Parts and accessories of . . . motor vehicles . . . Other parts and accessories . . . Other . . . Other . . . Other"), and Customs argues for classification under subheading 8708.29.50.60 ("Parts and accessories of . . . motor vehicles . . . Other parts and accessories of bodies (including cabs) . . . Other . . . Other . . .Other"). *See* Tr. at 5:21–24. Since the parties have not docketed a written stipulation as to a precise subheading, classification of the scalps is still a matter for the court to determine. *See Jarvis Clark*, 733 F.2d at 878 (interpreting that 28 U.S.C. § 2643(b) mandates that this Court "reach a correct decision in every case; but the statute leaves to the court the discretion" on how to proceed).

The court looks to GRI 6 to determine whether HTSUS subheading 8708.29.50.60 (Customs' preferred subheading) or 8708.99.81.80 (Jing Mei's preferred subheading) is the correct classification for the Category 4 (mirror scalps) articles. Pursuant to GRI 6, the only question for the court is whether the Category 4 articles are "Parts and accessories of . . . motor vehicles . . . Other parts and accessories . . . Other . . . Other . . . Other" under subheading 8708.99.81.80, or "Parts and accessories of . . . motor vehicles . . . Other parts and accessories of bodies (including cabs) . . . Other . . . Other . . . Other" under subheading 8708.29.50.60. No other provision of the HTSUS appears applicable.

Here, the Category 4 (mirror scalps) articles are chrome-plated plastic side view mirror housings which accommodate or "house" the "electrical and motorized mechanical components of side view mirror assemblies and are *attached to the side of the vehicle*." *See* Def.'s SOF ¶¶ 29–30; Pl.'s Resp. SOF ¶¶ 29–30 (emphasis added). While the Category 4 (mirror scalps) articles could be considered "[o]ther parts and accessories . . ." of motor vehicles under Jing Mei's preferred subheading 8708.99.81.80, they are more specifically described as "[o]ther parts and accessories of bodies" of motor vehicles under Customs' preferred subheading 8708.29.50.60.

The court has observed that the "body" is the main supporting structure of a vehicle, to which all other components are attached. *See, e.g.*, Def.'s Br. at 24, 40. The Category 4 (mirror scalps) articles at issue are described as "parts" that are "attached to the side of the

[37] No argument was made that the Category 4 (mirror scalps) articles should, by operation of section XVII's note 2(b), be excluded from classification under heading 8708 ("Parts and accessories of . . . motor vehicles").

vehicle" (i.e., the "body" of the vehicle). Therefore, because the Category 4 (mirror scalps) articles, as imported, are attached to the side doors (i.e., body) of vehicles, they are classifiable under Customs' preferred subheading 8708.29.50.60 ("Parts and accessories of . . . motor vehicles . . . Other parts and accessories of bodies (including cabs) . . . Other . . . Other . . . Other") rather than under Jing Mei's less specific provision of subheading 8708.99.81.80 ("Parts and accessories of . . . motor vehicles . . . Other parts and accessories . . . Other . . . Other . . . Other"). This is because subheading 8708.29.50.60 specifically describes "Other parts and accessories *of bodies* (including cabs)," and as discussed above, the mirror scalps are indisputably intended to form a part or accessory of a vehicle's body, and subheading 8708.99.81.80 does not. *Cf.* GRI 3 ("When . . . goods are, *prima facie*, classifiable under two or more headings . . . (a) [t]he heading which provides the most specific description shall be preferred to headings providing a more general description."). Indeed, in its brief Jing Mei accedes to classification of the Category 4 mirror scalps under Customs' preferred subheading 8708.29.50.60 as an alternative to its own preferred subheading 8708.99.81.80. *See* Pl.'s Br. at 4 ("[Jing Mei] asserts classification under HTSUS 8708.99.8180 but accepts under 8708.29.5060 in the alternative for the mirror scalps of Category 4 of the Complaint.").

CONCLUSION

In view of the foregoing, judgment for the Defendant will be entered.

Dated: December 18, 2023
New York, New York

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

Slip Op. 23–181

NEXTEEL CO., LTD., Plaintiff, and SEAH STEEL CORPORATION, Consolidated Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, MAVERICK TUBE CORPORATION, AND TENARISBAYCITY, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00083

[Sustaining the U.S. Department of Commerce's fourth remand redetermination following the 2015–2016 administrative review of the antidumping duty order on oil country tubular goods from the Republic of Korea.]

Dated: December 18, 2023

Jeffrey M. Winton, *Amrietha Nellan*, and *Jooyoun Jeong*, Winton & Chapman PLLC, of Washington, D.C., for Consolidated Plaintiff SeAH Steel Corporation.

Claudia Burke, Deputy Director, and *Hardeep K. Josan*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., 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 *Mykhaylo Gryzlov*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Choe-Groves, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") fourth remand redetermination in the administrative review of the antidumping duty order on oil country tubular goods ("OCTG") from the Republic of Korea ("Korea") covering the period from September 1, 2015 to August 31, 2016. *See* Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Fourth Remand Redetermination*"), ECF No. 140–1, pursuant to Order, ECF No. 130; *see also Certain Oil Country Tubular Goods From the Republic of Korea*, 83 Fed. Reg. 17,146 (Dep't of Commerce Apr. 18, 2018) (final results of antidumping duty administrative review and final determination of no shipments; 2015–2016) ("*Final Results*"), and accompanying Issues and Decision Memorandum for the Final Results of the 2015–2016 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea (Apr. 11, 2018) ("Final IDM"), PR 368.[1]

In *NEXTEEL Co. v. United States* ("*NEXTEEL V*"), 47 CIT __, 633 F. Supp. 3d 1190 (2023), the Court remanded for Commerce to reconsider or further discuss the issue of Commerce's calculation and

[1] Citations to the administrative record reflect the public administrative record ("PR") and public fourth remand record ("PRR") document numbers. ECF Nos. 60, 94, 129, 148.

application of the 0.8 threshold in the Cohen's *d* analysis. *NEXTEEL V*, 47 CIT at __, 633 F. Supp. 3d at 1201.

For the following reasons, the Court sustains Commerce's *Fourth Remand Redetermination*.

BACKGROUND

The Court presumes familiarity with the facts and procedural history of this case and recites the facts relevant to the Court's review of the *Fourth Remand Redetermination*. *See NEXTEEL Co. v. United States* ("*NEXTEEL I*"), 43 CIT __, __, 392 F. Supp. 3d 1276, 1283–84 (2019); *NEXTEEL Co. v. United States* ("*NEXTEEL II*"), 44 CIT __, __, 450 F. Supp. 3d 1333, 1336–37 (2020); *NEXTEEL Co. v. United States* ("*NEXTEEL III*"), 44 CIT __, __, 475 F. Supp. 3d 1378, 1379–80 (2020); *NEXTEEL Co. v. United States* ("*NEXTEEL IV*"), 28 F.4th 1226, 1231–33 (Fed. Cir. 2022); *NEXTEEL V*, 47 CIT at __, 633 F. Supp. 3d at 1192–93.

In this administrative review of OCTG from Korea, Commerce selected Plaintiff NEXTEEL Co., Ltd. ("NEXTEEL") and Consolidated Plaintiff SeAH Steel Corporation ("SeAH") as mandatory respondents for individual examination and determined that the Government of Korea's involvement in the Korean electricity market contributed to a particular market situation in Korea during the period of review. *See* Resp. Selection Mem. (Jan. 12, 2017), PR 28; Final IDM at 16–23.

In *NEXTEEL I*, the Court sustained in part and remanded in part the *Final Results*. 43 CIT at __, 392 F. Supp. 3d at 1297; *see* Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Remand Redetermination*"), ECF No. 81–1, pursuant to Order, ECF No. 73. Among the issues that the Court ordered Commerce to reconsider or further explain was the finding of a particular market situation in Korea. *NEXTEEL I*, 43 CIT at __, 392 F. Supp. 3d at 1286–88, 1292–94. In the *Remand Redetermination*, Commerce reviewed the record de novo, provided more explanation, and again determined that a particular market situation in Korea distorted the cost of producing OCTG. *NEXTEEL II*, 44 CIT __, 450 F. Supp. 3d at 1336.

In *NEXTEEL II*, the Court sustained in part and remanded in part the *Remand Redetermination*. *NEXTEEL II*, 44 CIT at __, 450 F. Supp. 3d at 1346– 47; *see* Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Second Remand Redetermination*"), ECF No. 96–1, pursuant to Order, ECF No.95. The Court concluded that Commerce's particular market situation determination was not supported by substantial evidence. *NEXTEEL II*, 44 CIT at __, 450 F. Supp. 3d at 1343.

In *NEXTEEL III*, the Court sustained the *Second Remand Redetermination*, in which Commerce reversed its particular market situation determination and recalculated the margins of NEXTEEL and SeAH without a particular market situation adjustment. *NEXTEEL III*, 44 CIT at __, 475 F. Supp. 3d at 1380.

In *NEXTEEL IV*, the U.S. Court of Appeals for the Federal Circuit ("CAFC") directed the *Second Remand Redetermination* to be remanded for Commerce to further consider whether a particular market situation could be found based on any subset of the factors or other reasoning, and for proceedings to be consistent with the CAFC's decision in *Stupp Corp. v. United States* ("*Stupp III*"), 5 F.4th 1341 (Fed. Cir. 2021). *NEXTEEL IV*, 28 F.4th at 1231 ("[W]e vacated aspects of Commerce's differential pricing analysis [in *Stupp III*] over concerns about Commerce's use of statistical methodologies when certain preconditions for their use are not met. Commerce's analysis here raises identical concerns, so we vacate the trial court's decision upholding the methodology and remand for reconsideration in view of [*Stupp III].*") (internal citation omitted).

In the *Third Remand Redetermination*, Commerce reconsidered the record and determined that substantial evidence did not support the conclusion that a particular market situation existed in Korea during the period of review. *Third Remand Redetermination*, ECF No. 119–1, pursuant to Order, ECF No. 114. Commerce reconsidered the differential pricing analysis, provided further explanation regarding Commerce's application of the Cohen's *d* test to SeAH's U.S. sales, and determined that the weighted-average dumping margins calculated in the *Second Remand Redetermination* would remain the same. *Id.* at 74.

In *NEXTEEL V*, the Court sustained Commerce's determination that the alleged particular market situation did not exist during the period of review in Korea, but remanded Commerce's determination of certain aspects of application of the Cohen's *d* test in light of *Stupp III* because Commerce's explanation did not resolve the CAFC's concerns pertaining to the use of the 0.8 threshold when the statistical assumptions are not observed. *NEXTEEL V*, 47 CIT at __, 633 F. Supp. 3d at 1200–01. The Court also directed SeAH to place on the record the academic literature cited by Commerce in the Final IDM. *Id.* at __, 633 F. Supp. 3d at 1203.

In the *Fourth Remand Redetermination*, Commerce determined that the statistical criteria (*i.e.*, normality of the distribution, equal variances, and roughly the same number of observations) discussed by the CAFC in *Stupp III* do not need to be observed in its application

of the Cohen's *d* test as part of its differential pricing analysis. *Fourth Remand Redetermination* at 5–7. Commerce explained that the academic literature included by Commerce in the Final IDM does not support the claims that Professor Cohen's 0.8 threshold was derived based on the statistical criteria or that the use of the threshold should only be limited to situations when sampled data exhibit a normal distribution or similarly equal variances because there is no express mention that these criteria or assumptions are necessary when examining an entire population, and that any adjustment to the population data would distort the actual population's parameters and is no longer reflective of the whole population. *See id.* at 6–10. Commerce determined that it would not revise the calculation of the weighted-average dumping margins. *Id.* at 22.

Consolidated Plaintiff SeAH filed its comments in opposition, challenging Commerce's application of the Cohen's *d* test in the differential pricing analysis. Cmts. SeAH Steel Corp. Opp'n Commerce's June 27, 2023 Redetermination ("SeAH's Br.") at 5–16, ECF No. 143. Defendant filed its response and argued that the Court should affirm the *Fourth Remand Redetermination*. Def.'s Resp. Cmts. Regarding Remand Redetermination ("Def.'s Br."), ECF No. 146.

JURISDICTION AND STANDARD OF REVIEW

The Court 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 will hold unlawful any determination found to be unsupported by substantial record evidence or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(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. Administrative Exhaustion

Defendant contends that Commerce did not have time to issue draft results of redetermination for SeAH's review and comment because of Commerce's unexpected workload in the months of April and May 2023. Def.'s Br. at 2, 4; *see also* Def.'s Unopposed Mot. Extension Time, ECF No. 138; Order (June 20, 2023), ECF No. 139. SeAH asserts that its brief to the Court is its first opportunity to comment on the remand results and argues that the doctrine of administrative exhaustion is inapplicable because Commerce did not provide a draft

of the *Fourth Remand Redetermination* for its review and comment at the administrative level. SeAH's Br. at 1 n.1.

Before commencing suit in the U.S. Court of International Trade, an aggrieved party must exhaust all administrative remedies available to it. "In any civil action . . . the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013) (citations omitted). There are limited exceptions to the exhaustion requirement. *See Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1145–48, 724 F. Supp. 2d 1327, 1351–53 (2010) (listing "futil[ity] for the party to raise its argument at the administrative level" and issues "fully considered by Commerce" as two generally recognized exceptions to the exhaustion doctrine); *see also Holmes Prod. Corp. v. United States*, 16 CIT 1101, 1104 (1992).

Because Commerce did not issue a draft of the *Fourth Remand Redetermination* on which SeAH could comment, SeAH could not have raised its arguments at the administrative level and therefore did not fail to exhaust its administrative remedies. Thus, SeAH's arguments are not barred by the doctrine of administrative exhaustion.

II. Placement of Academic Material on the Record

Judicial review is generally limited to the administrative record before the agency at the time it rendered its decision. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). "The 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." *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009) (internal quotations and citation omitted).

In its prior opinion, the Court directed SeAH to place on the administrative record copies of academic literature cited by Commerce in the Final IDM. *NEXTEEL V*, 47 CIT at __, 633 F. Supp. 3d at 1203. Commerce confirmed that SeAH placed the academic literature on the administrative record in compliance with the Court's remand. *Fourth Remand Redetermination* at 2, 5; *see also* Letter from Jeffrey M. Winton, Winton & Chapman PLLC, re: Remand Redetermination in the Second Administrative Review of Oil Country Tubular Goods from Korea – Resubmission of Publications Pursuant to Department's May 26 Letter (May 31, 2023) ("SeAH's May 31, 2023 Submission"), PRR 3; Letter from Jeffrey M. Winton, Winton & Chapman PLLC, re:

Remand Redetermination in the Second Administrative Review of Oil Country Tubular Goods from Korea – Resubmission of Publications Pursuant to Department's June 8 Letter (June 12, 2023) ("SeAH's June 12, 2023 Submission"), PRR 10 (collectively, "Academic Literature").

III. Differential Pricing Analysis

A. Legal Framework

When calculating a weighted dumping margin, Commerce may use three methodologies depending on the circumstances: the "average-to-average" (A-to-A) method, the "transaction-to-transaction" (T-to-T) method, or the "average-to-transaction" (A-to-T) method. *See* 19 U.S.C. § 1677f-1(d)(1); 19 CFR § 351.414(b)(1)–(3); *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013). Commerce ordinarily uses an A-to-A comparison of normal values to export prices for comparable merchandise in an investigation when calculating a dumping margin. *See* 19 U.S.C. § 1677f-1(d)(1)(A); 19 C.F.R. § 351.414(b)(1). The A-to-A methodology sometimes fails to detect targeted or masked dumping because a respondent's "sales of low-priced 'dumped' merchandise would be averaged with (and offset by) sales of higher-priced 'masking' merchandise, giving the impression that no dumping was taking place." *Apex Frozen Foods Priv. Ltd. v. United States* ("*Apex*"), 862 F.3d 1337, 1341 (Fed. Cir. 2017). "Targeted dumping" occurs when an exporter sells at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions, and as a result, uses higher-priced products to mask dumped products when Commerce averages the sales using the A-to-A method. *See id.*

Congress has not provided a method for Commerce to use for determining whether a pattern of significantly different prices exists, but the Statement of Administrative Action ("SAA") of the Uruguay Round Agreements Act explains that Commerce should proceed "on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 843 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4178.

Commerce can depart from using the A-to-A methodology and instead compare the weighted average of normal values to the export prices of individual transactions for comparable merchandise using the A-to-T methodology when (1) Commerce finds a pattern of export

prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (2) Commerce explains why such differences cannot be taken into account using the A-to-A methodology. *See* 19 U.S.C. § 1677f-1(d)(1)(B). Commerce has adopted the same basis for applying its A-to-T methodology in administrative reviews. *See JBF RAK LLC v. United States*, 790 F.3d 1358, 1364 (Fed. Cir. 2015).

To determine whether a pattern of significant price differences exists among purchasers, regions, or periods of time, Commerce uses its two-stage differential pricing analysis: first, Commerce applies the "Cohen's *d* test," which measures the degree of price disparity between two groups of sales by calculating the number of standard deviations by which the weighted-average net prices of U.S. sales for a particular purchaser, region, or time period (the test group) differ from the weighted-average net prices of all other U.S. sales of comparable merchandise (the comparison group) to come up with the *d* coefficient; and second, Commerce then applies the "ratio test," which considers the ratio of the sales in the targeted groups that have passed the Cohen's *d* test to the exporter's total U.S. sales to measure the extent of significant price differences. *See Apex*, 862 F.3d at 1341 n.2; Differential Pricing Analysis[:] Request for Comments, 79 Fed. Reg. 26,720, 26,722–23 (Dep't of Commerce May 9, 2014). The coefficient calculated from the first step may be situated within fixed thresholds, being small, medium, or large, and the targeted test groups pass the Cohen's *d* test if they yield coefficients that are equal to or exceed the large threshold, or the 0.8 threshold. *Apex*, 862 F.3d at 1341 n.2; Differential Pricing Analysis[:] Request for Comments, 79 Fed. Reg. at 26,722.

Based on how much of a percentage the passing sales account for the exporter's total U.S. sales, Commerce applies a different methodology to the data. If the passing sales account for 66% or more of the value of total sales, then the pattern of significant price differences warrants application of the A-to-T method to all sales. *See* Differential Pricing Analysis[:] Request for Comments, 79 Fed. Reg. at 26,722–23. If the passing sales make up more than 33% and less than 66% of the value of all sales, Commerce takes a hybrid approach, applying the A-to-T method to the sales that passed the Cohen's *d* test and applying the A-to-A method to all other sales. *See id.* at 26,723. If the passing sales make up 33% or less of total sales, then Commerce will apply the A-to-A method. *See id.* If both the Cohen's *d* test and ratio test demonstrate that the A-to-T methodology should be considered, and Commerce has not selected the A-to-A methodology, it applies its "meaningful difference" test, with which Commerce evalu-

ates whether the difference between the weighted-average dumping margins calculated by the A-to-A method is meaningfully different than the weighted-average dumping margins calculated by the A-to-T method. *See id.*

B. CAFC's Concerns in *Stupp III*

In *Stupp III*, the CAFC recognized that *Mid Continent Steel & Wire, Inc. v. United States* ("*Mid Continent*"), 940 F.3d 662 (Fed. Cir. 2019), had resolved the issue of whether Commerce's adoption of Professor Cohen's 0.8 threshold to determine whether price differences were significant was reasonable. *Stupp III*, 5 F.4th at 1356–57. In *Mid Continent*, the CAFC held that Commerce was within the wide discretion left to it under 19 U.S.C. § 1677f-1(d)(1)(B) in adopting the 0.8 threshold because "the 0.8 standard is 'widely adopted' as part of a 'commonly used measure' of the difference relative to such overall price dispersion; and it is reasonable to adopt that measure where there is no better, objective measure of effect size." *Mid Continent*, 940 F.3d at 673.

The CAFC did not reach the question of whether the 0.8 threshold could be applied when the data did not satisfy the statistical assumptions of the Cohen's *d* test. *Stupp III*, 5 F.4th at 1356–57. The CAFC expressed concerns about the reasonableness of Commerce's use of the Cohen's *d* test in less-than-fair-value adjudications because such application to data that do not satisfy the assumptions on which the test is based "may undermine the usefulness of the interpretive cutoffs." *Id.* at 1357.

The CAFC identified three potential scenarios when the Cohen's *d* test could raise such concerns: when the distribution of a respondent's sales data is not normal (lack of normality), when the test data have few data points (lack of sufficient data), and when there is not normal variance in a respondent's sales (lack of roughly equal variances). *Id.* at 1357–59. Additionally, the CAFC presented two hypotheticals to illustrate its concerns: (1) in its first hypothetical, an analysis of a group of only eight export sales across four groups, such that each test group would consist of only two sales, raising the concern that the prices' lack of normality and sufficient data will produce inaccurate results on the Cohen's *d* test; and (2) in its second hypothetical, an analysis of five test groups that contain sales prices that hover around the same value of about $100 each, differing from each other by up to two cents, raising the concern that prices with small variances will produce inaccurate results on the Cohen's *d* test. *Id.* at 1358–59. In the first situation, the CAFC noted that an analysis of

groups of such small numbers would potentially lack normality and produce an upward bias in effect size, which, in turn, will produce more passing results under the Cohen's *d* test and create an exaggeration of dumping margins. *Id.* at 1359. In the second situation, the CAFC pointed out that the lack of variance in the data would artificially inflate the dumping margins, and an objective examiner looking at these similar sales prices "would be unlikely to conclude that they embody a 'pattern' of prices which 'differ significantly.'" *Id.* (citing 19 U.S.C. § 1677f-1(d)(1)(B)(i)). The CAFC remanded Commerce's determination with instructions for "Commerce to clarify its argument that having the entire universe of data rather than a sample makes it permissible to disregard the otherwise-applicable limitations on the use of the Cohen's *d* test." *Id.* at 1360.

C. Commerce's Remand Redeterminations

In the *Third Remand Redetermination*, Commerce explained that its results from its utilization of the Cohen's *d* test do not require statistical inferences because Commerce looks at the full population of sale prices and calculates the actual parameters of data, and does not rely on sampled data that are estimates of the actual values, which would require the observation of such statistical criteria. *Third Remand Redetermination* at 20–21, 58–60; *see also NEXTEEL VI*, 633 F. Supp. 3d at 1200–01. The Court concluded that this explanation did not sufficiently resolve the CAFC's concerns or address the CAFC's observation that Professor Cohen had derived his interpretive cutoffs under certain assumptions and required Commerce to consider the Academic Literature to discuss whether the application of the Cohen's *d* coefficient and 0.8 threshold were reasonable. *NEXTEEL VI*, 633 F. Supp. 3d at 1200–01.

In the *Fourth Remand Redetermination*, Commerce provided a more complete explanation, stating that it reviewed the Academic Literature but found "no support in the Academic Literature for the claim that [Professor] Cohen's 0.8 threshold was derived based on the statistical criteria, or that the use of [Professor] Cohen's threshold should be limited to situations where the sampled data exhibit a normal distribution or similarly equal variances." *Fourth Remand Redetermination* at 6. Commerce contended that the assumptions of normality, equal variances, and sufficient data are only relevant as a matter of statistical significance, that these assumptions do not apply when analyzing a whole population, and that the Academic Literature does not support the contention that Professor Cohen's thresholds are derived from statistical assumptions, including two hypothetical frameworks of its own to illustrate its position. *Id.* at 12–14.

SeAH challenges the *Fourth Remand Redetermination* and Commerce's application of the Cohen's *d* test in its differential pricing analysis by arguing that: (1) the statistical assumptions of normality, equal variances, and sufficient data must be present regardless of data consisting of a sample or an entire population, and the data do not satisfy these assumptions; (2) Professor Cohen's thresholds were based on normally-distributed data and not on the analyses of entire populations, but SeAH's pricing data did not follow a normal distribution or have equal variances or a sufficient number of data points in the groups being compared; and (3) Professor Cohen's thresholds are not universally applicable, so Commerce's use of the 0.8 threshold to calculate effect sizes for price differences is not an acceptable use of such threshold. SeAH's Br. at 5–16.

Defendant argues that SeAH's arguments should not prevail because Commerce provided a reasonable explanation for its methodology and the Academic Literature does not support the claim that Professor Cohen's 0.8 threshold was based on the statistical assumptions for examining the entire population or limited to application for situations when only sampled data exhibit a normal distribution or similarly equal variances. Def.'s Br. at 4–5.

D. Differential Pricing Analysis

The Court must determine whether Commerce's explanation of its use of the 0.8 threshold resolves the CAFC's concerns with Commerce's methodology applied without the observation of certain statistical assumptions, including the normality, sufficient size, and roughly equal variances of the considered populations on which the Cohen's *d* test was based. *Stupp III*, 5 F.4th at 1357–58; *see also NEXTEEL IV*, 28 F.4th at 1238–39 (citing the same concerns). The Court's task is to determine whether Commerce's methodology is reasonable, rather than to interpret the meaning of the Academic Literature and the correct application of the Cohen's *d* test. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987) ("As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology.").

Commerce explained in the *Fourth Remand Redetermination* that Professor Cohen's 0.8 threshold is not dependent on the statistical

criteria identified by the CAFC in *Stupp III*, and there is no role for the statistical criteria to examine whether the test results are reliable and representative of the results when the calculations are based on the full populations of data because the prices used in the Cohen's *d* test include all prices of comparable merchandise for the test and comparison groups. *Fourth Remand Redetermination* at 12. Commerce provided its own illustrative framework of hypotheticals to demonstrate the relationship between Professor Cohen's thresholds and the statistical criteria. *Id.*

Commerce's first hypothetical involved the differential pricing analysis of the prices of BigBill's bicycles in Virginia and Maryland in 2020 using Professor Cohen's 0.8 threshold, with two sets of analyses to show the difference between the results obtained by using a small sample size and the results obtained by using a sample size that represents the full population of data. *Id.* at 12–13. The first analysis involved five random sale prices from each state, resulting in the *d* coefficient value of 0.9, and the second analysis involved twenty random sale prices from each state, resulting in the *d* coefficient value of 0.75. *Id.* Regarding the slight difference in results obtained by the two sets of data, Commerce argued that "the calculated results using the sample reliably represent the results as if the calculations had been based on the full populations of sale prices to each state." *Id.* at 13.

Commerce's second hypothetical involved the determination of the price difference between the sale prices of exotic sport cars in Vermont and New Hampshire. *Id.* at 13–14. Commerce posited that this example demonstrates that the concern of a small sample size, or concern over the lack of sufficient data, is not relevant when using the Cohen's *d* test because "although the number of observations is small, the results reflect the actual values of the full population of sale prices." *Id.* at 14.

In addition, Commerce asserted that the Academic Literature does not contain any express mention of criteria or assumptions necessary when examining data of an entire population and argued that there is no support for the claim that Professor Cohen's 0.8 threshold was derived from statistical criteria. *See id.* at 6–10. Commerce discussed Professor Cohen's real-life "operational definitions" to illustrate small, medium, or large effects to support this proposition. *See id.* at 17–21 (citing SeAH's June 12, 2023 Submission at Att. 2 ("*Cohen*") at 21–23, 26). In its discussion of the second "operational definition" of "percent nonoverlap," which uses two bell curves to illustrate the difference in the means, Commerce contended that the use of Professor Cohen's threshold should not be limited to situations in which

sampled data exhibit a normal distribution or similarly equal variances because such limitations would "not apply to [Professor] Cohen's thresholds themselves, but only to the calculations which permit this example of interpreting different effect sizes [such as the percent of overlap]." *Id.* at 19–20. In its discussion of the third "operational definition" of each threshold, which provided real-life examples in which small, medium, and large effects have been found, Commerce contended that these illustrative examples do not link Professor Cohen's thresholds with the statistical criteria. *Id.* at 20. Commerce reiterated the results of its illustrative framework and stated that "although the statistical criteria may be used to determine whether the result of an analysis is representative of the full populations of data, it is not part of [Professor] Cohen's proposed thresholds to qualify an effect as small, medium, or large." *Id.* at 21.

In *Stupp III*, the CAFC raised concerns about the assumptions of population size and normalcy, questioning whether small sample sizes without normal distributions could produce an upward bias in the calculated effect size, and ultimately "exaggerate" dumping margins. *Stupp III*, 5 F.4th at 1358–59.

In the *Fourth Remand Redetermination*, Commerce reasonably explained that the Cohen's *d* test does not apply a sampling methodology, but instead relies on the entire populations of sales observations and the "use of the statistical criteria to determine the statistical significance of the calculated results is not relevant for the Cohen's *d* test or the differential pricing analysis as a whole." *Fourth Remand Redetermination* at 22. Commerce noted that the purpose behind the three statistical criteria of normality of distribution, equal variances, and the size of the sample is to make samples more reflective of the population, which in turn increases the confidence level that the results are reflective of the whole population. *Id.* at 10. Commerce explained that:

> If researchers examine the whole population, these assumptions become unnecessary, as there is no need to make a whole population more reflective of the population. To repeat, any adjustment to the population data serves only to distort the actual population's parameters, making it no longer reflective of the whole population and reducing the 100 percent confidence level. Nowhere in the cited literature is there any mention of criteria or assumptions necessary when examining the entire population. In contrast, [Professor] Cohen's thresholds do not depend on the subjective composition of a particular sampled population. The only references to assumptions are related to drawing

> a sample and to efforts to improve the probability that the samples are as representative of the whole population as possible.

Id. at 1011. Commerce determined that its application of the Cohen's *d* test and Professor Cohen's thresholds to the entire population of relevant price observations does not require the application of the three statistical criteria identified by the CAFC in *Stupp III*. *Id.* at 11.

The CAFC specifically asked Commerce to explain why it can use the 0.8 threshold identified by Professor Cohen as a measure of significant price difference when Commerce evaluates data that fail to meet statistical assumptions of normality, size, and variance. *Stupp III*, 5 F.4th at 1360. The U.S. Court of International Trade previously sustained Commerce's remand redetermination pursuant to the CAFC's concerns regarding the use of the 0.8 threshold in *Stupp Corp. v. United States* ("*Stupp IV*"), 47 CIT __, __, 619 F. Supp. 3d 1314, 1328 (2023); *see* Final Results of Redetermination Pursuant to Court Remand [Pursuant to Order (Oct. 8, 2021)], Consol. Court No. 15–00334, ECF No. 208–1. The court concluded that "Commerce's decision to adopt [Professor] Cohen's 0.8 ('large') threshold as a measure of significance because it is widely accepted in the statistical literature does not undermine the reasonableness of that choice, if it is based on Commerce's expertise and Commerce demonstrates the reasonableness of that choice with reference to the impact it has on the differential pricing analysis." *Stupp IV*, 47 CIT at __, 619 F. Supp. 3d at 1327. Further, the court concluded that "Commerce's reference to [Professor] Cohen's work does not circumscribe its discretion to choose the same values in a new context, because that choice is itself reasonable." *Id.* Because Congress delegated to Commerce the authority to determine where a price difference is significant, 19 U.S.C. § 1677f-1(d)(1)(B)(i), and made clear that the definition of a "significant price difference" would depend on the product at issue, *see* SAA at 843, "Commerce's choice of a measurement that is a function of standard deviation as a uniform approach to identify differences as significant is reasonable, even if the absolute difference in means is small." *Stupp IV*, 47 CIT at __, 619 F. Supp. 3d at 1326.

Similarly, in the *Fourth Remand Redetermination*, Commerce explained that "although [the 0.8 threshold is] arbitrary, the proposed conventions [of Professor Cohen's thresholds] will be found to be reasonable by reasonable people." *Fourth Remand Redetermination* at 18 (citing *Cohen* at 13); *see also* SeAH's June 12, 2023 Submission at Att. 1 ("*Ellis*") at 41. Commerce noted that for an analysis based on the difference of the means, Professor Cohen proposed numerical

thresholds to define a small, medium, and large effect, *i.e.*, 0.2, 0.5, and 0.8 respectively. *Fourth Remand Redetermination* at 18. Commerce stated that Professor Cohen expected these numerical thresholds to be reasonable and argued that these thresholds have been widely accepted as recognized in *Mid Continent. Id.*

Commerce discussed scenarios in which the numerical thresholds present different real-life examples in which small, medium, and large effects have been found. *Id.* at 20. Commerce identified Professor Cohen's examples involving the differences in the IQs of various groups of people or the differences in the heights of various ages of teenage girls. *Id.* at 20 & n.58; *see also Cohen* at 27. Commerce noted that when the IQ data were collected, they were not collected from everyone in the group, but from a selected sample from the group. *Fourth Remand Redetermination* at 20. Commerce stated that:

> The results of the analysis would have been calculated based on the sampled data from each group, and also, through statistical inferences, the representativeness of those results for the entire populations would have been determined. If the statistical analysis of the sample demonstrated that the sample-based results are representative of the population, then the sample-based results would be applied to the entire populations of Ph.D. holders and college freshmen. This use of statistical inference, however, is necessary to ensure that the sample is representative, but it was not part of [Professor] Cohen's proposed small, medium, and large thresholds, which are numerical values that have been widely accepted in the academic community.

Id.

SeAH argues that Commerce has failed to provide an explanation that demonstrates that its use of the Cohen's *d* test is reasonable. SeAH's Br. at 16. The Court disagrees. Commerce explained that its analysis in the Cohen's *d* test is to determine whether prices differ significantly between the sales to a specific purchaser, region, or time period (*i.e.*, the test group), and all other comparable sales (*i.e.*, the comparison group), and these sales prices include all of the sales prices that are used to calculate each respondent's weighted-average dumping margin and represent the full population of sales prices to each test and comparison group. *Fourth Remand Redetermination* at 21–22.

As noted above, the question before the Court is whether Commerce's use of the Cohen's *d* test is reasonable, when applied as a

component of its differential pricing analysis. *See Ceramica Regiomontana, S.A.*, 10 CIT at 404–05, 636 F. Supp. at 966. The Court holds that Commerce has adequately explained how its methodology is reasonable.

CONCLUSION

For the foregoing reasons, Commerce's *Fourth Remand Redetermination* is supported by substantial evidence, in accordance with law, and therefore is sustained. Judgment will enter accordingly.

Dated: December 18, 2023
New York, New York

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

Slip Op. 23–182

HYUNDAI STEEL COMPANY, Plaintiff, v. UNITED STATES, Defendant, and SSAB ENTERPRISES LLC and NUCOR CORPORATION, Defendant-Intervenors.

Court No. 22–00029

DONGKUK STEEL MILL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION, Defendant-Intervenor.

Court No. 22–00032
Before: M. Miller Baker, Judge

[The court grants Plaintiffs' motions for judgment on the agency record in part and remands to the Department of Commerce.]

Dated: December 18, 2023

Brady W. Mills and *Nicholas C. Duffey*, Morris, Manning & Martin, LLP, of Washington, DC, argued for Hyundai Steel Company, Plaintiff in Case 22–29. With them on the briefs were *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas III*, and *Jordan L. Fleischer*.

Ruby Rodriguez, Winton & Chapman PLLC of Washington, DC, argued for Dongkuk Steel Mill Co., Ltd., Plaintiff in Case 22–32. On the briefs for Dongkuk were *Jeffrey M. Winton* and *Vi N. Mai*.

Elizabeth A. Speck, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, argued for Defendant in both cases. On the brief for Defendant were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *L. Misha Preheim*, Assistant Director; and *Kelly A. Krystyniak*, Trial Attorney. Of counsel for Defendant was *Jared M. Cynamon*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Derick G. Holt, Wiley Rein LLP of Washington, DC, argued for Nucor Corporation, Defendant-Intervenor in both cases. With him on the brief were *Alan H. Price*, *Christopher B. Weld*, and *Paul A. Devamithran*.

Christopher T. Cloutier, Schagrin Associates of Washington, DC, argued for SSAB Enterprises LLC, Defendant-Intervenor in Case 22–29 only.

OPINION

Baker, Judge:

This case involves a South Korean steel producer's challenge to a countervailing duty order focused on that country's cap-and-trade system for limiting carbon emissions. The Department of Commerce found that because the scheme provides some indigenous manufacturers with 100 percent of their allotted units under the system while giving other such producers only 97 percent, the system provides a countervailable subsidy to the former. For the reasons outlined below, the court remands for reconsideration.

I

The Tariff Act of 1930, as amended, provides that when Commerce determines that a foreign government is providing a "countervailable subsidy" as to goods imported into the United States, and the International Trade Commission further determines that such imports injure U.S. domestic industry, the Department will impose a "countervailing duty" on the relevant merchandise "equal to the amount of the net countervailable subsidy." 19 U.S.C. § 1671(a).

To conclude that a foreign producer received a subsidy, Commerce must determine that "(1) a foreign government provide[d] a financial contribution (2) to a specific industry and (3) a recipient within the industry receive[d] a benefit as a result of that contribution." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014) (citing 19 U.S.C. § 1677(5)(B)); *see also* 19 U.S.C. § 1677(5)(A). "Analyzing all three factors is therefore necessary for Commerce to determine whether a [countervailing duty] must be imposed." *Fine Furniture*, 748 F.3d at 1369.

As relevant here, the Tariff Act defines "financial contribution" as meaning "foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income." 19 U.S.C. § 1677(5)(D)(ii). The statute further (and unhelpfully) provides that "[a] benefit shall normally be treated as conferred where there is a benefit to the recipient," *id.* § 1677(5)(E), and (more helpfully) outlines four non-exclusive examples. *See id.* § 1677(5)(E)(i)–(iv).

II

A

The South Korean government has imposed a cap-and-trade system on that country's industry to reduce carbon emissions. In general, companies—including steel producers—that emit more than a certain volume of carbon must "pay" to do so by surrendering "Korean Allowance Units." Appx14329–14330. The South Korean government allocates the units. Appx14330. Before a given compliance year, the government calculates the number of units to be assigned to each regulated company. *Id.* Certain business sectors that meet "high international trade intensity" or "high production cost" criteria receive 100 percent of their assigned units. Appx14330–14331. Other sectors that fail to meet the "trade intensity" or "production cost" criteria instead receive 97 percent of their assigned units. Appx14330.

Every year, the South Korean government determines each regulated company's actual carbon emissions for the preceding year. Appx14331. Such an entity must then surrender the necessary num-

ber of units to cover—to "pay" for, as it were—its emissions. A company that does not have enough units available has various options. It can borrow from its anticipated future units; it can buy additional units through an auction at which the government sells the held-back three percent portion of other companies' units; it can buy units from other companies that have more than they need; or it can pay a monetary penalty. *Id.* A company that has more units than it needs can, in turn, sell its excess units to other companies either via a centralized exchange or directly, or it may carry over a certain percentage of units to the following compliance year. Appx14331–14332.

B

1

Hyundai Steel Company, a South Korean steel manufacturer, qualified for 100 percent of its allocated units because of its high international trade intensity and/or high production costs. Appx14332. During an administrative review for 2019 of a countervailing duty order on certain steel imported from South Korea, Nucor Corporation, an American steel producer, filed a "new subsidy allegation" with Commerce contending that Hyundai's receipt of 100 percent of its allocated units is a countervailable subsidy. Appx09230–09238.

Following an investigation, the Department found in a post-preliminary determination that by providing the additional three percent of units (i.e., the amount beyond the 97 percent awarded to most participants) to companies such as Hyundai at no cost, the South Korean government relieved them of the financial burden of purchasing those units from either the government-run auction or from private actors. Appx14332. Commerce found that because the South Korean government sells the additional units via a government- run auction, it "is able to collect revenue on any additional units that these entities may need to purchase," and it was therefore "providing something of value on which it could otherwise potentially collect revenue." *Id.* Based on that finding, the Department concluded that South Korea's provision of the "additional, free" three percent of the units was "a financial contribution in the form of revenue forgone" under 19 U.S.C. § 1677(5)(D)(ii). *Id.*

Commerce then found that the South Korean statute and implementing regulations "have delineated the criteria for determining which sectors and sub-sectors qualify for the additional [unit] allotment" and that the South Korean government applies those criteria to determine who qualifies:

> As such, companies falling within the sectors and sub-sectors that the GOK determined as trade intensive and/or high production cost sectors automatically qualify for the additional free three percent [unit] allocation from the GOK. Accordingly, we . . . preliminarily find the provision of additional free [units] to certain sectors, including Hyundai Steel, to be *de jure* specific under [19 U.S.C. § 1677(5A)(D)(i)].

Id.

Finally, the Department determined that because a company receiving 100 percent of its units "is relieved of the obligation to purchase additional allowances," such companies receive a benefit under 19 C.F.R. § 351.503(b)(2). Appx14333. Commerce therefore preliminarily assigned Hyundai a countervailable subsidy rate of 0.10 percent, *id.*, bringing the company's total margin to 0.56 percent. Appx01074–01075. The Department thereafter issued its final decision—which, as relevant here, remained unchanged—over the objections of both Hyundai and the South Korean government.

2

During the same administrative review, a second South Korean steel producer, Dongkuk Steel Mill Co., requested that Commerce examine it individually as a voluntary respondent. The Department declined to do so. Appx01070–01071. Commerce instead assigned Dongkuk the same 0.56 percent rate Hyundai received, citing the statutory requirement that because Hyundai's rate was neither zero nor *de minimis*, that rate also applied to non-examined respondents. Appx01074–01075.

C

Hyundai brought this suit under 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and 1516a(a)(2)(B)(iii) to challenge its countervailing subsidy margin. *See generally* Case 22–29, ECF 8 (complaint). Shortly thereafter, Dongkuk also sued under the same provisions to challenge that same margin. *See* Case 22–32, ECF 15 (complaint).

Nucor and SSAB Enterprises moved to intervene as of right in both cases. In Case 22–29, Hyundai consented and the court granted both motions. ECF 22 (SSAB) and 23 (Nucor). In Case 22–32, Dongkuk consented to Nucor's intervention and the court granted the latter's motion, ECF 29. Dongkuk, however, opposed SSAB's motion, and the court denied it because the latter did not actively participate in the Commerce proceedings and therefore was not a "party to the proceeding" with a right to intervene under 28 U.S.C. § 2631(j)(1)(B).

Dongkuk Steel Mill Co. v. United States, 567 F. Supp. 3d 1359, 1364 (CIT 2022).

The court then consolidated the cases for the limited purpose of briefing and argument. Hyundai filed a motion for judgment on the agency record. Case 22–29, ECF 38. Dongkuk filed a joinder to Hyundai's arguments and argued that if the court granted the latter's motion, it should also order Commerce to recalculate Dongkuk's rate. Case 22–32, ECF 43–1, at 4.[1]

The government, Case 22–29, ECF 47; Case 22–32, ECF 50, and Nucor, Case 22–29, ECF 51; Case 22–32, ECF 54, opposed.[2] Hyundai, Case 22–29, ECF 51, and Dongkuk, Case 22–32, ECF 55, replied. The court then heard argument.

III

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

In § 1516a(a)(2) actions, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

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

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

IV

Although Commerce assigned Hyundai a 0.56 percent countervailing duty margin, the company only challenges the 0.10 percent portion of that margin based on the company's receipt of 100 percent of

[1] The point of Dongkuk's case is to protect the company's interest in having its rate recalculated if Hyundai prevails. Because Dongkuk merely rides Hyundai's coattails, the court does not address the former's filings. All docket citations that follow therefore refer to Case 22–29 absent any indication otherwise.

[2] SSAB filed no response to the motion for judgment on the agency record in Case 22–29, the case where it was permitted to intervene.

its cap-and-trade units. More is at stake, however, than just one-tenth of one percent. Commerce's regulations preclude the imposition of any countervailable subsidy rate of less than 0.50 percent. *See* 19 C.F.R. § 351.106(c)(1). Thus, if Hyundai were to prevail on any remand and the challenged 0.10 percent portion is subtracted from its 0.56 percent margin, it will have no liability and will receive a refund of all countervailing duty cash deposits it paid under the order.[3]

In its challenge to that 0.10 percent portion, Hyundai raises three different issues. It contends that it received no subsidy because the South Korean government did not forego any revenue that was otherwise due, ECF 38–2, at 15–33, that its 100 percent unit allocation does not provide a benefit, *id.* at 34–47, and that the cap-and-trade system is not specific, *id.* at 47–57. The court addresses these issues in turn.

A

Hyundai argues that in awarding the company 100 percent of its cap-and-trade units, the South Korean government did not forego, or fail to collect, revenue that was "otherwise due," ECF 38–2, at 15–16 (citing 19 U.S.C. § 1677(5)(D)(ii)), and thus did not make a financial contribution. The company contends that there is no expected revenue otherwise due because there is no way to know, when the South Korean government issues units, whether the recipient will need all the units received, a smaller number (in which case the recipient might then sell the unused portion), or a larger number. ECF 38–2, at 19. The company further argues that when a recipient needs a larger number of units, there is no way to know whether that recipient will purchase them at the government-run auction or through private channels from another company that has surplus units. *Id.*

Commerce correctly rejected these arguments, explaining, "[T]he key consideration is that, in lieu of giving these entities the additional [units] for free, the [South Korean government] would have received revenue from said entities." Appx01051. As the government says: "By simply receiving an additional allocation of permits for free, the [South Korean government] has overlooked initial revenue it could have been received *but for* the three percent additional allocation." ECF 47, at 25–26 (emphasis in original). Because most other entities were required to pay for additional units that were simply given away to Hyundai and a few other similarly situated companies, the South Korean government failed to collect revenue that it otherwise would have received. Thus, Commerce's reading of 19 U.S.C. § 1677(5)(D)(ii)

[3] The same is true of Dongkuk. Its rate rises and falls with Hyundai's.

was exactly right, and its determination on the financial contribution issue is supported by substantial evidence.

B

Hyundai also challenges the Department's finding that the South Korean government's provision of the free units provided a "benefit." As noted above, the statute unhelpfully provides that "[a] benefit shall normally be treated as conferred where there is a benefit to the recipient." 19 U.S.C. § 1677(5)(E). Despite that definition's circularity, it's manifest that the additional three percent confers a benefit even if one accepts Hyundai's theory that the cap-and-trade system imposes an overall burden on companies subject to its requirements.

The company contends that "Commerce ignores the immense burden this program places on companies like Hyundai Steel and the fact that Hyundai Steel is subject to the program whereas other companies are not." ECF 38–2, at 34. There is no doubt that the cap-and-trade system imposes a burden. But the company's argument ignores that the free provision of additional units *reduces* the compliance burden that recipients would otherwise have to bear. As the government explains, "Hyundai and Dongkuk receive a benefit *compared to other Korean industries* with a lower volume of international trade or production costs," ECF 47, at 32 (emphasis in original), and if they instead received only the "standard" 97 percent allocation of units, "they would be required to incur a cost for acquiring these [units] from either the [South Korean government] or private markets," *id.*

The court agrees with the government. A company that receives 100 percent of its allocated units is relieved of the financial burden of purchasing the additional three percent that other companies must obtain. This is true even if the company needs to purchase extra units because its emissions exceed the allowable cap such that a 100 percent allocation is not enough—the company receiving 100 percent would still need fewer units than it would if it fell within the "97 percent" group.[4]

That is what Commerce found: "The fact that certain industries are . . . granted an additional three percent allocation . . . means that they are, on a proportional basis, given a benefit under K-ETS not available to those industries receiving the standard 97 percent allocation." Appx01049. The reduction of Hyundai's cost of compliance constitutes a benefit because "Commerce determines benefit by the reduction or elimination of the obligation, without regard to the source of that

[4] Conversely, even if entities—such as Hyundai—receiving the free extra units ultimately have no need for them because their carbon emissions are lower than anticipated, such entities can sell those units to companies that *do* need them. That's found money for the fortunate beneficiaries of the free units.

obligation." *BGH Edelstahl Siegen GmbH v. United States*, 600 F. Supp. 3d 1241, 1264 (CIT 2022). "Due to receiving the additional free allowances, [Hyundai] received something for free—allowances [it] would have been required to pay to acquire at auction or on the private market." *Id.* The Department's "benefit" determination is supported by substantial evidence.

C

The third and final issue Hyundai raises is whether the benefit it received is "specific." The statute provides that, subject to certain exceptions not relevant here, "a countervailable subsidy is a subsidy described in this paragraph which is specific as described in paragraph (5A)." 19 U.S.C. § 1677(5)(A). A specific subsidy may be *de jure* specific—that is, specific as a matter of law—under § 1677(5A)(D)(i),[5] or it may be *de facto* specific—"specific as a matter of fact," to use the statute's words—under § 1677(5A)(D)(iii).

Here, Commerce determined the subsidy to be *de jure* specific.[6] The Department's post-preliminary determination found that the South Korean statute and implementing regulations "have delineated the criteria for determining which sectors and sub-sectors qualify for the additional KAU allotment" and that companies within those sectors and sub-sectors "automatically qualify" for the subsidy, so it is therefore *de jure* specific. Appx14332. In its final determination, Commerce concluded that "the [statute] and implementing rules not only establish explicit limitations but also are not objective criteria or conditions, as defined by [19 U.S.C. § 1677(5A)(D)(ii)]. Accordingly, consistent with Commerce's decision in other similar cases, we continue to find that the additional three percent KAU allocation is *de jure* specific." Appx01052.

As it did before the agency, Hyundai relies primarily on this court's *ASEMESA* decision, *Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States*, 523 F. Supp. 3d 1393 (CIT 2021). *ASEMESA* examined the meaning of the statutory phrase "expressly limits access to the subsidy to an enterprise or industry." Relying on dictionary definitions of "express" and "limit," the court concluded that

> the plain meaning of the statute is that a subsidy is de jure specific when the authority providing the subsidy, or its operat-

[5] There is an exception to *de jure* specificity for subsidies that are governed by "objective criteria or conditions" and that satisfy three enumerated criteria. *See* 19 U.S.C. § 1677(5A)(D)(ii).

[6] The statute provides that "[w]here 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, the subsidy is specific as a matter of law." *Id.* § 1677(5A)(D)(i).

> ing legislation, directly, firmly, or explicitly assigns limits to or restricts the bounds of a particular subsidy to a given enterprise or industry.

Id. at 1403. The court explained that Commerce must determine "that the subsidy in question [is] explicitly limited to a *specific* enterprise or industry by the administering authority or its implementing legislation." *Id.* (emphasis added). "Under the plain meaning of Section 1677(5A), subsidies are only de jure specific where the authority providing the current subsidy, or its operating legislation, *directly* and *explicitly* prescribes limitations on the distribution of subsidies to an enterprise or industry." *Id.* at 1404 (emphasis added).

Hyundai argues that the cap-and-trade system does not fit within *ASEMESA*'s teaching because nothing in the South Korean statute prescribes an express limitation whereby only specific industries or enterprises can be eligible for the additional three percent unit allotment: "[T]he [System's] alleged failure to treat all enterprises or industries uniformly does not equate to an 'explicit restriction' to specific enterprises or industries," ECF 38–2, at 52 (citing *ASEMESA*, 523 F. Supp. 3d at 1403), because nothing in the South Korean statute or regulations "directly, firmly, or explicitly assign[s] limits to or restricts the bounds of a particular subsidy to a given enterprise or industry," *id.* (emphasis removed) (quoting *ASEMESA*, 523 F. Supp. 3d at 1403).

The government responds that the South Korean statute and regulations do "establish criteria that *expressly limit*[ ] which entities qualify for the additional allocation by setting thresholds that they must meet to qualify." ECF 47, at 42 (emphasis in original) (citing Appx01052). The government quotes a South Korean statutory provision whereby a business will be eligible for a 100 percent allocation if its "international trade intensity" exceeds a baseline "or if it engages in a type of business for which the production cost increased by reducing greenhouse gases is not less than the standard prescribed by" the implementing regulation. *Id.* (quoting Appx11585–11587). The government then notes that the regulation, in turn, provides that "any of the following *types of businesses*," *id.* (emphasis added) (quoting Appx01052), are eligible for the 100 percent allocation:

> (1) a business with an international trade intensity of at least 30 percent, (2) a type of business with production costs of at least 30 percent[,] or (3) a type of business with an international trade intensity of at least 10 percent and production costs of at least 5 percent.

Id. at 42–43 (quoting Appx01052 and citing Appx11638). "Thus, a participant who does not meet th[ose] criteria because they are a business with low international trade intensity or low production costs is *explicitly* ineligible." *Id.* at 43 (emphasis in original). The government contends that all that matters is that the statute "inherently limits the subsidy to large businesses with high international trade intensity or high production costs" and that the South Korean Ministry of Environment determined that "Manufacturing of Basic Steel" qualified. *Id.* (citing Appx14332).

For its part, Nucor contends that *ASEMESA*'s teaching is "inapplicable" here because that case involved an agricultural product and a Commerce regulation provides that agricultural subsidies are not specific under § 1677(5A)(D). ECF 49, at 30 (citing 19 C.F.R. § 351.502(e)). The court disagrees because *ASEMESA*'s analysis turns on the statutory language, not the regulation. *See* 523 F. Supp. 3d at 1403.

Nucor then argues that "businesses with low international trade intensity or low production costs, which are identified in the implementing legislation, are expressly ineligible for the 'gratuitous allocation of all emission permits,' " ECF 49, at 31 (citing Appx11638), and argues that "this subsidy is limited to large polluters with significant international trade exposure and/or production costs as defined by the" South Korean statute, *id.*

The regulation Nucor cites contains the same language Commerce and the government quoted regarding the three "types of businesses," Appx11638, and it refers to an attached Table 1. The full provision reads as follows:

> Types of business eligible for gratuitous allocation of all emission permits pursuant to Article 12(4) of the Act shall be any of the following types of businesses and determined in the allocation plan through evaluation in each commitment period:
>
> (1) A type of business, the international trade intensity of which, *referred to in attached Table 1* is at least 30/100;
>
> (2) A type of business, the production costs incurrence rates of which, *referred to in attached Table 1* is at least 30/100;
>
> (3) A type of business, the international trade intensity and production costs incurrence rate of which, *referred to in attached Table 1* are at least 10/100 and at least 5/100, respectively.

Appx11638 (emphasis added). The table, in turn, simply gives two formulas—one for calculating international trade intensity and the other for calculating the "production costs incurrence rate,"

Appx11896—and then provides two definitions of terms used in those formulas and instructions for how to ascertain certain figures to be included in the formulas' calculations, Appx11896–11897.

The court sees an inherent disconnect between a reference to "*types* of businesses" (or "*a type* of business") as referred to in the South Korean statute and implementing regulation and "a *specific* enterprise or industry," or "a *given* enterprise or industry," as referred to in the Tariff Act as interpreted by *ASEMESA*, 523 F. Supp. 3d at 1403 (emphasis added). Commerce's final determination here acknowledged that "the rules do not name specific industries" but found the program *de jure* specific anyway without responding in any meaningful way to Hyundai's arguments about *ASEMESA*. Appx01052. The Department also found that the statute imposes a "limitation on *which industries qualify* for the additional allocation by setting thresholds that *industries* must meet *in order to qualify*." *Id.* (emphasis added).

Absent from this discussion is any indication of how the criteria, or the limitation and the thresholds, operate to "restrict the bounds of [the] particular subsidy to *a given* enterprise or industry," "*a specific* enterprise or industry," or even a "specific" small universe of enterprises or industries. *See ASEMESA*, 523 F. Supp. 3d at 1403 (emphasis added).

Two questions thus present themselves here. First, did the Department consider whether, as Hyundai argues, any large business could qualify for the additional three percent allocation regardless of the industry to which it belongs? Second, did Commerce consider that the South Korean government's determination that "Manufacturing of Basic Steel" qualified for the additional allocation appears to have no significance for whether any other enterprise or industry does or does not qualify? The Department failed to address either of these questions.

In other words, nothing in the record demonstrates that the South Korean statute or regulations expressly restrict access to a particular (specific, as it were) and limited number of enterprises or industries. There is also nothing to demonstrate why any particular enterprise or industry would not qualify as long as it met the statutory numbers. Hyundai correctly argues that Commerce failed to address this issue and simply found specificity—to which the government has no response.

In sum, the Department's finding of "*de jure* specificity" is conclusory and is not supported by substantial evidence. But there is one other loose end to tie up. The Tariff Act contains an exception whereby

a subsidy is not specific, even if it would otherwise be considered *de jure* specific, when it satisfies three conditions:

> Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, the subsidy is not specific as a matter of law, if—
>
> (I) eligibility is automatic,
>
> (II) the criteria or conditions for eligibility are strictly followed, and
>
> (III) the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document so as to be capable of verification.
>
> For purposes of this clause, the term "objective criteria or conditions" means criteria or conditions that are neutral and that do not favor one enterprise or industry over another.

19 U.S.C. § 1677(5A)(D)(ii).

Hyundai argued before Commerce, and argues again here, that the cap-and-trade system's three percent allocation subsidy satisfies all three conditions and thus falls within this exception even if it is otherwise *de jure* specific. ECF 38–2, at 54–58; ECF 51, at 30–34. The Department's decision did not address the issue in any meaningful way: Commerce simply found, without explanation, that the South Korean statute and its implementing rules do not establish "objective criteria or conditions." Appx01052 (quoting the regulation's three categories of eligible types of business and then stating, "As such, the [statute] and implementing rules not only establish explicit limitations but also are not objective criteria or conditions, as defined by" 19 U.S.C. § 1677(5A)(D)(ii)).

Absent analysis and explanation, the court cannot properly perform its judicial review function. *See Innovation Techs., Inc. v. SplashA Med. Devices, LLC*, 528 F.3d 1348, 1350–51 (Fed. Cir. 2008) (remanding fee award because district court failed to support "exceptional case" finding with particular factual findings and reasoning); *ASE-MESA*, 523 F. Supp. 3d at 1403 n.1 ("Conclusory statements without more are not reviewable even where the statute applied by Commerce is unambiguous."). The court therefore remands this issue for reasoned analysis.

* * *

For the foregoing reasons, the court grants judgment on the agency record in part to Hyundai Steel and Dongkuk. A separate remand order will issue.

Dated: December 18, 2023
New York, NY

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

Slip Op. 23–183

HYUNDAI STEEL COMPANY, Plaintiff, and AJU BESTEEL CO., LTD., NEXTEEL CO., LTD., and HUSTEEL CO., LTD., Consolidated Plaintiffs, and HUSTEEL CO., LTD., NEXTEEL CO., LTD., and SEAH STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and VALLOUREC STAR, L.P., WELDED TUBE USA INC., and UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 22–00138

[Sustaining the U.S. Department of Commerce's remand results in the 2019–2020 administrative review of the antidumping duty order on certain oil country tubular goods from the Republic of Korea.]

Dated: December 18, 2023

Jarrod M. Goldfeder and *Robert G. Gosselink*, Trade Pacific PLLC, of Washington, D.C., for Plaintiff Hyundai Steel Company and Consolidated Plaintiff AJU Besteel Co., Ltd.

J. David Park, *Henry D. Almond*, and *Kang Woo Lee*, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for Consolidated Plaintiff and Plaintiff-Intervenor NEXTEEL Co., Ltd.

Claudia Burke, Deputy Director, and *Hardeep K. Josan*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., 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 on the brief was *Jared M. Cynamon*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

OPINION

Choe-Groves, Judge:

Plaintiff Hyundai Steel Company ("Plaintiff" or "Hyundai Steel") filed this action challenging the final results in the 2019–2020 administrative review of the antidumping duty order on certain oil country tubular goods ("OCTG") from the Republic of Korea ("Korea"). Summons, ECF No. 1; Compl., ECF No. 8; *see Certain Oil Country Tubular Goods From the Republic of Korea* ("*Final Results*"), 87 Fed. Reg. 20,815 (Dep't of Commerce Apr. 8, 2022) (final results of antidumping duty administrative review and final determination of no shipments; 2019–2020), and accompanying Issues and Decisions Memorandum ("Final IDM"), ECF No. 41–5.

The Court remanded the case to Commerce in *Hyundai Steel Co. v. United States* ("*Hyundai Steel*"), 47 CIT __, 639 F. Supp. 3d 1325 (2023). Now before the Court are the Final Results of Redetermination Pursuant to Court Remand from the U.S. Department of Commerce ("Commerce"). *See* Final Results of Redetermination Pursuant

to Court Remand, ECF No. 78–1 ("*Remand Results*"). For the following reasons, the Court sustains the *Remand Results*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's calculation of Hyundai Steel's constructed export price profit is supported by substantial evidence;
2. Whether Commerce's calculation of Hyundai Steel's constructed value profit and selling expenses is supported by substantial evidence;
3. Whether Commerce's calculation of Hyundai Steel's constructed value profit cap is supported by substantial evidence; and
4. Whether Commerce's dumping margin determination for non-examined respondents is supported by substantial evidence.

BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case and reiterates facts relevant to review of the *Remand Results*. *See Hyundai Steel*, 47 CIT at __, 639 F. Supp. 3d at 1330–31.

In *Hyundai Steel*, the Court sustained: (1) Commerce's use of proprietary third-country sales information pertaining to SeAH Steel Corporation ("SeAH") in calculations related to Hyundai Steel; (2) Commerce's adjustments of reported general and administrative expenses of Hyundai Steel and its U.S. affiliate, Hyundai Steel USA, Inc.; and (3) Commerce's application of neutral facts available to adjust Hyundai Steel's reported further manufacturing costs to account for yield loss; and remanded: (4) the calculation of Hyundai Steel's constructed export price profit (for which Commerce requested a voluntary remand); (5) the calculation of Hyundai Steel's constructed value profit and selling expenses; and (6) the calculation of Hyundai Steel's constructed value profit cap. *Hyundai Steel*, 47 CIT at __, 639 F. Supp. 3d at 1332–39. Specifically, the Court remanded Commerce's determination of the constructed export price profit to allow Commerce to reconsider a potential misunderstanding of evidence on the administrative record that had relied on third-country data of SeAH's OCTG sales to Kuwait. *Id.* at __, 639 F. Supp. 3d at 1334. The Court also concluded that the *Final Results* had not foreclosed the claims of NEXTEEL Co. ("NEXTEEL") based only on Defendant's counterclaim of technicality (i.e., exhaustion of administra-

tive remedies). *Id.* at __, 639 F. Supp. 3d at 1339. Commerce was also directed to reconsider the separate rates calculated for non-examined companies if Plaintiff's weighted-average dumping margin was changed on remand. *Id.* at __, 639 F. Supp. 3d at 1337–38.

Commerce filed its *Remand Results* on August 15, 2023, revising its methodology of calculation of constructed export price profit to rely on Hyundai Steel's actual sales data. *Remand Results* at 7–10. Commerce continued to use SeAH's third-country market sales to Kuwait in calculating the constructed value profit and selling expenses and the constructed value profit cap. *Id.* at 10–19.

Hyundai Steel filed its Comments in Partial Opposition to Commerce's Remand Redetermination and Comments in Partial Support of Commerce's Remand Redetermination. Cmts. Pl. Part. Opp'n Remand Redetermination ("Pl.'s Opp'n Cmts."), ECF No. 81; Cmts. Pl. Part. Supp. Remand Redetermination, ECF No. 86. NEXTEEL filed its Comments in Partial Opposition to the Remand Results and Comments in Partial Support of Remand Results. Cmts. Consol. Pl. Pl.-Interv. NEXTEEL Part. Opp'n Remand Results ("NEXTEEL's Opp'n Cmts."), ECF No. 80; Cmts. Consol. Pl. Pl.-Interv. NEXTEEL Part. Supp. Remand Results, ECF No. 84. Consolidated Plaintiff AJU Besteel Co., Ltd. ("AJU Besteel") filed its Comments in Partial Opposition to Commerce's Remand Redetermination. Cmts. Consol. Pl. AJU Besteel Part. Opp'n Remand Redetermination ("AJU Besteel's Opp'n Cmts."), ECF No. 82. Defendant United States ("Defendant") filed Defendant's Response in Support of Remand Results. Def.'s Resp. Supp. Remand Results ("Def.'s Resp."), ECF No. 85.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an antidumping duty order. The Court will hold unlawful any determination found to be unsupported by substantial record evidence or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(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).

STATUTORY FRAMEWORK

Commerce imposes antidumping duties on foreign goods if "(1) it determines that the merchandise 'is being, or is likely to be, sold in the United States at less than its fair value,' and (2) the International

Trade Commission determines that the sale of the merchandise at less than fair value materially injures, threatens, or impedes the establishment of an industry in the United States." *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017) (quoting 19 U.S.C. § 1673(1)). Antidumping duties are calculated as the difference between the normal value of subject merchandise and the export price or the constructed export price of the subject merchandise. *See* 19 U.S.C. § 1673.

Normal value is ordinarily determined using the sales price of the subject merchandise in the seller's home market. 19 U.S.C. § 1677b(a)(1)(B)(i). If Commerce determines that normal value cannot be calculated reliably using home market or third-country sales, Commerce may use the subject merchandise's constructed value as an alternative to normal value. *Id.* § 1677b(a)(4). The method for calculating constructed value is defined by statute. *Id.* § 1677b(e). When calculating constructed value, Commerce must utilize the respondent's actual selling, general, and administrative expenses, and profits in the respondent's home market or a third-country market, if possible. *See id.* § 1677b(e)(2)(A). If Commerce cannot rely on those data, it may look to:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise[.]

Id. § 1677b(e)(2)(B).

Commerce must also calculate the export price or constructed export price of subject merchandise. Relevant here is constructed export price, which is:

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, [subject to certain adjustments].

Id. § 1677a(b). The price used to calculate constructed export price is reduced by commissions, selling expenses, further manufacturing expenses, and the profit allocated to incurred expenses. *Id.* § 1677a(d). Those profits are "an amount determined by multiplying the total actual profit by the applicable percentage." *Id.* § 1677a(f)(1).

DISCUSSION

I. Constructed Export Price Profit Methodology

Commerce based its margin calculations for Hyundai Steel on constructed export price. Final IDM at 5. When calculating constructed export price, the profits to be allocated to incurred expenses are "an amount determined by multiplying the total actual profit by the applicable percentage." 19 U.S.C. § 1677a(f)(1). In that calculation, Commerce "may rely on any appropriate financial reports, including public, audited financial statements, or equivalent financial reports, and internal financial reports prepared in the ordinary course of business." 19 C.F.R. § 351.402(d)(2). The "applicable percentage" is "the percentage determined by dividing the total United States expenses by the total expenses." 19 U.S.C. § 1677a(f)(2)(A). The statute defines "total expenses" and "total actual profit" as follows:

> (C) Total expenses
>
> The term "total expenses" means all expenses in the first of the following categories [that] applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:
>
> (i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses

were requested by the administering authority for the purpose of establishing normal value and constructed export price.

(ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.

(iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

(D) Total actual profit

The term "total actual profit" means the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph.

Id. § 1677a(f)(2)(C)–(D).

During the administrative review, Plaintiff proposed six options to Commerce for calculating Hyundai Steel's constructed export profit ratio:

Option 1: Hyundai Steel's actual OCTG pipe profit ratio during the period of review, based on the information in Hyundai Steel's sales and cost reconciliations in this administrative review.

Option 2: Hyundai Steel's overall profit for all steel-related sales and activities.

Option 3: The overall profit of Hyundai Steel USA for all steel-related sales and activities.

Option 4: The actual U.S. sales data reported in Hyundai Steel's most recently submitted U.S. sales and cost of production files.

Option 5: An average of various surrogate pipe producers from other countries.

Option 6: SeAH's overall profit for its steel operations, averaged for the two-year period.

Remand Results at 3–4 (citing Pl.'s Admin. Case Br. (Nov. 9, 2021) at 31–32, PR 281).[1] In the *Final Results*, Commerce rejected each of the proposed options and calculated Plaintiff's constructed export price

[1] Citations to the administrative record reflect the public record ("PR") and public remand record ("PRR") numbers filed in this case, ECF Nos. 68, 88.

profit by relying instead on SeAH's third-country OCTG sales experience in Kuwait during the period of review based on Commerce's conclusion that these were all constructed export price sales. Final IDM at 44–47.

On appeal at the U.S. Court of International Trade, Defendant requested a remand of the constructed export price profit determination to allow Commerce to reconsider a potential misunderstanding of evidence on the administrative record. Def.'s Resp. Opp'n Mot. J. Admin. R. at 32–34, ECF No. 60. The Court granted the request and remanded the issue to Commerce. *Hyundai Steel*, 47 CIT at __, 639 F. Supp. 3d at 1334–35.

On remand, Commerce determined that its previous rejection of Hyundai Steel's proposed options for calculating constructed export price profit and reliance on SeAH's Kuwait sales data were based on a misunderstanding of the administrative record. *Remand Results* at 7. Upon reconsideration, Commerce determined that SeAH's Kuwait sales did not reflect constructed export price sales in fact, and Commerce reversed the determination to use those sales as the source for calculating the constructed export price profit ratio and reconsidered the six options proposed by Hyundai Steel. *Id.* Commerce redetermined that Hyundai Steel's options 1, 2, 3, and 4 represented Hyundai Steel's actual profit, option 5 represented profit from surrogate price producers, and option 6 represented profits from SeAH. *Id.* at 8. Commerce stated that its interpretation of 19 U.S.C. § 1677a(f)(2)(C) and (D) created a preference for calculating the constructed export price profit ratio based on the expenses and profits of the "foreign producer, exporter, and affiliated parties." *Id.* Based on this reading of the statute, Commerce focused its analysis on whether Hyundai Steel's proposed options 1–4, which were specific to Hyundai Steel's actual profits, fell within the three alternatives under 19 U.S.C. § 1677a(f)(2)(C). *Id.* at 8–9.

Subsection 1677a(f)(2)(C)(i) of Title 19 covers: "[t]he expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price." 19 U.S.C. § 1677a(f)(2)(C)(i). Commerce determined that none of the proposed options 1–4 fell under this category. *Remand Results* at 9. Commerce next considered alternative (ii), which covers: "[t]he expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise." *Id.*; 19 U.S.C. § 1677a(f)(2)(C)(ii). Commerce determined that options 1–4 did not fit into alternative

(ii). *Remand Results* at 9. Lastly, Commerce considered alternative (iii), which covers, "[t]he expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise." *Id.* at 9–10; 19 U.S.C. § 1677a(f)(2)(C)(iii). After reconsideration, Commerce determined that option 2 represented Hyundai Steel's actual profits and fit within alternative (iii), recalculating Hyundai Steel's dumping margin based on Hyundai Steel's overall profit for all steel-related sales and activities. *Remand Results* at 10.

No party objects to Commerce's revised constructed export price profit methodology. NEXTEEL's Cmts. Part. Supp. at 2–3; *see also* NEXTEEL's Cmts. Part. Opp'n; Pl.'s Cmts. Part. Opp'n; AJU BESTEEL's Cmts. Part. Opp'n. The Court sustains this determination accordingly.

II. Constructed Value Profit and Selling Expenses

In the underlying administrative review, Commerce calculated Hyundai Steel's constructed value profit and selling expenses by using SeAH's combined constructed value profit and selling expenses for third-country market sales. Final IDM at 37. Because Hyundai Steel did not have viable home or third-country markets during the period of review to serve as a basis for normal value, Commerce based normal value on constructed value in accordance with 19 U.S.C. § 1677b(a)(4). *Id.* at 37. As a further result, Commerce could not calculate constructed value profit and selling expenses based on the respondent's own home market or third-country sales made in the ordinary course of trade, which is the preferred method under 19 U.S.C. § 1677b(e)(2)(A). *Id.* at 37–38.

For the calculation of Hyundai Steel's constructed value profit and selling expenses, interested parties placed numerous alternative sources on the record:

Alternative 1:	Financial statements for the first three quarters of 2020 and the audited 2019 financial statements of Borusan Mannesmann Boru Sanayi ve Ticaret A.S. ("Borusan");
Alternative 2:	Financial statements for the first three quarters of 2020 and the audited 2019 financial statements of Chung Hung Steel Corp. ("Chung Hung");
Alternative 3:	Audited 2020 financial statements of Nippon Steel Corporation ("Nippon Steel");
Alternative 4:	Audited 2020 and 2019 financial statements of PAO TMK ("TMK");

Alternative 5: Financial statements for SeAH's third-country period of review sales of OCTG;
Alternative 6: Audited 2020 and 2019 financial statements of Tenaris S.A. ("Tenaris");
Alternative 7: Audited 2020 financial statements of Welspun Corp. Limited ("Welspun").

See id. at 39.

Commerce determined that, in contrast to the alternative data sources submitted by interested parties, the combined constructed value profit and selling expenses for SeAH's third-country market sales of OCTG during the period of review represented the best source for valuing Hyundai Steel's constructed value profit and selling expenses because they reflected the profit and selling expenses of a Korean OCTG producer, were based on OCTG sales to a viable comparison market, and were derived from sales made in the ordinary course of trade. *Id.* at 40–41.

On remand, Commerce continued to adhere to this determination. *Remand Results* at 10–16, 21–32; *see* Final IDM at 37–41.

Plaintiff, NEXTEEL, and AJU Besteel contend that Commerce: (1) misread the statute concerning constructed value profit and selling expenses; (2) relied unreasonably on SeAH Steel's third-country sales data to calculate constructed value profit and selling expenses for Hyundai Steel; and (3) placed inappropriate weight on the U.S. Court of Appeals for the Federal Circuit's ("CAFC") affirmance of a substantially identical approach in a recent case to support its determination. *See* Pl.'s Opp'n Cmts at 2–13; NEXTEEL's Opp'n Cmts. at 1–2; AJU Besteel's Opp'n Cmts. at 1–2; *see also NEXTEEL Co., Ltd. v. United States* ("*NEXTEEL II*"), 28 F.4th 1226, 1240–41 (Fed. Cir. 2022). Defendant argues that Commerce's determination is reasonable and supported by substantial evidence. Def.'s Resp. at 8–15.

The statute directs Commerce to utilize the respondent's actual selling, general, and administrative expenses and profits from the home market or a third-country market when calculating constructed value for a respondent. *SeAH Steel Corp. v. United States*, 45 CIT __, __, 513 F. Supp. 3d 1367, 1378 (2021) (citing 19 U.S.C. § 1677b(e)(2)(A)). If those data are unavailable, however, then the statute provides three alternative methodologies. *See* 19 U.S.C. § 1677b(e)(2)(B). The first alternative permits evaluation of the data associated with the respondent company's other products "in the same general category of products as the subject merchandise." *Mid Continent Steel & Wire, Inc. v. United States* ("*Mid Continent*"), 941 F.3d 530, 535 (Fed. Cir. 2019) (quoting 19 U.S.C. § 1677b(e)(2)(B)(i)). The second alternative permits evaluation of the data of other re-

spondents to the investigation. *See id.* (citing 19 U.S.C. § 1677b(e)(2)(B)(ii)). "The third allows Commerce to use 'any other reasonable method,'" subject to a profit cap. *See id.* (citing 19 U.S.C. § 1677b(e)(2)(B)(iii)).

Towards a determination on constructed value profit, "[t]he objective is to find a good proxy (or surrogate) for the profits that the respondent can fairly be expected to build into a fair sales price of the particular merchandise." *SeAH Steel Corp.*, 45 CIT at __, 513 F. Supp. 3d at 1396 (citing *Mid Continent*, 941 F.3d at 542).

Hyundai Steel had no viable home market or third-country market, and the record lacked evidence of actual amounts incurred or realized by Hyundai Steel for profits in connection with production and sale of a foreign like product in the ordinary course of trade in Korea. *Remand Results* at 11; Final IDM at 37. As a result, Commerce was unable to calculate the constructed value profit and selling expenses pursuant to 19 U.S.C. § 1677b(e)(2)(A) (i.e., the preferred method), resulting in Commerce considering the alternatives provided in 19 U.S.C. § 1677b(e)(2)(B). *Remand Results* at 11.

The statute does not provide a hierarchy for selecting among the alternatives. The Statement of Administrative Action Accompanying the Uruguay Round Agreements Act provides that "the selection of an alternative will be made on a case-by-case basis, and will depend, to an extent, on available data." *See* Uruguay Round Agreements, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 840 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4176.

Commerce weighed the value of the available data on the record and determined that it was appropriate to calculate constructed value profit and selling expenses in accordance with 19 U.S.C. § 1677b(e)(2)(B)(iii) (i.e., using any other reasonable method). *Remand Results* at 12–13. Commerce determined that the combined constructed value profit and selling expenses for SeAH's third-country market sales of OCTG during the period of review was the best information on the record. *See id.* at 14. Commerce determined that "SeAH's combined selling expense and profit experience reflects the profit of a Korean OCTG producer, on comparison market sales of the merchandise under consideration, in the ordinary course of trade." *Id.* Therefore, Commerce determined that SeAH's profit was both specific to OCTG and production within Korea. *Id.*

In contrast, Commerce determined that the alternative profit information on the record (specifically, the financial statements for Borusan, Chung Hung, Nippon Steel, TMK, Tenaris, and Welspun) were less specific to OCTG (or even to products in the same general

category as OCTG), did not reflect the production experience of an OCTG producer in Korea, and in some instances were not contemporaneous with the period of review. *Id.* at 15. Thus, Commerce relied on SeAH's third-country market sales of OCTG during the period of review because it found that this source most closely approximated the statutory preference for profits "in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country." *See id.*; *see also* 19 U.S.C. § 1677b(e)(2)(A).

Plaintiff first argues that Commerce misread the statute concerning constructed value profit and selling expenses "[b]ecause 19 U.S.C. § 1677b(e)(2)(B) contains no language setting forth a preference that the profit and selling expenses must reflect the foreign like product . . . over other merchandise within the same general category of merchandise as subject merchandise." Pl.'s Opp'n Cmts. at 6. Plaintiff submits that "Commerce unreasonably assigned a legal preference for SeAH Steel's third-country sales of foreign like product as the basis for [constructed value] profit instead of the alternate financial data of products within the same general category as OCTG." *Id.*

The Court considers that Commerce's analysis of the relevant statutes proceeded along the following lines. Initially, 19 U.S.C. §§ 1677b(e)(2)(A) and (B) expressly reference "foreign like product." *See Remand Results* at 24. Both 19 U.S.C. §§ 1677b(e)(2)(B)(i) and 19 U.S.C. § 1677b(e)(2)(B)(iii) reference profit in connection with "merchandise that is in the same general category of products as the subject merchandise." *See id.* Further, 19 U.S.C. § 1677(16) defines the term "foreign like product" to include *"[t]he subject merchandise* and other merchandise, which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise." *See id.* (citing 19 U.S.C. § 1677(16) (emphasis added)). Although the statute "recognizes that Commerce has imperfect information on the record in situations where [Commerce] must resort to alternative methods, affording some flexibility to the agency . . . , this does not mean that there is no preference in the statute." *Id.* To the contrary, "the statute has a preference for profit sources in the [constructed value] profit calculation reasonably approximating the profit connected to the production and sale of the merchandise under consideration (as opposed to dissimilar products) in a foreign country because it increases the accuracy of that calculation." *Id.*

Commerce's interpretation of the statute is not unreasonable. This Court has previously acknowledged that the "statute indicates a preference in calculating [constructed value] profit for data sources reflecting production and sales in the foreign country of the foreign

like product." *See Husteel Co. v. United States* ("*Husteel II*"), 40 CIT __, __, 180 F. Supp. 3d 1330, 1346 (2016). In addition, this Court has sustained a similar methodological approach in other recent cases. *See SeAH Steel Corp.*, 45 CIT at __, 513 F. Supp. 3d at 1397; *Bldg. Sys. de Mexico v. United States*, 46 CIT __, __, 609 F. Supp. 3d 1369, 1374–76 (2022); *see also* Remand Results at 16.

In applying "any other reasonable method" pursuant to 19 U.S.C. § 1677b(e)(2)(B)(iii), Commerce considered the degree to which each profit source reflected production and sales in the relevant foreign country of Korea, and the merchandise under consideration. *Remand Results* at 15. Commerce considered the financial statements on the record for Borusan, Chung Hung, Nippon Steel, TMK, Tenaris, and Welspun. *Id.* Commerce considered that each was less specific to the product under consideration (i.e., OCTG) and none represented the production experience or profit from production in Korea. *See id.* 25–26; Final IDM at 39–40. Commerce found repeatedly that SeAH's third-country sales of OCTG were the best choice among various profit sources on the record. Draft Remand Results at 10–16, PRR 1; *Remand Results* at 22–32; *see also* Final IDM at 37–41.

SeAH's profit reflected Korean production of OCTG, which Commerce determined could reasonably be used as a constructed value profit source for determining the profitability of OCTG sales of Hyundai Steel, another Korean producer. *Remand Results* at 26. Commerce determined that SeAH's third-country OCTG sales reflected production of OCTG in Korea, and SeAH's data provided the greatest specificity to the merchandise under consideration. *Id.* Commerce emphasized that OCTG are specialized and high value products, and the alternative profit sources included, at least in part, profit from non-comparable products that were not in the same general category of products as subject merchandise. *Id.*[2] Thus, profit from these alternative sources would have been derived from a mixture of various products that included products that were outside the general category of merchandise with subject OCTG, whereas SeAH's third-country sales profit did not include such products and provided the greatest specificity with regard to the product under consideration. *Id.* at 26–27. For these reasons, the Court concludes that Commerce's determination that SeAH's third-country profit and selling expenses was the best information available is reasonable.

[2] *See also Husteel II*, 40 CIT at __, 180 F. Supp. 3d at 1341–42 ("Commerce's interpretation of same general category of products in this case as excluding non-OCTG products is reasonable. . . . Commerce explained that it was reasonable to expect differences in the industry to reflect differences in the product based on the various applications and uses of the products in each respective industry. Because of the significant differences in the industries, Commerce's conclusion that non-OCTG pipe is not in the same general category of products as OCTG was not unreasonable or unsupported.").

Plaintiff next claims that Commerce's decision to rely on SeAH's third-country sales data was unreasonable and unrepresentative for calculating constructed value profit and selling expenses for Hyundai Steel. *See* Pl.'s Opp'n Cmts. at 6–11. Specifically, Plaintiff argues that Commerce did not address certain arguments regarding the model mix of OCTG sold by SeAH and Hyundai Steel or any deficiencies with the SeAH dataset. *Id.* It appears from the record, however, that Commerce examined all potential sources of constructed profit and selected the source that best reflected the statutory preferences.

Commerce determined that SeAH's dataset was the most specific and related to production in Korea compared to the alternative financial statements, which related to non-Korean producers, profit from products that were outside of the same general category of products, and were less contemporaneous with the period of review. *Remand Results* at 30–31. Commerce also determined that the alternative sources did not represent the production experience in Korea. *Id.* at 30. Commerce explained further that it was not necessary to "dissect" differences among various models of OCTG when the alternative sources on the record incorporated profit from dissimilar products, such as "water pipe, line pipe, automotive pipe, structural pipe, various coils, etc." *Id.* at 31 and n.112 (citing SeAH's Constructed Value Submission (Apr. 14, 2021) ("SeAH's Constructed Value Submission") at Att. 2-C ("TMK Product Information"), PR 139–144; Hyundai Steel's Letter, "Oil Country Tubular Goods from the Republic of Korea: Submission of Factual Information and Comments Concerning CV Profit and Selling Expenses (Apr. 14, 2021) ("Hyundai Steel Constructed Value Submission") at Ex. 1, PR 145–150).

In addition, Commerce observed that the "alternative sources of profit are company-wide financial statements that incorporate the profit at the aggregate level" and therefore it was "impossible to determine the exact model mix for the OCTG these companies sell or conclude that their model mix is a better fit with Hyundai Steel's model mix." *Id.* at 31.[3] Commerce observed that both SeAH's third-country sales and Hyundai's U.S. sales related exclusively to welded pipe, whereas the product catalogues of the alternative sources

[3] *See* Def.'s Resp. at 13–14 (citing SeAH's Constructed Value Submission at Atts. 1-A–5-A; Hyundai Steel's Constructed Value Submission at Exs. 1–4; Petitioner's Letter, "Oil Country Tubular Goods from the Republic of Korea: Response to Request for Constructed Value Profit and Selling Expense Comments and Information" (Apr. 14, 2021) ("Petitioner's Constructed Value Submission") at Exs. 6 and 8, PR 153–154, 156).

indicated the sale of seamless pipe. *Remand Results* at 32.[4] Such observations are not indicia of impropriety in relying on SeAH third-country sales data.

Finally, Plaintiff argues that "[t]he Court must reject Commerce's reliance on other cases involving [constructed value] profit determinations because they have no bearing on the factual record applicable to the current appeal involving SeAH Steel's demonstrably unrepresentative sales to Kuwait." *See* Pl.'s Opp'n Cmts. at 11–13. Relying on *Mexichem Fluor Inc. v. United States*, 40 CIT __, 179 F. Supp. 3d 1238 (2016), and *Nucor Corp. v. United States*, 414 F.3d 1331 (Fed. Cir. 2005), Plaintiff argues that facts do not automatically transfer to another investigation, and any prior administrative determination is not legally binding on other reviews. *Id.* at 12–13 (citing *Mexichem Fluor Inc. v. United States*, 40 CIT __, 179 F. Supp. 3d 1238, 1255 (2016); *Nucor Corp. v. United States*, 414 F.3d 1331, 1340 (Fed. Cir. 2005)).

Commerce must make a determination based on the record before it. Prior administrative determinations may not be "legally" binding in future proceedings, but Commerce is obliged to act consistently. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently"). However, neither "administrative stare decisis" nor consistent treatment are issues in this case. Commerce weighed the available record evidence and evaluated that evidence against the applicable legal framework. The fact that Commerce cited cases in which this Court and the CAFC sustained Commerce's analysis of similar factual and legal issues does not imply—as Plaintiff suggests—that Commerce "blindly" relied on those cases without further analysis.

Commerce reasonably explained the shortcomings of the alternative of profit data and provided extensive reasoning regarding the benefits of relying on SeAH's third-country sales of OCTG. While Plaintiff would prefer its own methodology, Commerce presented substantial evidence and explained why reliance on the SeAH data was reasonable under 19 U.S.C. § 1677b(e)(2)(B)(iii). "[I]t is well-settled that the Court may not substitute its judgment for that of the agency when the choice is between two fairly conflicting views." *Coal. for Fair Trade in Hardwood Plywood v. United States*, 46 CIT __, __, 610 F. Supp. 3d 1344, 1368 (2022) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). The Court concludes that Commerce's

[4] *See* Def.'s Resp. at 14 (citing SeAH's Constructed Value Submission at Atts. 1C ("Tenaris Product Information") and 2-C; *see also* Hyundai Steel's Constructed Value Submission at Ex. 3 at 73 ("Product Information: Seamless pipe pipes & tubes") and Ex. 4; Petitioner's Constructed Value Submission at Ex. 1 at 10–11).

determination to rely on SeAH's third-country sales data was reasonable and supported by substantial evidence.

III. Constructed Value Profit Cap

In the underlying administrative review, Commerce calculated the constructed value profit based on the "any other reasonable method" pursuant to section 19 U.S.C. § 1677b(e)(2)(B)(iii). Final IDM at 40.

When Commerce applies the "any other reasonable method" of alternative (iii), the "amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise" (i.e., the "profit cap"). 19 U.S.C. § 1677b(e)(2)(B)(iii). Neither Hyundai Steel nor SeAH provided evidence on the record to show profit that satisfied the requirements of the profit cap under the statute, i.e., profit generated from the sale of OCTG in Korea or products in the same general category as the subject merchandise in Korea. *See* Final IDM at 42. Consequently, for the underlying administrative review, Commerce determined the profit cap based on "facts available" using the profit from SeAH's third-country sales of OCTG as the best available information. Final IDM at 42–43. On remand, Commerce reconsidered its determination and reached the same result. *Remand Results* at 34–40.

Plaintiff argues that Commerce did not apply an appropriate profit cap in this instance, "or rather, it used the source it selected as the profit cap. This was tantamount to applying no cap at all[.]" Pl.'s Opp'n Cmts. at 14. Plaintiff contends that this determination was unreasonable. *Id.* at 13–18. Specifically, Plaintiff asserts that the use of facts available was impermissible and that the use of SeAH Steel's third-country sales was inconsistent compared to other record sources. *Id.*

The reason for the profit cap is to prevent the various possible calculation methods from yielding anomalous results that stray beyond the "amount normally realized" from sales of merchandise in the same general category. *See Atar S.r.l. v. United States*, 730 F.3d 1320, 1327 (Fed. Cir. 2013); *see also Mid Continent*, 941 F.3d at 545. Congress intended the profit cap to be "(1) based on home market sales information of the same general category of products as the subject merchandise, (2) non-aberrational to the industry under consideration, (i.e., 'the amount normally realized'), and (3) not based on the

data of the respondent." *Mid Continent*, 941 F.3d at 545. But "[w]hen Commerce determines that necessary information is missing from the administrative record, it must rely on facts otherwise available to fill in the gap in the record." *Hyundai Steel*, 47 CIT at __, 639 F. Supp. 3d at 1337 (citing 19 U.S.C. § 1677b(e)(a)). In that situation, it "may apply neutral facts available when information is absent from the administrative record, regardless of the reason for the absence." *Id.*

In this instance, Commerce was "unable to calculate the amount realized by exporters or producers in connection with the sale, for consumption in the foreign country, of the merchandise in the same general category of products as the subject merchandise" as required by 19 U.S.C. § 1677b(e)(2)(B)(iii). *Remand Results* at 5, 17. Commerce therefore applied neutral facts available for the profit cap and relied on SeAH's profit from sales in a third-country market. *Id.* "As facts available, ... they are specific to OCTG and reflect the production experience of a Korean OCTG producer." *Id.* at 5–6; *see also id.* at 17–18.

The situation here is similar to that of *NEXTEEL Co. v. United States* ("*NEXTEEL II*"), 28 F.4th 1226 (Fed. Cir. 2022), in which Commerce was also unable to calculate the profit cap pursuant to 19 U.S.C. § 1677b(e)(2)(B)(iii) because no profit information for sales in Korea of OCTG or for products in the same general category were on the record. *See NEXTEEL II*, 28 F.4th at 1240–41. Commerce in that situation relied on facts available, and SeAH's sales were chosen because those sales were "specific to OCTG and represent the production experience of a Korean OCTG producer in Korea" and were therefore considered a reasonable choice for a profit cap. *Id.* at 1241. The CAFC sustained Commerce's approach, *id.*, and the *Remand Results* reflect that Commerce's approach in this case is substantively the same.

In addition, the Court has previously sustained "Commerce's conclusion that non-OCTG pipe is not in the same general category of products as OCTG [as it] was not unreasonable or unsupported" in other cases. *See*, *e.g.*, *Husteel II*, 40 CIT at __, 180 F. Supp. 3d at 1342. In the present case, Commerce determined that the SeAH third-country data met the constructed value profit requirements for use under the statutorily-preferred method and were not distorted by the production and sale of products not considered to be in the same general category of products as OCTG. *Remand Results* at 19. Commerce determined that SeAH's profit data from the sale of OCTG in its third-country market were the best data to be used as the "facts available" profit cap in calculations for Hyundai Steel because they

were specific to OCTG and represented the production experience of a Korean OCTG producer in Korea. *Id.*

Relying on *Geum Poong Corp. v. United States* ("*Geum Poong*"), 25 CIT 1089, 163 F. Supp. 2d 669 (2001), and *Husteel Co. v. United States* ("*Husteel I*"), 39 CIT __, 98 F. Supp. 3d 1315 (2015), Plaintiff argues that Commerce may not apply facts available and that its use perpetuates irrational or unrepresentative results. *See* Pl.'s Opp'n Cmts. at 13–15 (citing *Geum Poong*, 25 CIT at 1097, 163 F. Supp. 2d at 679; *Husteel I*, 39 CIT at __, 98 F. Supp. 3d at 1348). The Court in *Geum Poong* stated that "Commerce is free to employ a reasonable approach" and "Commerce must explain why it chose one methodology over another." *Geum Poong*, 25 CIT at 1097, 163 F. Supp. 2d at 679. "Commerce cannot sidestep the requirement without giving adequate explanation even in a facts available scenario." *Id.* The Court concludes that Commerce has supplied an adequate explanation in this case.

In *Husteel I*, the court concluded that even if Commerce's determination that there was no home market profit data for other exporters and producers in Korea of the same general category of products was reasonable, "Commerce still was required to attempt to apply a profit cap on the basis of the facts available." *Husteel I*, 39 CIT at __, 98 F.Supp.3d at 1348. The court reiterated this conclusion on remand. *Husteel II*, 40 CIT at __, 180 F. Supp. 3d at 1348.

Plaintiff focuses on *Husteel II*'s statement that "a non-cap is not a cap." Pl.'s Opp'n Cmts. at 14–15 (quoting *Husteel II*, 40 CIT at __, 180 F. Supp. 3d at 1348). However, the court still found that:

> Commerce's failure to cap the profit rate . . . was reasonable based on the record. Commerce was faced with a difficult decision as all of the information on the record had imperfections, and the court is not persuaded that any of the 'caps' suggested by Respondents fulfill the statute any better than no cap.

Husteel II, 40 CIT at __, 180 F. Supp. 3d at 1348. Furthermore, the Court has opined that "[w]hen Commerce explains reasonably that information is not available for Commerce to calculate a profit cap, Commerce may calculate constructed profit under subsection (iii) without calculating a profit cap." *SeAH Steel Corp. v. United States*, 45 CIT __, __, 539 F. Supp. 3d 1341, 1362 (2021). And "[t]he court normally defers to Commerce's selection of the best available information when Commerce is forced to rely on facts available." *Husteel I*, 39 CIT at __, 98 F. Supp. 3d at 1347 (referencing *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993)).

In the *Remand Results*, Commerce determined that information to calculate a profit cap under 19 U.S.C. § 1677b(e)(2)(B)(iii) was not available on the record. *See Remand Results* at 17–19; Draft Remand Results at 16–18. Commerce calculated a profit cap based on facts available using SeAH's third-country sales as the best available information. *Remand Results* at 39. Commerce also examined "the alternative profit sources on the record (and reexamined them for both the *Final Results* and this remand proceeding), concluding each time that SeAH's data are the best available information for using as the profit cap." *Id.* Further, Commerce reasonably explained that the selection of a facts available profit cap based on profit from third-country sales of OCTG was a reasonable proxy for profits normally realized by Korean exporters and producers from sales of merchandise in the same category of merchandise as the subject merchandise, which was in accordance with the CAFC's holding in *NEXTEEL II*. *See Remand Results* at 40; *see also NEXTEEL II*, 28 F.4th at 1241. All of the alternative profit sources on the record included sales of products that were outside the same general category of merchandise. *Remand Results* at 40. Thus, the "SeAH data meet the [constructed value] profit requirements for use with regard to SeAH under the preferred method of the law and *are not distorted by the production and sale of products not considered to be in the same general category of products as OCTG*." *Id.* (emphasis in original). The Court is not persuaded by Plaintiff's argument that Commerce may not apply facts available to calculate the profit cap.

Finally, Plaintiff contends that Commerce should not have relied on SeAH's third-country sales, as "the goal in calculating [constructed value] profit is to approximate the home market profit experience of the respondents." *See* Pl.'s Opp'n Cmts. 15–18. Plaintiff's comparison of alternative profit sources to demonstrate that SeAH's profit was abnormally high is not persuasive. Commerce determined that the alternative sources included, in part, profit from non-comparable products that were outside of the same general category of products as the subject merchandise. *Remand Results* at 37. Commerce explained that comparing sales of "Korean-made OCTG to profit that is derived, in part, from sales of such dissimilar products as Russian power generation pipe, Japanese chemicals and steel sheet, Taiwanese coils, or Turkish automotive tube and water transmission pipe" was illogical. *Id.* at 37–38. By contrast, Commerce determined that "SeAH's profit of 16.3 percent from sales of OCTG in Kuwait was almost identical to the average [constructed value] profit of 16.2 percent (based on sales of two OCTG producers) that Commerce used on remand in the original investigation, which this Court sustained."

Id. at 38 n.145. Finally, Commerce determined SeAH's profit rate to have been a reasonable replacement for the missing requested information because "in addition to sales of OCTG to third-country markets, it includes both profit from OCTG dumped in the U.S. market as well as from sales of lower-end merchandise that is outside of the same general category of products as the subject merchandise." *Id.* at 38; *see also* SeAH's Letter, "Oil Country Tubular Goods from the Republic of Korea – Response to the Department's July 2 Supplemental Questionnaire" (Jul. 26, 2021) at Appendix SA-5-A, PR 216–218.

Taken as a whole, the Court concludes that the SeAH data were a reasonable proxy to use as facts available based on Commerce's explanations and citations to substantial record evidence.

IV. Dumping-Margin for Non-Examined Respondents

As stated in the *Remand Results*, "the Court remanded for further consideration the dumping margin calculation for non-examined companies, if Commerce recalculated the weighted-average dumping margin for Hyundai Steel, finding that the non-examined companies were not barred from relief for failing to exhaust administrative remedies." *Remand Results* at 2 (citations omitted); *see Hyundai Steel*, 47 CIT at __, 639 F. Supp. 3d at 1337–38. According to the *Remand Results*:

> Using Hyundai's recalculated margin [of 9.63 percent] to determine the margin applicable to non-examined companies, for these final results of redetermination, we determine the weighted-average dumping margin applicable to the non-examined companies which are parties to this litigation; those companies are AJU Besteel, Co., Ltd. (AJU Besteel), Husteel Co., Ltd. (Husteel), and NEXTEEL Co., Ltd. (NEXTEEL), the margin for which has changed from 11.70 percent to 6.74 percent.

Remand Results at 2–3.

No party commented on that redetermination. Accordingly, the dumping margin calculation for non-examined companies will be sustained.

CONCLUSION

For the aforementioned reasons, the Court sustains Commerce's determinations of Hyundai Steel's constructed export price profit, constructed value profit and selling expenses, constructed value profit cap, and the dumping margin rate for non-examined respondents.

Judgment will enter accordingly.

Dated: December 18, 2023
New York, New York

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

Slip Op. 23–184

CVB, INC., Plaintiff, v. UNITED STATES, Defendant, and BROOKLYN BEDDING, LLC, et al., Defendant-Intervenors.

Before: Stephen Alexander Vaden, Judge
Court No. 1:21-cv-00288 (SAV)

[Sustaining the International Trade Commission's final affirmative injury determination.]

Dated: December 19, 2023

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Mary Jane Alves, Cassidy Levy Kent (USA) LLP, of Washington, DC, for Defendant-Intervenors Brooklyn Bedding, LLC; Corsicana Mattress Company; Elite Comfort Solutions; FXI, Inc.; Innocor, Inc.; Kolcraft Enterprises, Inc.; Leggett & Platt, Inc.;the International Brotherhood of Teamsters; and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO. With her on the briefs were *Yohai Baisburd* and *Sydney Reed*.

OPINION

Vaden, Judge:

CVB, Inc. (CVB) challenges the International Trade Commission's (ITC or the Commission) final affirmative injury determination in its antidumping and countervailing duty investigations of mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam. *See* Compl. ¶ 1, ECF No. 8; *Mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam*, 86 Fed. Reg. 26,545 (ITC May 14, 2021), J.A. at 14,715, ECF No. 60; *Mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam* (Final Determination), Inv. Nos. 701–TA– 645 and 731–TA–1495–1501 (Final), USITC Pub. No. 5,191 (May 2021), J.A. at 124,040, ECF No. 66. Defendant-Intervenors in support of the Commission's final affirmative injury determination are Brooklyn Bedding, LLC; Corsicana Mattress Co.; Elite Comfort Solutions; FXI, Inc.; Innocor, Inc.; Kolcraft Enterprises, Inc.; Leggett & Platt, Inc.; the International Brotherhood of Teamsters; and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (collectively, Defendant-Intervenors). *See* Def.-Ints.' Resp. to Pl.'s Mot. for J. on the Agency R. (Def.-Ints.' Resp.) at 1, ECF No. 53. Before

the Court is CVB's Motion for Judgment on the Agency Record. Pl.'s Mot. for J. on the Agency R. (Pl.'s Br.), ECF No. 48. CVB contends that the Commission's final affirmative injury determination is unsupported by substantial evidence. *Id.* at 1–2. For the reasons set forth below, the Court **SUSTAINS** the Commission's determination.

BACKGROUND

A. Procedural History

On March 31, 2020, the Defendant-Intervenors petitioned the Department of Commerce and the Commission to impose antidumping and countervailing duties on imports of mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam (the Subject Countries). *See Petition: Mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam: Antidumping and Countervailing Duty Petitions*, J.A. at 1,000–3,951, ECF No. 60. The Commission's period of investigation covered calendar year 2017 through September 2020. Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. (Def.'s Resp.) at 6, ECF No. 51. On May 15, 2020, the Commission issued its preliminary determination. *See Mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam*, 85 Fed. Reg. 30,984 (ITC May 21, 2020), J.A. at 9,046, ECF No. 60; *Mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam*, Inv. Nos. 701–TA–645 and 731–TA–1495–1501 (Preliminary), USITC Pub. No. 5,059 (May 2020), J.A. at 9,048–373, ECF No. 60. Nearly one year later, on May 14, 2021, the Commission published its final determination. *See* Final Determination, J.A. at 124,040–570, ECF No. 66.

B. Prior Mattresses from China Investigation

In December 2019, three months before the underlying petition in this case, the Commission published its final affirmative injury determination in an investigation of Chinese mattress imports. *Mattresses from China*, Inv. No. 731–TA–1424 (Final), USITC Pub. No. 5,000 (December 2019), J.A. at 6,505–62, ECF No. 60. In 2017 and 2018, Chinese imports accounted for roughly four-fifths of cumulated subject imports. Final Determination at 39, J.A. at 124,081, ECF No. 66. In 2019, Chinese imports constituted less than one-third of all imports while subject imports from other countries rose by thousands of percent. *Id.* at 39–40, J.A. at 124,081–82. Between interim 2019 and interim 2020, Chinese imports declined to almost nothing; but subject imports from other countries rose a further two hundred percent. *Id.* at 40, J.A. at 124,082. These imports from other countries were often from companies related to Chinese producers that no

longer exported their products to the United States. *Id.* At 39 n. 165, 40 n.168, J.A. at 124,081–82.

C. The Present Factual Record

The Commission began its material injury investigation by defining the "domestic like product." Final Determination at 7–9, J.A. at 124,049–51, ECF No. 66; *see also* 19 U.S.C. § 1677(10). The Commission defined the domestic like product as:

> The products covered by this investigation are all types of youth and adult mattresses. The term "mattress" denotes an assembly of materials that at a minimum includes a "core," which provides the main support system of the mattress, and may consist of inner springs, foam, other resilient filling, or a combination of these materials. Mattresses may also contain (1) "upholstery," the material between the core and the top panel of the ticking on a single-sided mattress, or between the core and the top and bottom panel of the ticking on a double-sided mattress; and/or (2) "ticking," the outermost layer of fabric or other material (e.g., vinyl) that encloses the core and any upholstery, also known as a cover.
>
> The scope of this investigation is restricted to only "adult mattresses" and "youth mattresses." [. . . .] All adult and youth mattresses are included regardless of size or size description.
>
> The scope encompasses all types of "innerspring mattresses," "non-innerspring mattresses," and "hybrid mattresses." [. . . .]
>
> Mattresses covered by the scope of this investigation maybe imported independently, as part of furniture or furniture mechanisms (e.g., convertible sofa bed mattresses, sofa bed mattresses imported with sofa bed mechanisms, corner group mattresses, day-bed mattresses, roll-away bed mattresses, high risers, trundle bed mattresses, crib mattresses), or as part of a set in combination with a "mattress foundation." [. . . .]
>
> Excluded from the scope of this investigation are "futon" mattresses. [. . . .]
>
> Also excluded from the scope are air beds (including inflatable mattresses) and water beds, which consist of air- or liquid-filled bladders as the core or main support system of the mattress. Also excluded is certain multifunctional furniture that is convertible from seating to sleeping [. . . .] Such furniture may, and

> without limitation, be commonly referred to as "convertible sofas," "sofa beds," "sofa chaise sleepers," "futons," "ottoman sleepers" or a like description.
>
> Also excluded from the scope of this investigation are any products covered by the existing antidumping duty orders on uncovered innerspring units from China or Vietnam.
>
> Also excluded from the scope of this investigation are bassinet pads with a nominal length of less than 39 inches, a nominal width less than 25 inches, and a nominal depth of less than 2 inches.
>
> Additionally, also excluded from the scope of this investigation are "mattress toppers." [. . . .]

Final Determination at 7–9, J.A. at 124,049–51, ECF No. 66 (internal citations omitted). No party challenges the like product definition, which includes many mattress varieties. *See* Def.'s Resp. at 7, ECF No. 51 ("During the final phase, CVB did not argue for another domestic like product definition or against cumulation, and it does not challenge the Commission's findings on these issues."); Pl.'s Reply at 6–7, ECF No. 58 (agreeing that CVB did not challenge the domestic like product determination and distinguishing its argument from a challenge to the domestic like product determination).

Mattresses are either boxed or flat-packed. Both packaging methods are included in the domestic like product definition. *See* Def.'s Resp. at 6–7, ECF No. 51; Pl.'s Reply at 4, ECF No. 58. Boxed mattresses are compressed and rolled into a box for shipping, while flat-packed mattresses are boxed as-is and not compressed. Statement of Brian Adams at 143:7–13, J.A. at 7,569, ECF No. 60. Shipping boxed mattresses is typically cheaper and easier than shipping flat-packed mattresses because boxed mattresses are smaller when packaged. *Id.* at 144:7–17, J.A. at 7,570. Consumers can transport boxed mattresses themselves or have them delivered to their door, whereas flat-packed mattresses require specialized delivery. *Id.* at 144:13–45:11, J.A. at 7,571–72. CVB argued throughout the administrative proceeding that the two packaging methods represent distinct, segmented markets with little direct competition. *See, e.g.*, Pl.'s Reply at 6, ECF No. 58 ("[C]ompetition between the [flat-packed] and [boxed mattress] segments is highly attenuated").

The Commission based its U.S. industry data on responses from fifty-three domestic producers that represented the vast majority of domestic production in 2019. Final Determination at III-1, J.A. at

124,193, ECF No. 66. It based its U.S. import data on questionnaire responses from forty-nine companies that represented the majority of U.S. imports from the subject countries. *Id.* at IV-1, J.A. at 124,223. The foreign producer and exporter data was based on nineteen questionnaire responses from companies that represent a significant portion of subject imports. *Id.* at 4–5, J.A. at 124,046–47.[1]

The Commission may issue an affirmative injury determination when it concludes that an industry in the United States is materially injured or threatened with material injury by reason of certain imports. 19 U.S.C. §§ 1671d(b), 1673d(b). In making this determination, the Commission must consider the volume of subject imports, their effect on prices for the domestic like product, and their impact on producers of the domestic like product. 19 U.S.C. § 1677(7)(B). The statute defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). In assessing material injury, the Commission considers all relevant economic factors that bear on the state of the industry in the United States. 19 U.S.C. § 1677(7)(C)(iii). No single factor is dispositive, and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id.*

The Commission began its Views by discussing the conditions of competition in the industry. It found that mattress demand "is tied to housing sales and economic activity, particularly new home sales, housing starts, home resales, interest rates, gross domestic product ("GDP") growth, and consumer sentiment." Final Determination at 35, J.A. at 124,077, ECF No. 66. The Commission found that demand trends were mixed, but up overall, with different types of mattresses having different sales trends. *Id.* at 36, J.A. at 124,078. Demand for boxed mattresses increased, but demand for flat-packed mattresses decreased. *Id.*

Turning to supply, the Commission noted that domestic production served about two-thirds of the domestic needs; subject imports served less than one-third; and non-subject imports served the remainder. *Id.* at 37, J.A. at 124,079. The Commission found that many domestic producers specialize in certain kinds of mattresses, but a little less than a quarter of producers overlap between boxed mattresses and flat-packed mattresses. *Id.* at 38, J.A. at 124,080. After discussing industry consolidation and new investment, the Commission noted

[1] The Commission noted that sixteen responses were received to the final phase questionnaires, and the Commission relied on three more preliminary phase questionnaires in the absence of better data from Cambodia, Serbia, and Thailand. *See* Final Determination at 4–5, J.A. at 124,046–47, ECF No. 66.

that domestic production capacity for boxed mattresses increased by 121.2 percent during the period of investigation and a further 48.6 percent in interim 2020. *Id.* at 38–39, J.A. at 124,080–81. The Commission concluded its discussion of supply by describing the near-total shift in subject imports away from China and toward other countries during the period of investigation. *Id.* at 39–40, J.A. at 124,081–82.

The Commission also considered substitutability. *Id.* at 41, J.A. at 124,083. The Commission found a "moderately high degree of substitutability between domestically produced mattresses and subject imports." *Id.* It further found that subject imports of boxed mattresses competed with flat-packed mattresses. *Id.* at 41–42, J.A. at 124,083–84. Although most domestic production was flat-packed mattresses and most imports were boxed mattresses, the Commission found "the vast majority of responding purchasers reported that domestically produced mattresses were interchangeable with and comparable to subject imported mattresses." *Id.* at 42, J.A. at 124,084. From reviewing the provided data, the Commission concluded that: (1) boxed and flat-packed mattresses can usually be made to the same specifications and are functionally interchangeable once unpackaged; (2) packaging is unimportant to end consumers; (3) online retailers do not provide search filters for packaging; and (4) "[c]onsumer indifference towards mattress packaging is reflected in purchasing behavior at the wholesale level." *Id.* at 42–43, J.A. at 124,084–85.

The ITC observed that "price is an important factor in purchasing decisions for mattresses, although non-price factors are also important." *Id.* at 44, J.A. at 124,086. Among those non-price factors, the Commission found that domestically produced mattresses and subject imports were "comparable in terms of lead times and channels of distribution" and "sold through the same channels of distribution." *Id.* at 45, J.A. at 124,087. The Commission noted that the domestic industry faced about a ten percent increase in raw material costs during the period of investigation. *Id.* at 46, J.A. at 124,088.

Having considered the prevailing conditions of competition, the Commission moved to the other statutory factors: the volume, price effect, and impact of subject imports. 19 U.S.C. § 1677(7)(B)(i). In considering these factors, the Commission must establish a causal connection between the subject imports and the material injury. *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997). The statute ensures the Commission cannot "attribut[e] to subject imports an injury whose cause lies elsewhere." *OCP S.A. v. United States*, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 139 at *64 (citing *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1222 (2006)).

Each of the factors requires the Commission to consider the effects of subject imports on the domestic industry. In its volume inquiry, the Commission must consider the significance of the quantity of imports, not just the absolute number. *Id.* at *39 (citing *USX Corp. v. United States*, 11 CIT 82, 85 (1987)). In its price inquiry, the Commission must consider whether there has been "significant price underselling" and whether "the effect of imports . . . otherwise depresses prices to a significant degree[.]" 19 U.S.C. § 1677(7)(C)(ii). Finally, in its impact inquiry, the Commission must consider "all relevant economic factors which have a bearing on the state of the industry[.]" 19 U.S.C. § 1677(7)(C)(iii).

The Commission found the volume of subject imports was significant, both in absolute terms and relative to consumption. Final Determination at 48, J.A. at 124,090, ECF No. 66. For price effects, the Commission found that subject imports sold for less than domestically produced mattresses in nearly every quarterly comparison. *Id.* at 50, J.A. at 124,092.

> Based on the moderately high degree of substitutability between subject imports and the domestic like product, the importance of price in purchasing decisions, and the pervasive underselling, as well as the purchase cost data, we find that subject import underselling was significant during the period of investigation. The significant underselling by cumulated subject imports contributed to subject imports gaining sales and market share at the domestic industry's expense during the period of investigation.

Id. at 52, J.A. at 124,094. The Commission therefore determined that imports had significant adverse effects on domestic like product prices. *Id.* at 56, J.A. at 124,098.

In its impact analysis, the Commission found that low-priced subject imports kept prices low despite rising U.S. consumption. *Id.* at 58, J.A. at 124,100. The Commission based its determination that imports significantly impacted the domestic industry on reduced capacity utilization, high end-of-period inventories, slight reductions in sales, and changes in research and development and capital expenditures. *Id.* at 58–73, J.A. at 124,100–15. Having found that all three statutory factors were satisfied under the prevailing conditions of competition, the Commission concluded that the domestic industry was "materially injured by reason of imports of mattresses" from the subject countries. *Id.* at 73, J.A. at 124,115.

D. The Present Case

On July 13, 2021, CVB filed a complaint with this Court, alleging that the Commission's injury determination was unsupported by substantial evidence or otherwise not in accordance with law. Compl. ¶ 39, ECF No. 8. CVB argues that the Commission's determination is unsupported by substantial evidence because: (1) The Commission improperly ignored record evidence that the U.S. mattress market is sharply segmented and that competition in it is highly attenuated; (2) it improperly ignored record evidence showing significant non-price reasons for increases in subject imports; (3) its determination that subject imports depressed or suppressed the prices of domestic like products is unsupported without either price convergence or signs of falling domestic prices; and (4) its determination that subject imports had a significant impact on the domestic industry improperly failed to consider the mattress industry's segmentation between boxed and flat-packed mattresses. Pl.'s Br. at 2–4, ECF No. 48. CVB filed its Motion for Judgment on the Agency Record on March 28, 2022; the Commission filed its response on June 13, 2022; Intervenors filed their response on July 1, 2022; and CVB filed its reply on August 1, 2022. Pl.'s Br., ECF No. 48; Def.'s Resp., ECF No. 51; Def.-Ints.' Resp., ECF No. 53; Pl.'s Reply, ECF No. 58.

The crux of CVB's argument is that boxed mattresses and flat-packed mattresses occupy different segments of the mattress market — with producers and purchasers concentrating on one or the other and only highly attenuated competition existing between the two. CVB argues that any domestic industry injury reflected a demand shift away from flat-packed mattresses toward boxed mattresses and was not a consequence of unfairly priced imports. The parties agree that boxed mattresses are, as a general matter, cheaper than flat-packed mattresses. Oral Argument Transcript (Oral Arg. Tr.) at 7:21–22; 37:19, ECF No. 75. Because the domestic industry produced mostly flat-packed mattresses and subject imports consisted almost exclusively of boxed mattresses, this demand shift resulted in an increased market share for imports at the expense of the domestic industry. *See* Pl.'s Br. at 9, ECF No. 48.

At oral argument, the Court focused on the Commission's use of statistics to support its conclusion that a significant share of producers and purchasers of mattresses overlapped between flat-packed and boxed mattresses. If true, this would tend to undermine CVB's claim of market segmentation and attenuated competition. First, the Court noted that the Commission opportunistically treated companies that merged during the period of investigation as single companies in order to reach the conclusion that "[n]early a quarter (12) of respond-

ing domestic producers produced both [flat-packed] and [boxed mattresses] in 2019, with these producers accounting for [a majority] of [boxed mattress] production that year[.]" Final Determination at 38, J.A. at 124,080, ECF No. 66; Oral Arg. Tr. at 25:1–20, ECF No. 75. Tempur Sealy acquired Comfort in 2018, and Leggett & Platt acquired Elite in 2019. In each case, the acquiring company produced primarily flat-packed mattress; and its merger target predominately produced boxed mattresses. The ITC treated them as four separate entities throughout its Final Determination — *except* the one time it found it convenient to treat the four companies as only two entities to inflate the market share of producers that manufactured *both* flat-packed and boxed mattresses. *See id.* Second, the Court noted the Commission's questionable purchaser data summary, which concluded that "[c]onsumer indifference toward mattress packaging is reflected in purchasing behavior at the wholesale level" in part because "[e]leven of [nineteen] responding purchasers reported purchasing and/or importing both [boxed and flat-packed mattresses]." Final Determination at 43, J.A. at 124,085, ECF No. 66; *see also* Oral Arg. Tr. at 27:22–28:1, ECF No. 75. The Court noted that most purchasers who reported buying both packaging types purchased vastly more of one mattress type than the other and that "there are only two . . . that had anything close to parity in their purchases of [boxed mattresses] and flat-pack mattresses." Oral Arg. Tr. at 27:22–28:1, ECF No. 75. The Court characterized the Commission's use of statistics as "legerdemain." *Id.* at 26:16. The Commission responded that, although these portions of its Final Determination were "very inarticulately written," they amounted only to "harmless error." *Id.* at 65:2–3.

The Court recognized that the ITC changed its approach in the final pages of its Views. *Id.* at 41:16–25 (characterizing the last portion of the Views as an "alternative holding."). After spending much of the document struggling against the evidence for a polarized mattress market, the Commission directly answered CVB's rejoinder. It found that the domestic boxed mattress sector, considered separately from the domestic flat-packed mattress sector, was injured by subject imports. *See* Final Determination at 69–73, J.A. at 124,111–15, ECF No. 66. Specifically, the Commission found that, although domestic boxed mattress producers "improved their performance by most measures during the period of investigation," their performance "would have been appreciably stronger during the period of investigation but for the significant volume and increase in volume of low-priced subject imports that displaced domestic industry shipments from the U.S. market and depressed domestic like product prices to a significant

degree, including the prices of [boxed mattress] products." *Id.* at 69–70, J.A. at 124,111–12. The Commission cited record evidence in support of this finding, including: (1) low factory capacity utilization despite increased U.S. boxed mattress consumption, (2) "subject imports of [boxed mattresses] increased their share of overall apparent U.S. consumption by more than domestically produced [boxed mattresses] during the period[,]" and (3) questionnaire responses from domestic boxed mattress producers indicated that imports adversely impacted returns on their investments. *See id.* at 70–72, J.A. at 124,112–14. In other words, imports of boxed mattresses retarded the growth of domestic boxed mattress manufacturers' sales.

The Court ordered the parties to submit supplemental letter briefs addressing whether the Commission's "alternative holding" that considered the domestic boxed mattress industry in isolation allowed for the Commission's mishandling of market polarization statistics to be harmless error. *See* Minute Order, ECF No. 71. In its supplemental brief, the Commission argued (1) "there has been no error" with respect to its handling of statistics; (2) "any lack of perfect clarity is unfortunate, but not deceptive"; and (3) were the Court to find that the Commission's statistics were in error, "such error is harmless and does not warrant a remand." Def.'s Supp. Br. at 2, ECF No. 79. The Commission asserted that it derived its finding of a high degree of overlap between boxed and flat-packed mattress manufacturers from a table that used data from 2019 only, and the relevant corporate acquisitions took place in 2018 and 2019. *See id.* at 2–4; *see also* Final Determination at III-3–6, J.A. at 124,195–98, ECF No. 66 (tabulating U.S. producer shares of flat-packed and boxed mattresses in 2019). Although the table treated the four producers separately and the Commission combined them to make its finding, the Commission "indicat[ed] in the corresponding footnote (n. 156) that 'although [boxed mattress] producers Comfort and Elite completed separate domestic producers' questionnaire responses, Tempur Sealy acquired Comfort in 2018 and Leggett & Platt acquired Elite in 2019.'" Def.'s Supp. Br. at 3–4, ECF No. 79; *see also id.* at 38 n.156, J.A. at 124,080. The Commission explained that it included this footnote "specifically to inform how it had tabulated the data and to provide its reasoning" and that "it was a factually accurate finding, which reasonably accounted for company acquisitions[.]" Def.'s Supp. Br. at 4, ECF No. 79.

The ITC next addressed the standard for harmless error. It cited case law in support of its argument that errors are harmless where, even including the error, substantial evidence supports the Commission's determination. *Id.* at 4–5 (citing *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1363–65 (Fed. Cir. 1996) for the proposition that

errors are harmless where other evidence, taken as a whole, was sufficient to support the conclusion). The Commission argued that substantial evidence still supports its material injury finding because it defined a single domestic like product that encompassed all mattresses within the scope of its investigation, which CVB did not challenge. *Id*. at 5–6. Because the Commission analyzed the domestic industry as a whole, it was not legally required to analyze different segments of the domestic industry and assess the impact to each independently. *Id.* In a footnote, the Commission also asserted that, even if it treated Elite and Comfort — the two boxed mattress producers that merged with flat-packed mattress producers — separately, "there would still be the same 12 domestic producers that produced both [flat-packed] and [boxed mattresses] in 2019, accounting for a smaller but not insignificant portion of U.S. [boxed mattress] production . . . that year." *Id.* at 4–5, n.6. The Commission concluded by once again noting that it

> addressed [CVB's] arguments with respect to the performance of [boxed mattress] producers and found that subject imports had an impact on this subset of the domestic industry, negatively affecting their capacity utilization rates, sales revenues and operating and net income, and returns on investments as subject imports surged into the U.S. market and displaced domestically produced [boxed mattresses] and significantly depressed prices for this product.

Id. at 9.

The Defendant-Intervenors' supplemental brief endorsed the Commission's brief. *See* Def.-Ints.' Supp. Br. at 1–2, ECF No. 81. Defendant-Intervenors similarly argued that the Commission's statistical summary "while inartful, is accurate and does not constitute an error"; and even if the Court were to find that the Commission was in error, such error was harmless. *Id.* The Intervenors acknowledged that the Commission changed its "tabulation methodology" when summarizing Table III-1 but claimed that "[i]n footnote 156 on page 38 of its Views, the Commission attempted to alert the reader" of the change. *Id.* at 4. Although "this footnote might have been phrased more artfully . . . it still shows that the Commission did try to be transparent about this limited instance where it combined U.S. producer data due to the Leggett & Platt/Elite and Tempur Sealy/Comfort transactions." *Id.* at 4–5. Further, the table "only presented data for 2019 and given that the transactions had occurred inmid-2018 and January 2019, it was not unreasonable to point to combined data in this instance." *Id.* at 5.

Invoking the harmless error standard, Defendant-Intervenors assert that "Courts have previously affirmed Commission determinations containing an error, where the outcome would have been the same because the error did not detract from the substantial evidence as a whole supporting the Commission's decision." *Id.* at 8–9. They claim that "the path of the Commission's decision here is discernible even without" the misleading statistical summary because the Commission's Views "set forth all issues material to its conclusion[.]" *Id.* at 9. Defendant-Intervenors contend that, even if the Commission's creative statistics detract from its conclusion, the Commission's decision was "otherwise reasonable and supported by the record as a whole." *Id.* at 10.

CVB had the last word. Its brief argued that (1) the Commission was in error; (2) the error was not harmless because it prejudiced CVB and because, after correcting the error, the Commission's material injury determination is not supported by substantial evidence; and (3) the final pages of the Final Determination were not supported by substantial evidence and therefore do not function as an alternative holding. Pl.'s Supp. Br. at 1–2, ECF No. 84. CVB first offered its standard of harm, writing without citation to authority that "[e]rror is not harmless if the Commission cannot say for certain that its ultimate injury finding would not have changed in light of the error." *Id*. at 4. CVB then explained how it believed it had been harmed by the Commission's misleading statistical summary, as "the error contributed to the Commission's refusal to meaningfully engage with CVB's market polarization argument and to evaluate properly the conditions of competition in the mattress industry." *Id.* at 3.

CVB rejected the Commission's and Defendant-Intervenors' assertion that the Commission did not need to address CVB's attenuated competition argument, claiming that the law requires the Commission to evaluate "all relevant economic factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id.* at 3 (citing 19 U.S.C. § 1677(7)(C)(iii)). CVB wrote that "the Commission must comply with the statute no matter how a respondent allegedly structures its arguments." *Id*. Plaintiff acknowledged that there may be situations where the Commission is not required to engage in a market segmentation analysis but argued that § 1677(7)(C)(iii) made it necessary here. *Id.* at 5. It also criticized the Commission's and Defendant-Intervenors' attempts to "justify the Commission's mathematical legerdemain" and argued that "the record clearly supports a finding of market polarization when the error is removed." *Id.* at 6. CVB invoked the Commission's purchaser data summary for support. *Id*.

CVB closed by arguing that the Views' final pages could not function as an "alternative holding" because they were not supported by substantial evidence. *See id.* at 7. Plaintiff asserted that the domestic boxed mattress industry suffered no injury, noting that the domestic industry gained market share during the period of investigation. *See id.* It quoted the Commission's admission that "'domestic producers of [boxed mattresses] improved their performance by most measures during the period of investigation.'" *Id.* at 8 (quoting Def.'s Resp. at 45, ECF No. 51). CVB cited cases where this Court sustained the Commission's finding of no material injury when the domestic industry's performance improved during the period of investigation. *Id.* at 8–9. It faulted the Commission for "merely assum[ing] that the cause of the unused capacity was subject imports, and not some other cause such as raw material shortages . . . or an inability to produce [boxed mattresses] to the same standard as importing producers." *Id.* at 9 (citing to record evidence that seven importers indicated that subject imports were superior in quality).

With briefing and argument concluded, the Court considers the claims of the parties.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The Court must assess the factual and legal findings underpinning the Commission's determinations and "hold unlawful any determination, finding or conclusion . . . unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 USC § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938). It must be "more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). However, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

This Court's review of the Commission's determination is limited to the administrative record that was before the agency. 19 U.S.C. § 1516a(b)(2)(A). To determine if substantial evidence exists, the Court considers "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379

(Fed. Cir. 2003) (quoting *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The Court assesses whether the Commission succeeded in putting forward a reasoned explanation by "mak[ing] the necessary findings and hav[ing] an adequate evidentiary basis for its findings." *In re NuVasive, Inc.*, 842 F.3d 1376, 1382 (Fed. Cir. 2016) (internal citations omitted). To meet this threshold, the Commission must not only "examine the relevant data and articulate a satisfactory explanation for its action," it must also provide "a rational connection between the facts found and the choice made." *Id.*

DISCUSSION

At the heart of CVB's argument lies the claim that the Commission unreasonably determined that boxed mattresses and flat-packed mattresses are not a segmented market. *See* Pl.'s Br. at 2–4, ECF No. 48 (summarizing argument as containing four distinct claims, but with the first, second, and fourth claims being dependent on distinguishing data about boxed and flat-packed mattresses). CVB argues that boxed mattresses experienced most of the competition from subject imports, but the domestic boxed mattress industry thrived during the period of investigation. *Id.* at 9. In contrast, the domestic flat-packed mattress industry contracted; but there were relatively few imports of flat-packed mattresses. *Id.* CVB therefore argues the downturn cannot be attributed to subject imports but instead to a marketplace shift characterized by increased boxed mattress demand and declining flat-packed mattress demand. *Id.* CVB believes that the Commission unreasonably found that there was not a segmented market between boxed and flat-packed mattresses. *Id.* at 8–17. The Commission responds that it fully considered and analyzed the data, and CVB's primary objection is simply that the Commission came to conclusions opposite CVB's preference. *See generally* Def.'s Resp. at 17–26, ECF No. 51.

The Court first analyzes three sections of the Commission's Views that were not supported by substantial evidence: (1) the discussion of specialization in the industry, (2) the characterization of mattress purchasers' specialization, and (3) the analysis of purchaser questionnaires. Final Determination at 38, 43–44, J.A. at 124,080, 124,085–86, ECF No. 66. The Court then turns to the question of harmless error. The Court finds that the Commission's misleading statistical summaries are harmless error. Because the Court holds that there remains sufficient reasoning in the Commission's Views to

uphold its injury determination as supported by substantial evidence, the determination is **SUSTAINED**.[2]

I. The Commission's Errors

The Commission's Views contain errors that center around a common theme. For much of its Views, the Commission employed mathematical obfuscation and statistical chicanery to make the mattress industry appear less segmented than it is. When it addressed producer specialization, the Commission tried to make producers appear less specialized. To do this, it treated two pairs of companies that merged during the period of investigation as two single companies that produced both boxed and flat-packed mattresses, rather than as four companies that each specialized in one or the other. To make purchasers seem less specialized, the Commission reported that eleven of nineteen purchasers bought both boxed and flat-packed mattresses but conveniently omitted that almost all of those eleven purchased far more of one packaging type than the other. Finally, the Commission omitted important context from its description of purchaser surveys, giving the impression that wholesale purchasers did not care about packaging type. Each error demonstrates the Commission's unfortunate attempt to paint a perfect picture of an unsegmented market.

A. Producer Specialization

The Commission's first error is its analysis of producer specialization. During the period of investigation, two pairs of domestic producers merged. Final Determination at III-9–10, J.A. at 124,201–02, ECF No. 66. Throughout the Views, the Commission treated those domestic producers as four separate companies. However, in its analysis of producer specialization, it treated the producers that merged as two companies instead of four; and it gave no explanation for making the change. The reason is self-evident. It was more con-

[2] The determination is sustained except with respect to Malaysia. Plaintiff CVB does not possess standing to challenge the Commission's determination with respect to Malaysia. Def.'s Resp. at 1, ECF No. 51. *But see* Oral Arg. Tr. at 55:5–16, ECF No. 75 (preserving standing argument for appeal). It is well-established that each subject country is its own, unique determination, even when the Commission cumulates imports from multiple countries for its injury determination. *See, e.g.*, *Shandong TTCA Biochemistry Co. v. United States*, 34 CIT 582, 589–90 (2010) (collecting cases). A party requires standing to challenge the determination for each country. Because CVB conceded there is no evidence it imports mattresses from Malaysia, it cannot show any injury from the Malaysia determination and therefore lacks standing to challenge the Commission's determination with respect to Malaysia. Oral Arg. Tr. at 55:5–16, ECF No. 75; *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) ("To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing.").

venient to treat them as two companies because doing so gave the impression that more domestic producers manufacture both boxed and flat-packed mattresses.

The Commission summarized its findings regarding producer specialization:

> Although two of the three largest domestic producers of [boxed mattresses] produced no [flat-packed mattresses], the three largest producers of [flat-packed mattresses] also produced [boxed mattresses]. Nearly a quarter (12) of responding domestic producers produced both [flat-packed mattresses] and [boxed mattresses] in 2019, with these producers accounting for [a majority] of [boxed mattress] production that year, and nearly half (21) of all responding producers reported production of [boxed mattresses].

Id. at 38, J.A. at 124,080, (internal citations omitted). To support its claims, the Commission relies primarily on Table III-1. *Id.* Table III-1 is a chart that lists for each U.S. producer in 2019 its share of total mattress production, boxed mattress production, and flat-packed mattress production. *Id.* at III-3–6, J.A. at 124,195–98.

First, the Commission states that two of the three largest domestic producers of boxed mattresses produced no flat-packed mattresses. *Id.* at 38, J.A. at 124,080. According to the table, the three largest domestic producers of boxed mattresses are Elite, Innocor, and Purple, none of which produce flat-packed mattresses. *Id.* at III-3–4, J.A. at 124,195–96. Looking at the Commission's chart, it therefore appears that *all three* of the largest domestic boxed mattress producers manufactured no flat-packed mattresses in 2019. However, Leggett & Platt — a flat-packed mattress producer — acquired Elite in a deal completed in January 2019. *Id.* at 38 n.156, J.A. at 124,080. The Commission apparently chose to treat them as one entity in 2019, allowing the Commission to say that one — rather than zero — of the three largest domestic producers of boxed mattresses also produced flat-packed mattresses. The Commission did not explain its decision to treat the two companies as one entity, even though Elite's data was reported separately in the Commission's own charts and Elite continued to operate separately.[3] *See id.* at III-3–4, III-9–10, J.A. at 124,195–96, 124,201–02. It also does not explain why it treated Elite as a separate entity everywhere else in the Views.

The Commission next states that the twelve producers that produced both kinds of mattresses represented a majority of domestic

[3] The same is true of the Comfort/Tempur Sealy acquisition. *See* Final Determination at III-3–6, III-9–10, J.A. at 124,195–98, 124,201–02, ECF No. 66.

boxed mattress production in 2019. *Id.* at 38, J.A. at 124,080. But when the Court manually summed the data, it sums to less than a quarter, as presented by the Commission in the chart. *Id.* at III-3–6, J.A. at 124,195–98. The only way to reach a majority of production is to include Comfort and Elite with their respective acquirers, Tempur Sealy and Leggett & Platt. Once again, the Commission elsewhere treats these entities as separate. It repeatedly references fifty-three companies, not fifty-one; the acquisitions were not coextensive with the period of investigation; and the Commission treats Comfort and Elite as separate entities from Tempur Sealy and Leggett & Platt at almost every other point in its determination. *See, e.g.*, *id.* at 37–39, J.A. at 124,079–81. *Compare id.* at 36, n.156, J.A. at 124,080 (treating Comfort and Elite as "domestic producers [that] produced both [flat-packed] and [boxed] mattresses in 2019" to create a useful statistic), *with id.* at 69, n.305, J.A. at 124,111 (listing "domestic producers that produced [boxed mattresses] but no [flat-packed mattresses] in 2019" and including both Comfort and Elite). No explanation for the statistical gimmick appears.

Second, the Commission found that the three largest domestic producers of flat-packed mattresses also produced boxed mattresses. *Id.* at 38, J.A. at 124,080. The Commission is correct; it is strictly true that the three largest domestic producers of flat-packed mattresses also produced boxed mattresses. However, this fails to tell the whole story. Although the three companies produced both boxed and flat-packed mattresses, each produced multiples more flat-packed mattresses. The three largest domestic flat-packed mattress producers are Serta Simmons, Tempur Sealy, and Corsicana. Each company's market share in flat-packed mattresses is at least fifteen times greater than its share of the domestic boxed mattress market. *Id.* at III-3–6, J.A. at 124,195–98.

The relative shares of boxed and flat-packed mattresses in domestic production are also important. The Commission reported that in 2019 flat-packed mattresses were the substantial majority of domestic production, and boxed mattresses were less than a quarter of domestic production. *Id.* at III-19, J.A. at 124,211. Correcting for this domestic production ratio, for every one thousand flat-packed mattresses Serta Simmons produced in 2019, it produced only twelve boxed mattresses; for every one thousand flat-packed mattresses Tempur Sealy produced, it produced seventeen boxed mattresses; for every one thousand flat-packed mattresses Corsicana produced, it produced sixteen boxed mattresses. The Commission's statement that the three largest domestic producers of flat-packed mattresses also produced boxed mattresses obscured the fact that their boxed mat-

tress production was negligible. The Commission is obligated to draw from the evidence all inferences the evidence reasonably demands, not just those that are convenient. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998) (The Commission must draw "all those inferences that the evidence fairly demands."). The Commission failed to do so here.

Third, the Commission stated, "Nearly a quarter (12) of responding domestic producers produced both [flat-packed mattresses] and [boxed mattresses] in 2019, with these producers accounting for [a majority] of [boxed mattress] production that year[.]" Final Determination at 38, J.A. at 124,080, ECF No. 66. Of the twelve companies that produced both mattress types in 2019, five produced virtually none of one kind. *Id.* at III-3–6 124,195–98 (providing data that Ashley, Estee, Jeffco, Old West, and Salt Lake each produced far less than one percent of U.S. production of one kind of mattress). Of the remaining seven domestic manufacturers, four have stark production differences: Corsicana produced more of one type of mattress than the other by a ratio of 63-to-1; Kolcraft had a ratio of 74-to-1; Serta Simmons had a ratio of 83-to-1; and Tempur Sealy had a ratio of 60-to-1. *Id.* Of the remaining three companies, Solstice had a ratio of nearly 11-to-1; Leggett & Platt, of nearly 5-to-1; and the lone balanced producer, Carpenter, had a nearly 1-to-1 ratio.[4] *Id.* Again, the Commission failed to provide necessary context by drawing all those inferences fairly demanded by the evidence.

The Commission must fairly analyze the data. *See Allentown Mack Sales & Serv.,* 522 U.S. at 378. Here, the evidence demanded acknowledgement that nearly every producer is highly specialized. The Commission's failure to do so was not merely "inartful." It misread the data in question. *See* Def.-Ints.' Supp. Br. at 1, ECF No. 81. The law charges the Commission with explaining how it views the evidence before it. When it changes methodologies in analyzing the data, the Commission must acknowledge and justify any inconsistent treatment. *See Wheatland Tube Co. v. United States,* 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) (reviewing courts look for "a reasoned analysis or explanation" and can only affirm when the agency's path is "reasonably discernible"). Because the Commission opportunistically combined production figures only when it found it useful to avoid CVB's market segmentation objections, the Commission has failed to support its findings on producer specialization with substantial evidence.

[4] Some producers manufactured more flat-packed mattresses, and others produced more boxed mattresses. These ratios represent either flat-packed-to-boxed or boxed-to-flat-packed, depending on what packaging type the producer predominantly made.

B. Mattress Purchasers' Specialization

The Commission's second error is its analysis of purchaser specialization. As with producer specialization, the Commission ignored or failed to provide important context in its analysis of purchaser specialization. This gave the false impression that purchasers are indifferent about mattress packaging. Not so. Out of nineteen purchasers, only three purchased flat-packed and boxed mattresses in numbers approaching parity. The other sixteen purchased far more of one packaging type than the other, and eight of the nineteen (42%) exclusively purchased one packaging type. The Commission papered over these statistics to make purchasers appear less specialized and therefore make the market appear less segmented.

The Commission reported that "[c]onsumer indifference towards mattress packaging is reflected in purchasing behavior at the wholesale level" in part because "[e]leven of [nineteen] responding purchasers reported purchasing and/or importing both [boxed and flat-packed mattresses]." Final Determination at 43, J.A. at 124,085, ECF No. 66. The Commission cites its purchaser questionnaires but does not provide a detailed analysis of their responses. The data demonstrate significant bifurcation in wholesale purchasing decisions. Eight of the nineteen purchasers buy only one kind of mattress packaging; and eight of the remaining eleven wholesale mattress purchasers are highly specialized. Wayfair purchases one type of mattress more than another at nearly a 10-to-1 ratio; Amazon at a 15-to1 ratio; Home Depot at a 5-to-1 ratio; Nebraska Furniture Mart at a 12-to-1 ratio; Rooms to Go at a 50-to-1 ratio; Target at a 13-to-1 ratio; Transform at a 62-to-1 ratio; and Overstock at a 6.5-to1 ratio. J.A. at 102,831, ECF No. 66 (Wayfair); *id.* at 103,156 (Amazon); *id.* at 103,086 (Home Depot); *id.* at 103,051 (Rooms to Go); *id.* at 102,935 (Target); *id.* at 102,865 (Transform); J.A. at 108,419, ECF No. 65 (Nebraska Furniture Mart); J.A. at 102,977, ECF No. 73 (Overstock).[5] Only Berrios and Bob's Discount Furniture had a roughly 1-to-1 ratio with Costco at about 2-to-1. J.A. at 103,268, ECF No. 73 (Berrios); *id.* at 103,122 (Costco); *id.* at 111,476 (Bob's Discount).

The Commission must fairly analyze the data and draw all inferences the data reasonably demands. *See Allentown Mack Sales & Serv.,* 522 U.S. at 378. It is true that eleven of nineteen purchasers buy both boxed and flat-packed mattresses, but the data once again show this statistic is misleading. Only three of nineteen wholesale purchasers buy boxed and flat-packed mattresses in similar quantities. Sixteen of nineteen wholesale purchasers either purchase only

[5] These ratios represent either flat-packed-to-boxed or boxed-to-flat-packed, depending on what packaging type the purchaser predominantly bought.

one kind of mattress packaging or purchase overwhelmingly one kind of packaging. No reasonable person could review this data and determine that it shows wholesale purchasers are "indifferent" to packaging. *See Goss Graphics Sys., Inc. v. United States*, 22 CIT 983, 1004 (1998), *aff'd*, 216 F.3d 1357 (Fed. Cir. 2000) (The Commission has "discretion to make *reasonable* interpretations of the evidence.") (emphasis added). Most purchasers strongly favor one packaging type over the other. The Commission should have acknowledged this data and provided its views. Its failure to do so is error. *See Allentown Mack Sales & Serv., Inc.*, 522 U.S. at 378.

C. Purchaser Survey Rankings

The Commission's third error is found in its analysis of purchaser surveys. Again, the Commission ignored or failed to provide important context that undermined the Commission's conclusion that packaging type is irrelevant to purchasers. The Commission wrote that "[a]lthough 11 purchasers reported that packaging was very important to their purchasing decisions, only two purchasers ranked packaging among the top three factors driving their purchasing decisions, consistent with the large number of purchasers reporting purchases of both [boxed and flat-packed mattresses]." Final Determination at 44, J.A. at 124,086, ECF No. 66. In a footnote, the Commission added that "[a]lthough responding purchasers were free to rank 'Packaging (i.e., [boxed] or flat packed mattresses)' among their top three purchasing factors, as among the purchasing factors enumerated in the purchasers' questionnaire, only two did so." *Id.* at 44, n.185, J.A. at 124,086.

The Commission's statements imply that the question involved ranking from a pre-selected list. It did not. The question merely provided a blank space and some examples: "Major purchasing factors. Please list, in order of their importance, the main factors your firm considers in deciding from whom to purchase mattresses (examples include availability, extension of credit, contracts, price, quality, range of supplier's product line, traditional supplier, etc.)." Despite packaging not being listed as a factor for this question, many wholesale purchasers' questionnaire responses told a more nuanced story about what drove their decisions. *See, e.g.*, U.S. Purchasers' Questionnaire of Bob's Discount Furniture, J.A. at 111,481, 111,490, ECF No. 66 (listing three factors other than packaging but earlier stating that "[w]e expect the industry to continue towards [boxed mattresses] due to customer preference and convenience/portability of the product"); U.S. Purchasers' Questionnaire of Burlington, J.A. at 102,902, 102,915, ECF No. 65 (listing three non-packaging factors as

most important but purchasing zero boxed mattresses); U.S. Purchasers' Questionnaire of American Signature, J.A. at 103,013, 103,028, ECF No. 66 (listing three non-packaging factors as most important but purchasing zero flat-packed mattresses); U.S. Purchasers' Questionnaire of Rooms to Go, J.A. at 103,051, 103,065 (listing "[p]roduct features and specifications" as third most important and purchasing a 50-to-1 ratio of flat-packed-to-boxed mattresses).

Although it is not the Court's domain to reweigh the evidence, it is the Court's domain to require that the Commission weigh *all* the evidence in the record — not just the evidence that supports its decision. *See Nippon Steel Corp.*, 337 F.3d at 1379 (requiring examination of "the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence") (internal quotation omitted). The manufacturers' data combined with the wholesale purchasers' data tell a much more complicated story than the Commission's initial line that packaging is irrelevant. It was error to not examine this data on the record and explain what it meant for the Commission's ultimate decision. *See In re NuVasive, Inc.*, 842 F.3d at 1382 (requiring the ITC to "examine the relevant data and articulate a satisfactory explanation for its action[,]" so that it provides "a rational connection between the facts found and the choice made"). The only thing the Commission has proven is the truth of the adage that "There are three kinds of lies: Lies, Damned Lies, and Statistics." Mark Twain, *Chapters from My Autobiography – XX*, NORTH AMERICAN REVIEW 465, 471 (July 5, 1907).[6]

II. Harmless Error

The Commission need not have gone to such lengths to avoid addressing the segmentation in the U.S. mattress market. When the Commission finally engaged with CVB's arguments and addressed the domestic boxed mattress industry as a distinct segment, the Commission found injury to that segment. These findings are supported by substantial evidence. Contrary to CVB's assertions, the Commission did not need to go further and conduct a formal market segmentation analysis. Because, even with the Commission's errors, there is still substantial evidence to support the Commission's ultimate injury finding, the Commission's errors were harmless. It is on this basis that the Court will sustain the Commission's Final Determination.

[6] Twain attributes this adage to British Prime Minister Benjamin Disraeli.

A. Legal Standard

The principle of harmless error applies to judicial review of agency action. *See Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("Administrative decisions should be set aside . . . only for substantial procedural or substantive reasons[.]"); *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings."). Injury determinations by the Commission are no different. *See, e.g.*, *CP Kelco US, Inc. v. United States*, 38 CIT 1511, 1529–31 (2014) (applying the principle of harmless error to an injury determination by the Commission), *aff'd*, 623 F. App'x 1012 (Fed. Cir. 2015).

The touchstone of the harmless error inquiry is prejudice. If the errors did not change the ultimate result of the agency action, they are harmless. Put another way, if the Commission's injury determination is still supported by substantial evidence — even with the errors — the errors are harmless; and the Commission's determination may be sustained. *See Belton Indus., Inc. v. United States*, 6 F.3d 756, 761 (Fed. Cir. 1993) ("Commerce's violation did not prejudice appellees. Accordingly, Commerce's violation was harmless error."); *CP Kelco US*, 38 CIT at 1529 (finding any potential error harmless because "[the Commission's] ultimate injury finding would not have changed"). The Court thus looks past the Commission's clumsy efforts to dodge CVB's arguments and now examines where the Commission squarely addressed CVB's objections regarding harm to domestic boxed mattress manufacturers.

B. The Commission's Errors Were Harmless

In the final pages of its Views, the Commission found that — even when examining only domestic producers who exclusively manufactured boxed mattresses — subject imports injured the domestic industry. The Commission forthrightly acknowledged that domestic boxed mattress manufacturers "improved their performance" during the period of investigation, but it found that these manufacturers could have performed even better if not for the subject imports. Final Determination at 69–73, J.A. at 124,111–114, ECF No. 66. In support, the Commission pointed to the low capacity utilization of domestic boxed mattress factories, which it attributed to the subject imports. *Id.* Substantial evidence supports this portion of the Commission's Views, and it is enough to sustain the Commission's ultimate injury

finding. *See* 19 U.S.C. § 1677(7)(B) (requiring findings as to volume, price effects, and impact to sustain a material injury determination). Accordingly, the final section of the Commission's analysis renders its earlier errors harmless.

When the Commission finally turned to addressing CVB's arguments and examined domestic producers of boxed mattresses, it found subject imports injured those producers. Final Determination at 69–70, J.A. at 124,111–112, ECF No. 66. The Commission observed that these producers improved their performance during the period of investigation. *Id.* This improvement was expected because boxed mattress imports from China decreased dramatically in the wake of an antidumping order, and the domestic industry invested in increasing boxed mattress production capacity. *Id.* at 69–72, J.A. at 124,111–14. However, the Commission found that, but for the subject imports "displac[ing] domestic industry shipments . . . and depress-[ing] domestic like product prices to a significant degree," domestic boxed mattress producers would have improved their performance even more. *Id.* at 70, J.A. at 124,112.

In particular, the Commission pointed to domestic manufacturers' excess production capacity at a time when the market for boxed mattresses grew. *Id.* at 70–71, J.A. at 124,112–113. Capacity utilization "remained low over the [period of investigation]" and decreased from 2019 to 2020. *Id.* at 70, J.A. at 124,112. Although domestic producers of boxed mattresses grew their share of U.S. mattress consumption, importers saw their share of the market grow more — even as domestic producers had unused capacity. *Id.* at 71, J.A. at 124,113.

The Commission concluded that low-priced imports caused this excess domestic manufacturing capacity. *Id.* at 70–72, J.A. at 124,112–114. It also rejected arguments that factors other than price explained the low utilization of domestic manufacturing plants. *Id.* at 70, n.308, J.A. at 124,112. The Commission found a "moderately high degree of substitutability" between domestically produced mattresses and imports based on reports from domestic producers, importers, and purchasers. *Id.* at 28–29, J.A. at 124,070–71. The majority of responding purchasers said domestic boxed mattresses and imports were similar "in terms of product range, quality, and reliability of supply," undercutting any argument that a deficiency in one of those factors explained imports' advantage. *Id.* at 70, n.308, J.A. at 124,112. The Commission also noted domestic producers' low rate of warranty claims, indicating the quality of their products. *Id.* These findings undermine the argument that low quality, and not subject imports,

led to low capacity utilization. *Compare* Pl.'s Supp. Br. at 9, ECF No. 84 ("[T]he Commission merely assumes that the cause of the unused capacity was subject imports, and not some other cause such as . . . an inability to produce [boxed mattresses] to the same standard as importing producers."), *with* Final Determination at 70, n.308, J.A. at 124,112, ECF No. 66 (finding that "[n]on-price differences cannot explain the . . . low rates of capacity utilization because a majority of responding purchasers reported that domestically produced mattresses were comparable to subject imports in . . . quality" and "domestic producers of [boxed mattresses] experienced low warranty return rates").

When comparing the use of available manufacturing capacity between flat-packed mattress manufacturers and boxed mattress manufacturers, the Commission determined that boxed mattress manufacturers had more unused manufacturing capacity. Final Determination at 70, n.308, J.A. at 124,112, ECF No. 66. This discredits raw material shortages as a cause of the low utilization because flat-packed and boxed mattresses use similar inputs so that any raw material shortage should have affected both similarly. *Compare* Pl.'s Supp. Br. at 9, ECF No. 84 ("[T]he Commission merely assumes that the cause of the unused capacity was subject imports, and not some other cause such as raw material shortages[.]"), *with* Final Determination at 70, n.308, J.A. at 124,112, ECF No. 66 ("While we recognize that the domestic [boxed mattress] producers' reduced rate of capacity utilization in interim 2020 partly reflects raw material shortages, their capacity utilization rates remained low . . . relative to domestic [flat-packed mattress] producers . . . and there is no evidence that [boxed mattress] producers were incapable of utilizing more of their reported capacity[.]"). It also undercuts CVB's argument that examining domestic boxed mattress manufacturers separately would lead to a determination of no injury. *See* Pl.'s Supp. Br. at 1–2, ECF No. 84. At least for capacity utilization, treating domestic boxed mattress producers separately hurts rather than helps CVB.

Plaintiff points to prior decisions of this Court affirming Commission determinations of no injury where the domestic industry grew during the period of investigation and suggests the same result should apply here. *See* Pl.'s Supp. Br. at 7–8, ECF No. 84. Not so. That the Commission could have come to a different conclusion does not mean its conclusion here was unsupported by substantial evidence. *See Vermont Yankee*, 435 U.S. at 558 (administrative review is supposed to "insure a fully informed and well-considered decision, not necessarily a decision the judge[] . . . would have reached"). The standard of review the Court must apply is determinative. As the

Supreme Court has explained, "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966). Further, the law prohibits the Commission from finding that there is no material injury to an industry "merely because . . . the performance of that industry has recently improved." 19 U.S.C. § 1677(7)(J). The Commission can find injury to the domestic industry even when the domestic industry's performance improved by some metrics over the course of the period of investigation. *See, e.g.*, *OCTAL Inc. v. United States*, 539 F. Supp. 3d 1291, 1311–13 (CIT 2021) (affirming the Commission's finding of injury despite an increase in profit for the domestic industry during the period of investigation when other factors, including capacity utilization, suggest injury). Indeed, § 1677(7)(C)(iii) directs the Commission to evaluate "all relevant economic factors" when conducting its impact analysis, including "actual and potential negative effects on. . . growth[.]" The statute allows the Commission to consider whether the domestic industry grew less than it otherwise would have. *Cf.* 19 U.S.C. § 1677(7)(J) ("The Commission may not determine that there is no material injury or threat of material injury to an industry in the United States merely because that industry is profitable or because the performance of that industry has recently improved.").

For sixty-nine pages, the Commission dodges and ducks to avoid separately addressing domestic boxed mattress producers as CVB argued it should. The Commission buried important information and engaged in statistical chicanery. *See* Oral Arg. Tr. at 29:7–14, ECF No. 75 (describing the Commission's actions as "mathematical legerdemain"). The Commission persisted with its strategy even after oral argument. *See* Def.'s Supp. Br. at 4–5, n.6, ECF No. 79 (only acknowledging in a footnote that the Commission's disparate treatment of companies that merged during the period of investigation resulted in a threefold increase in the percentage of domestic mattresses produced by companies making both flat-packed and boxed mattresses); *see also* Pl.'s Supp. Br. at 3–4, ECF No. 84. None of this was necessary. In the final section of its Views, the Commission addressed CVB's argument and reached the same ultimate finding of injury in a manner that satisfies the substantial evidence standard. Rather than attempting to paint a perfect picture, the Commission could have addressed CVB's arguments directly from the beginning. Instead, the Commission prevails only because of the final section of its Views and the harmless error principle. Candor should be option one, not the last resort.

C. The Commission Was Not Required to Conduct a Formal Market Segmentation Analysis

In a final argument, CVB says that the Commission needed to conduct a "proper market segmentation analysis" to satisfy its statutory obligation to "evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry." Pl.'s Supp. Br. at 5, ECF No. 84 (quoting 19 U.S.C. § 1677(7)(C)(iii)). CVB acknowledges the many cases holding the Commission need not conduct a formal market segmentation analysis but nonetheless argues that such an analysis was necessary here. *See id.*; Def.'s Supp. Br. at 6–7, ECF No. 79 (listing cases). Courts will defer to the Commission's methodology when it is reasonable, even if a plaintiff presents a reasonable alternative. *JMC Steel Grp. v. United States*, 39 CIT 649, 657 (2015) ("It is not enough for Plaintiffs simply to proffer an alternate methodology to that relied upon by the agency, even if that alternate methodology is reasonable and not inconsistent with the statute."). Because the Commission reasonably found that subject imports injured the domestic industry, the Commission satisfied its statutory obligations. *See supra* Section II-B.

Absent a statutory command, this Court cannot force a specific methodology onto the Commission. *See Vermont Yankee*, 435 U.S. at 546–47 (instructing courts not to mandate procedures beyond those explicitly required by Congress); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 100 (2015) (citing *Vermont Yankee* and abrogating a doctrine that "imposes on agencies an obligation beyond" the Administrative Procedure Act's requirements); *U.S. Steel Grp.*, 96 F.3d at 1362 ("This court has no independent authority to tell the Commission how to do its job. We can only direct the Commission to follow the dictates of its statutory mandate. So long as the Commission's analysis does not violate any statute and is not otherwise arbitrary and capricious, the Commission may perform its duties in the way it believes most suitable."). Instead, the Court asks whether the Commission's methodology complied with the relevant statutes and finds substantial evidentiary support. *See U.S. Steel Grp.*, 96 F.3d at 1362. Here, it did.

No statute requires the Commission to conduct a market segmentation analysis. The Commission cites many cases holding that it was not obligated to conduct a market segmentation analysis. *See* Def.'s Supp. Br. at 6–7 (listing cases); *see also Full Member Subgroup of Am. Inst. of Steel Constr., LLC v. United States*, 547 F. Supp. 3d 1211, 1233 (CIT 2021) ("[T]he Commission was not required to analyze the impact of subject imports on different segments of the domestic industry."), *aff'd*, No. 2022–1176, 2023 WL 5761126 (Fed. Cir. Sept. 7,

2023); *ITG Voma Corp. v. United States Int'l Trade Comm'n*, 253 F. Supp. 3d 1339, 1354 (CIT 2017) (rejecting an argument that the Commission was required to engage in a market segmentation analysis because "the law imposes no such requirement"), *aff'd*, 753 F. App'x 913 (Fed. Cir. 2019). CVB meanwhile cites no caselaw to support its stance. The statute instructs the Commission to "evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii). This general instruction does not obligate the Commission to use any specific methodology. *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. United States*, 348 F. Supp. 3d 1328, 1333 (CIT 2018) ("The statute does not provide further guidance, giving the Commission discretion to assess the conditions of competition in a particular industry."). Finding no support in caselaw or statutory text, the Court finds the Commission was not required to conduct a formal market segmentation analysis. The final section of its Views addressed imports' effects on the domestic boxed mattress market segment separately and that suffices.

CONCLUSION

The Commission's determinations are reviewed under the substantial evidence standard. 19 U.S.C. § 1516a(b)(1)(B)(i). Here, the Commission's errors were needless but ultimately harmless. When the Commission stopped trying to dodge the issue and instead directly addressed harm to domestic boxed mattress manufacturers, it made the necessary findings to have its decision supported by substantial evidence. It is on this basis that the Commission's final affirmative injury determination is **SUSTAINED**, and Plaintiff's Motion for Judgment on the Agency Record is respectfully **DENIED**.

Dated: December 19, 2023
New York, New York

/*s*/ *Stephen Alexander Vaden*
JUDGE

Slip Op. 23–185

RISEN ENERGY CO., LTD., Plaintiff, JINGAO SOLAR CO., LTD., et al., Consolidated Plaintiffs, and SHANGHAI BYD CO., LTD., TRINA SOLAR CO., LTD., et al. Plaintiff-Intervenors v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Consol. Court No. 20–03912

[Commerce's Final Results in the Sixth Administrative Review of Commerce's countervailing duty order on crystalline silicon photovoltaic cells from the People's Republic of China are sustained.]

Dated: December 19, 2023

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for the plaintiff Risen Energy Co., Ltd. With them on the brief was *James K. Horgan*.

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Craig A. Lewis, Hogan Lovells US LLP, of Washington DC, for plaintiff-intervenor Shanghai BYD Co., Ltd.

Jonathan M. Freed, Trade Pacific PLLC, of Washington DC, for plaintiff-intervenor Trina Solar Co., Ltd. With him on the brief were *Robert G. Gosselink, MacKensie R. Sugama* and *Kenneth N. Hammer*.

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

JUDGMENT

This matter is before the court following issuance of the results of a third remand order. *See* Redetermination Pursuant to Court Remand Order, ECF No. 137 (Dec. 7, 2023) ("*Third Remand Results*"); *see also Risen Energy Co., Ltd. v. United States*, Slip Op. 23–161, 2023 WL 7991650 (CIT Nov. 17, 2023). All parties agree that the United States Department of Commerce ("Commerce") has complied with the remand order of the court and no party objects to the results. *See id.*; Comments in Support of Third Remand Redetermination of Consolidated Plaintiffs JingAo Solar Co., Ltd., Shanghai JA Solar Technology Co., Ltd., JA Solar Technology Yangzhou Co., Ltd., Hefei Ja Solar Technology Co., Ltd. and JA Solar (Xingtai) Co., Ltd. at 2, ECF No. 138 (Dec. 18, 2023); Plaintiff-Intervenor Shanghai BYD Co., Ltd.'s Comments in Support of the Final Results of Remand Redetermination, ECF No. 139 (Dec. 18, 2023); Plaintiff-Intervenor Trina's Comments on Final Results of Third Remand Redetermination, ECF No. 140 (Dec. 18, 2023). The *Third Remand Results* comply with the

court's order. *See Risen*, Slip Op. 23–161, 2023 WL 7991650 (CIT Nov. 17, 2023). Accordingly, it is

ORDERED, **ADJUDGED**, and **DECREED** that the *Third Remand Results* by Commerce are **SUSTAINED**.

Dated: December 19, 2023
New York, New York

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

Slip Op. 23–186

CAMBRIA COMPANY LLC, Plaintiff, and ANTIQUE MARBONITE PRIVATE LIMITED; PRISM JOHNSON LIMITED; SHIVAM ENTERPRISES; ARIZONA TILE, LLC; M S INTERNATIONAL, INC.; and PNS CLEARANCE LLC, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and APB TRADING, LLC; ARIZONA TILE LLC; COSMOS GRANITE (SOUTH EAST) LLC; COSMOS GRANITE (SOUTH WEST) LLC; COSMOS GRANITE (WEST) LLC; CURAVA CORPORATION; DIVYASHAKTI GRANITES LIMITED; DIVYASHAKTI LIMITED; FEDERATION OF INDIAN QUARTZ SURFACE INDUSTRY; M S INTERNATIONAL, INC.; MARUDHAR ROCKS INTERNATIONAL PVT LTD.; OVERSEAS MANUFACTURING AND SUPPLY INC.; QUARTZKRAFT LLP; STRATUS SURFACES LLC; and PNS CLEARANCE LLC, Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 23–00007

[Denying Plaintiff's partial consent motion for statutory injunction and Consolidated Plaintiffs' partial consent motion to partially dissolve statutory injunctions.]

Dated: December 19, 2023

Luke A. Meisner and *Roger B. Schagrin*, Schagrin Associates, of Washington, DC, for Plaintiff Cambria Company LLC.

Jonathan T. Stoel, *Jared R. Wessel*, *Nicholas R. Sparks*, and *Cayla D. Ebert*, Hogan Lovells US LLP, of Washington, DC, for Consolidated Plaintiffs Arizona Tile LLC, M S International, Inc., and PNS Clearance LLC.

Joshua E. Kurland, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. Of counsel are *Vania Y. Wang* and *Joseph Grossman*, Attorneys, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Julie C. Mendoza, *Donald B. Cameron*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, *Eugene Degnan*, *Jordan L. Fleischer*, *Nicholas C. Duffey*, and *Ryan R. Migeed*, Morris Manning & Martin LLP, of Washington, DC, for Defendant-Intervenors Federation of Indian Quartz Surface Industry.

OPINION AND ORDER

Barnett, Chief Judge:

This consolidated case is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the first administrative review of the antidumping duty order covering certain quartz surface products ("QSPs") from India for the period of review December 13, 2019, through May 31, 2021. *See Certain Quartz Surface Prods. From India*, 88 Fed. Reg. 1,188 (Dep't Commerce Jan. 9, 2023) (final results of antidumping duty admin. rev.; 2019–2021) ("*Final Results*"), ECF No. 41–4, and accompanying Issues and Decision Mem., A-533 889 (Dec. 30, 2022), ECF No. 41–5.

Plaintiff Cambria Company LLC ("Cambria") now moves the court for a statutory injunction pursuant to 19 U.S.C. § 1516a(c)(2) and U.S. Court of International Trade ("CIT") Rules 7(b) and 56.2(a) enjoining Defendant ("the Government") from liquidating the entries subject to the *Final Results* pending a final and conclusive court decision in this matter, including all appeals. Pl.'s. Partial Consent Mot. for Statutory Inj., ECF No. 63 ("Cambria's Mot."). Consolidated Plaintiffs M S International, Inc. ("MSI") and Arizona Tile LLC ("AZ Tile") move the court to partially dissolve the statutory injunctions granted by the court in their member case in order to allow for the liquidation of entries made during the period of review for which MSI and AZ Tile served as importers of record in connection with some of the listed producers or exporters. *See* Consol. Pls.' Partial Consent Mot. to Partially Dissolve Inj. of Liquidation, ECF No. 64 ("MSI & AZ Tile's Mot.").[1]

While the Government consents to both motions, Cambria's Mot. at 7;[2] MSI & AZ Tile's Mot. at 3, Cambria opposes MSI and AZ Tile's motion, and MSI and AZ Tile oppose Cambria's motion, Consol. Pls.' Resp. to Cambria's Mot. for Statutory Inj., ECF No. 69 ("Consol. Pls.' Resp."); Pl.'s. Resp. in Opp'n to Consol. Pls.' Mot. to Partially Dissolve Inj. of Liquidation, ECF No. 70 ("Pl.'s Resp."). Defendant-Intervenor Federation of Indian Quartz Surface Industry ("the Federation") also opposes Cambria's motion. Opp'n of Def.-Int. [the Federation] to Pl.'s Mot. for Statutory Inj., ECF No. 71 ("Def.-Int.'s Resp.").[3] For the reasons discussed herein, the court will deny both motions.

BACKGROUND

The merits of these consolidated cases are still being briefed. Pending before the court now are essentially cross-motions regarding the suspension and lifting thereof of liquidation of entries from India covering QSPs subject to Commerce's *Final Results*.

Prior to consolidation in the present matter, on January 31, 2023, MSI and AZ Tile filed suit to contest certain aspects of the *Final Results*. *See* Summons, *Ariz. Tile LLC v. United States*, Ct. No. 23-cv-00019 ("Ariz. Tile 23–19") (Jan. 31, 2023), ECF No. 1. In litigation pursuant to 28 U.S.C. § 1581(c) seeking to challenge the final results

[1] While MSI and AZ Tile are operating as Consolidated Plaintiffs for purposes of the present motions based on the commencement of their own action that is consolidated under this lead case, they also intervened as Defendant-Intervenors in this case. *See* Order (Mar. 10, 2023), ECF No. 36.

[2] The Government consented to Cambria's motion while noting that "Commerce has already issued liquidation instructions for entries not covered by the injunctions previously issued." Cambria's Mot. at 7.

[3] Additional Defendant-Intervenors informed Cambria that they did not consent to the motion but did not file a separate response thereto. *See id.* at 8.

of an antidumping or countervailing duty administrative review, liquidation is governed by 19 U.S.C. § 1516a(c)(2). Pursuant thereto, liquidation in accordance with the agency determination is generally final and conclusive unless an interested party secures a statutory injunction to ensure liquidation in accordance with any final court decision reviewing the agency determination. *See* 19 U.S.C. § 1516a(c), (e); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983) (addressing the statutory scheme). In accordance with this framework, MSI and AZ Tile each obtained statutory injunctions enjoining liquidation of entries imported by the respective party and produced or exported by several identified Indian companies. *See* Orders for Statutory Inj. Upon Consent, Ariz. Tile 23–19 (Feb. 13, 2023), ECF Nos. 17, 18.[4] Both MSI and AZ Tile listed Antique Marbonite Private Ltd. ("Antique Marbonite") among the producers/exporters whose entries made by MSI and AZ Tile were subject to the injunction. *See id.*[5]

On March 17, 2023, the court consolidated *Arizona Tile* with challenges to the same underlying agency decision filed by Cambria, Antique Marbonite, APB Trading LLC, and the Federation (and their respective co-plaintiffs). Order (Mar. 17, 2023), ECF No. 40. In this lead case commenced by Cambria, the deadline to seek a statutory injunction lapsed on March 13, 2023. *See* CIT Rule 56.2(a)(4) (setting a 30-day deadline following service of the complaint "or at such later time, for good cause shown"); Certificate of Service (Feb. 10, 2023), ECF No. 15. Cambria did not file a Form 24 or otherwise seek an injunction by the expected deadline.

On November 17, 2023, MSI and AZ Tile filed a partial consent motion to partially dissolve the Form 24s. MSI & AZ Tile's Mot. They request the court to lift the suspension of liquidation for all previously enjoined entries for which MSI or AZ Tile served as the importer of record with the exception of entries produced or exported by Antique Marbonite. *Id.* at 3. In anticipation of MSI and AZ Tile's motion,

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[4] Parties seeking an order for statutory injunction upon consent may file a Form 24 with the court pursuant to Rule 56.2. *See* Form 24, https://www.cit.uscourts.gov/sites/cit/files/Form%2024.pdf. References to these items hereinafter will be to "Form 24s."

[5] Producers and exporters covered by the Form 24 filed by Arizona Tile are: Antique Marbonite, ARO Granit Ind-Quartz, Esprit Stones Pvt. Ltd., Marudhar Rocks International Pvt Ltd, Pacific Industries Limited, Pacific Quartz Surfaces LLP, Paradigm Stone India Pvt Ltd, and Quartzkraft LLP. Producers and exporters covered by the Form 24 filed by MSI are: Antique Marbonite, Baba Super Minerals Pvt Ltd, Camrola Quartz Limited, Chariot International Pvt Ltd, Cuarzo, Glowstone Industries Pvt Ltd, Keros Stone LLP, Mahi Granites Pvt Ltd, Pacific Industries Limited, Pacific Quartz Surfaces LLP, Paradigm Stone India Pvt Ltd, Pelican Quartz Stone, Rocks Forever, Safayar Ceramics Pvt Ltd, Satya Exports, and Southern Rocks & Minerals Pvt Ltd. Another plaintiff, PNS Clearance LLC, obtained an injunction in *Arizona Tile* prior to consolidation but has not requested dissolution.

Cambria filed a partial consent motion for a statutory injunction on the same date, seeking to enjoin liquidation of all entries subject to the *Final Results* from a list of 51 Indian producers/exporters, more than are covered by the existing Form 24 injunctions, regardless of the importer. Cambria's Mot. at 6, Attach. In other words, Cambria seeks to enjoin the liquidation of entries for which MSI and AZ Tile seek dissolution of the present injunctions *and* to enjoin the liquidation of additional entries from additional producers/exporters beyond those covered by the existing statutory injunctions, regardless of importer.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this matter pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),[6] and 28 U.S.C. § 1581(c).

The court retains the "inherent power and the discretion to modify injunctions for changed circumstances." *AIMCOR Ala. Silicon, Inc. v. United States*, 23 CIT 932, 938, 83 F. Supp. 2d 1293, 1299 (1999) (citing *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961)). "[A] party moving for modification bears the burden of showing that changed circumstances, legal or factual, make the continuation of the injunction inequitable." *Id.* (citation omitted).[7]

CIT Rule 56.2(a)(4)(A) provides that any motion for a statutory injunction "to enjoin the liquidation of entries that are the subject of the action must be filed by a party to the action within 30 days after service of the complaint, or at such later time, for *good cause* shown." CIT Rule 56.2(a)(4)(A) (emphasis added). While good cause as it applies in Rule 56.2(a) is not defined in that Rule, CIT Rule 24(a), addressing third-party intervention, defines good cause as "(i) mistake, inadvertence, surprise or excusable neglect; or (ii) under circumstances in which by due diligence a motion could not have been made within the 30-day period." CIT Rule 24(a)(3); *see also Carpenter Tech. Corp. v. United States*, 31 CIT 1, 4, 469 F. Supp. 2d 1313, 1316

[6] Citations to the Tariff Act of 1930, as amended, are to Tile 19 of the U.S. Code. All references to the U.S. Code are to the 2018 edition unless otherwise specified.

[7] In the context of considering a motion to dissolve a non-statutory preliminary injunction, the court explained that the "dual burden of showing changed circumstances and inequity 'prevents an enjoined party from constantly challenging the imposition of a preliminary injunction and relitigating arguments on motions to dissolve that have already been considered by the . . . court in its initial decision.'" *Invenergy Renewables LLC v. United States*, 44 CIT __, __, 450 F. Supp. 3d 1347, 1361–62 (2020) (quoting *Sprint Commc'ns Co. v. CAT Commc'ns Int'l Inc.*, 335 F.3d 235, 242 (3d Cir. 2003)). While the statutory injunctions at issue here were requested and obtained on the consent of the parties, the court applies the same standard to reviewing motions to dissolve. *See AIMCOR*, 23 CIT at 939, 83 F. Supp. 2d at 1299 (stating that a party seeking "dissolution [of a statutory injunction] must make a very compelling demonstration, both of changed circumstances and resulting inequities for the moving party").

(2007). Additionally, for parties seeking an extension of time pursuant to CIT Rule 6(b)(1), "[g]ood cause requires the moving party to show that the deadline for which an extension is sought cannot reasonably be met despite the movant's diligent efforts to comply with the schedule." Order, *POSCO v. United States*, Ct. No. 16-cv-00225 (Apr. 21, 2017), ECF No. 50 (citing *High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1319 (Fed. Cir. 2013), and *United States v. Horizon Prods. Int'l, Inc.*, 38 CIT 1883, 1885, 34 F. Supp. 3d 1365, 1367 (2014)). These authorities inform the court's consideration of Cambria's motion.

DISCUSSION

I. Subject Entries for Which Liquidation is Presently Enjoined

MSI and AZ Tile contend that changed circumstances merit partial dissolution of the statutory injunctions pursuant to the Form 24s. MSI & AZ Tile's Mot. at 5. The changed circumstances cited by MSI and AZ Tile include (1) an expectation of a lengthy litigation process, and (2) a desire to "free up certain cash collateral owed to their respective sureties." *Id.* at 7. Cambria contends that MSI and AZ Tile have not met the relevant standard for modifying a preliminary injunction because (1) MSI and AZ Tile failed to demonstrate a "change in circumstances that would make continuation of the injunction inequitable," and (2) granting MSI and AZ Tile's motion has the potential to "moot some of the issues raised in this appeal and undermine the remedial purpose of the antidumping statute." Pl.'s Resp. at 5. MSI and AZ Tile's stated changed circumstances fail to amount to a cognizable changed circumstance and instead simply reflect the parties' change in business preferences.

It is not uncommon for litigation to be a lengthy process. MSI and AZ Tile are represented by experienced counsel, aware of the complexity of matters before the court and the timeline required to brief and adjudicate trade disputes. Thus, the mere desire to receive an outcome outside of the timeframe a party may have anticipated does not entitle a moving party to the requested relief, particularly a mere ten months after first seeking the injunction. Additionally, MSI and AZ Tile's preference to "free up" cash collateral is not an example of a factual changed circumstance, but rather, exemplifies their change in business strategy. Thus, the desire for a party to gain more liquidity for their internal business purposes does not amount to a changed circumstance appropriate to invoke the court's discretion.[8] MSI and

[8] Additionally, MSI and AZ Tile refer to a party's "right to seek dissolution of its own injunction," MSI & AZ Tile's Mot. at 7, and, in responding to Cambria's motion, state that

AZ Tile do not have good cause to partially dissolve the existing injunctions simply because they were the movants for those orders, and they have not demonstrated changed circumstances appropriate for the court to agree to partially dissolve them. Because MSI and AZ Tile do not make a sufficient showing under the applicable legal standard, the court will deny their partial consent motion to partially dissolve the injunctions against liquidation.

Given that the denial of MSI and AZ Tile's motion results in the existing Form 24s remaining in place, the court shall deny in part Cambria's motion with respect to the subject entries for which liquidation is already enjoined pursuant to the Form 24s. By way of good cause, Cambria points to the new risk of dissolution of the existing injunctions and the potential for Cambria's case to become moot if the subject entries are liquidated. Cambria's Mot. at 4–6. Such reasons do not constitute good cause for Cambria's untimely motion. Rather than speaking to good cause, these reasons speak more to the merits of Cambria's motion for injunction, and, to that end, Cambria is under no threat of irreparable harm because liquidation of these entries is enjoined by the Form 24 statutory injunctions. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20–22 (2008) (explaining that a plaintiff must identify and establish that any irreparable harm is a *likely* outcome of the denial of a motion for a preliminary injunction).

II. Subject Entries for Which Liquidation is Not Presently Enjoined

In addition to seeking to enjoin the liquidation of entries subject to the existing Form 24s, Cambria seeks to enjoin the liquidation of additional entries produced or exported by Indian companies not presently enjoined under the existing Form 24s and without regard to the importer involved. Cambria's Mot. at 2, Attach.[9] Because Cambria filed its motion for a statutory injunction after the 30-day deadline provided in Rule 56.2(a)(4)(A), the court will review Cambria's motion for a showing of good cause.

"[c]ourts are generally inclined to allow a party to dissolve its own injunction (or parts of its injunction) as it sees fit," Consol. Pls.' Resp. at 5 (citing as one example *Commodity Futures Trading Comm'n v. Bame*, 2009 WL 10675779 (C.D. Cal. Jul. 1, 2009)). To be clear, statutory injunctions are orders of the court and should be treated as such. *See* CIT Rule 56.2(a)(4)(A) (noting the nature of Form 24s as proposed orders). Parties may seek modification of court orders by meeting their obligations under the applicable legal standard, which MSI and AZ Tile have not done here.

[9] In addition to the producers and exporters referenced in the existing Form 24s, Cambria seeks to enjoin the liquidation of entries from: Alicante Surfaces Pvt., Ltd., Antique Granito Shareholders Trust, Argil Ceramic Private Limited, Asian Granito India Ltd, Chaitanya International Minerals LLP, Colors Of Rainbow, Creative Quartz LLP, Divyashakti Granites Limited, Globalfair Technologies Pvt., Gupta Marbles, Gyan Chand Lodha, Hi Elite Quartz LLP, Hilltop Stones Pvt., Ltd., Inani Marbles and Industries Ltd., International

Cambria argues that good cause exists to grant its motion because (1) "a substantial portion of the entries have already been suspended as part of the consolidated action as a result of a prior statutory injunction by the [c]ourt," (2) the "potential that Plaintiff's appeal will be mooted if the entries at issue in this case are liquidated," and (3) granting of its motion "would not unfairly prejudice either the opposing parties or the interests of justice." Cambria's Mot. at 3. MSI and AZ Tile contend that Cambria fails to "demonstrate good cause justifying its tardy request" or "satisfy the showing required for the imposition of a preliminary injunction." Consol. Pls.' Resp. at 3. The Federation contends that "Cambria lacks good cause for filing its motion out-of-time" and that "[the Federation's] members would be prejudiced by granting Cambria a statutory injunction after the Federation voluntarily dismissed its own appeal of the *Final Results*." Def.-Int.'s Resp. at 2.

The purpose of the good cause provision of Rule 56.2(a)(4)(A) is to "reduce costs and procedural delays in antidumping and countervailing litigation by encouraging the early filing of motions for preliminary injunction." *Laclede Steel Co. v. United States*, 20 CIT 712, 714, 928 F. Supp. 1182, 1185 (1996). It constitutes a factor the court must consider separate and distinct from the factors that otherwise may justify entering a preliminary injunction. As discussed below, with respect to the subject entries for which liquidation is not currently enjoined, Cambria has failed to demonstrate good cause for filing its motion 249 days after the Rule 56.2(a)(4)(A) deadline.

Cambria's first claim, that good cause exists because a substantial portion of the entries have already been enjoined, is clearly limited to the entries discussed above and covered by the existing statutory injunctions, the liquidation of which will remain enjoined. While it is clear that one injunction is sufficient to enjoin the liquidation of any particular entry, *see Stanley Works (Langfang) Fastening Sys. Co. v. United States*, Slip Op. 18–134, 2018 WL 4850386, at *8 (CIT Oct. 5, 2018), the court routinely grants overlapping Form 24 injunctions when they are sought in a timely manner, particularly prior to the consolidation of multiple challenges to the same administrative determination, *see, e.g.*, Order, *Hyundai Steel Co v. United States*, Ct. No. 22-cv-00170 (Aug. 12, 2022), ECF No. 19 (consolidating cases in which parties had obtained separate statutory injunctions covering overlapping entries prior to consolidation). While timely requests for

Stones India Private Limited, Jennex Granite Industries, Jessie Kan Granite Inc., M.B. Granites Private Ltd., Malbros Marbles & Granites Industries, Mountmine Imp. & Exp. Pvt., Ltd., P.M. Quartz Surfaces Pvt., Ltd., Pangaea Stone International Private Ltd., Paradigm Granite Pvt., Ltd., Rose Marbles Ltd., Stone Imp. & Exp. (India) Pvt., Ltd., Stoneby India LLP, Tab India Granites Pvt., Ltd., Ultima International, Vishwas Ceramic, Vishwas Exp., and Yash Gems.

such overlapping injunctions may even constitute a "best practice" when there are challenges to an unfair trade determination by both the domestic and foreign/importing interests which may proceed along different timelines, at this stage in the proceeding, creating such overlap does not constitute "good cause" for Cambria's delay.

Cambria's second assertion of good cause similarly fails because of the currently enjoined entries. Cambria's concern that its challenge to Commerce's determination will be mooted by liquidation will not be realized so long as the Form 24 statutory injunctions remain in place. Beyond that, the court notes that the potential for Cambria's challenge to have been mooted speaks to the irreparable harm factor for obtaining an injunction in the first instance. *See Zenith Radio Corp.*, 710 F.2d at 810. While such potential mootness may justify an injunction in the first instance, it does not constitute good cause for Cambria to have failed to request an injunction within 30 days of serving its complaint. For the court to find otherwise would obviate the need to show good cause for seeking an injunction beyond the 30-day deadline set out in Rule 56.2(a)(4)(A).

Cambria's third claimed "good cause" factor is that granting the injunction "would not unfairly prejudice either the opposing parties or the interests of justice." Cambria's Mot. at 3. Cambria failed to develop its suggestion that this factor constituted good cause for its failure to seek an injunction within 30 days of serving its complaint. Moreover, to the extent that this factor appears analogous to the "balance of interests" and "public interest" factors for evaluating a motion for preliminary injunction, *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (citing *Winter*, 555 U.S. at 20), as with the mootness point above, for the court to rely on this claim would undermine the good cause requirement in CIT Rule 56.2(a)(4)(A) for moving for an injunction after the 30-day deadline.

CONCLUSION AND ORDER

For the reasons discussed herein, it is hereby

ORDERED that MSI and AZ Tile's partial consent motion to partially dissolve injunction of liquidation (ECF No. 64) is **DENIED** ; and it is further

ORDERED that Cambria's partial consent motion for statutory injunction (ECF No. 63) is **DENIED.**

Dated: December 19, 2023
New York, New York

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

Slip Op. 23–187

AG DER DILLINGER HÜTTENWERKE, Plaintiff, and THYSSENKRUPP STEEL EUROPE AG, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and NUCOR CORPORATION and SSAB ENTERPRISES LLC, Defendant-Intervenors.

Before: Leo M. Gordon, Judge
Consol. Court No. 17–00158

[Commerce's *Fourth Remand Results* sustained.]

Dated: December 21, 2023

Marc E. Montalbine, deKieffer & Horgan, PLLC, of Washington, D.C., for Plaintiff AG der Dillinger Hüttenwerke. With him on the brief were *Gregory S. Menegaz*, *Alexandra H. Salzman*, and *Merisa A. Horgan*.

Robert L. LaFrankie, Crowell & Moring, LLP of Washington, D.C., for Plaintiff-Intervenor thyssenkrupp Steel Europe AG.[1]

Kara M. Westercamp, Trial Attorney, 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, and *Tara K. Hogan*, Assistant Director. Of counsel was *Ayat Mujais*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, D.C.

Jeffrey Gerrish, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor SSAB Enterprises LLC. With him on the brief were *Roger B. Schagrin*, *Luke A. Meisner*, and *Nicholas J. Birch*.[2]

Stephanie M. Bell, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor Nucor Corporation. With her on the brief were *Alan H. Price* and *Christopher B. Weld*.

OPINION

Gordon, Judge:

This consolidated action involves challenges to the final determination in the antidumping ("AD") investigation conducted by the U.S. Department of Commerce ("Commerce") of certain carbon and alloy steel cut-to-length plate ("CTL plate") from the Federal Republic of Germany. *See Certain Carbon and Alloy Steel Cut-to-Length Plate from the Federal Republic of Germany*, 82 Fed. Reg. 16,360 (Dep't of Commerce Apr. 4, 2017) ("*Final Determination*"), and accompanying Issues and Decision Memorandum, A-428–844 (Mar. 29, 2017), http://enforcement.trade.gov/frn/summary/germany/2017–06628–1.pdf (last visited this date) ("*Decision Memorandum*").[3]

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[1] Plaintiff-Intervenor thyssenkrupp Steel Europe AG did not file any comments on the *Fourth Remand Results*.

[2] Defendant-Intervenor SSAB Enterprises LLC also did not file any comments on the *Fourth Remand Results*.

[3] The court previously issued a partial judgment as to the Ilsenburger and Salzgitter consolidated plaintiffs. *See* Slip Op. 23–160, ECF No. 197 (Nov. 15, 2023) (opinion granting partial judgment as to issues raised by consolidated plaintiffs).

Before the court are Commerce's Final Results of Redetermination Pursuant to Court Remand, ECF No. 184 ("*Fourth Remand Results*") filed pursuant to the court's remand order in *AG der Dillinger Huttenwerke v. United States*, 47 CIT ___, 648 F. Supp. 3d 1321 (2023) ("*Dillinger III*"). The court presumes familiarity with the history of this action. Plaintiff AG der Dillinger Hüttenwerke ("Dillinger") challenges Commerce's decision not to revisit its rejection of Dillinger's proposed quality code for sour service pressure vessel plate, while Defendant-Intervenor Nucor Corporation ("Nucor") challenges Commerce's determination to adjust its model match methodology to include a separate quality code for sour transport plate in calculating Dillinger's dumping margin. *See* Pl. Dillinger's Comments in Partial Opp'n to Final Results of Redetermination, ECF No. 192 ("Dillinger Opp'n Comments"); Def.-Int. Nucor Corp.'s Comments on Final Results of Redetermination, ECF No. 193 ("Nucor Opp'n Comments"); *see also* Def.'s Resp. to Comments on Remand Redetermination, ECF No. 199 ("Def.'s Resp."); Pl. Dillinger Comments in Partial Support to Final Results of Redetermination, ECF No. 200 ("Dillinger Support Comments"); Def.-Int. Nucor Corp.'s Comments in Support of Final Results of Redetermination, ECF No. 201 ("Nucor Support Comments"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii),[4] and 28 U.S.C. § 1581(c) (2018).

For the reasons set forth below, the court sustains the *Fourth Remand Results*.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed.

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

Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. & Richard Murphy, *Administrative Law and Practice* § 9.24[1] (3d ed. 2023). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2023).

II. Discussion

On remand, as directed by the court in *Dillinger III*, Commerce "reconsidered its rejection of Dillinger's proposed quality code for sour service petroleum transport plate (*i.e.*, 771) in light of [its] analysis of the facts in [*Bohler Bleche GMBH & Co. KG v. United States*, 42 CIT ___, 324 F. Supp. 3d 1344 (2018) ("*Bohler*")]." *Fourth Remand Results* at 3. Commerce examined the facts and decision in *Bohler* as compared to the facts and circumstances in the present matter, and ultimately found that "the facts of this case are analogous to those of *Bohler*." *Id.* at 5. As a result, Commerce "reconsidered [its] rejection of Dillinger's proposed quality code for sour service petroleum transport plate (*i.e.*, 771) and ... included this quality code in the CONNUMs used in the margin calculations for Dillinger to account for commercially significant physical differences between sour service petroleum transport plate and other steels designated specifically for the transport of petroleum products." *Id.* at 6. Consequently, "the final estimated weighted-average dumping margin for Dillinger increas[ed] to 4.99 percent." *Id.*; *see also* Dillinger Opp'n Comments at 6 n.1 ("Dillinger's revised margin in the final results of redetermination has increased from 4.98% to 4.99%.").

Dillinger does not challenge Commerce's findings in the *Fourth Remand Results*, but rather emphasizes that "Commerce Properly Determined That the Facts of This Case Are Analogous to Those of *Bohler*." Dillinger Opp'n Comments at 1. However, Dillinger argues that "[i]n Light of Its Determination That the Facts of This Case Are Analogous to Those of *Bohler*, Commerce Should Also Accept Dillinger's Quality Code for Sour Service Pressure Vessel Steel (Code

759)." *Id.* at 2. Acknowledging that the court has already rejected Dillinger's claim as to sour service pressure vessel steel, Dillinger maintains that the court "Should Revise Its August 2021 Order and Remand Commerce's Determination Concerning the Quality Code for Sour Service Pressure Vessel Plate." *Id.* at 7. Specifically, Dillinger contends that a "key holding in *Bohler* is that the Court specifically found that the plaintiffs' proposed revisions to Commerce's model-match methodology were not untimely even though they were made after the initial comment period had expired and Commerce had issued its final product characteristics." *Id.* at 8 (citing *Bohler*, 324 F. Supp. 3d at 1352). Dillinger reasons that "[i]f such significant additions to the model-match methodology [as those made in *Bohler*] cannot properly be considered untimely, then the limited addition of a Quality code for sour service pressure vessel steel as specifically permitted by the questionnaire instructions can certainly not be considered untimely." *Id.* at 4.

The Government disagrees and maintains that there is no basis for revisiting the sour service pressure vessel plate issue that was previously decided by the court. *See* Def.'s Resp. at 5–6. Defendant explains that Commerce found that Dillinger provided a similar revision to the model match hierarchy used in *Bohler* and provided information on the record like that submitted in *Bohler* to demonstrate the consistently higher costs and net price for sour service petroleum transport plate. *Id.* Thus, based on the information on the record and its similarities to the information submitted in *Bohler*, Commerce included Dillinger's proposed quality code for sour service petroleum transport plate, *i.e.*, 771, in the control numbers used in the margin calculations for Dillinger to account for commercially significant differences. *Id.* at 6.

Defendant highlights that this Court's remand order "only directed Commerce on remand to reconsider its decision to reject Dillinger's proposed quality code for sour service petroleum transport plate, and not Dillinger's proposed quality code for sour service pressure vessel steel." *Id.* at 5 (citing *Dillinger III*, 47 CIT at ___, 648 F. Supp. 3d at 1333–36). In the Government's view, the limited nature of the remand made sense in light of the fact that the court had "already sustained Commerce's rejection of Dillinger's proposed quality code for sour service pressure vessel steel." *Id.* (citing *August 2021 Order*, ECF No. 121, which upheld rejection of Dillinger's proposed quality code "because it was not submitted within the time for submitting model match comments, nor did Dillinger provide information during the investigation that would justify revisiting this issue"). Commerce

decided that it would not reconsider its "rejection of Dillinger's proposed quality code for sour service pressure vessel steel, given that the Court already sustained Commerce's rejection of this quality code." *Fourth Remand Results* at 9 (citing *August 2021 Order*).

As the parties acknowledge, the court has already sustained Commerce's rejection of Dillinger's proposed quality code for sour service pressure vessel steel. *See, e.g.*, Dillinger Opp'n Comments at 7 (recognizing that court would need to "revise its August 2021 Order" in order to grant Dillinger relief on this issue); Def.'s Resp. at 5 (citing *August 2021 Order*); Nucor Opp'n Comments at 2 n.1. Notably, the court did not direct Commerce to reconsider this issue on remand, so Dillinger's arguments on this issue essentially amount to a request for reconsideration of the court's *August 2021 Order*. The court observes that Dillinger did not frame its arguments against the standard for a motion for reconsideration. *See, e.g.*, USCIT R. 59 (setting forth guidance for moving for reconsideration of a court's judgment); USCIT R. 52(b) (permitting parties to move court to amend its findings and its judgment). Furthermore, while Dillinger's arguments highlight the similarities of its circumstances with those in *Bohler*, Dillinger does not account for the factual distinctions specific to this issue that may justify differing outcomes. As Defendant-Intervenor Nucor points out, Dillinger's reliance on *Bohler* is misplaced as "[i]n *Bohler*, the Court rejected the argument that plaintiffs' model match challenges were untimely." Nucor Support Comments at 3. As the *Bohler* court explained:

> Plaintiffs raised their concerns at every turn. Plaintiffs proposed addition of a GRADE field to account for alloy content was submitted with their questionnaire responses on July 15, 2016, just 35 days after the Department had issued its revised model-match methodology [and] four months prior to the Department's *Preliminary Determination* . . . . Commerce then reviewed Plaintiffs' GRADE-field proposal and sought additional clarifying information on this issue in its September 14, 2016 supplemental questionnaire, which Plaintiff then provided. *See* Pls. Supp. Questionnaire Resp. Sec. D & E 7. The court will not now entertain the Government's argument that the model-match methodology was a closed issue prior to July 15, 2016.

Bohler, 42 CIT at ___, 324 F. Supp. 3d at 1352. "In contrast, here, Dillinger not only failed to raise this issue in its product characteristic comments, but again failed to raise it in its initial questionnaire response. This is a fundamental difference between the two proceedings." Nucor Support Comments at 3–4.

While the court maintains the inherent authority to reconsider its ruling sustaining Commerce's rejection of the proposed quality code for sour service pressure vessel steel, Dillinger has not made the requisite showing to demonstrate that reconsideration is appropriate here. Accordingly, the court rejects Dillinger's challenge and will sustain the *Fourth Remand Results*.

Curiously, despite Commerce's remand resulting in an increase to Dillinger's calculated dumping margin, Nucor challenges the *Fourth Remand Results*, arguing that Commerce's determination is "unsupported and insufficiently explained." *See* Nucor Opp'n Comments at 2. Specifically, Nucor contends that "although Commerce asserts that Dillinger has 'provided information on the record to demonstrate the consistently higher costs and net prices for sour service petroleum transport plate, along with supporting documentation,' the agency has provided no discussion or analysis of this information." *Id.* at 3 (quoting *Fourth Remand Results* at 5–6). Nucor further maintains that Commerce failed to "provide any citation to the record to support its determination or otherwise identify what information it was relying on or found to be persuasive." *Id.*

Nucor also highlights that Commerce's draft remand redetermination differed significantly from the final determination in the *Fourth Remand Results*, and laments that Commerce failed to "provide any explanation of why [its draft remand redetermination] conclusion was no longer supported or what record evidence supported the opposite conclusion." *Id.* at 3–4. For instance, Nucor notes that "[i]n contesting Commerce's original determination before this Court, as well as challenging the agency's draft remand determination, Dillinger relies predominately on information and analysis that it never presented to Commerce in the original investigation." *Id.* at 4. Nucor maintains that Commerce failed to "discuss the information on the record, identify the record evidence it relied on, or analyze how this information supports its conclusion." *Id.* at 6–7. Nucor thus urges the court to conclude that "Commerce's brief, uncited statements that Dillinger provided certain information, without discussing what that information was or how it was taken into consideration, does not provide the guidance and clarity required for there to exist a rational connection between the facts found and the choices made." *Id.* at 7.

Nucor's arguments are unpersuasive. Commerce's remand redetermination explained why the facts of this action are analogous to *Bohler*. In particular, Commerce stated that the respondent in *Bohler* "argued for a revision to the model-match hierarchy, through the

addition of two product characteristic fields (*i.e.*, 'grade' and 'process') to account for commercially significant physical differences, while Dillinger has similarly proposed a revision to the model match hierarchy, through the additional quality product characteristic code (*i.e.*, 771), to account for the different physical characteristics of sour service petroleum transport plate." *Fourth Remand Results* at 5.

"Additionally, in *Bohler*, the respondent provided information on the record to support the additional product characteristic to demonstrate the impact of alloy content on the {cost of production} of its products, while Dillinger similarly provided information on the record to demonstrate the consistently higher costs and net prices for sour service petroleum transport plate, along with supporting documentation." *Id.* at 5–6. This supporting documentation included: (1) sales and cost information for products with its proposed quality code, demonstrating the consistently higher net prices and costs for sour service petroleum transport plate and other steels designated specifically for the transport of petroleum products; and (2) documentation comparing the manufacturing of sour service petroleum transport plate to other steels designated specifically for the transport of petroleum products, as well demonstrating the unique physical properties of sour service petroleum transport plate. *Id.* at 5; *see* Dillinger Section B Response and accompanying home market sales database (July 15, 2016) (PD[5] 194; CD 77, 88); Dillinger Section C Response and accompanying U.S. sales database (July 15, 2016) (PD 198; CD 95, 96); Dillinger Section D Response and accompanying cost database (July 15, 2016) (PD 199; CD 103). As a result, Commerce reconsidered its rejection of the proposed quality code for sour service petroleum transport plate and determined to include the quality code of 771 "for Dillinger to account for commercially significant physical differences between sour service petroleum transport plate and other steels designated specifically for the transport of petroleum products." *Fourth Remand Results* at 6. Thus, contrary to Nucor's argument, Commerce addressed why the facts of this case are analogous to Bohler and that there was sufficient record evidence to support this determination. *Id.* at 9.

Nucor also argues that Commerce relied on information and analysis that Dillinger never presented to Commerce in the investigation. *See* Nucor Opp'n Comments at 5–6. The court disagrees. While Dillinger provided more analysis of this issue in its briefing before the Court, the information on which the analysis was based was already

[5] "PD ___" refers to a document contained in the public administrative record, which is found in ECF No. 23–5, unless otherwise noted. "CD ___" refers to a document contained in the confidential administrative record, which is found in ECF No. 23–6, unless otherwise noted.

on the record. *See* Dillinger Section B Response and accompanying home market sales database (July 15, 2016) (PD 194; CD 77, 88); Dillinger Section C Response and accompanying U.S. sales database (July 15, 2016) (PD 198; CD 95, 96); Dillinger Section D Response and accompanying cost database (July 15, 2016) (PD 199; CD 103); *see also* Nucor Opp'n Comments at 4 n.3 ("*To be clear, Nucor is not claiming that Dillinger has relied on information that was not on the record in the underlying investigation*, but instead that it has relied on information and analysis that was not presented or identified as relevant to the agency in support of its argument regarding the model match methodology." (emphasis added)).

Given that Commerce reasonably found the facts of *Bohler* to be analogous to the circumstances in this matter, and that Commerce reasonably explained why a similar analysis and outcome should apply here in light of the court's decision in *Dillinger III*, the court will reject Nucor's challenge and sustain the *Fourth Remand Results*.

III. Conclusion

For the foregoing reasons, Commerce's *Fourth Remand Results* are sustained. Judgment will enter accordingly.

Dated: December 21, 2023
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 23–188

JILIN BRIGHT FUTURE CHEMICALS CO., LTD., Plaintiff, NINGXIA GUANGHUA CHERISHMET ACTIVATED CARBON CO., LTD. AND DATONG MUNICIPAL YUNGUANG ACTIVATED CARBON CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CALGON CARBON CORPORATION AND NORIT AMERICAS, INC., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Court No. 22–00336

[Denying Plaintiff's motion for judgment on the agency record and sustaining the U.S. Department of Commerce's final results in the fourteenth administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China.]

Dated: December 21, 2023

Jonathan M. Freed, *Robert G. Gosselink*, and *Doris Di*, Trade Pacific PLLC, of Washington, DC, for Plaintiff Jilin Bright Future Chemicals Co., Ltd.

Francis J. Sailer, *Jordan C. Kahn*, and *Kavita Mohan*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for Plaintiff-Intervenors Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. and Datong Municipal Yunguang Activated Carbon Co., Ltd.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Deputy Director. Of counsel on the brief was *Ruslan Klafehn*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

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

OPINION

Barnett, Chief Judge:

Jilin Bright Future Chemicals Co., Ltd. ("Jilin Bright" or "Plaintiff") challenges the final results of the U.S. Department of Commerce ("Commerce" or "the agency") in the fourteenth administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China ("China") for the period of review ("POR") April 1, 2020, through March 31, 2021. *See Certain Activated Carbon From the People's Republic of China*, 87 Fed. Reg. 67,671 (Dep't Commerce Nov. 9, 2022) (final results of antidumping duty admin. rev.; and final determination of no shipments; 2020–2021) ("*Final*

Results"), ECF No. 28–5, and accompanying Issues and Decision Mem., A-570–904 (Nov. 2, 2022) ("I&D Mem."), ECF No. 28–4.[1]

Jilin Bright challenges Commerce's selection of surrogate values for bituminous coal and coal tar pitch. Confid. Mem. in Supp. of Mot. for J. Upon the Agency R. of Pl. Jilin Bright Future Chemicals Co., Ltd. ("Pl.'s Mem."), ECF No. 37; Pl. Jilin Bright's Reply to Def.'s Resp. to Jilin Bright's Mot. for J. on the Agency R. ("Pl.'s Reply"), ECF No. 50; *see also* Mem. of Law in Supp. of Pl.-Ints.' Mot. for J. on the Agency R., ECF No. 39 (supporting Plaintiff's arguments); Pl.-Ints.' Reply Br., ECF No. 51 (same). Defendant United States ("Defendant" or "the Government") responds in support of Commerce's determination. Confid. Def.'s Resp. to Pl.'s and Pl.-Ints.' Mots. for J. on the Agency R. ("Def.'s Resp."), ECF No. 43; *see also* Def.-Ints.' Resp. in Opp'n to Pls.' Mot. for J. on the Agency R., ECF No. 45 (supporting the Government's arguments).

For the following reasons, the *Final Results* will be sustained.

LEGAL BACKGROUND

The United States imposes antidumping duties on foreign-produced goods sold in the United States at less than fair value based upon certain findings by Commerce and the U.S. International Trade Commission. 19 U.S.C. § 1673 (2018).[2] Commerce compares the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise" to determine the antidumping duty margin. *Id.* § 1677(35)(A).

In a nonmarket economy country, like China, Commerce generally determines the normal value by valuing "the factors of production" in a surrogate market economy country that is, to the extent possible, "at a level of economic development comparable to the nonmarket economy country" and a "significant producer[] of comparable merchandise." *Id.* § 1677b(c)(4); *see also id.* § 1677b(c)(1).[3] The agency determines these surrogate values "based on the best available information." *Id*. § 1677b(c)(1). "Commerce has discretion to determine what constitutes the best available information" because the term is

[1] The administrative record for the *Final Results* is contained in a Public Administrative Record ("PR"), ECF No. 28–2, and a Confidential Administrative Record ("CR"), ECF No. 28–3. Parties filed joint appendices containing record documents cited in their briefs. Public J.A. ("PJA"), ECF No. 53; Confid. J.A. ("CJA"), ECF No. 52; Public Suppl. J.A. ("Suppl. PJA"), ECF No. 55; Confid. Suppl. J.A. ("Suppl. CJA"), ECF No. 54.

[2] Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and reference to the U.S. Code are to the 2018 edition unless otherwise specified.

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

not statutorily defined. *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1375 (Fed. Cir. 2015). The agency generally relies on "surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review." *Id*. (citation omitted); *see also* 19 C.F.R. § 351.408(c)(1) (2021)[4] (stating preference for "publicly available information"). Commerce prefers to use a single surrogate country to value all factors of production. 19 C.F.R. § 351.408(c)(2) (excepting labor).

Commerce may test the reasonableness of the surrogate values available to it using "benchmark" data of "a product whose price roughly correlates with the price of an input assigned a surrogate value." *Blue Field (Sichuan) Food Indus. Co. v. United States*, 37 CIT 1619, 1622, 949 F. Supp. 2d 1311, 1317 (2013). Although benchmark data need not come from an economically comparable country, the data may be "less informative the greater the difference" in economic development. *Id.*

PROCEDURAL BACKGROUND

On June 11, 2021, Commerce initiated the fourteenth administrative review of the antidumping duty order on certain activated carbon from China. *Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 86 Fed. Reg. 31,282, 31,289 (Dep't Commerce June 11, 2021), PR 12, PJA Tab 1. Commerce selected Jilin Bright and Datong Juqiang Activated Carbon Co., Ltd. ("DJAC") as the mandatory respondents. *See* Resp't Selection (Aug. 5, 2021) at 1, 5, CR 17, PR 50, PJA Tab 2.

On May 6, 2022, Commerce preliminarily determined that certain activated carbon from China was sold at less than fair value in the United States during the POR. *Certain Activated Carbon From the People's Republic of China*, 87 Fed. Reg. 27,094 (Dep't Commerce May 6, 2022) (prelim. results of antidumping duty admin. rev., prelim. determination of no shipments; 2020–2021) ("*Prelim. Results*"), PR 304, PJA Tab 15; Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Rev., A-570–904 (Apr. 29, 2022) ("Prelim. Mem."), PR 299, PJA Tab 13. Commerce preliminarily selected Malaysia as the primary surrogate country. Surrogate Values for the Prelim. Results (Apr. 29, 2022) at 1, PR 302, PJA Tab 14. Commerce preliminarily valued bituminous coal using Malaysian import data under Harmonized Tariff Schedule ("HTS") 2701.12 and coal tar pitch using Ma-

[4] This section of the Code of Federal Regulations was in effect during the entire POR, which spanned two calendar years. The section was updated in October 2023 but remains substantively the same for the purposes of this opinion. All citations to the Code of Federal Regulations are to the 2021 edition unless otherwise stated.

laysian import data under HTS 2706. *Id.* at 4. With respect to its bituminous coal valuation, Commerce also requested that the parties supply information about the calculation of gross calorific value to aid its determination as to whether respondents' inputs meet the requirements of bituminous coal under HTS 2701.12. *See* Prelim. Mem. at 27.

Jilin Bright contested these two preliminary surrogate values. First, Jilin Bright disputed the surrogate value for bituminous coal, relying on its testing to argue that, because of heat value, the coal it used falls under HTS 2701.19, "other coal," rather than HTS 2701.12, "bituminous coal." Case Br. (July 8, 2022) ("Jilin Bright Case Br.") at 8–10, CR 220, PR 328, CJA Tab 8. Second, relying on the Global Coal Tar and Coal Tar Pitch Report ("UMR Coal Tar Report")[5] as a benchmark, Jilin Bright argued that Malaysian import data under HTS 2706 for coal tar pitch was anomalous. *Id.* at 5–6. Jilin Bright proposed that Commerce should instead use the data from the UMR Coal Tar Report as the surrogate value because the report contained specific pricing based on pitch content and product application. *Id.* at 7. In the alternative, Jilin Bright proposed that Commerce use data for Russian imports under HTS 2706 as the surrogate value for coal tar pitch. *Id.* at 8.

For the *Final Results*, Commerce selected a formula to convert the heat value of Jilin Bright's bituminous coal and, based on that conversion, rejected Jilin Bright's argument that such coal did not meet the standards for HTS 2701.12. I&D Mem. at 23–24. Commerce also continued to value coal tar pitch using the Malaysian import data under HTS 2706 because the UMR Coal Tar Report did not include an adequate explanation of the methodology used to obtain and report the data therein. *Id.* at 27–28.

Jilin Bright now challenges the *Final Results*, arguing that Commerce's surrogate value selections for bituminous coal and coal tar pitch are not supported by substantial evidence. Pl.'s Mem. at 6, 16.

JURISDICTION AND STANDARD OF REVIEW

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

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[5] Throughout the administrative proceedings and in court filings, parties used both "UMR Coal Tar Report" and "Global Coal Tar and Pitch Report" to refer to the same document. *Compare* Pl.'s Mem. at 17, *with* Def.'s Resp. at 24. The court uses UMR Coal Tar Report for clarity and consistency. UMR stands for "Up Market Research" and is the distributor of the report. DJAC's First Surrogate Value Cmts (Nov. 15, 2021) ("DJAC 1st Cmts"), Ex. 5Q at 2, PR 115–122, 124, 132–37, PJA Tab 5.

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 217 (1938). Substantial evidence requires Commerce to "explain the basis for its decisions," and "the path of Commerce's decision must be reasonably discernable." *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). "The question here is not whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information." *Jiaxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1300–01 (Fed. Cir. 2016) (citation omitted).

DISCUSSION

I. Bituminous Coal

A. Coal Heat Value Formula Selection

To determine a surrogate value for the coal Jilin Bright used, Commerce considered the heat value of that coal. HTS 2701.12 includes bituminous coal with a heat value "equal to or greater than 5,833 [kilocalorie/kilogram ('kcal/kg')]." I&D Mem. at 22 (referencing Note 2 of HTS Chapter 27). Coal with a heat value of less than 5,833 kcal/kg may be included under HTS 2701.19 (Other Coal). *See* DJAC 1st Cmts, Ex. 3B (HTS Chapter 27 notes). Calorific heat value may be based on useful heat value (UHV), net calorific value (NCV), or gross calorific value (GCV). *See id.* at 7. Before the agency, the mandatory respondents and the petitioners (Defendant-Intervenors here) disputed the appropriate heat value scale for HTS purposes and the appropriate formula for converting between the reported measurements. *See* I&D Mem. at 15–20 (summarizing the arguments). Relevant to this case are two potential formulae for converting UHV or NCV to GCV: (GCV = 1.053*UHV)[6] and (GCV = (UHV + 3645 – 75.4M)/1.466).[7] Commerce ultimately selected GCV as the relevant

[6] At various points, parties suggest that UHV and NCV are equivalent by referencing a variation of this formula, (GCV = 1.053*NCV). *Compare* Case Br. of [DJAC] (July 11, 2022) ("DJAC Case Br.") at 11, CR 221–22, PR 329–30, CJA Tab 9 (using NCV), *with* Third Suppl. Section D Resp. (June 15, 2022) ("Jilin Bright Suppl. Resp."), Ex. S3–2, CR 213–15, PR 320, CJA Tab 7 (using UHV). Plaintiff avers that UHV and NCV "are often used interchangeably" but does not support this statement with any citation. Pl.'s Mem. at 7. At the administrative level, Commerce explained that UHV is calculated from a nonlaboratory test sample and NCV is calculated under laboratory conditions. I&D Mem. 22. Ultimately, the distinction is not dispositive to the resolution of this case.

[7] In this equation, "M" represents moisture content.

measurement for HTS classification purposes and used (GCV = (UHV + 3645 – 75.4M)/1.466) to convert reported heat values to that measurement scale. I&D Mem. at 23.

Jilin Bright contends that Commerce failed to explain why its selection of the formula (GCV = (UHV + 3645 – 75.4M)/1.466)) yields the most accurate results. Pl.'s Mem at 16. Defendant responds that Jilin Bright cannot now challenge the agency's selection because Jilin Bright did not raise this argument before the agency. Def.'s Resp. at 13 (citing 28 U.S.C. § 2637(d)). Defendant further argues that even if Jilin Bright may raise this challenge, the selection of the formula is supported by substantial evidence. *Id.* at 17–22.

The U.S. Court of International Trade "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d); *see also* 19 C.F.R. § 351.309(c)(2). Parties need not anticipate issues not raised at the administrative level, but when parties have notice of an issue in dispute, they must raise any arguments to the agency to exhaust their remedies. *See Boomerang Tube LLC v. United States*, 856 F.3d 908, 912–13 (Fed. Cir. 2017).

Here, Commerce identified heat value conversion formula as an open issue in the review. Commerce noted that the mandatory respondents provided a UHV formula along with moisture, ash, and volatile matter content, while the petitioners submitted evidence that the HTS subheading notes were based on GCV, not UHV. Prelim. Mem. at 26 & nn.140, 142. The agency then stated that it "intend[ed] to request clarification and/or additional information from the parties on the [GCV] calculation and how the information in the mandatory respondents' test reports can be used to calculate the GCV of their bituminous coal." *Id.* at 27. Commerce then sent Jilin Bright a supplemental questionnaire, citing a table DJAC had provided that included a calculated UHV and GCV, and asked Jilin Bright to provide "a similar table summarizing the moisture, ash, volatile matter content of the bituminous coal procured from each vendor, and provide the calculated [UHV] and calculated [GCV] for each test report in the same table." Jilin Bright Suppl. Resp. at S3–2 (incorporating Commerce's question and responding to the question). The table referenced by Commerce relied on the formula (GCV = 1.053*UHV). *See id.*; *see also* DJAC's Final Surrogate Value Rebuttal Cmts and Pre-Prelim. Cmts ("DJAC Final SV Cmts") (Apr. 18, 2022) at 9, CR 189–90, PR 283–84, CJA Tab 5 (providing table Commerce later referenced).

Following the *Preliminary Results*, the mandatory respondents and the petitioners provided additional information to Commerce on the

heat value conversion formula. First, Jilin Bright responded to the supplemental questionnaire by providing the requested table using the same formula that DJAC had used in the sample table. *See* Jilin Bright Suppl. Resp., Ex. S3–2; *see also* DJAC Final SV Cmts at 9 (DJAC's table). Shortly thereafter, the petitioners submitted an article identifying (GCV = (UHV + 3645 – 75.4M)/1.466) as a formula for converting UHV heat values to GCV. Pet'rs' Submission of Info. to Rebut, Clarify, or Correct DJAC's June 17, 2022 Suppl. Questionnaire Resp. (June 24, 2022) ("Pet'rs' Submission"), Ex. 1 at 6, PR 324, PJA Tab 18. Next, DJAC and Jilin Bright submitted case briefs. In its case brief, DJAC continued to argue that UHV or NCV was the appropriate heat value measurement for HTS purposes but, in the alternative, identified (GCV = (UHV + 3645 - 75.4M)/1.466) as one of two formulae Commerce could use to derive GCV from UHV. DJAC Case Br. at 7, 12. Meanwhile, Jilin Bright, citing the table it submitted using (GCV = 1.053*UHV), argued that its coal did not meet the requirements of HTS 2701.12. Jilin Bright Case Br. at 8–10. Jilin Bright did not make any arguments in support of, or in opposition to, any particular conversion formula. *See id.* The petitioners, for their part, responded to the case briefs by contesting the formula used by DJAC and Jilin Bright and, like DJAC's alternative argument, supporting the formula (GCV = (UHV + 3645 - 75.4M)/1.466). *See* Rebuttal Br. of Pet'rs (July 22, 2022) at 5–7, CR 226, PR 338–39, Suppl. CJA Tab 2. In rebuttal, Jilin Bright again did not address the formula selection. *See* Rebuttal Br. (July 22, 2022), PR 335, Suppl. PJA Tab 1 (presenting arguments on foreign inland freight surrogate value and surrogate financial ratios). Ultimately, Commerce relied on (GCV = (UHV + 3645 - 75.4M)/1.466) as the conversion formula. I&D Mem. at 23.

The court must first consider whether Jilin Bright exhausted its arguments before the agency. Jilin Bright contends that exhaustion does not apply because it "did not have a full and fair opportunity to challenge Commerce's chosen formula at the administrative level." Pl.'s Reply at 2. Jilin Bright avers that Commerce, in its supplemental questionnaire, "instruct[ed] Plaintiff to use the formula GCV = 1.053*UHV." *Id.* at 3 (emphasis omitted). Thus, Jilin Bright argues, it was "not required to predict" Commerce's decision to accept a formula first proposed by petitioners after the preliminary results. *Id.* at 4–5 (discussing *Qingdao Taifa Grp. Co. v. United States*, 33 CIT 1090, 637 F. Supp. 2d 1231 (2009), and *Jacobi Carbons AB v. United States*, 38 CIT 932, 992 F. Supp. 2d 1360 (2014), *aff'd*, 619 F. App'x 992 (Fed. Cir. 2015)).

Contrary to Jilin Bright's argument, this case fits squarely into the classic administrative exhaustion paradigm. Jilin Bright had notice

that calorific value conversion was an open issue. Jilin Bright concedes that, "at the time of Commerce's preliminary results, Commerce did not make a determination regarding the utilization of UHV or GCV." Pl.'s Reply at 3. More than not deciding whether to use UHV or GCV, Commerce solicited information "on the [GCV] calculation" and how available information could "be used to calculate the GCV of [the mandatory respondents'] bituminous coal input." Prelim. Mem. at 27. As discussed above, the petitioners and DJAC addressed the alternative conversion formulae in their submissions to Commerce. Indeed, the petitioners and DJAC addressed, and DJAC endorsed, the formula that Commerce ultimately adopted. Based on that record, Jilin Bright knew or should have known that this issue was undecided, yet it failed to raise any arguments before the agency, as it was required to do. *See* 28 U.S.C. § 2637(d); 19 C.F.R. § 351.309(c)(2).

Jilin Bright's attempted reliance on Commerce's reference to DJAC's table in its supplemental questionnaire is misplaced. In that questionnaire, Commerce did not "instruct[]" Jilin Bright to use any specific formula, as Jilin Bright avers in its reply. *See* Pl.'s Reply at 3. Rather, Commerce instructed Plaintiff to provide the calculated GCV in a table and cited as an example DJAC's table that used the formula. *See* Jilin Bright Suppl. Resp. at S3–2. This questionnaire was issued after Commerce explicitly indicated that it needed further input on the appropriate formula to use in its preliminary results. Prelim. Mem. at 27. Nothing in the questionnaire suggests that Commerce had determined its preferred formula.

Jilin Bright was required to raise arguments related to the heat value conversion formula to the agency in the first instance, and it is clear from the record that Jilin Bright, as much as the petitioners and DJAC, had notice of this issue. Because Jilin Bright failed to contest the conversion formula before Commerce, the court declines to review it now.[8]

[8] Jilin Bright also objects to the assumption of a five percent moisture content in the GCV formula and argues that because of that flawed assumption the agency should have used an alternative formula, namely (GCV = 1.053*UHV). Pl.'s Mem. at 13–15. As with any general argument about the conversion formula selected, Jilin Bright failed to challenge the five percent moisture assumption. *Cf.* Rebuttal Br. of Pet'rs at 17 (raising the five percent inherent moisture). In presenting this argument to the court, Jilin Bright included a table purportedly adapted from the administrative record and to which the Government objected. *See* Pl.'s Reply at 5–6 (summarizing parties' positions). Because the table goes to the substantive issue of the formula selection, for which Jilin Bright failed to exhaust its administrative remedies, the court need not address the Government's objection.

B. Benchmark Data

Jilin Bright next revives an argument DJAC presented to Commerce regarding benchmark data for bituminous coal valuation.[9] To ensure the reasonableness of surrogate values, Commerce may review comparative "benchmark" data to the extent that data is useful. *Blue Field*, 37 CIT at 1622, 949 F. Supp. 2d at 1317. At the administrative level, DJAC proposed benchmark data from a Chinese coal expert and the U.S. Energy Information Administration purporting to show that the price of coking coal is generally higher than the price of non-coking coal. DJAC Case Br. at 17. In contrast, the average unit value of Malaysian imports under HTS 2701.12.9000 (noncoking coal) was double that of HTS 2701.12.1000 (coking coal), and DJAC argued that this disaggregated information at the ten-digit HTS level contributed to the unreliability of the Malaysian import data at the six-digit HTS level for HTS 2701.12. *Id.* For the *Final Results*, Commerce explained that it rejected DJAC's argument because "appropriate benchmark data" included "historical import data for the potential surrogate countries" and "data from the [HTS] category for the primary surrogate country over multiple years," and "the record lack[ed] sufficient benchmark data" to support DJAC's argument. I&D Mem. at 21 & n.154.

Jilin Bright challenges this decision, arguing that, based on global and U.S. prices, the Malaysian import data under HTS 2701.12 is not product-specific and is anomalous. Pl.'s Mem. at 9–11. Like DJAC did before the agency, Jilin Bright avers that coking and non-coking coal within the Malaysian HTS 2701.12 has the opposite price correlation as world and U.S. prices for the same. *Id.* at 9–10 (discussing DJAC's submissions to the agency). Jilin Bright contends that Commerce must consider all the evidence, even that which "fairly detracts" from its conclusion, such as this proposed benchmark data of global and U.S. prices. *Id.* at 10 (quoting *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006)). Jilin Bright argues that Malaysian HTS 2701.12 is anomalous based on the proposed benchmark data and, therefore, Commerce should have valued bituminous coal under Malaysian HTS 2701.19. *Id.* at 11. Defendant counters that Commerce reasonably determined that the disaggregated data for coking and non-coking coal did not constitute an appropriate benchmark for determining whether the aggregated data for bituminous coal was aberrant. Def.'s Resp. at 23.

[9] Although Jilin Bright did not present this argument to Commerce, DJAC did. As a result, Commerce considered the issue, and this court may review Jilin Bright's argument now. *See Valley Fresh Seafood, Inc. v. United States*, 31 CIT 1989, 1995 (2007) ("The court may excuse a party's failure to raise an argument before the administrative agency if, as occurred in this case, the agency in fact considered the issue.").

Contrary to Jilin Bright's assertion, Commerce did consider the record as a whole when it addressed DJAC's (now Jilin Bright's) argument and declined to reject the Malaysian data based on the argument about the relationship between coking and non-coking coal prices. *See* I&D Mem. at 21. Commerce explained that "appropriate benchmark data" is "historical import data for the potential surrogate countries" or data from "the same [HTS] category for the primary surrogate country over multiple years." *Id.* From the explanation provided, the court understands Commerce's preference for relying on benchmark data from economically comparable countries. Thus, the U.S. and global prices that Jilin Bright seeks to rely on are less informative than the data identified by Commerce given the economic disparities in the level of development between the United States and Malaysia. *Cf. Calgon Carbon Corp. v. United States*, 40 CIT __, __, 190 F. Supp. 3d 1224, 1234 (2016) (concluding that Commerce "acted reasonably" in not using U.S. data as a benchmark because of the economic disparity between levels of development). Likewise, global prices, encompassing data from countries of various levels of economic development, are also less informative. *See Blue Field*, 37 CIT at 1622, 949 F. Supp. 2d at 1317 ("Benchmarks, of course, become less informative the greater the difference in the levels of development of the countries from which the data derive."). Finally, the supposed benchmark data was not for the same six-digit HTS category. Rather, Jilin Bright (and DJAC) relied on data from ten-digit subcategories (2701.12.1000 and 2701.12.9000). *See* Pl.'s Mem. at 9 (citing DJAC 1st Cmts, Ex. 3(A)(i)). At most, the proposed data suggests inconsistencies between Malaysian imports under HTS 2701.12.1000 and 2701.12.9000; it does not explain how those figures would render Malaysian import data under HTS 2701.12 aberrant. Even if Jilin Bright identified an anomalous relationship between the two ten-digit subheadings, Jilin Bright did not identify any aberration in the six-digit subheading. Neither respondent proffered any data to suggest that Malaysian import data under HTS 2701.12, the category upon which Commerce relied, was aberrant.

Jilin Bright's further argument, made for the first time in its reply brief, fares no better. Therein, Plaintiff claims that the disaggregated data for Turkey and Russia support the notion that coking coal is priced higher than non-coking coal. *See* Pl.'s Reply at 8–9 (citing DJAC's 1st Cmts, Ex. 3(A)(i) at 7–8). Arguments raised for the first time in reply are generally waived. *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002). Waiver aside, the referenced data is not for the HTS category selected by Commerce and, as Commerce

noted for its *Preliminary Results*, although the agency considered Turkey and Russia as potential surrogate countries, Malaysia was the only potential surrogate country that was a significant producer of comparable merchandise. *See* Prelim. Mem. at 14 (explaining selection of Malaysia); *see also* Reqs. for Econ. Dev., Surrogate Country and Surrogate Value Cmts and Info. (Oct. 18, 2021) at Attach. 1, PR 96, PJA Tab 3 (listing Russia and Turkey as possible surrogate countries).

As stated previously, Commerce will compare potential surrogate values against appropriate benchmark data for "a product whose price roughly correlates with the price of an input assigned a surrogate value." *Blue Field*, 37 CIT at 1622, 949 F. Supp. 2d at 1317. Additionally, when using import prices as a surrogate value, Commerce will exclude from its surrogate value calculation imports from nonmarket economy countries and from countries providing export subsidies or found to have engaged in dumping. *See, e.g.*, 19 U.S.C. § 1677b(c)(5); *Fresh Garlic Prods. Ass'n v. United States*, 39 CIT __, __, 121 F. Supp. 3d 1313, 1318 (2015). Plaintiff has failed to convince the court that it should impose an additional burden on the agency to disaggregate its selected surrogate value data and test it against data from noncomparable or nonproducing countries.

II. Valuation of Coal Tar Pitch[10]

Jilin Bright contests Commerce's determination to use Malaysian import data under HTS 2706 to value its coal tar pitch, relying, as it did before the agency, on the UMR Coal Tar Report. Pl.'s Mem. at 17–23. Jilin Bright primarily contends that the UMR Coal Tar Report shows that Malaysian import data under HTS 2706 is anomalous and should not be used as a surrogate value. *Id.* at 19–23. First, Jilin Bright relies on the Malaysian import average value unit being seven times higher than UMR Coal Tar Report average prices. *Id.* at 22. Second, Jilin Bright points to the UMR Coal Tar Report showing that pitch, which is more processed than coal tar or partially distilled tar/pitch, has a "significantly higher" value than coal tar, in contrast to the inverse price relationship for the Malaysian import data. *Id.* Jilin Bright also argues that the UMR Coal Tar Report is more

[10] Jilin Bright uses "coal tar" and "coal tar pitch" interchangeably. *Compare* Pl.'s Mem. at 16 (introducing its challenge to Commerce's surrogate value for "coal tar pitch"), *with id.* (noting Jilin Bright had advocated for the UMR Coal Tar Report to value "coal tar"). The record indicates that coal tar has 50–65 percent pitch, partially distilled tar/pitch has 65–99 percent pitch, and pure pitch has 100 percent pitch. *Id.* at 17 (citing the UMR Coal Tar Report). Based on pitch content, Jilin Bright's coal tar pitch corresponds to coal tar and partially distilled tar/pitch, but not pure pitch. *Id.* The court uses "coal tar pitch" for consistency.

specific than Malaysian import data under HTS 2706 because it differentiates by pitch content and by application (namely chemical applications). *Id.* at 17. Commerce declined to rely on the UMR Coal Tar Report, both as benchmark data to establish aberrancy and as an alternative surrogate value, because the report failed to adequately explain the methodology for its data collection and reporting. *See* I&D Mem. at 28. Plaintiff argues that Commerce's decision was unsupported by substantial evidence because the UMR Coal Tar Report has a methodology section. Pl.'s Mem at 18.

Commerce reasonably declined to rely on the UMR Coal Tar Report as either benchmark data or as an alternative surrogate value. Commerce explained that the report lacked sufficient information and explanation for Commerce to confirm the validity of the data contained therein or to confirm the data was representative of a broad market average and free from taxes and duties. I&D Mem. at 28. Commerce acted reasonably in determining that unverifiable data is not helpful in demonstrating the aberrancy of a surrogate value. *See Blue Field*, 37 CIT at 1622, 949 F. Supp. 2d at 1317 ("In sum, Commerce may use benchmark data if these data prove helpful in determining whether a surrogate value is aberrational . . . ."). Likewise, given Commerce's stated preference for surrogate values that are representative of a broad market average and are tax- and duty-exclusive, I&D Mem. at 28; *see also Downhole Pipe*, 776 F.3d at 1375, the agency's decision to reject the UMR Coal Tar Report as a surrogate value when the agency could not determine these factors was also reasonable.

Jilin Bright's arguments to the contrary are unpersuasive. Plaintiff avers that the UMR Coal Tar Report included a methodology section, and therefore Commerce's decision was unsupported by substantial evidence. Pl.'s Mem. at 18. However, the inclusion of a section labeled "Research Methodology" is of no consequence if it does not adequately describe the methodology such that Commerce may verify the data or confirm its representativeness and determine the inclusion of taxes or duties. *See* DJAC's 1st Cmts, Ex. 5Q at 12–14 (methodology section). The UMR Coal Tar Report's recitation of generic primary and secondary sources that may or may not have been utilized and reference to "a variety of methods," *id.*, are not descriptions of the methodology adequate to address Commerce's concerns. Thus, Jilin Bright has not met its burden to identify record evidence that would enable Commerce to confirm the relevance of the UMR Coal Tar Report data.

QVD Food Co. v. United States, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (explaining that the interested party bears the burden to create an adequate record).[11]

Plaintiff argues that even if Commerce reasonably declined to rely on the UMR Coal Tar Report, Commerce should have used Russian import data under HTS 2706 as the surrogate value for coal tar pitch. Pl.'s Mem. at 23. However, the only data that Jilin Bright cites to call into question the Malaysian import data is the UMR Coal Tar Report. Jilin Bright asserts that pitch should have a higher price than tar (or partially distilled tar/pitch) because it is more processed. *See id.* at 20 (citing the UMR Coal Tar Report). The court is not persuaded by that assertion. As Commerce pointed out, "there may be factors involved with pricing apart from the cost of manufacturing that impact a product's value." I&D Mem. at 27; *see also Carbon Activated Tianjin Co. v. United States*, 45 CIT __, __, 650 F. Supp. 3d 1354, 1368 (2023) (discussing and rejecting a similar argument). Moreover, Commerce prefers surrogate values from a single surrogate country, 19 C.F.R. § 351.408(c)(2), and Jilin Bright provided no reason (beyond the rejected UMR Coal Tar Report) for Commerce to abandon that preference.

Commerce reasonably determined to rely on Malaysian import data under HTS 2706 to value coal tar pitch, and its decision to reject Plaintiff's arguments against such reliance was based on substantial evidence.

CONCLUSION

For the reasons discussed above, the court will sustain Commerce's *Final Results*. Judgment will enter accordingly.

Dated: December 21, 2023
New York, New York

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

[11] Jilin Bright compares the UMR Coal Tar Report to the report that the petitioners submitted regarding heat value conversion formula for bituminous coal. Plaintiff argues that Commerce relied on that conversion formula despite petitioners' source having "far less explanation regarding its methods and sources, credentials of its author, or its public-availability." Pl.'s Mem. at 18. Plaintiff's comparison is inapposite. Commerce used the petitioners' report as a source of a conversion formula to understand the relationship between two different measures of heat value – not as a source of heat value itself, or a surrogate value.

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