U.S. Court of International Trade

Slip Op. 17–36

DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff, v. UNITED STATES, Defendant, and BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, GANG YAN DIAMOND PRODUCTS, INC., CLIFF INTERNATIONAL LTD., HUSQVARNA CONSTRUCTION PRODUCTS NORTH AMERICA, INC., HEBEI HUSQVARNA-JIKAI DIAMOND TOOLS CO., LTD., WEIHAI XIANGGUANG MECHANICAL INDUSTRIAL CO., LTD., BOSUN TOOLS CO., LTD., and BOSUN TOOLS INC., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 15–00164

[Remanding fourth administrative review of antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China.]

Dated: March 31, 2017

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OPINION AND ORDER

Musgrave, Senior Judge:

This consolidated suit concerns the record of the fourth of the administrative reviews of diamond sawblades ("DSBs") and parts thereof from the People's Republic of China ("PRC"). *See Diamond Sawblades and Parts Thereof From the PRC*, 80 Fed. Reg. 32344 (June 8, 2015) (final results of antidumping duty administrative review; 2012–2013) ("*Final Results*"), as explained by its accompanying issues and decision memorandum, Public Record Document ("PDoc") 354 (June 2, 2015) ("*IDM*"). The review's preliminary results

had been published six months earlier, *Diamond Sawblades from the PRC*, 79 Fed. Reg. 71980 (Dec. 4, 2014) ("*Preliminary Results*"), PDoc 324, as articulated in its accompanying preliminary decision memorandum ("*PDM*"), PDoc 307, which was approximately eleven months after the review's initiation in December 2013, covering the November 1, 2012, through October 31, 2013 period of review ("POR").

The *IDM* explains Commerce's reasoning, *inter alia*, on its (1) selection of surrogate financial statements, (2) valuation of steel cores, and (3) assignment of the PRC-wide rate of 82.05 percent to the "ATM entity," of which Beijing Gang Yan Diamond Products, Co. ("BGY") and Gang Yan Diamond Products, Inc. ("GY") (together with BGY, "Gang Yan") are part.[1] Diamond Sawblades Manufacturers' Coalition ("DSMC") challenges those first two matters while Gang Yan challenges the latter.

Jurisdiction here is proper under 28 U.S.C. §1581(c), pursuant to which final determinations of the International Trade Administration, U.S. Department of Commerce ("Commerce" or "Department") will be upheld unless 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). For the following reasons, the matter requires remand.

Discussion

I. Valuation of Steel Cores

As part of the review, Commerce once again had to determine surrogate values for all of the factors of production ("FOPs") for DSBs, in particular for steel cores, which are a major DSB input and subject merchandise in their own right.

A. Background

In the original investigation, Commerce valued the steel cores using import data for Indian Harmonized Tariff Schedule ("HTS") provision 7326.19.00 in accord with its preference for valuing input factors using official import data.[2] In subsequent administrative reviews, however, Commerce abandoned this approach after deciding

[1] BGY along with Advanced Technology & Materials Co., Ltd. and three other affiliated companies has been treated in all segments of the antidumping proceeding thus far as collapsed into a single "ATM entity." *See IDM* at 2. The papers do not elaborate on GY, in particular whether it is an independent entity apart from BGY, *cf.*, *e.g.*, *id.*, but they evince uniform regard of GY as also part of the ATM entity.

[2] *See*, *e.g.*, *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 78 Fed. Reg. 11143 (Feb. 15, 2013) (final results of admin. rev.; 2009–2010) and accompanying issues and decision memorandum ("I&D Memo") at cmt. 11 ("we prefer country-wide information such as government import statistics to information from a single source and we prefer industry-wide values to values of a single producer because industry-wide values better represent prices of all producers in the surrogate country.").

that the tariff schedules of its choice of primary surrogate country (*i.e.*, Thailand) did not provide a reasonable analogue for the cores themselves, and it resorted to valuing both self-produced and purchased cores based on the FOPs reported by respondents for producing them, *i.e.*, a "build-up" methodology.[3] *See IDM* at 38.

For the matter at bar, during the course of the administrative review DSMC urged Commerce to (re)consider using Thai HTS subheading 8202.31.10 for surrogate valuation of DSB steel cores. DSMC pointed out that this subheading reflected an amendment of Thai HTS heading 8203 to provide for merchandise that was highly similar, if not commercially identical, to cores for DSBs. *See generally* PDoc 232. In particular, DSMC argued, the subheading covers steel "toothed blanks", *i.e.*, cores, for circular sawblades, and they averred that the provision was specific to cores for circular sawblades with a working edge of steel. *Id.* DSMC also placed information on the record indicating that the production process used and costs incurred to make steel cores for DSB cores and cores with metal working parts were largely identical. *See* CDoc 174, PDoc 226, at Att. 1.

Commerce preliminarily rejected reliance upon Thai HTS 8202.31.10 after finding that the resulting surrogate value was "unreasonably high." *See* PDoc 314–15 at 7. Rather, according to the defendant, Commerce continued to follow its recent "build-up" practice, in this instance by relying on purchases from unaffiliated suppliers Bosun Tools Co., Ltd. ("Bosun") and Weihai Xiangguang Mechanical Industrial Co., Ltd. ("Weihai"), the two mandatory respondents selected for individual examination, with the addition of surrogate values for steel, labor, and electricity used to produce the cores. Def.'s Resp. at 4, citing *PDM* at 22; Preliminary Surrogate Value Memo, PDoc 314, at 7. Commerce justified continued reliance on its build-up methodology due to the absence of "appropriate HTS codes or other data source we can rely on to value cores directly." *Id*.

Commerce then verified Weihai's FOPs information between January 26 and 30, 2015, including the information Weihai had provided for steel cores used to produce subject merchandise. Weihai Verification Report (Feb. 20, 2015), PDoc 349, CDoc 271, at 1, 10. The verification report summarizes Weihai's opinion that Thai HTS item 8202.31 does not cover diamond sawblade cores. *Id*.

In its administrative case brief, DSMC sought to rebut the preliminary finding that the Thai surrogate produced "unreasonably high"

[3] *See id*.; *Diamond Sawblades and Parts Thereof Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 36166 (June 17, 2013) and accompanying I&D Memo at cmt. 8; *Diamond Sawblades and Parts Thereof Final Results of Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 35723 (June 24, 2014) and accompanying I&D Memo at cmt. 12.

results. *See* CDoc 275, PDoc 356 at 4–8. It did so by comparing the average unit value ("AUV") of import data for Thai HTS 8202.31.10 with the prices at which Weihai actually purchased cores. *Id.* Regarding that subheading's coverage, DSMC asserted that steel cores for sawblades with working edges of different materials are made according to highly similar production processes, such that any differences in producing steel cores for sawblades with steel working parts and those with working parts of diamond segments do not meaningfully impact their costs. *Id*. at 10–11. DSMC further argued that Commerce's build-up of the respondents' FOPs for self-produced cores did not adequately account for the value of purchased cores insofar as the build-up method produced valuations that were [[ ]] than the prices at which the respondents actually purchased cores. *Id*. at 8–9. Further, DSMC argued that given the fact that respondents did not produce [[ ]]. *Id*. at 9–10. Thus, DSMC argued, the agency's preliminary core valuation methodology did not produce accurate results.

Considering that argument, Commerce continued to credit Weihai's opinion that Thai HTS 8202.31 does not cover DSB cores and to find that the products covered by Thai HTS subheading 8202.31.10 are "different from" DSB cores, and that when it can value cores respondents purchased from NME suppliers using the inputs they used to self-produce the identical types of cores (*i.e.*, DSB cores), it need not "resort to an AUV derived from a Thai HTS subheading for merchandise different from cores for diamond sawblades (with the exception of a circular physical appearance in general)." *IDM* at 38–39. Explaining more fully:

> In the last review, with the petitioner's support, we decided that this build-up methodology is the best methodology to value cores in the absence of a better alternative.[ ] We do not consider that an AUV based on an HTS subheading for nonidentical products is a better alternative to the build-up methodology, which is based on the inputs for the production of the identical products, cores for diamond sawblades. Even if the build-up methodology uses inputs consumed for the production of cores with specifications different from the cores purchased from NME suppliers, we find that such differences within the identical products, cores for diamond sawblades, do not justify the use of the alternative valuation methodology the petitioner proposes.
>
> We find that the prices Weihai paid to its unaffiliated NME suppliers and the petitioner used in its price comparisons are unsuitable as benchmarks to determine whether the petitioner's

> suggested AUV is reasonable because these prices are (1) Weihai's business proprietary information and thus do not necessarily represent industry-wide prices available to other producers and (2) NME prices presumably distorted by the PRC government interference.[ ] Accordingly, we did not rely on Weihai's actual NME purchase prices for our decision not to use the petitioner's proposed AUV.
>
> We also find that the petitioner's methodology in attempting to demonstrate the reasonableness of its proposed AUV itself is flawed because the petitioner did not take into account the weight of the cores that Weihai purchased from NME suppliers when the petitioner used the NME prices of these cores in its demonstration. We tested the petitioner's methodology by taking into account the weight of these cores and we found that the petitioner's proposed AUV overvalues cores much more than the petitioner claims in its demonstration.[ ] This leads us to conclude that the petitioner's demonstration methodology is flawed because, by averaging the weight of all cores Weihai reported, the petitioner's demonstration methodology masks the fact that valuing certain cores with this AUV, $32.45/kg, can result in valuing cores at much higher prices than the petitioner claims with its demonstration. Both Bosun and Weihai reported cores in a weight/piece basis for each CONNUM.[ ] So, for example, if a particular core a respondent purchased from an unaffiliated NME supplier can be reasonably valued at $32.45/piece in Thailand, this core weighs 10 kilograms, and the respondent reported this core on a kilogram/piece basis for a CONNUM in its FOP database, then the use of this AUV would result in valuing this core at $324.50/piece, which is 10 times higher than the reasonable surrogate price, $32.45/piece.

Id. at 39 (footnotes omitted). Thus, for the *Final Results*, Commerce continued to value all respondent cores using build-up methodology based on the respondents' reported FOPs, rather than using Thai import data for toothed blanks. *Id*. at 38–40.

B. Analysis

The record persuades that remand of this DSB core valuation issue is necessary for three broad reasons. First, DSMC is correct that there is no guidance in the record from which to adduce what is or is not "unreasonably high," which is akin to asking "how high is 'up'?" There is nothing inherently unreasonable about a method that pro-

duces a value that is ten times higher (or lower) than the compared value when the reliability of the latter is uncertain, as Commerce indicated, *see supra*, and the reader has no way of knowing from the record if a 10-kilogram core "can be reasonably valued at $32.45/piece in Thailand".

Second, the defense here is that rejection of DSMC's analysis of the Thai surrogate value, an analysis that compared the Thai AUV with Weihai's purchase prices from NME suppliers, was proper because that analysis was (1) based on proprietary NME prices that do not necessarily represent industry-wide prices available to other producers, and (2) did not properly take core weight into account. Def.'s Resp. at 32; Bosun's Resp. at 4–5. But Commerce itself compared the Thai surrogate value against Weihai's own NME purchase prices,[4] *supra*, and the finding that Weihai's purchase prices "do not necessarily" represent "industry-wide" prices at which other PRC suppliers might be able to purchase cores appears unsupported. *See* DSMC's Br. at 13–14. Either Commerce believes it is appropriate to use Weihai's purchase prices to test the reasonableness of the surrogate value or it does not; it cannot have it both ways.

Regarding the agency's conclusion that the Thai AUV method results in overvaluation, the conclusion is based on cores selected from Weihai's NME purchases for use in production that are atypical of Weihai's average core weight. *Cf.* CDoc 283, PDoc 377 at 4, *with* CDoc 275, PDoc 356, at 7 (establishing average weight of Weihai's cores). Thus, while faulting DSMC's analysis for inadequately taking core weight into account, Commerce does not appear to have considered whether its own build-up methodology adequately considered core weight. DSMC more fully elucidates by example the core valuations produced by the build-up methodology as compared with those cores' purchase prices in its confidential briefs, but its presentment makes clear that the build-up methodology suffers from the same "problem," albeit inverted, that formed the agency's logical basis for rejecting the DSMC's proposed Thai surrogate valuation method, *i.e.*, that the build-up methodology in this review apparently produces "unreasonably low" valuations for many certain cores when applying an inverted "unreasonably high" standard thereto that Commerce apparently used to evaluate DSMC's Thai HTS method on the record.[5]

[4] One might assume that the wider the results diverge from Weihai's actual purchase prices, the more unreasonable the method used to produce the comparison becomes. That, however, assumes that the actual purchase prices form a reliable benchmark in this first place, which, in the case of Weihai's NME purchases, Commerce has already rejected.

[5] DSMC further explains it was and is not seeking to have Weihai's own purchase prices used as the surrogate; rather, it is apparent that DSMC simply used those prices in order to assess the reasonableness of the potential surrogate values while acknowledging that

Third, although Commerce's finding — to wit, that the products covered by Thai HTS provision 8202.31.10 are "different" from the cores used in production of DSBs — is not incorrect, it is only accurate insofar as the products covered by Thai HTS 8202.31.10 are not meant to be fitted with diamond segments.[6] The finding does not meaningfully distinguish products covered by Thai HTS 8202.31.10 from DSB cores to support the outright rejection of that HTS tariff item and the import data therefor as a suitable surrogate.

The sole commonality expressed in the *IDM* is "circular appearance in general". And indeed, Thai HTS 8202.31.10 covers circular blanks, *e.g.,* cores, for circular saw blades (including slitting or slotting saw blades) with a working edge of steel. But, DSB cores, to which individual diamond segments are attached, are (also) circular in profile and "slotted," *i.e.,* have cut-outs and indentations that on the whole are akin to the squared-off "teeth" covered by Thai HTS 8202.31.10, *see* PDoc 369 at 4, quoting scope language to the effect that "[d]iamond sawblade cores are circular steel plates, whether or not attached to non-steel plates, with slots"; further, cores for DSBs are also produced from steel, *see id.,* through a multi-step process that involves cutting a steel plate or sheet into the precise shape required (inclusive of slotting), heat-treatment, flattening, and grinding, CDoc 174, PDoc 226 at Att. 1, and cores for circular sawblades with steel edges are produced in largely the same manner and from the same material, although such cores are generally shaped with pointed teeth, rather than squared-off slots, *id., see also* PDoc 369 at 5 (describing out-of-scope non-diamond sawblade cores/blades).[7] Hence, given the close resemblance of diamond sawblade cores and cores for blades with a working part of steel, and given record evidence showing that both diamond sawblades cores and cores for blades with working parts of steel are produced from the same materials and by

this would be a different issue if the data were used as surrogate values rather than merely as a tool of comparison. DSMC's Br. at 13, citing 19 C.F.R. §351.408(c)(1). Furthermore, DSMC points out, the agency's antidumping duty calculations in general are based, at least in part, on business proprietary data, and this data is used in determining margins for companies other than the submitter. *Id.*

[6] *Compare* PDoc 232*, with* PDoc 369 at 38–39.

[7] DSMC thus argued that the record showed that, while not completely identical with diamond sawblade cores, Thai HTS 8202.31.10 cores were produced from the same materials and in almost the same manner — with any production differences being immaterial to their cost. CDoc 174, PDoc 226 at Att. 1 (describing affiant's company's production of blanks for diamond sawblades, carbide sawblades and sawblades with cutting edges of metal, and stating that "the production processes for these different types of blanks are very similar; the differences do not meaningfully impact their production costs."). As further support for the similarities between cores for diamond sawblades and cores for steel-edged sawblades, DSMC pointed out that [[ ]], as did [[ ]]. *See id.* ; CDoc 275, PDoc 356 at 10–11.

the same processes and costs,[8] it is unclear why the agency found products covered by Thai HTS 8202.31.10 meaningfully "different" or why it found the Thai import data *prima facie* unsuitable as a means of valuing cores; nor, as the DSMC explain more fully in their confidential reply,[9] does the verification report and its exhibits (referenced in the agency's decision) elucidate Commerce's thinking. The court agrees with the DSMC that Commerce appears to have overstated the differences and failed to address the many similarities.

As it appears that material and undisputed record evidence shows that the two types of cores are highly similar, Commerce was compelled to address this evidence. *See Usinor v. United States*, 26 CIT 767, 783 (2002) (discussing agencies' "responsibility to explain or counter salient evidence that militates against [their] conclusions."). An administrative determination is inadequate when the agency "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir.1977) (holding that "[i]t is not in keeping with the rational [agency] process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.").

Last, but perhaps most importantly, the conclusion that Commerce "[do]es not need to resort" to import data when it "can value" using build-up methodology seems to present a seemingly insurmountable hurdle to arguments in favor of an alternative methodology, which conclusion also glosses over Commerce's previously expressed preference for official import data. *See supra* note 2 and accompanying text. The DSMC contend the official import data of record comport with "Commerce's practice . . . to prefer surrogate values that are product-specific, representative of a broad market average, publicly available, contemporaneous with the [POR]", *e.g.*, Def.'s Resp. at 35, citing *PDM* 19, but further consideration thereof is for Commerce on remand.

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[8] And indeed, [[ ]]. *See, e.g.,* CDoc 275, PDoc 356 at 10–11; CDoc 174, PDoc 226 at Att. 1 (describing affiant's company's production of blanks for diamond sawblades, carbide sawblades and sawblades with cutting edges of metal, and stating that "the production processes for these different types of blanks are very similar; the differences do not meaningfully impact their production costs.").

[9] The cited pages of the report describe Weihai as stating that it did not import DSB cores into the PRC under subheading 8202.31 of the PRC HTS, and that Thai HTS subheading 8202.31 does not cover cores for diamond sawblades. CDoc 271, PDoc 349 at 10. The cited pages of the accompanying exhibits comprise a [[ ]], CDoc 266–270, PDoc 347 at Ex. 18, pp. 21–22, a page from [[ ]], *id.,* p. 23, two pages from [[ ]], *id.,* pp. 24–25, and four pages from [[ ]]. *Id.,* pp. *26–29.* These materials simply show that, as no one has contested, [[ ]]. As for the pages from the [[ ]], these confirm that [[ ]]. The [[ ]].

In passing, the court notes the defendant's argument that "Commerce reasonably preferred as the best available information steel cores that are identical, rather than at most merely similar, to those used to produce diamond sawblades." *Id*. at 33. But this elides over the fact that the "identical" steel cores, to which the defendant refers, are "virtual," *i.e.*, non-existent, and merely the result of build-up cost methodology. As such, it paints an incomplete picture. The valuation of "identical" steel cores is the ideal, of course, but analysis of each surrogate valuation method in this instance reveals that both methods produce unreasonable values for certain cores at the heavier or lighter weight core spectrum depending upon the method used, implying that neither DSMC's method nor Commerce's method by itself seems to produce adequately representative surrogate values. The bottom line here is that, when viewed in light of the record as a whole, Commerce has not explained or countered "salient evidence that militates against its conclusions", *Usinor,* 26 CIT at 783, and the matter therefore requires reconsideration.

II. Selection Of Surrogate Financial Statements

DSMC also challenges Commerce's use of the financial statements of Trigger Co. Philippines, Inc. ("Trigger"), a producer of comparable merchandise located in a country not on Commerce's list of economically comparable countries, to value the financial factors. DSMC argues for using those of Tyrolit Thai Diamond Company Limited ("Tyrolit") and K.M.&A.A. Co., Ltd. ("KM"), producers from the primary surrogate country. DSMC's Br. at 5–7.

A. Background

Commerce has articulated a preference for valuing all FOPs from the primary market economy to be used as a surrogate for the NME country producing the subject merchandise, and familiarity with that process is here presumed.[10] *See* 19 C.F.R. §351.408(c)(2). In NME cases, Commerce must also obtain surrogate values for financial factors in addition to those for the physical inputs used in production.

[10] However, by way of further background, "normal value" is usually determined as the price at which the merchandise in question is sold in the exporting country. NME country domestic "sales of merchandise . . . do not reflect the fair value of the merchandise" because those counties "do[ ] not operate on market principles of cost or pricing structures". 19 U.S.C. §1677(18). The antidumping statute thus requires that normal value for NME countries be determined "on the basis of the value of the [FOPs] utilized in producing the merchandise[,] to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* §1677b(c)(1). Commerce's preference for such cases is to use the values of FOPs that prevail in a single "primary" surrogate market economy country that Commerce finds to comport with the statutory requirement of being both (a) economically comparable to the non-market economy country in question and (b) a significant producer of the merchandise in question. *See* 19 U.S.C. §1677b(c)(2); 19

See 19 U.S.C. §1677b(c); *see also* 19 C.F.R. §351.408(c)(4). For surrogate financial values, Commerce's regulation states that nonproprietary data will be "gathered from producers of identical or comparable merchandise in the surrogate country." 19 C.F.R. §351.408(c)(4).

Commerce's OP list, for the matter at bar, contained six potential surrogate countries, which included Thailand but not the Philippines. Commerce found the six countries "at the same level of economic development as the PRC" based on their "per capita gross national incomes." *PDM* at 12; PDoc 39 at Attachment. Commerce selected Thailand as the primary surrogate country "because it is at the level of economic development of the PRC, because it is a significant producer of merchandise comparable to subject merchandise, and because of the availability and quality of Thai data for valuing FOPs." *IDM* at 5, referencing *PDM* at 12–14.

For the *Final Results*, and as it had in the preliminary determination, Commerce selected Trigger's financial statements for surrogate financial factors after determining that Trigger's represented the only usable financial statements on the record. *IDM* at 47–51. Commerce's position is that Trigger's offers the best available information. *Id*. at 48–51. Commerce recognized that the Philippines did not appear on the OP list for this review, but it highlighted that the Philippines is still at "a level of economic development comparable to the PRC." *Id*. at 49 (comparing the per capita GNI of the Philippines ($2,470) to that of Indonesia ($3,420), which is included on the OP list). Commerce also noted its determinations in the prior two reviews of this order that Trigger's financial statements were the best available information to calculate surrogate financial ratios. *Id.* at 47.

Commerce reasoned that it could not use either KM's or Tyrolit's financial statements. It claimed that it could not use KM's statements because the company did not produce subject merchandise during the POR and that the statements lacked detailed line items such as

C.F.R. §351.408(c)(2); *see*, *e.g.*, *Dorbest Ltd. v. United States*, 604 F.3d 1363 (Fed. Cir. 2010). In this instance, and in accordance with established policy, Commerce again regarded the PRC as an NME. *See Diamond Sawblades and Parts Thereof From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012–2013*, 79 Fed. Reg. 71980 (Dec. 4, 2014) (*Preliminary Results*). Commerce's NME practice for selecting the primary surrogate country involves requesting from the Office of Policy ("OP") a list of potential surrogates with per capita gross national income ("GNI") falling within a range of "comparability" to the GNI of the NME in question, identifying among the potential surrogates on the OP list those countries that are producers of comparable merchandise, determining whether any of the countries producing comparable merchandise are "significant" producers of such comparable merchandise, and selecting the country with the best data as the primary surrogate based on an evaluation of data quality. *See Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (Import Admin., U.S. Dep't of Commerce, 2004) ("*Policy Bulletin 04.1*"); *see also Ad Hoc Shrimp Trade Action Committee v. United States*, 36 CIT ___, ___, 882 F. Supp.2d 1366, 1371 (2012). The policy bulletin explains that in cases of "[l]imited data availability" Commerce may "'go off' the OP list "in search of a viable primary surrogate country." *Policy Bulletin 04.1.*

inventories open and closed. *Id*. Regarding Tyrolit, although record evidence indicated that the company did produce comparable merchandise as in the prior review, Commerce determined that the absence of specific line items barred reliance upon Tyrolit's statements to calculate surrogate financial ratios. *Id*. In particular, Commerce claimed that the line item expense for "Raw materials and consumables used" was unclear as to whether it includes direct material costs only or also includes other expenses such as factory overhead, and that the only identifiable line item for manufacturing overhead is "Depreciation", which Commerce determined could not reasonably be deemed the only manufacturing overhead amount, particularly in light of the financial statements for Trigger, the company located in the Philippines upon whose financial statements Commerce ultimately determined to rely.

B. Analysis

Commerce's *Policy Bulletin 04.1* covers two possible scenarios: (1) when no country on the OP list meets both criteria of being economically comparable to the NME country and a significant producer of comparable merchandise, and (2) when the OP list includes possible surrogates that are economically comparable to the NME country and significant producers of comparable merchandise but the record lacks adequate data for all countries on the OP list, in which case Commerce "should" request a second list from OP and follow the aforementioned steps to choose a surrogate country, but the bulletin also indicates that adhering to an OP-generated list is not always the solution: "[l]imited data availability sometimes is the reason why the team will 'go off' the OP list in search of a viable primary surrogate country." *Policy Bulletin 04.1*. In either event, Commerce is to follow procedure and provide a memorandum for the record providing "substantive reasons on the record for why . . . . it is a 'significant producer'." *Id*.

Policy Bulletin 04.1 states that "the country with the best factors data is selected as the primary surrogate country." *Id.* It further indicates that "[a]n additional surrogate is sometimes used to fill factor price 'holes' in the primary surrogate." *Id.* at n. 7. The standards by which Commerce resorts to off-list data are unclear. It is, however, at least clear that in going "off list" to select Philippine data in this matter, Commerce was seeking an additional surrogate to fill factor price "holes" in Thailand's data. *See id.* But, in order to fill such a hole, common sense dictates that a hole must exist in the first place. By extension, that the burden of showing the existence of a hole

would be on the party claiming its existence. The burden, thus, is on Commerce to demonstrate the inadequacy of the Thai data.

1. Thailand Data

As indicated, two choices were on the record for Thai data: KM and Tyrolit. Commerce avers each failed a critical element of *Policy Bulletin 04.1*. At issue here is whether Commerce accurately concluded that KM did not produce comparable or identical merchandise during the POR, and whether Tyrolit had sufficient data quality. The reasoning that follows demonstrates that Commerce satisfied this burden with regards to both KM and Tyrolit.

a. KM Financial Statements

DSMC argues that the record evidence sufficed for Commerce to conclude that KM produced comparable or identical merchandise during the POR. DSMC's Br. at 39–41. DSMC's argument depends upon pages from KM's website that postdate the POR by thirteen months.

Commerce determined that the information indicated by those pages are not represented in statements in KM's financial statement, to wit, that during the POR the company KM produced only whetstone, hand glider, and polished stones — products that are not comparable to subject merchandise. The defendant argues that Commerce therefore reasonably determined that KM's financial statements were not suitable[11] and that, as in *Nails from China*, Commerce placed greater weight on "more reliable financial statements" than on information printed from a company's website. Def.'s Resp. at 28, referencing *IDM* at 47. "Indeed, the facts of this proceeding present an even stronger case than *Nails from China* because the KM webpages relied upon by DSMC postdate the POR by thirteen months and, as Commerce observed, '[n]othing in these website pages indicates that KM produced [comparable merchandise] during the POR or fiscal year 2013.'" *Id.*

DSMC argues that Commerce's determination that the KM webpages do not support the conclusion that KM produced comparable merchandise during the POR relies on the assumption that, between the POR and the date DSMC downloaded pages from KM's

[11] In calculating the normal value of merchandise from a nonmarket economy, the statute directs Commerce to use merchandise "comparable to the subject merchandise." 19 U.S.C. §1677b(c)(2). In evaluating whether a company produces "comparable" merchandise, it is Commerce's stated practice to place particular weight on that company's audited financial statements. *IDM* at 47. *See*, *e.g.*, *Certain Steel Nails from China*, 75 Fed. Reg. 34425 (June 17, 2010) (final results of new shipper rev.) and attached I&D Memo at cmt. 4 (*Nails from China*).

website, KM altered production from non-comparable to encompass comparable merchandise. DSMC's Br.at 40–41.

The defendant argues the contrary, that it is DSMC's position that would require Commerce to assume that post-POR information held true during the POR. Def.'s Resp. at 28. The defendant further supports this by noting that the post-POR KM webpage information was contradicted by contemporaneous information in KM's financial statements, which showed that KM only produced non-comparable merchandise during the POR. *Id.*, citing *IDM* at 47. The defendant continues that consistent with its practice, Commerce placed greater weight on the information contained in KM's own audited financial statements. *Id*.

DSMC contends Commerce's reasoning turns a blind eye to overwhelmingly reasonable inferences from the record to infer that KM "suddenly," post-POR, had the capacity and capability of producing grinder wheels. But howsoever unreasonable that may seem to be, in accordance with the substantial evidence standard of review Commerce has the discretion as to how it may reasonably interpret the record, and its determination is apparently consistent with its established practice and the record of this segment. Commerce determined that KM did not produce comparable or identical merchandise during the POR and that KM's financial statements were unusable consistent with its practice. The court cannot substitute judgment therefor. *See*, *e.g.*, *American Spring Wires Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984), quoting *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951) (internal citations and quotations omitted).

b. Tyrolit Data

The parties do not dispute that Tyrolit produced diamond sawblades during the POR, the dispute at this point rests on the quality and specificity in Tyrolit's financial statements. Commerce found that these lacked sufficient line-item specificity and necessitated its decision to go off the OP list.

DSMC argues Commerce erred when concluding that Tyrolit's financial statements were deficient and thus not usable. *See* DSMC's Br. at 23–29. In brief, DSMC acknowledges the line item deficiencies identified by Commerce, but it nonetheless argues that the lack of specificity in the Tyrolit statements should be excused due to alleged problems with the Trigger financial statements. *See* DSMC's Br. at 30–31.

The argument is limited to the alleged conflicting standards applied to Trigger and Tyrolit financial statements. *Id*. at 29–38. Here the court is evaluating whether the Tyrolit data was sufficiently lacking such as to necessitate going off-list to fill holes from the primary

surrogate country. *Cf. infra* (Trigger's Financial Data). And the "fuzzy" problem here, as the Federal Circuit in *Dorbest* observed, is not only that 19 U.S.C. §1677b(c)(4) simply requires that Commerce select surrogate data from an economically comparable country "to the extent possible", *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1371–72 (Fed. Cir. 2010) ("*Dorbest*"), the court must avoid invasion of the reasonable fact-finding province that is Commerce's.

In the prior administrative review of the antidumping duty order, Commerce determined that the Tyrolit financial statements lacked specific line items necessary to calculate surrogate financial ratios, *e.g.*, for raw materials, overhead, and financing. Def.'s Resp. at 22, *see also IDM* at 48, n.166, citing *AR3 Final Results* at cmt. 16. Commerce acknowledged that the financial statements show a line item for "Raw materials and consumables used," and the defendant reiterates that they provide no indication of whether that expense includes just direct material costs or, alternatively, direct material costs in addition to other expenses, such as factory overhead. Def.'s Resp. at 20, citing *IDM* at 48. This is significant, according to the defendant, because in order to calculate the surrogate manufacturing overhead ratio Commerce must segregate such additional costs from the direct material costs. *Id*. Commerce also explained that this lack of detail was only one factor that made the Tyrolit financial statements unusable. *See IDM* at 48–49.

The defendant further argues that Commerce's preference for statements coming from the primary surrogate country does not cure Tyrolit's financial statements of the deficiencies that render them unusable for calculation of financial ratios. Def.'s Resp. at 20, citing *IDM* at 51. For its part, DSMC does not contest Commerce's determination that it lacked a basis to discern from the general descriptor "Raw materials and consumables used" whether the category included direct material costs only or additional expenses, such as factory overhead. *See* DSMC's Br. at 30. Instead, DSMC argues that Commerce held Tyrolit's financial statements to a stricter standard than Trigger's financial statements. The argument, however, fails to confront directly Commerce's factual determination that Tyrolit's financial statements contained inadequate detail to distinguish direct material costs from other expenses and that such deficiency was a factor rendering Tyrolit's financial statements deficient. *See IDM* at 48.

Commerce found that the one line item identifiable as "Manufacturing Overhead" was the line item "Depreciation" and it explained that it could not reasonably assume that depreciation represented the

only manufacturing overhead. *Id.* at 49. This contributed to Commerce's evaluation that the Tyrolit financial statements contained insufficient detail to calculate financial ratios. *Id.* at 48–49. The defendant contrasts that point against Trigger's financial statements, which contain multiple manufacturing overhead amounts. Def.'s Resp. at 21.

On the one hand, the defendant's contrast does not detail why a single manufacturing overhead line item is intrinsically insufficient beyond the conclusory and/or speculative statement to that effect. *See* Def.'s Resp. at 21. DSMC, for example, points to Commerce's prior reliance upon a financial statement that listed depreciation as the only manufacturing overhead. DSMC's Br. at 34, citing *IDM* at 49, citing *Xanthan Gum From The People's Republic Of China*, 78 Fed. Reg. 33351 (June 4, 2013) (final determ.) and attached issues and decision memorandum at cmt. 2) ("*Xanthan Gum*"). On the other hand, common sense dictates that it is not unreasonable to infer that manufacturing has more overhead than mere depreciation.

The defendant points out that Commerce distinguished *Xanthan Gum* as reflecting certain "unique circumstances", for example among the record financial statements from the primary surrogate country the financial statements in question were "the only complete and fully translated financial statements." Def.'s Resp. at 22, citing *IDM* at 49; *see Xanthan Gum* I&D Memo at cmt. 2. The court can agree that relying on limited data once, of necessity, does not require Commerce to forever accept questionable data in the future, however the defendant's point appears to undercut its reasoning for going off-list, as *Xantham Gum* rather appears to support using data from the primary surrogate country "to the extent possible". *See* 19 U.S.C. §1677b(c)(4). But be that as it may, Commerce identified an additional reason for why it could not use Tyrolit's financial statements: they contained only a general heading for "net financing costs" the precise composition of which Commerce could not discern. *IDM* at 49. The portion of Tyrolit's financial statement cited by Commerce shows "net financing costs" as a general expenditure category that is not broken down into specific line items. *Id*., citing DSMC Surrogate Value Comments, June 25, 2014, ex. 3A. Commerce explained that the entry for "net financing costs" contains no subcategories or specific line items, *id*., and it also justified rejecting Tyrolit on this basis by drawing the comparison to Trigger's financial statements as "provid[ing] detailed line items that permitted [it] to identify 'profit and adjustment to profit' and 'SG&A and interest (SGA).'" *Id*. Elaborating, Commerce stated that "when available on the record [it prefers] to

use financial statements that contain the full level of details, including line-item expenses that comprise manufacturing overhead." Def.'s Resp. at 21, citing *IDM* at 49.

Based on the aforementioned discussion, a reasonable mind could accept Commerce's conclusion that the Tyrolit statement lacked sufficient line item specificity for its purposes. The agency's determination, thus, was supported by substantial evidence. DSMC claims that if there is any "viable" financial data in Thailand, then the Department must rely on it instead of a country off the list, DSMC's Br. at 25, but the argument seeks to hold Commerce to choosing data of lesser quality containing "holes" from the primary surrogate country over data that is of better quality from an on-list country. Commerce, however, retains the flexibility to rely on an additional surrogate country "to fill factor price 'holes' in the primary surrogate", *Policy Bulletin 04.1* at n.7, when seeking the "best available information". *See* 19 U.S.C. §1677b(c)(1)(B). Having noted the inadequacies of the KM and Tyrolit financial statements, Commerce satisfied the process of *Policy Bulletin 04.1* to find the "best available information" and justifiably opted to consider data from off-list countries. This, however, is not to be construed as an affirmation that Tyrolit data can never be used.[12]

2. Philippine Data

DSMC challenges Commerce's decision to go off list and use Philippine data. Commerce justified this decision by first demonstrating the inadequacies of Thai data and second by arguing that the Philippine data was the only usable data. The former claim has already been addressed and accepted. The latter claim is addressed herein. Commerce explained that Trigger's financial statement represented "the only financial statements on the record of this review that are useable." Def.'s Resp. at 3, quoting *PDM* at 22. Although Commerce selected Thailand as the primary surrogate country, *id*. at 5, it explained that the absence of viable financial statements from that country required that it consider other options. *Id*. at 3–4, citing *PDM* at 22. DSMC argues that there is insufficient support on the record to use surrogate data from the off-list country the Philippines, because the Trigger data is not supported as the best data available. *See* DSMC's Br. at 31–35. Although, as also discussed above, this court

[12] If, for example, Commerce were to find on remand that Trigger, *infra*, has the inadequacies identified by DSMC, then Commerce would necessarily seem to compel to reevaluate whether the Tyrolit data should be used in light of deficiencies in both data sets and agency preference for a single surrogate country.

agrees that Commerce may have cause to go off list in certain circumstances, the determinations discussed as follows are insufficiently supported.

a. Decision to go "Off List"

The DSMC first criticize Commerce for going "off list" in selecting a Philippine financial statement instead of one from the selected primary surrogate country. DSMC contends that the agency's determination appears to be at odds with OP's decision not to place the Philippines on the list of potential surrogate countries, that the agency failed to explain the basis for its determination that the Philippines were at a level of economic development comparable with that of China, and that the prior agency precedent referenced for support does not suffice to explain Commerce's actions here. DSMC's Br. at 27. Commerce explains that the countries on the OP list had the "same" GNI, whereas the Philippines GNI is "comparable". Def.'s Resp. at 17.

Determining whether GNI is "comparable" is a rather imprecise standard, as all countries are "comparable" to some degree. Commerce appears to generally equate the term "comparable" with "approximate." Be that as it may, "the statute does not require the Department to use a surrogate country that is at a level of economic development *most* comparable to the NME country." *Policy Bulletin 04.1* at n.5 (emphasis in original). Indeed, Commerce routinely resorts to "comparable" countries that are less comparable nonetheless.[13] Such an inquiry is presumptively driven by the statutory requirement of finding the "best available" data for the case at hand.

DSMC argues that because the Philippines was not found to be at the "same" level of economic development as the PRC and the other countries on the OP list, Commerce contradicts itself in finding the Philippines nonetheless "comparable". *See* DSMC 56.2 Br. at 26–29. This kind of distinction, however, is a well-established Department practice insofar as Commerce views countries on its surrogate country list as being "at" the "same" level of economic comparability and it

[13] *See, e.g.*, *Freshwater Crawfish Tail Meat From The People's Republic of China*, Fed. Reg. 60,134 (Oct. 6, 2014) (prelim. results of admin. rev.) and attached Preliminary Decision Memorandum at 4–5 (unchanged in *Freshwater Crawfish Tail Meat From The People's Republic of China*, 79 Fed. Reg. 75,535 (Dec. 18, 2014) (final results of admin. rev.). Wherein confronting the absence of usable data from any of the potential surrogate countries prompted Commerce to rely upon data from Spain, a country that did not appear on the list. *Id.*

views countries outside of this band (*i.e.*, lower and upper ranges of the per capita GNI) as still being economically comparable, only less so. This terminology and finding is a common distinction used by the Department.[14]

Here , Commerce found that the Philippines is less economically comparable to the PRC than Thailand, but that the Philippines is still economically "comparable" to a certain degree nonetheless. The Department articulated its policy about relying on less comparable countries in its surrogate value letter:

> This list provides you countries that are at the same level of economic development as [the PRC]. In general, the countries listed below are likely to have good data availability and quality, *i.e.*, the specificity of these countries' data are more likely to assist the team in its valuation of inputs. However, you may also consider other countries on the case record that are significant producers of comparable merchandise if the record provides you adequate information to evaluate them. Countries on the case record that are at the same level of economic development as [the PRC] should be given equal consideration for the purposes of selecting a surrogate country. Countries that are not at the same level of economic development as [the PRC], but still at a level of economic development comparable to [the PRC], should be selected only to the extent that data considerations outweigh the difference in levels of economic development.

Dep't Surr. Country Ltr (Feb. 6, 2014) at 2.

The defendant argues that Commerce correctly found that the problems with the Thai statements outweighed the fact that Thailand is more economically comparable with the PRC than the Philippines. By extension, they argue that the outcome is consistent with Commerce's standard written policy.

DSMC claims that if there is any "viable" financial data in Thailand, then the Department must rely on it instead of a country off the list. DSMC 56.2 Br. at 25. This is incorrect. Simply "viable" is not the Department's preferred standard to select surrogate values. The Department retains the flexibility to select values from other countries because it has an overriding obligation to value factors accurately,

[14] *See e.g. Pure Magnesium from the People's Republic of China: Preliminary Results of 2011–2012 Antidumping Duty Administrative Review*, 78 Fed. Reg. 34646 (June 10, 2013), and accompanying issues and decision memorandum at 9–12; *see also Certain Activated Carbon From the People's Republic of China: Final Results of Fourth Antidumping Duty Administrative Review; 2013–2014*, 80 Fed. Reg. 61172 (Oct. 9, 2015) and accompanying issues and decision memorandum at 6–7 (while ultimately finding no need to resort to these countries, the Department still notes that Indonesia and the Philippines are "at a less comparable level of economic development").

according to the "best available information." *See* 19 U.S.C. §1677b(c)(1)(B); *see also Calgon Carbon Corp. v. United States*, 40 CIT __, __, 145 F. Supp.3d 1312, 1326–28 (2016) ("Commerce has promulgated a regulation providing that 'the Secretary normally will value all factors in a single surrogate country.' This 'preference,' however, carries the day only when it is used to 'support a choice of data as the best available information where the other available data "upon a fair comparison, are otherwise seen to be fairly equal." . . . the preference on its own is not a sufficient reason to reject superior data.'") (citations omitted).

DSMC continues in this vein, arguing that non-economically comparable country can be a source only when it is "impossible" to derive the value in the primary surrogate country. DSMC's Br. at 26, citing *Dorbest*, 604 F.3d at 1371–72. This is a misstatement of the issue at hand. The *Dorbest* court merely held what the plain language of the statute indicates*, i.e.,* that the Department shall obtain surrogate values from economically comparable countries. *Dorbest*, 604 F.3d at 1371–72. The Federal Circuit clearly understood that there was flexibility in the statute in order to permit the Department to achieve the overarching goal of using the "best available information." *See id.* ; 19 U.S.C. §1677b(c)(1)(B).

Dorbest supports the Department's policy decision to rely on Trigger in two important respects: (1) it upheld the Department's authority to rely on multiple countries, and (2) it recognized that a particular country source could be disregarded if the data were "irretrievably tainted by some statistical flaw." *See* 604 F.3d at 1371–72.

As it were, even if this GNI data made the Philippines and PRC incomparable markets, Commerce is required to follow economic comparability and significant producer of comparable merchandise "*only to the extent possible*". *Policy Bulletin 04.1* (emphasis in original). DSMC argues that Commerce did not provide sufficient evidence on the record for its conclusion that the Philippines is economically comparable to China. DSMC's Br. at 25–29. In response, the defendant and Bosun both argue that (1) Commerce is permitted to utilize data from an economically comparable country other than the primary surrogate country or those identified by the Office of Policy and (2) Commerce here found that the Philippines is economically comparable to the PRC. Def.'s Resp. at 15–19; Bosun's Resp. at 6–10. These responses fail to address a critical shortcoming in Commerce's conclusion — Commerce's lack of an explanation as to why and on what basis it found the Philippines and the PRC to be economically comparable.

"Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court." *NMB Singapore Ltd.* v. *United States,* 557 F.3d 1316, 1319 (Fed. Cir. 2009) (citation omitted). Here, Commerce did not articulate the basis for its conclusion that the Philippines is economically comparable to the PRC. Commerce's discussion of the issue was limited to observing that "[t]he 2012 per capita[] GNI was $5,740 for the PRC, $3,420 for Indonesia (the listed potential surrogate country with the lowest per capita GNI), and $2,470 for the Philippines." PDoc 369 at 49. Missing from this explanation is any discussion of why these figures establish the Philippines as economically comparable to the PRC. Likewise, Commerce did not identify the factors that it considered in assessing economic comparability, or address how they influenced its decision. Regardless of its method used to determine comparability Commerce is not absolved from providing a memorandum detailing the methods used and related explanations. Accordingly, Commerce should address those on remand.

For example, in *DuPont Teijin Films v. United States,* this Court reviewed Commerce's selection of India as the primary surrogate country. 37 CIT __, __, 896 F. Supp.2d 1302, 1305 (2013). Although India was identified by OP as one of six economically comparable countries based on 2008 GNI data, plaintiffs argued that 2009 GNI data, which were subsequently placed on the record, demonstrated that India and the PRC could no longer be considered economically comparable. *Id.* at 1304–06. Commerce, however, based its determination on 2008 GNI data alone and "justified its decision to disregard the 2009 GNI data by noting that the change in disparity between India's and PRC's GNI between 2008 and 2009 was not significant enough to render India not economically comparable to the PRC." *Id.* at 1307. In finding that Commerce's analysis was "conclusory and unsupported", the court explained:

> Commerce did not provide any explanation as to why the change in proportionality was too "small" to warrant consideration or affect the economic comparability analysis, why Commerce chose to rely on a change in proportionality between two countries, or how Commerce determines what is an acceptable change in proportionality of GNI. Commerce has previously warned that there is a point at which the disparity between India's and the PRC's GNI will be too great for India to be considered economically comparable to the PRC. Commerce has not, however, provided any explanation as to why the change in disparity between the 2008 and 2009 data either does or does

> not rise to such a level. Commerce merely stated, without further explanation, that the change in disparity was not significant.

Id. at 1308 (citations omitted). Accordingly, the court remanded the issue, directing Commerce to either provide a reasoned explanation for disregarding the 2009 GNI data or include such data in its surrogate country selection determination. *Id*. at 1309–10.

A conclusory statement of comparability is not sufficient evidence on the record. Here, too, Commerce provided no explanation of why it determined that the Philippines is economically comparable to the PRC. Instead, Commerce merely stated, without further elucidation, that it was so. Thus, Commerce's conclusion that the Philippines is economically comparable to the PRC cannot be sustained without further elucidation on the record.

b. Trigger's Financial Data

DSMC also argues the Trigger financial data are not the "best available" records. DSMC takes issue with several perceived defects in the Trigger data. DSMC requests a remand in order for Commerce to provide further explanation.

DSMC questions the level of detail included in Trigger's selling expenses, particularly when compared to Tyrolit. *See* DSMC's Rep. at 31–35. They observed that the Trigger statements did not enumerate line items for selling expenses. To correct for this, Commerce determined the selling expenses by shifting data from other line items in the report. DSMC noted that this was not done by Trigger's auditors and that there was no explanation as to why these line items could or should have been reclassified as such. *Id.* at 31–32.

The defendant states that the Tyrolit and Trigger values were not distinguishable on the issue of selling expenses. Def.'s Resp. at 24–25. If so, the defendant undermines a reason for going off the OP list. The defendant also states that Commerce compared the line items of Trigger and Tyrolit records, explaining that although the line items were not in the same places on the expense reports, the same general matters are included. Def.'s Resp. at 24. Bosun argues further that a lack of delineation for selling expenses does not preclude the existence of selling expenses. *See* Bosun's Resp. at 15. While that is true, Commerce is seeking the best available information. If data must be shifted arbitrarily from one category to another, this draws into question the sufficiency of that data. Likewise, while Bosun argues that selling expenses are generally a small part of a company's ex-

penses, *see id.*, that does not deplete the relevance of an inquiry into their specificity.

Further, DSMC argues Trigger primarily sold to its parent company, unlike the subject companies who sold to unaffiliated third parties. DSMC claims that Trigger is a captive supplier of its parent company and this is evidenced by the fact that 99 percent of Trigger sales are to the parent company. DSMC's Br. at 35. DSMC argues that this qualified Trigger as a captive supplier, which inherently distorts Trigger's financial performance. They attest this is proven by Trigger's relatively low profit ratio and markups falling nearly 50 percent over the previous year. *Id.* In essence, the argument surmises that Trigger's performance is not driven by market conditions, but by the needs and desires of the parent company. *Id.* DSMC presses that equating the subject companies to Trigger is inappropriate because the sales structure of the subject companies sold to non-affiliated companies, not to parent companies. *Id.*

The defendant responds that Trigger was not alone in making sales to a parent company. Def.'s Resp. at 25–26. Rather, Tyrolit and KM both had sold to parent companies. *Id.* The *IDM* adds that "sales to the parent company do not undermine specificity, contemporaneity, and quality" of financial statements. *IDM* at 51.

Bosun also expounds that DSMC gave no explanation to support its argument that this financial position makes the data unreliable. Bosun's Resp. at 15–16. Bosun is correct that DSMC has not proven that this financial arrangement makes the data unreliable, *id.*; however, a reasonable mind can *see* that the trends and information have a tendency to indicate a divergence from that of a market based or non-captive enterprise. Bosun also argues that the same negative conjecture can be made about KM and Tyrolit, arguing that a plaintiff cannot pick and choose on the basis of financially favorable loan conditions. *Id.* But, DSMC accurately identifies this as *post hoc* rationalization, which cannot be considered. DSMC's Rep. at 15; *Burlington Truck Lines, Inc.v. United States*, 371 U.S. 156, 168–69, 83 S. Ct. 239, 246 (1962) (the court may not accept "*post hoc* rationalizations for agency action" and agency action may be "upheld, if at all, on the same basis articulated in the order by the agency itself"). Bosun also argues that the effects of this simply cancel out, Bosun's Resp. at 16, but without the data and calculations to support such conclusions, the court is unpersuaded.

Without sufficient evidence on the record, this court is left to consider conclusory statements and *post hoc* rationalizations on all sides. The matter must therefore be remanded. On remand Commerce is requested to provide support with the regards to whether and to what

extent Trigger is a captive producer and whether that state undermines the applicability of Trigger as an appropriate surrogate.

DSMC also contends that Trigger's use of prison labor compromised the usefulness of its labor data. DSMC's Br. at 36–38. DSMC explains that the purpose of surrogate data is to replace a NME with a market economy, whereas prison laborers are unlikely to be able to negotiate market wages, reduced wages likely affect profits and expenses in Trigger data. *Id.* Chiefly, DSMC argues prison labor may broadly affect the overall financial experience and that the implications on the overall financial experience make Trigger an unsuitable proxy. DSMC's Rep. at 16–17.

The defendant counters that it relies on industry-specific labor data, not Trigger's data, when it calculates labor costs. Def.'s Resp. at 25. The defendant also points out that DSMC did not argue the amount of prison labor or how specifically it distorted the financial statements, *i.e.*, what the effect of prison labor was, if any. *Id.* Bosun states that only three percent of the labor comes from inmates and that there is no evidence indicating the labor is subsidized. Bosun's Resp. at 17. Further, Bosum argues that the data would not be used in the labor calculation, but it could be used in the denominator, where it would be undervalued. *Id*.

In focusing on the influence on the use of labor costs alone, Commerce and Bosun "[f]ailed to consider an important aspect of the problem." *State Farm,* 463 U.S. at 43. Commerce must address arguments of "cogent materiality." *Altx Inc.,* 25 CIT 1100, 1103, 167 F. Supp.2d 1353, 1359 (2001), quoting *United States v. Nova Scotia Food Prods.*, 568 F.2d 240, 252 (2d Cir. 1977). Commerce did not merely gloss over the primary concerns raised by DSMC, but failed to address the broader implications entirely. As Bosun identifies, three percent is the amount of labor coming from prison, but this gives little insight to what butterfly effect such a change may create. It also does not resolve whether and how Commerce indeed considered the implication of such down the line non-market expenses. Commerce is requested on remand to evaluate the influence of prison labor on Trigger's overall financial picture. In particular, whether the use of this labor materially alters the financial position of Trigger, making it non-comparable.

DSMC argues that Trigger's 2013 income was so small that the tax liability increased from 10.5 percent before-tax profits in 2012 to 80.5 percent in 2013. DSMC's Br. at 35–37. DSMC further argues that Commerce failed to address DSMC's concerns. DSMC's Rep. at 35–36. The defendant simply asserts that the tax liability was resolved and

there are no deficiencies. Def.'s Resp. at 25–26, citing *IDM* at 5–51. Bosun supports this by stating that Commerce does not look into tax situations of surrogate countries when audited locally. Bosun's Resp. at 17. DSMC's concern here is over how this, in the aggregate, influence's Trigger's ability to be comparable. *See IDM* at 50. They do not take into account markups. *Id.*

The tax data alone does not give reason to question the validity of the Trigger data. Further, DSMC fails to provide any support that would indicate Commerce's normal methodology is to give such tax changes an increased weight. However, given the overarching implications in an aggregation of these elements, on remand Commerce is requested to reevaluate whether Trigger is indeed comparable and appropriate to use as a surrogate source, or whether additional factors should be included to account for any such variation in Trigger's data.

C. Assignment of PRC-Wide Rate To ATM

The last issue concerns Gang Yan's challenges to the application of the PRC-wide rate and the rate itself.

1.

The initiation notice for this fourth DSB review stated in relevant part that "companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name, should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding." *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 Fed. Reg. 79392, 79393 (Dec. 30, 2013) (initiation of admin. rev.) (footnote omitted). The ATM entity duly submitted a "separate rate certification" ("SRC") on February 28, 2014, a form for firms previously awarded separate rate status. *See* PDoc 53, CDoc 9.

For the review at bar, Commerce selected for individual examination Bosun and Weihai as the two entities with the largest volume of imports of subject merchandise during the POR. PDoc 95, CDoc 42, at 5–6. Commerce did not conduct an "individual" examination of the ATM entity.

During the proceeding, and prior to publication of the preliminary determination, the Court of Appeals for the Federal Circuit affirmed,

per curium and pursuant to CAFC Rule 36, this court's ruling on the ATM entity's appeal of the issue of its eligibility for a separate rate status that Commerce reversed on redetermination, and this court sustained. *Advanced Technology & Materials Co. v. United States*, 581 Fed. Appx. 900 (Fed. Cir. Oct. 24, 2014); *see also Advanced Technology & Materials Co. v. United States*, 37 CIT ___, 938 F. Supp. 2d 1342 (2013).

During the proceeding at bar, Commerce concluded from the ATM entity's declaration on its SRC that its status was essentially the same as that of the prior administrative review(s). Commerce therefore concluded the ATM entity had not demonstrated eligibility for a separate rate pursuant to Commerce's evaluation of its *de jure* and *de facto* government control tests and the ATM entity is properly considered part of the PRC-wide entity that includes the Central Iron and Steel Research Institute Group and/or China Iron and Steel Research Institute Group ("CISRI").[15] *Preliminary Results*, 79 Fed. Reg. 71980, 71981 n.11; *PDM* at 9. Commerce preliminarily assigned to the ATM entity the PRC-wide entity the rate of 164.09 percent, the margin calculated in the original investigation. 79 Fed. Reg. at 71980–81; *PDM* at 10–11.

Between the preliminary and *Final Results*, Commerce adjusted the PRC-wide margin to 82.05 percent consistent with remand results on prior administrative reviews.[16] *See* 80 Fed. Reg. 32344. For the final results, Commerce continued to rely on the fact that the ATM entity did not demonstrate its eligibility for a separate rate as a distinct entity from the PRC-wide entity, *IDM* at 6–7, but in accordance with judicial proceedings on the prior administrative reviews subsequent to the preliminary fourth DSB review determination, Commerce revised downward the rate assigned to the ATM entity from 164.09 to 82.05 percent. *IDM* at 12. Commerce calculated the 82.05 percent rate through a simple average of the PRC-wide rate, 164.09 percent, and the 0.00 percent margin calculated for the ATM

[15] *Advanced Technologies* noted record evidence from the investigation that CISRI "is a state owned enterprise that is wholly owned and controlled by the State Asset Supervision and Administration Commission ("SASAC"), a PRC government agency." *Advanced Technology & Materials Co.v. United States*, 35 CIT __, __, Slip Op. 11–122, 11 (2011).

[16] Relevant to this case, the court previously sustained redetermination of the PRC-wide margin for the first and second administrative reviews to 82.05 percent, via voluntary remand. *See Diamond Sawblades Manufacturers Coalition v. United States*, No. 13–00078, Apr. 10, 2015, ECF No. 76 (AR1 final remand results); *Diamond Sawblades Manufacturers Coalition v. United States*, No. 13–00241, May 18, 2015, ECF No. 96 (AR2 final remand results); *see also Diamond Sawblades Mfrs. Coal. v. United States*, 39 CIT __, Slip Op. 15–105 at 16 (Sep. 23, 2015) (*DSMC AR1*) (sustaining results of redetermination of first administrative review); *Diamond Sawblades Mfrs. Coal. v. United States*, 39 CIT ___, Slip Op. 15–116 (Oct. 21, 2015) (*DSMC AR2*) (sustaining results of redetermination of second administrative review).

entity for the second administrative review of the order. *Id*. Commerce explained that the ATM entity's rate was based not on adverse inferences but, rather, (1) "the rate applied to the PRC-wide entity based on the actions of the PRC-wide entity" and (2) the ATM entity's "experience as a fully cooperative mandatory respondent" in the second administrative review. *IDM* at 11. Commerce further explained that its application of the PRC-wide rate to the ATM entity, and its calculation of that rate, was consistent with its approach from the remand results in the first and second administrative reviews. *See IDM* at 12.

2.

Many of Gang Yan's arguments emanate from the perspective that the ATM entity is an "individual" — separate and apart from the PRC entity — and therefore entitled to be considered as such. But that is a factually incorrect characterization of the *Final Results* for the ATM entity and inaccurately characterizes the law. The relevant issue here is Commerce's authority to impose a PRC-wide rate to the ATM entity and the propriety of that rate itself, not the ATM entity's "individual" behavior.

19 U.S.C. §1677f-1 only speaks to authorizing Commerce to "use averaging and statistically valid samples" and "determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to — (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." 19 U.S.C. §1677f-1(a), (c)(2).

By contrast, Commerce's authority to impose a "PRC-wide" margin emanates from its authority to determine an estimated "all others" rate under 19 U.S.C. §1673d(c)(1)(B), not 19 U.S.C. §1677f-1. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997). And in accordance with *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Non-market Economy Entity in NME Antidumping Duty Proceedings*, 78 Fed. Reg. 65963, 65970 (Nov. 4, 2013), Commerce will now review that "all others" PRC-wide rate if it receives a review request. 19 U.S.C. §1675(a)(1). Section 1677f-1(c) has no bearing on the determination of that rate or its application to companies within the PRC-wide ambit, such as the ATM entity: once a company is determined ineligible for a separate date, 19 U.S.C. §1677f-1 ceases to have any

applicability because the question of the authority to apply that rate to all companies within the PRC-wide ambit has been answered in the affirmative by *Sigma Corp.* and *Transcom, Inc. v. United States*, 294 F.3d 1371, 1379 (Fed. Cir. 2002) (conditionally reviewed companies also are deemed to have received sufficient notice in the initiation).

During the course of this review, Commerce changed its approach to the standards for separate rates, due to earlier decisions of this court. As a result, Commerce declared the ATM entity part of the PRC-wide entity. Further, as mentioned, Commerce modified its prior practice of "conditionally" reviewing the NME entity whenever, even absent a request, review of an exporter requesting a separate rate was unable to demonstrate that it was separate from the PRC-wide entity, such that Commerce's current practice is to conduct an administrative review of the NME-wide entity if it receives a request for, or self-initiates, a review of that entity. 78 Fed. Reg. at 65970.

The PRC-wide rate of 82.05 percent for this fourth DSB review is the same rate as that sustained for prior administrative reviews, and Commerce found it to be of continued relevance for this review. Gang Yan argues that the PRC-wide entity was not a named entity under review (conditional or otherwise), so the fact that the ATM entity (of which BGY is a part) was determined to be part of the PRC-wide entity means that BGY's shipments during the POR must be liquidated "as entered" in accordance with 19 C.F.R. §351.212(c) (in the absence of request for review of an antidumping duty order, imports are to be liquidated as entered). If by liquidated "as entered", Gang Yan means subject to the PRC-wide rate of 82.05 percent, *see* 80 Fed. Reg. at 32345, the court agrees. Gang Yan's argument otherwise appears to confuse what it means to be "subject to" a review and the actual review process, but 19 U.S.C. §1675(a) is clear in stating that Commerce will "review and determine" the amount of any antidumping duty for a 12-month review period if a request for such review is received. Which, of course, does not imply that if no request for review is received then subject merchandise will enter without antidumping duties imposed — it simply means that the rate from the prior review period will carry forward. And if by liquidated "as entered", Gang Yan means Commerce is obligated to issue liquidation instructions that do not impose the PRC-wide rate of antidumping duties on the ATM entity's subject merchandise, the argument is untenable because the status of the ATM entity changed during the course of the review when it lost its entitlement to a rate separate from the PRC-wide entity. That is, the "automatic assessment" provisions of 19 C.F.R.

§351.212(c) indeed apply, but they apply to and as the PRC-wide entity rate for purposes of the ATM entity's subject merchandise's liquidation.

Elsewhere, Gang Yan's arguments conflate its identity as an "individual" company with the identity of the PRC-wide entity. Gang Yan intimates that the ATM entity "responded" as part of the PRC-wide entity and "participated" in the review as a part of the PRC-wide entity. However, the record belies that stance, as the ATM entity specifically sought separate rate status for BGY and filed no-shipment certifications for its other three exporters. Further, nothing of record indicates the ATM entity was authorized to speak for the PRC-wide entity or otherwise had standing to do so. Gang Yan does not here purport to represent, or be representative of, that PRC-wide entity.

Gang Yan also argues that the 164.09 percent rate from the investigation is an adverse facts available rate, *see* 19 U.S.C. §1677e, and that there is nothing on the record indicating the PRC-wide entity failed to cooperate and no finding of non-cooperation of the PRC-wide entity by Commerce, and that an adverse rate cannot be "assigned" to the ATM entity. The argument misleads what transpired on the record for two primary reasons. First, the 164.09 percent rate is only tangentially relevant at this point, as the rate for the PRC-wide entity from the previous review that Commerce carried forward to this review was not that rate but reflected the fact that as a consequence of judicial proceedings over the investigation, the PRC-wide entity was reconsidered to consist of a portion that had in fact cooperated as well as an uncooperative portion. Rather than attempt to weight-average those portions for purposes of subsequent administrative reviews, Commerce generously applied a simple average that actually inured to the PRC-wide entity's benefit. The ATM entity has, from then onwards, been considered a part of that PRC-wide entity, and the ATM entity's "separate" existence or behavior ceased to have further meaning apart from the impact that it had on the reconsideration of the margin from the investigation that carried forward to subsequent administrative reviews that were judicially challenged and subsequently modified as a consequence thereof. *See*, *e.g.*, *Peer Bearing Co.-Changshan v. United States*, 32 CIT 1307, 1313, 587 F. Supp.2d 1319, 1327 (2008) ("[T]here is no requirement that the PRC-wide entity rate based on AFA relate specifically to the individual company. It is not directly analogous to the process used in a market economy, where there is no countrywide rate. Here, the rate must be corroborated according to its reliability and relevance to the countrywide entity as a whole.") (citations omitted).

Second, "cooperation" implies responsiveness to a request for action, and although the PRC-wide entity was "subject to" the review and the results of it, as Gang Yan acknowledges, the PRC-wide entity was not actively reviewed because Commerce did not receive a request for review of the PRC-wide entity. Gang Yan argues that if Commerce had any questions about whether non-responding companies were controlled by the PRC government, it could simply have asked that government, but the argument inverts Commerce's well-established presumption regarding the PRC-wide entity and the burden of proof thereon. Nothing of record indicates that the PRC government could not itself, for example, have requested review of the PRC-wide entity, via, for example, the agency of CISRI or SASAC. *See* 19 U.S.C. §1677(9)(B) (defining the government of a country in which subject merchandise is produced or manufactured, or from which such merchandise is exported, as an "interested party"). In this instance, because the PRC-wide entity was not itself being reviewed, the fact that there is no finding of cooperation, partial cooperation, or non-cooperation of the PRC-wide entity on the record is irrelevant.

Gang Yan further argues Commerce failed to corroborate the PRC-wide rate. However, once Commerce established the PRC-wide rate, it was permitted to use that rate in the manner it did in this review. Gang Yan identifies no basis for departing from the court's prior rulings sustaining Commerce's application of the PRC-wide rate to the ATM entity. Nonetheless, as those rulings are currently on appeal to the Federal Circuit, Commerce of course retains the authority to revisit this issue in consequence of any decision of that court during remand of this matter to Commerce. The court considered parties' remaining arguments and finds they lack merit.

Conclusion

For the above reasons, Diamond Sawblades and Parts Thereof from the Republic of China, 80 Fed. Reg. 32344 (June 8, 2015), is hereby remanded to the International Trade Administration, U.S. Department of Commerce for further proceedings consistent with this opinion.

The parties shall provide comment, or indication of none, on the sufficiency of the information indicated to be redacted from the confidential version of this opinion (indicated above by double bracketing) to the Clerk of the Court within seven (7) days, including any indication of information that should be but is not presently indicated as subject to redaction.

The results of remand shall be due July 31, 2017, whereupon by the fifth business day thereafter, the parties shall file a joint status report

as to a proposed scheduling of comments, if any, on the remand results, as well as a proposed page limitations(s) thereof.

So ordered.

Dated: March 31, 2017
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 17–37

FORMER EMPLOYEES OF GEOKINETICS, INC., Plaintiff, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: Claire R. Kelly, Judge
Court No. 16–00057
PUBLIC VERSION

[Remanding the U.S Department of Labor's negative determination on remand denying certification to Plaintiffs as entitled to Trade Adjustment Assistance and Alternative Trade Adjustment Assistance benefits.]

Dated: April 3, 2017

Gregory Carroll Dorris, Pepper Hamilton LLP of Washington, DC, for plaintiff.

Agatha Koprowski, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Tecla A. Murphy*, Attorney Advisor, Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

OPINION AND ORDER

Kelly, Judge:

Before the court for review is the U.S. Department of Labor's ("Department" or "Labor") remand determination denying certification to Plaintiffs as a class of workers entitled to Trade Adjustment Assistance ("TAA") and Alternative Trade Adjustment Assistance ("ATAA") benefits under Section 222(c)(2) of the Trade Act of 1974, as amended, 19 U.S.C. § 2272(c)(2) (2012).[1] *See* Geokinetics, Inc. Notice of Negative Determination on Remand, Sept. 16, 2016, ECF No. 14–1 ("Remand Results"). Labor filed its Remand Results pursuant to the court's order, which granted Defendant's unopposed motion for remand of Labor's Negative Determination Regarding Eligibility Relating to Geokinetics, Inc. ("Negative Determination"). Order, Aug. 25,

[1] All further references to the Trade Act of 1974, as amended, are to Title 19 of the U.S. Code, 2012 edition.

2016, ECF No. 13 ("Remand Order"); Conf. Administrative R. Item p at 93–98, Sept. 16, 2016, ECF No. 15–1 ("Negative Determination"); *see generally Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance*, 81 Fed. Reg. 9,509, 9,512 (Dep't Labor Feb. 25, 2016); Unopposed Mot. Voluntary Remand, June 2, 2016, ECF No. 8 ("Remand Mot."). The court directed Labor to:

> consistent with applicable statutes and regulations: (1) conduct further investigation, as appropriate, including into the aggregate imports and domestic production data; (2) determine whether the petitioning workers, as engaged in activities related to the production of oil/gas, are eligible to apply for [TAA]; and (3) issue the appropriate redetermination on remand.

Remand Order 1.

Labor's Remand Results are not supported by substantial evidence. Specifically, the court remands Labor's determination that Plaintiffs are not entitled to certification for TAA benefits as primary workers. Labor's determination is not supported by substantial evidence because: (1) Labor has not explained why its practice for comparing a firm's sales data is reasonable; (2) Labor failed to consider whether like imports increased absolutely, or explain why it was reasonable not to examine whether like imports had increased; and (3) Labor failed to consider whether like imports had shifted to foreign countries, or explain why it was reasonable not to examine whether like imports had shifted to foreign countries. In addition, the court remands Labor's determination not to certify Plaintiffs as secondary workers eligible for TAA benefits. On remand, Labor must further explain its determination in light of these concerns or reconsider its determination consistent with this decision.

BACKGROUND

Plaintiffs are a group of former employees of the survey department of Geokinetics, Inc. ("Geokinetics"), a company located in Houston, Texas that is engaged in "seismic oil [and] gas exploration," who became separated from the company as of January 31, 2015. *See* Public Administrative R. Item a at 1, Sept. 16, 2016, ECF No. 16–1 ("Pet."); Public Administrative R. Item o at 91, Sept. 16, 2016, ECF No. 16–1 ("Negative Determination Investigative Rep."). Plaintiffs filed a petition seeking certification for TAA and ATAA benefits with Labor on July 10, 2015. *See* Pet. In their petition, Plaintiffs allege that their separations occurred as a result of "OPEC's decision to increase oil production, [which] caused widespread lay-offs and job

cuts in the Energy Industry." *Id.* at 2. Plaintiffs annex to their petition a copy of a letter from Geokinetics informing one of its employees, a mapper and surveyor, that his employment is terminated as of January 29, 2015. *Id.* at 3. Geokinetics' letter attributed this employee's loss of employment to "the current downturn in the energy industry and its effect on [the] company . . . not a reflection on [this employee's] performance." *Id.*

After determining that Plaintiffs had correctly filed a petition, on September 23, 2015, Labor's Office of Trade Adjustment Assistance ("OTAA") began its investigation by soliciting information regarding Plaintiffs' worker group through a Business Data Request ("BDR") issued to Geokinetics, which included a Form ETA-9043a requesting data tailored to producers of an article. *See* Public Administrative R. Item e at 16, Sept. 16, 2016, ECF No. 16–1; Public Administrative R. Item f at 18–28, Sept. 16, 2016, ECF No. 16–1. On September 24, 2015, Geokinetics responded to Labor's request indicating that it "does not produce any articles" and referencing the form's directions that the company contact the investigator assigned to the case if the company does not produce an article. *See* Public Administrative R. Item h at 42, Sept. 16, 2016, ECF No. 16–1. Labor responded indicating that it would send a revised BDR for services "to be completed instead of the BDR for articles." *Id.* at 41–42. On October, 22, 2015, Labor sent a revised BDR for services ("First BDR").[2] *See* Public Administrative R. Item I at 44–57, Sept. 16, 2016, ECF No. 16–1 ("First BDR"). Geokinetics responded to Labor's First BDR by providing the requested information. *See* Conf. Administrative R. Item j at 64, 67–68, Sept. 16, 2016, ECF No. 15–1 ("First BDR Resp.").

[2] This First BDR, which pertained to services, requested information necessary to evaluate Plaintiffs' eligibility for TAA and ATAA benefits, including: (1) a description of services supplied by the subject firm; (2) whether worker separations have occurred and the reasons for separation; (3) whether the firm imported or acquired services like or directly competitive with the services supplied by the subject firm from a foreign country; (4) whether the subject firm shifted like or directly competitive services to another country or if such a shift is scheduled; (5) whether the services supplied by the subject firm are supplied to another division, parent company, or affiliate that is producing an article; (6) whether the worker separations were caused in any part by the subject firm importing any articles like or directly competitive with articles produced using services supplied by the workers at the subject firm; (7) import data, production and sales data of the company for the years 2013 and 2014 as well as for the periods January through September of 2014 and January through September of 2015; (8) whether the subject firm supplies services to a firm whose workers have been certified under the TAA program; and (9) a listing of the company's lost bids for contracts to supply services in the past 2 years. First BDR at 46–53.

Aside from the fact that the First BDR pertaining to services requested information on services provided rather than on articles produced, the First BDR differed from the BDR issued by Labor on September 23, 2015 in that the First BDR requested import data, production and sales data of the company for the periods January through September of 2014 and January through September of 2015. *See* Public Administrative R. Item f at 23, Sept. 16, 2016, ECF No. 16–1.

However, in response to Labor's question asking whether Geokinetics supplies services to a firm whose workers have been certified under the TAA program, Geokinetics did not fill in a response in either the box marked "yes" or the box marked "no." *See id.* at 65. Geokinetics attributed the separation of the worker group to a decline in the oil and gas sector to which it provides services, which it contends is caused by "a sustained collapse in the price of oil. As oil prices have decreased, so has exploration activity, which has greatly reduced the need for our highly specialized services." *Id.* at 63.

On January 16, 2016, Labor issued its first negative determination on Plaintiffs' petition for certification as a worker group eligible for TAA and ATAA benefits.[3] *See* Negative Determination at 98. Labor denied Plaintiffs' petition for the following reasons: (1) imports of services like or directly competitive with the services supplied by Geokinetics have not increased;[4] (2) Geokinetics did not shift the supply of seismic data acquisition or like or directly competitive services to a foreign country or acquire such services from a foreign country;[5] (3) Geokinetics is not a supplier of services to a firm that employs workers that have been certified as eligible for TAA or ATAA benefits; and (4) Geokinetics does not act as a downstream producer to a firm that employed a group of workers who had been certified as eligible for TAA or ATAA benefits.[6] *See* Negative Determination at 97–98.

On June 2, 2016, Defendant moved for remand so that Labor could "conduct further investigation and redetermine whether certain current and former employees of Geokinetics are eligible for certification for [TAA] benefits." Remand Mot. 1. Plaintiffs did not oppose Defendant's remand request. *Id.* In its request for remand, Defendant states that, although "Labor addressed whether there was evidence of an increase in 'imports of services like or directly competitive with the services supplied by Geokinetics,' . . . Labor did not address whether

[3] Labor defines the subject worker group as the survey department of Geokinetics. *See* Negative Determination Investigative Rep. at 91 (citing Pet. at 1).

[4] No findings support Labor's determination. *See* Negative Determination Investigative Report. Labor's investigative report contains no data reflecting the level of U.S. imports of articles or services like or directly competitive with articles produced or services supplied by Geokinetics. *See id.*

[5] To support this determination, Labor referenced Geokinetics' response to its First BDR. Negative Determination Investigative Rep. at 91 (citing First BDR Resp. at 63).

[6] Labor does not cite support for its determinations that: (1) Geokinetics is not a supplier of services to a firm that employs workers that have been certified as eligible for TAA or ATAA benefits; or (2) that Geokinetics does not act as a downstream producer to a firm that employed a group of workers who had been certified as eligible for TAA or ATAA benefits. *See* Negative Determination Investigative Rep. at 92; Negative Determination at 97–98.

there has been an increase in relevant imports of articles."[7] *Id.* at 2–3. Defendant further recognized that Plaintiffs' claim raises a question as to whether Plaintiffs may be eligible for TAA benefits "as employees of a firm that produces articles directly competitive with imports of oil and gas."[8] *Id.* at 3. Lastly, Defendant contended that, in order to make such a determination during remand, "Labor will conduct further investigation, as appropriate, including into the aggregate imports and domestic production data" of oil and gas. *Id.* On June 3, 2016, the court granted Defendant's motion for remand. *See* Remand Order.

During its investigation on remand, Labor issued a second BDR ("Second BDR") to Geokinetics, which included a Form ETA 9043a for firms that produce articles. *See* Administrative R. Item t at 124–132, Sept. 16, 2016, ECF No. 16–1 ("Second BDR Resp."). Together with its Second BDR, Labor included a covering e-mail, which advised that

> According to [19 U.S.C. § 2272(c)(2)] any firm that engages in exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas and any firm that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas. Additionally, the Conference Report that accompanied H.R. 3 (Omnibus Trade and Competitiveness Act of 1988), which amended the Trade Act, explains the expansion of eligibility to all workers and firms in the oil and natural gas industry (exploration to refining) and to workers and firms who supply essential goods or essential services as their principal trade or business to firms in the oil or natural gas industry.

[7] Although Defendant states that Labor addressed whether there was evidence of an increase in imports of services provided by Geokinetics, *see* Remand Mot. 2–3, Labor's investigative report contains no U.S. import data for any like or directly competitive service. *See* Negative Determination Investigative Rep. at 91–92. Labor only references Geokinetics response to Labor's inquiry data relating to Geokinetics' own imports of like or directly competitive services with those it supplies. *See id.* at 92 (citing First BDR Resp. at 63 (answering that Geokinetics itself has not imported or acquired from a foreign country services like or directly competitive with the services it supplies, but not providing U.S. import data on services like or directly competitive with those provided by Geokinetics)). Labor does not explain why Geokinetics response to this question is relevant to assessing whether there has been an increase in imports of services into the United States like or directly competitive with those provided by Geokinetics. *See id.*.

[8] Defendant argued that

> [a] remand is appropriate to permit Labor to conduct further investigation, including into whether there has been an increase in the importation of oil and natural gas, and any other information appropriate to the determination regarding a firm producing articles like or directly competitive with imports of oil and imports of natural gas.

Remand Mot. 3.

> This expanded list would include, for example, independent drillers, pumpers, seismic and geophysical crews, geological crews, and mud companies.
>
> When answering form ETA-9043a – Business Data Request (Article), please be advised that your responses should be based upon the activities of the firm, as well as the firm's production of oil and natural gas (if applicable).

Id. at 122.

Labor's Second BDR requested new employment, sales, and import data of the company for the years 2013 and 2014 as well as for the periods January through June of 2014 and January through June of 2015.[9] *See id.* at 132. Labor's Second BDR otherwise differed from the first, in relevant part, in that it requested: (1) a description of articles manufactured by the subject firm, their end uses, and whether the articles are incorporated as components into another article; (2) information on whether the subject firm imported or acquired from a foreign country articles like or directly competitive with the articles it produces; (3) information on whether the subject firm imported articles that incorporate an article like or directly competitive with the articles it produces; (4) information on whether the subject firm shifted production of articles like or directly competitive with articles it produces to another country or whether such a shift in production is scheduled; (5) information on whether the firm experienced a decline in sales to a customer located outside the United States; and (6) information on whether the subject firm conducts business with any firm whose workers have been certified under the TAA program. *See id.*

Geokinetics responded to the Second BDR by stating that

> many answers are the same as in the previous submission but for many others the answer is not N/A as we are not a company that manufactures products but rather provides services. Therefore, we do not have "production numbers," for example.

[9] In Labor's First BDR, Labor requested employment, sales, production, and import data for the years 2013 and 2014 as well as for the periods January through September of 2015. *See* First BDR at 34. The periods in Labor's Second BDR pertaining to articles were the years 2013, 2014, January through June 2014, and January through June 2015. Second BDR Resp. at 127. The periods for which Labor requested data in the Second BDR matched the periods in the initial BDR pertaining to articles that Labor issued in its initial investigation on September 23, 2015. *Compare* Public Administrative R. Item f at 23, Sept. 16, 2016, ECF No. 16–1 (requesting employment, sales, production and import data for the periods 2013, 2014, January through June 2014, and January through June 2014) with Second BDR Resp. at 127 (also requesting employment, sales, production and import data for the periods 2013, 2014, January through June 2014, and January through June 2014).

Id. at 120. Geokinetics otherwise provided the information requested in Labor's Second BDR.[10] *See* Second BDR Resp. at 124–132. In response to Labor's question asking whether it conducts business with a firm whose workers have been certified under the TAA program, Geokinetics did not mark either the box marked "yes" or the box marked "no." *See id.* at 128.

On September 16, 2016, Labor filed its remand results affirming its original negative determination not to certify Plaintiffs as a class of workers entitled to TAA benefits. *See* Remand Results 8. Labor continued to find that Geokinetics is "engaged in activities related to the supply of seismic data services to firms within the oil industry." *Id.* at 1 (citing Pet. at 1–5; Negative Determination Investigative Report at 90–91). Labor identified seismic data services provided by Geokinetics as "production of oil under 19 U.S.C. § 2272(c)(2)." *Id.* Labor determined that: (1) a significant number or proportion of workers at the subject firm is totally or partially separated, or threatened with such separation; (2) industry data shows that aggregate imports of oil and gas during the relevant period decreased; (3) Geokinetics' sales/production increased during the relevant period; (4) Geokinetics did not shift the production of articles like or directly competitive with oil to a foreign country; (5) Geokinetics is not a supplier to a firm that employs workers that have been certified as eligible for TAA or ATAA benefits; and (6) Geokinetics does not act as a downstream producer to a firm that employed a group of workers who had been certified as eligible for TAA or ATAA benefits. *Id.* at 6–7 (citing Negative Determination Investigative Report at 90–92).

In its Remand Results, Labor revisited certain aspects of its initial determination after further developing the record. First, Labor reviewed the information collected in its initial investigation along with revised sales and production data provided by Geokinetics for the years 2013 and 2014 and the periods January through June of 2014

[10] Geokinetics reported identical employment data in its Second BDR response, but the sales data reported and the periods differed. *See* Conf. Administrative R. Item t at 132, Sept. 16, 2016, ECF No. 15–1; First BDR Resp. at 64. In its First BDR response, Geokinetics reported sales of "seismic acquisition" services $[[ ]] for the period January through September of 2014 and $[[ ]] for the period January through September of 2015. *See* First BDR Resp. at 64. In its Second BDR, Labor requested that Geokinetics report sales of "seismic acquisition," which Labor denoted as an "article produced." Second BDR Resp. at 127. In its Second BDR response, Geokinetics reported sales for the period January through June of 2014 of $[[ ]]. Second BDR Resp. at 132. For the period January through June of 2015, Geokinetics reported sales of $[[ ]]. *Id.* In each field where Labor requested that Geokinetics report the quantity of "seismic acquisition" articles produced during a given period, Geokinetics wrote in "Services." Id.

and January through June of 2015.[11] *See* Remand Results at 4 (citing Second BDR Resp. at 132). Labor determined that the revised data comparing sales/production data for the years 2013, 2014 as well as the periods January through June of 2014 and January through June of 2015 show an overall increase in sales and production.[12] *See id.* at 6. Second, Labor compared aggregate import data of oil and gas into the United States for the periods from August of 2013 through June of 2014 and August of 2014 through June of 2015, and Labor concluded that aggregate imports of oil and gas decreased.[13] *Id.* at 6 (citing Public Administrative R. Item v at 136–146, Sept. 16, 2016, ECF No. 16–1; Public Administrative R. Item w at 147–150, Sept. 16, 2016, ECF No. 16–1). Labor otherwise found that the record information obtained on remand confirmed its other findings in the negative determination. *See* Remand Results at 6–7.

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[11] In completing the Second BDR, Geokinetics filled in "services" in the field where it was directed to fill in quantity of sales. *See* Second BDR Resp. at 132. Labor determined that Geokinetics is engaged in the production of oil. Remand Results at 4. Therefore, Labor concluded that Geokinetics' sales data functions as production data. *Id.*

[12] In the investigative report prepared in connection with its remand, Labor requested that Geokinetics complete the ETA-9043a form for firms engaged in the production of an article (*i.e.*, oil and gas), and Geokinetics reported sales data. *See* Conf. Administrative R. Item Y at 157– 158, Sept. 16, 2016, ECF No. 15–1. In its remand investigative report, Labor found that Geokinetics' sales, which Labor treats as equivalent to production data, decreased in 2014 from 2013 levels by $[[ ]], and sales increased from January to June 2014 to the period from January to June 2015 by $[[ ]]. *Id.* at 158. In the remand investigative report, Labor further stated that its initial investigation did not include production figures because "the general counsel representing Geokinetics, Inc. responded that the firm is engaged in activities related to the supply of a service." *Id.* at 154.

[13] Labor states that it considers Geokinetics "to be engaged in the production of oil rather than the provision of a service" because of the language in 19 U.S.C. § 2272(c)(2). Administrative R. Item y at 157–158, Sept. 16, 2016, ECF No. 15–1.

On remand, Labor examined oil and gas imports. Administrative R. Item y, Sept. 16, 2016, ECF No. 15–1. Labor found that U.S. imports of crude oil declined from 2,821,480 thousand barrels in 2013 to 2,680,626 thousand barrels in 2014 (a 4.99% decline), and have declined further from 1,322,027 thousand barrels in the period from January through June of 2014 to 1,315,438 thousand barrels in the period from January through June of 2015 (a 0.50% decline). *Id.* at 154, 158–59. Labor also found that U.S. production of crude oil has increased from 2,720,782 thousand barrels in 2013 to 3,180,363 thousand barrels in 2014 (a 16.89% increase) with a further increase from 1,514,407 thousand barrels in the period from January through June of 2014 to 1,701,470 thousand barrels in the period from January through June of 2015 (a 12.35% increase). *Id.* at 159.

Labor found that U.S. imports of natural gas declined from 2,883,355 million cubic feet in 2013 to 2,695,355 million cubic feet in 2014 (a 6.52% decline), but increased from 1,383,948 million cubic feet in the period from January through June of 2014 to 1,406,002 million cubic feet in the period from January through June 2015 (a 1.59% increase). *Id.* Labor also found that U.S. production of natural gas increased from 24,205,523 million cubic feet in 2013 to 25,728,496 million cubic feet in 2014 (a 6.29%) increase, and continues to increase from 11,878,793 million cubic feet in the period from January through June of 2014 to 13,402,995 million cubic feet in the period from January through June of 2015 (a 12.83% increase). *Id.* at 159–60.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(d)(1) (2012) and 19 U.S.C. § 2395(a). Under 19 U.S.C. § 2395(b) the agency's determination must be sustained if it is supported by substantial evidence in the administrative record and is otherwise in accordance with law. *See* 19 U.S.C § 2395(b) (providing that the Court may remand Labor's findings of fact to take further evidence for good cause); *see also* 28 U.S.C. § 2640(c) (2012) (making an action to review a determination by Labor reviewable under the standard provided by 19 U.S.C. § 2395(b)).

DISCUSSION

I. Certification of Primary Workers

The court reviews Labor's analysis of Plaintiffs' eligibility for certification as primary workers. First, the court reviews Labor's determination that Geokinetics' sales increased. For the reasons that follow, Labor's determination is not supported by substantial evidence. Second, the court reviews Labor's determination that imports of like or directly competitive articles have increased. This determination is also not supported by substantial evidence. Third, the court reviews Labor's determination that Geokinetics has not shifted production of like or directly competitive articles to a foreign country or acquired like or directly competitive articles from a foreign country. For the reasons that follow, the court also concludes that this determination is not supported by substantial evidence.

A. Decreased Sales

Plaintiffs contend that Labor compared incorrect periods of sales data to support its determination that Geokinetics' sales increased during the relevant period. Comments of Pls. Former Employees of Geokinetics, Inc. on Remand Results Confidential Version 5–7, Nov. 16, 2016, ECF No. 17 ("Pls.' Remand Comments"). Specifically, Plaintiffs argue that Labor failed to consider sales data for the month of July in both 2014 and 2015, which it argues is part of the relevant time period for comparison under the statute. *Id.* at 6. Plaintiffs claim that Labor's conclusion likely would have been different if it had considered the additional months of sales data.[14] *Id.* Defendant responds that Labor's determination is supported by the record because

[14] Plaintiffs argue that the sales data produced by Geokinetics showed a "[[ ]]" Pls.' Remand Comments 6. Therefore, Plaintiffs claim that "[i]ncluding July data for 2014 and 2015 very easily could flip the interim data for 2014 to 2015 to a decline in sales value." *Id.* Regardless of whether the data makes a difference, Plaintiffs argue that Labor's determination cannot be supported by substantial evidence if it fails to consider the appropriate time periods. *See id.*

Geokinetics' sales declined during the relevant time periods, as interpreted by Labor based on relevant statutory and regulatory authorities. *See* Def.'s Resp. Pl.s' Comments Dep't Labor's Remand Results 11, n.2, Dec. 30, 2016, ECF No. 21 ("Def.'s Reply"). The court remands Labor's determination that Geokinetics' sales decreased absolutely for further explanation and consideration consistent with this decision.

Certain workers who have been affected by an increase in foreign imports or a shift in production or services to a foreign country are eligible for certification by Labor for TAA benefits. 19 U.S.C. § 2272(a). To be eligible for certification under § 2272(a), "a significant number or proportion of the workers in such workers' firm" must have become separated. 19 U.S.C. § 2272(a)(1). If this threshold requirement is satisfied, there are two general paths leading to certification under § 2272(a): (1) the increased imports path, 19 U.S.C. § 2272(a)(2)(A); and (2) the shift in production or services path, 19 U.S.C. § 2272(a)(2)(B). To qualify for certification under the increased imports path, the workers' firm's sales or production, or both, must also have decreased absolutely. 19 U.S.C. § 2272(a)(2)(A)(i). In addition, any such increase must have "contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm." 19 U.S.C. § 2272(a)(2)(A)(iii).

The statute does not define the time periods for Labor to analyze in assessing whether the subject firms sales have decreased absolutely under the increased imports path. *See* 19 U.S.C. § 2272(a)(2)(A)(i) Defendant states that Labor's practice for determining the relevant time periods for comparing sales data is contained in Labor's BDR, which is sent to subject firms during the TAA investigation. *See* Def.'s Reply 11, n.2. Labor's First BDR requests that the subject firm report employment, sales, production, and import data for "the service identified for the last two full years, the most recent year-to-date period, and the comparable period in the previous year." *See* First BDR at 49. Labor's Second BDR form, issued in the remand investigation, asks the firm to report its employment, sales, and production data "for the periods provided in the table." From the face of the Second BDR form pertaining to articles, it does not appear that Labor has any uniform practice for determining the periods for which to examine decreases in sales and production of subject firms because the language of the form does not state a uniform methodology for computing the time periods. Moreover, a comparison of Labor's First BDR to its Second BDR reveals that Labor defined the relevant periods of time differently in each depending upon whether the form pertained to articles

or services. *Compare* First BDR at 34 (requesting partial year data from January through September of 2014 and January through September of 2015) to Second BDR at 127 (requesting partial year data from January through June of 2014 and January through June of 2015). Labor never explains this discrepancy.

Here, Labor determined that a significant number or proportion of workers at the subject firm is totally or partially separated.[15] Remand Results 6 (citing Conf. Administrative R. Item y at 154, Sept. 16, 2016, ECF No. 16–1("Remand Investigative Rep.")). Defendant contends that "Labor requested comprehensive sales data for the most recent completed quarters prior to the petition (in this instance, the first two quarters of 2015), and the comparable period in the previous year." Def.'s Reply 11 (citing Remand Results 6). Defendant justifies obtaining sales and production data for the most recent period as

> ensur[ing] that the periods of review of imports either predate or occur simultaneously with the periods for review of sales or production, allowing Labor to analyze the relationship between import and sales or production data for evidence that the causal "contributed importantly" standard has been met.

Id. However, Labor fails to provide any indication that it has a defined practice to compare sales data for purposes of determining whether sales decreased to determine eligibility for TAA benefits. Moreover, in this investigation Labor solicited information covering different periods in its initial investigation and on remand without explantion for or acknowledgment of the difference. *Compare* First BDR at 34 (requesting partial year data from January through September of 2014 and January through September of 2015) to Second BDR at 127 (requesting partial year data from January through June of 2014 and January through June of 2015). Labor may have a reason for defining its relevant time periods to exclude the months of July of 2014 and 2015, but Labor has not explained how it defines these periods for purposes of assessing whether sales of the subject firm have decreased, nor has it explained why the periods compared here are reasonable. *See* Remand Results 6. On remand, Labor must explain how it determines the relevant periods for comparing sales data and explain why its practice is reasonable in light of its statutory mandate

[15] Labor reviews its findings in its investigative report supporting its initial negative determination, in which Labor notes that it determined that Geokinetics had separated approximately [[ ]] workers since July 31, 2014. Remand Investigative Report at 154. Labor further reviews the fact that the investigation found that [[ ]] more workers were to be separated in the fourth quarter of 2015 and the first quarter of 2016. *Id.* Lastly, Labor notes that the investigation found that Geokinetics stated that "there were a total of [[ ]] workers in the worker group through September 2015." *Id.* (citing First BDR Resp.).

to determine whether the sales or production, or both, of the subject firm have decreased, or reconsider its determination.

Defendant contends that Labor's practice for determining the periods for comparison of sales and production data is reasonable because it ensures that such data either occurs simultaneously or after the periods of review of imports. Def.'s Reply 11. Defendant further argues that looking at import data that either predates or occurs simultaneously with the periods of review for sales and production data ensures a causal relationship between the increased imports and the decrease in sales or production required by the statute. *See id.* (referencing 19 U.S.C. § 2272(a)(2)(A)(ii); 29 C.F.R. § 90.16(b)(3) (2015)[16]). Defendant's explanation addresses why it is reasonable to look at sales and production data for a period occurring simultaneously or after the period of review for the increase in imports, but Labor does not explain why it is reasonable to define that period as from January through June. The effect of looking at sales data through June of 2014 and 2015 is to exclude monthly data from July of 2014 and 2015 despite the fact that the petition was filed on July 10, 2015. Neither the statute nor Labor's regulations defines the relevant periods for purposes of the decreased sales or production comparison. *See* 19 U.S.C. § 2272(a)(2)(A)(ii); 29 C.F.R. § 90.16(b)(3). Although Labor has discretion to fill gaps in the statute through practice, that practice must be a reasonable means of effectuating the statutory purpose. *See Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), aff'd 810 F.2d 1137, 1139 (Fed. Cir. 1987). Without further explanation, the court cannot assess the reasonableness of Labor's practice for defining these time periods or assess whether the discrepancy between how it defines these periods based on whether it is assessing producers of articles or providers of services is arbitrary. Firms in industries like oil and gas, where contracts are bid for far in advance, may be unlikely to show a decrease in sales well before laying off workers. Because firms in long-lead industries must make staffing decisions based on forecasted demand, anticipated decreases in sales may only become apparent immediately prior to the workers' separation in such firms because the firm anticipates decreased sales in the future. Thus, data for the month immediately preceding the filing of the petition may be particularly relevant in evaluating eligibility in this investigation. On remand, Labor must explain why its interpretation is reasonable in light of these concerns.

Defendant also contends that Plaintiffs' "speculation that including July 2015 sales data would have changed Labor's determination is

[16] Further references to the Code of Federal Regulations are to the 2015 edition.

contradicted by record evidence." Def.'s Reply 12 (citing First BDR Resp. at 64 (showing that sales for the first three quarters of 2015 were greater than the same period of 2014) (internal citation omitted)). However, quarterly sales data reflecting increases in third quarter sales does not necessarily demonstrate that the results would not have been different had Labor included only July sales.

B. Increased Imports

Plaintiffs argue that Labor failed to consider whether imports of seismic data services have increased. Pls.' Remand Comments 8–9. Defendant responds that Labor properly limited its examination to imports of articles of oil and gas because the statute requires Labor to limit its analysis to oil and gas imports.[17] Def.'s Reply 8–9 (citing 19 U.S.C. § 2272(c)(2)(A)–(B)). The court remands Labor's determination for further consideration and explanation. Section 2272(c)(2)(B) instructs Labor to treat oil and natural gas exploration and drilling services as articles directly competitive with imports of oil and natural gas. 19 U.S.C. § 2272(c)(2)(B). However, § 2272(a)(2)(A)(ii) requires Labor to consider increased imports of not only directly competitive articles, but also increased imports of like articles. *See* 19 U.S.C. § 2272(a)(2)(A)(ii). On remand, Labor must explain why it is reasonable to consider only oil and gas imports, which the statute instructs are directly competitive with oil and natural gas exploration and drilling services, and therefore not like imports, in evaluating Plaintiffs' eligibility for TAA certification.

In order to qualify for certification under the increased imports path, in addition to determining whether a significant number or proportion of workers in the subject firm have become totally or partially separated, *see* 19 U.S.C. § 2272(a)(1), three additional criteria must be present. First, "the sales or production, or both, of [the workers'] firm [must] have decreased absolutely." 19 U.S.C. § 2272(a)(2)(A)(i). Second, "imports of articles or services like or di-

[17] Although neither party requested oral argument, after reviewing the parties' submissions, the court asked Defendant for further explanation on why its interpretation of 19 U.S.C. § 2272(a)(2)(A)(ii)(I) as precluding Labor from considering whether imports of services like or directly competitive with those produced by Geokinetics had increased during the relevant period is reasonable. *See* Conf. Letter Concerning Suppl. Briefing Questions 1–3, Jan. 23, 2017, ECF No. 22; *see also* Order, Jan. 23, 2017, ECF No. 23; Def.'s Reply Br. 8–11. Labor did not state its interpretation of the statute in its Remand Results. *See* Remand Results 6. Defendant first stated that Labor's determination not to consider increases in services resulted from Labor's interpretation of the statute in its reply brief. *See* Def.'s Reply Br. 8–11. In response to the court's questions, Defendant states that 19 U.S.C. § 2272(a)(2)(A)(i) requires it to consider oil and natural gas exploration and drilling services firm as engaging in the production competitive with oil and natural gas. Def.'s Suppl. Br. 4, Feb. 13, 2017, ECF No. 29. Defendant's argument is first raised in Defendant's supplemental brief, *see id.,* to which the court did not permit Plaintiffs to respond. *See* Order, Jan. 23, 2017, ECF No. 23.

rectly competitive with articles produced or services supplied by [the subject] firm [must] have increased."[18] 19 U.S.C. § 2272(a)(2)(A)(ii)(I). The increase can be either absolute or relative to domestic production compared to a representative base period.[19] 29 C.F.R. § 90.2. If these first two criteria are met, Labor must also find that any such increase "contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm." 19 U.S.C. § 2272(a)(2)(A)(iii).

The statute requires Labor to consider whether imports that are like or directly competitive with articles produced or services provided by the subject firm have increased. *See* 19 U.S.C. § 2272(a)(2)(A)(ii). The statute provides that "[a]ny firm that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas."[20] 19 U.S.C. § 2272(c)(2)(B). Therefore, as Labor concluded in its remand

[18] Alternatively, though not at issue in this remand, a petitioning group could show that:
(1) "imports of articles like or directly competitive with articles into which one or more component parts produced by [the subject] firm are directly incorporated . . . have increased," 19 U.S.C. § 2272(a)(2)(A)(ii)(II)(aa);
(2) "imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm . . . have increased," 19 U.S.C. § 2272(a)(2)(A)(ii)(II)(bb); or
(3) "imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by [the subject] firm have increased," 19 U.S.C. § 2272(a)(2)(A)(ii)(III).

[19] To assess whether imports have increased, Labor examines imports during the "representative base period," (*i.e.*, the earlier period of import data for comparison) defined as "one year consisting of the four quarters immediately preceding the date which is twelve months prior to the date of petition." *See* 29 C.F.R. § 90.2. Labor compares imports during the representative base period to a comparison period to determine if imports of like or directly competitive articles or services have increased. *See id.* Based upon the language of Labor's regulation, it can be inferred that the comparison period (*i.e.*, the latter period of import data for comparison) is one year consisting of the four quarters preceding the date of the petition. *See id.* Labor uses the term "relevant time period" throughout its Remand Results to refer to the later period for comparing imports. *See*, *e.g.*, Remand Results 4–6.

[20] In 1988 Congress amended § 2272 to add 19 U.S.C. §§ 2272(c)(2)(A)–(B). *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1421, 102 Stat. 1107, 1242(1988). The purpose of this amendment was to "facilitate the availability of benefits under the trade adjustment assistance program for workers employed by firms engaged in exploration or drilling for crude oil or natural gas." H.R. Conf. Rep. 100–576, at 694 (Apr. 20, 1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1727. Congress intended for "workers employed by independent firms engaged in exploration or drilling [to] be eligible to apply for program benefits on the same basis as workers employed by firms that are engaged in the production of crude oil or natural gas as well as exploration or drilling." *Id.* Previously, "workers engaged in exploration or drilling for firms that also produce crude oil or natural gas [were] considered as eligible to apply for such benefits." *Id. See id.* At the time of the 1988 amendment, services were not covered under the TAA and workers in service industries did not qualify for TAA benefits. In 2009, the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, § 1801, 123 Stat. 115, 367 (2009), amended 19 U.S.C. § 2272(a)(2)(A)(ii) to add imports of services like or directly competitive with services supplied by such firm to the increased imports path. *See* H.R. Conf. Rep. 111–16, at 247

determination, the provision of oil and natural gas exploration and drilling services is, for the purposes of the statute, the production of articles directly competitive with oil or natural gas. *See* Def.'s Suppl. Br. 4 (citing 19 U.S.C. § 2272(c)(2)(A)–(B)). But the statute mandates that Labor consider both increases in imports of "like" and "directly competitive" articles.[21] These words are not synonymous.[22] The regulations reflect the different considerations each term in the statute calls upon Labor to consider.[23]

In its original determination, Labor treated the Plaintiffs as workers in a firm providing seismic data acquisition services. *See* Negative Determination at 96–97. Labor sought a remand to consider Plaintiffs' eligibility for TAA benefits as workers of a firm producing an article despite the fact that Geokinetics provides seismic data services because that is what the statute requires. Remand Mot. 2–3;

(Feb. 12, 2009), *reprinted in* 2009 U.S.C.C.A.N. 3, 654. The motivation for making the change was that "[m]ost service sector workers presently are ineligible for TAA benefits because of a statutory requirement that the workers must have been employed by a firm that produces an 'article.'" *Id.* at 249. When Congress amended the statute in 2009 to extend the statute to all service workers, it did not deal with the fact that it had effectively previously deemed certain oil and gas service providers as producers of articles. *See* American Recovery and Reinvestment Act § 1801.

[21] The statute separately states that "[a]ny firm that engages in exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas." 19 U.S.C. § 2272(c)(2)(A). This provision seems to relate to subsection (e) of the act, which allows workers to seek benefits if their "firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in an affirmative determination" pursuant to 19 U.S.C. §§ 2252(b)(1), 2451(b)(1), 1671(b)(1)(A) or 1673(b)(1)(A). *See* 19 U.S.C. § 2272(e).

[22] Indeed, the legislative history corroborates the notion that the words are not used interchangeably, specifically stating that:

> The term "like or directly competitive" used in the bill to describe the products of domestic producers that may be adversely affected by imports was used in the same context in section 7 of the 1951 Extension Act and in section 301 of the Trade Expansion Act. The term was derived from the escape-clause provisions in trade agreements, such as article XIX of the GATT. The words "like" and "directly competitive," as used previously and in this bill, are not to be regarded as synonymous or explanatory of each other, but rather to distinguish between "like" articles and articles which, although not "like", are nevertheless "directly competitive." In such context, "like" articles are those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which made, appearance, quality, texture, etc.), and "directly competitive" articles are those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes, that is, are adapted to the same uses and are essentially interchangeable therefor.

145 Cong. Rec. H10937 (daily ed. Dec. 10, 1973) (statement of Rep. Ullman; summary of Section 201 of the Trade Act of 1974). *See* also S. Rep. No. 93–1298, at 232 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7185, 7360.

[23] The regulations provide that "like or directly competitive means that like articles are those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which the articles are made, appearance, quality, texture, etc.); and directly competitive articles are those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes (i.e., adapted to the same uses and essentially interchangeable therefore)." 29 C.F.R. § 90.2.

Def.'s Suppl. Br. 4.[24] Fair enough. However, Labor's determination restricts itself to considering imports of directly competitive products as defined by § 2272(c)(2)(B), *i.e.*, oil and natural gas articles. *See* Remand Results at 6–7. Labor's analysis ignores the language of the statute requiring it to also consider imports of like articles and the statute's broader remedial purpose.[25] If the statute requires Labor to

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[24] In its determination on remand, Labor did not tie its determination to consider increased imports of oil and gas to an interpretation of the statute requiring it to consider Geokinetics to be only a producer of an article. *See* Remand Results 2–4, 6–7. In its request for remand, Defendant states that, whereas "Labor addressed whether there was evidence of an increase in 'imports of services like or directly competitive with the services supplied by Geokinetics,' . . . Labor did not address whether there has been an increase in relevant imports of articles." Remand Mot. 2–3. Nor do Labor's instructions to Geokinetics accompanying its Second BDR questionnaire alert Geokinetics to the notion that Geokinetics is only a provider of articles and not a provider of services. *See* Second BDR Resp. at 122. Labor's instructions state affirmatively that the statute considers "any firm that engages in exploration of drilling for oil or natural gas, or otherwise produces oil or natural gas" to be "producing articles directly competitive with imports of oil and with imports of natural gas." *Id.* Labor further instructs that Geokinetics responses "should be based upon the activities of the firm, as well as the firm's production of oil and natural gas (if applicable)." *Id.* It is unclear from these instructions that Geokinetics responded understanding that Labor considers it only a provider of articles and not provider of services. In fact, the confusion of Geokinetics' general counsel is apparent from her correspondence with Labor. Geokinetics states

> You will note that many answers are the same as in the previous submission but for many others the answers [are] now N/A as we are not a company that manufactures products but rather provides services. Therefore we don't have "production numbers," for example.

Id. at 120.

[25] Since its inception, the statute has required Labor to consider the effect of increased imports in order to assess whether those imports are in some measure causing harm to domestic workers. *See* Trade Expansion Act of 1962, Pub. L. No. 87–794, § 302, 76 Stat. 872, 885–886 (1962). The Trade Expansion Act of 1962 established relief that was the precursor to TAA under the Trade Act of 1974. Section 301 of the Trade Expansion Act tied eligibility of a group of workers for tariff adjustment assistance to the United States Tariff Commission's (*i.e.*, the precursor agency to the U.S. International Trade Commission) determinations. Trade Expansion Act § 301. After a petition was filed the Tariff Commission had to investigate

> whether, as a result in major part of concessions granted under trade agreements, an article like or directly competitive with an article produced by such workers' firm, or an appropriate subdivision thereof, is being imported into the United States in such increased quantities as to cause, or threaten to cause, unemployment or underemployment of a significant number or proportion of the workers of such firm or subdivision.

Trade Expansion Act § 301(c)(2). A group of workers was eligible to apply for adjustment assistance if Labor found that

> the increased imports (which the Tariff Commission has determined to result from concessions granted under trade agreements) have caused or threatened to cause unemployment or underemployment of a significant number or proportion of workers of such workers' firm or subdivision thereof.

Trade Expansion Act § 302(a)(2). Therefore, the Trade Expansion Act tied the harm caused by increased imports to concessions granted under trade agreements. *See id.* The Trade Act of 1974 made it easier to secure benefits by no longer requiring that the increase in imports be tied to concessions explicitly granted under trade agreements, *see* Staffs of S. Comm. on Finance and H. Comm. on Ways and Means, 93rd Cong., Trade Act of 1974, Summary of the Provisions of the Provisions of H.R. 10710 7 (Comm. Print 1974), but the Trade Act of 1974 retained the concept that "like or directly competitive" articles are being imported and that

adopt the fiction that oil and gas exploration and drilling service providers produce articles that are directly competitive with oil and gas production, then Labor must explain why it is reasonable not to consider imports of seismic data services (which would appear to be "like" the articles produced by those same service providers) in order to foster the remedial purposes of the statute or reconsider its determination.[26]

Defendant's reliance on the Court of Appeals for the Federal Circuit's holding in *Former Employees of Marathon Ashland v. Chao*, 370 F.3d 1375 (2004) to support its determination does not address the question of whether Labor must also consider an increase in like imports. *See* Def.'s Suppl. Br. 2 (citing *Former Employees of Marathon Ashland v. Chao*, 370 F.3d 1375, 1383–84 (2004)). Rather, the *Marathon* court held that Labor's determination that the services performed by gaugers, whose services were involved in performing quality control on crude oil purchased from independent oil producers, were not involved in the oil production process was supported by substantial evidence. *See id.* at 1376, 1383. The court noted that the statute does not require all employees who perform tasks at the interface between oil production and transportation to be considered involved in production or transportation services. *Id.* at 1381 (construing identical statutory language in what was then 19 U.S.C. § 2272(b)(2)(A)–(B) (2000)). Here, Plaintiffs do not challenge whether the services provided by Geokinetics are involved in the oil production process or even whether imports of oil and natural gas decreased, but rather argue that Labor should have considered increased imports of like articles (i.e. seismic data services). *See* Pls.' Remand Comments 8–9.

C. Shift in Production to Foreign Countries or Acquisition of Products from a Foreign Country

Plaintiffs argue that Labor failed to adequately evaluate whether Geokinetics shifted production or services to foreign countries or acquisition of like or directly competitive articles produced or services performed from a foreign country, which it is obligated to indepen-

such imports are causing worker separations or the threat of separation remained in the statute after these changes. Trade Act of 1974, Pub. L. No. 93–618, § 222, 88 Stat. 1978, 2019 (1975).

[26] Competition from foreign suppliers of seismic data acquisition services may have had a more significant impact on Geokinetics' decision to lay off its surveying department than increases in imports of oil and gas. For example, because the oil and gas industry is a global industry dominated by many large multinational players, it is likely that employees of U.S. providers of exploration and drilling services could be harmed by competition from imports of foreign exploration and drilling services providers even during a period when the U.S. oil imports was decreasing. Labor must explain the reasonableness of its determination in light of this concern.

dently investigate under the statute. Pls.' Remand Comments 10– 12 (citing 19 U.S.C. § 2272(a)(2)(B)(i)(I)–(II)). Defendant responds that Labor reasonably relied on the unrebutted information on the record provided by Geokinetics to conclude that Geokinetics had not shifted production or services to a foreign country or acquired like or directly competitive articles produced or services supplied from a foreign country. Def.'s Reply 13–15. The record lacks evidence to support a determination that Geokenetics did not shift production or services to a foreign country, and it is unclear whether Labor considered a shift by Geokinetics in seismic data services to foreign countries.

In order to qualify for TAA certification under the shift in production or services path or shift in acquisition path, Labor must initially determine that a significant number or proportion of the workers' firm have become totally or partially separate or have been threatened to become totally or partially separated. *See* 19 U.S.C. § 2272(a)(1). If that initial requirement is met, the statute further requires that Labor consider both whether: (1) there has been a shift in the production of articles or the supply of services like or directly competitive with the articles produced or services supplied by the subject firm to a foreign country, 19 U.S.C. § 2272(a)(2)(B)(i)(I); or (2) the subject firm has acquired articles or services that are like or directly competitive with articles which it produces or services it supplies from a foreign country, 19 U.S.C. § 2272(a)(2)(B)(i)(II). In addition, the statute requires that such a shift have contributed importantly to the workers' separation or threat of separation. 19 U.S.C. § 2272(a)(2)(B)(ii).

The court's concerns with regard to the distinct requirements of the terms "like" and "directly competitive" under the increased imports path apply equally with regard to Sections 2272(a)(2)(B)(i)(I) and 2272(a)(2)(B)(i)(II). Thus, Labor must explain why it is reasonable to consider only whether directly competitive production shifted to foreign countries, *see* 19 U.S.C. § 2272(a)(2)(B)(i)(I) and whether the subject firm acquired from a foreign country articles that are directly competitive with articles produced by such firm, and exclude consideration of like products.

Here, Labor supports its determination that there has not been a shift to a foreign country or acquisition from a foreign country by the subject firm of articles like or directly competitive by referencing the negative responses to Labor's Second BDR questionnaire indicating that Geokinetics had not imported or acquired from a foreign country articles that are like or directly competitive with the articles it

produced. Remand Results 6–7 (citing Second BDR Resp. 126).[27] It is not at all clear that Geokenetics understood the full import of Labor's question given Labor's shift in its approach to consider Geokinetics a producer of an article rather than a provider of services.[28] Labor did not explain that, pursuant to statute, it would not consider seismic services to be like products. As already discussed, exploration and drilling services are, by statute, directly competitive with oil and gas production. *See* Def.'s Suppl. Br. 2–4; 19 U.S.C. § 2272(c)(2)(B). Labor did not consider whether seismic data services (presumably a like product to the articles produced by Geokinetics) had been shifted to or been acquired from a foreign country. *See* Remand Results 7. Nor did it explain why it was reasonable not to make such an inquiry. Therefore, Labor's determination that Geokinetics did not shift the production of articles like or directly competitive with oil and natural gas or acquire like or directly competitive articles from a foreign country is not supported by substantial evidence.

Defendant's argument that Labor's determination is supported by Geokinetics' response to Labor's First BDR questionnaire inquiring whether Geokinetics shifted to a foreign country or acquired from a foreign country services or products that were like or directly competitive with the services and products provided by Geokinetics is not persuasive. Def.'s Reply Br. 13. (citing First BDR Resp. at 63 (answering negatively to Labor's questions about whether the subject firm "imported or acquired from a foreign country services like or directly competitive with services supplied by the subject firm" and whether the subject firm "supplying like or directly competitive services shifted that work to another country or countries, or is a shift of services to another country scheduled")). Labor's remand determination cites only to the Second BDR Response. *See* Remand Results 6–7. On remand, Labor must clarify its approach to evaluating whether Geokinetics shifted services to a foreign country, explain why it is

[27] Geokinetics answers negatively Labor's questions about whether the subject firm "imported or acquired from a foreign country articles that are like or directly competitive with articles produced by the subject firm," and whether the subject firm "producing like or directly competitive articles shifted that work to another country or countries, or is a shift in production to another country scheduled." Second BDR Resp. at 126. Geokinetics answers "N/A" in the fields where Labor requested that it list "Production Shifted by the Subject Firm or Parent Company From this Location to Foreign Countries." *Id.* 132.

[28] As already discussed, it is apparent from the correspondence between Labor and Geokinetics in connection with completing Labor's Second BDR questionnaire that Geokinetics was confused about the implications of Labor's shift in approach. *See* Second BDR at 120. Geokinetics continued to view itself as a provider of services not a manufacturer of oil and natural gas products, *see id.*, so it is unclear that Geokinetics considered the full range of articles that are like or directly competitive with oil and natural gas articles.

reasonable to consider only directly competitive articles, explain what record evidence supports its conclusion, or reconsider its determination.

II. Certification of Adversely Affected Secondary Workers

Plaintiffs contend that Labor's conclusion that Geokinetics is not a supplier or downstream producer to a firm that employed a group of workers who received TAA certification is unsupported by substantial evidence. Pls.' Remand Comments 13–14. Defendant responds that Labor reasonably relied upon Geokinetics response in its BDR. Def.'s Reply 15–17. The statement relied upon by Labor to conclude that Geokinetics has no supplier or downstream producer relationship with a firm whose workers have been previously certified as primary workers entitled to TAA benefits does not support Labor's determination. *See* Second BDR Resp. at 128. On remand, Labor must explain what other evidence on the record supports its determination, inquire further to develop record information to support its determination, or reconsider its determination.

Similar to certification of primary workers, to be certified to receive TAA benefits as adversely affected secondary workers, the statute initially requires that "a significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated." 19 U.S.C. § 2272(b)(1). In addition, to be certified as secondary workers, the subject firm must be "a supplier or downstream producer to a firm that employed a group of workers who received [primary worker TAA certification], and such supply or production must be related to the article or service that was the basis for such certification." 19 U.S.C. § 2272(b)(2).[29]

Here, Labor's determination that Geokinetics is not a supplier or downstream producer to a firm whose workers received primary worker TAA certification is unreasonable because it is based upon Geokinetics' incomplete responses to Labor's Second BDR questionnaire. *See* Remand Results 7 (citing Second BDR Resp. at 128). Geokinetics left Labor's question asking whether it conducts business with a firm whose workers have been certified under the TAA program blank. *See* Second BDR Resp. at 128. Where Labor asked Geokinetics to provide a list of its customers that account for the majority

[29] Further, either: (1) the subject firm must be a supplier and the component parts it supplied to a firm it supplied must have accounted for at least 20 percent of the production or sales of the subject firm; or (2) a loss of business by the subject firm must have "contributed importantly to the workers' separation or threat of separation." 19 U.S.C. §§ 2272(b)(3)(A)–(B).

of the decline of sales of "data acquisition" articles, Geokinetics responded: "[Not applicable ("N/A")] – Customers are variable depending upon exploration activities. Not constant/fixed." *Id.* It is unclear from this response that Geokinetics even understood the thrust of Labor's question. Whether Geokinetics' customers vary depending upon exploration activities does not establish whether Geokinetics is a supplier or downstream producer to a firm whose workers received TAA certification as primary workers. Moreover, Geokinetics' blanket response of "N/A" to Labor's request that it provide a list of customers that account for the majority of the decline of sales does not make clear that the company is stating that a loss of business did not contribute importantly to Plaintiffs' separation. Nor does Geokinetics' response that its customers vary necessarily establish that the loss of supply or downstream customers did not contribute importantly to Plaintiffs' separation. It is not reasonable for Labor to conclude based upon these limited and inconclusive responses that Plaintiffs had not satisfied the requirements for certification as secondary workers. On remand, Labor must explain what record evidence supports a conclusion that Geokinetics is not a supplier or downstream producer to a firm whose workers were certified for TAA benefits as primary workers, what supports a determination that Geokinetics' loss of business did not contribute importantly to Plaintiffs' separation, or reconsider its determination.

It is also unclear what in the record supports Labor's statement in its findings that

> [s]eparations were not caused by a loss experienced by a customer whose workers were certified eligible to apply for Trade Adjustment Assistance (TAA), but rather by a steep drop in oil prices that was not caused by U.S. imports into the United States.

Remand Investigative Rep. at 160. Although Labor's findings reference data showing a decrease in the price of oil, Labor references no data on the record suggesting a causal relationship between that drop in oil prices and the separations here. On remand, Labor must explain what record evidence supports such a conclusion.

Defendant argues that Labor is entitled to accept the unrebutted statements responding to TAA inquiries without undertaking additional investigation.[30] Def.'s Reply Br. 16 (citing *Marathon*, 370 F.3d

[30] Defendant argues that Labor has no means to determine which firms do business with Geokinetics other than to rely upon its response to its request for a list of relevant customers. Def.'s Reply Br. 16. The court's decision remanding Labor's determination does not prevent Labor's reliance on Geokinetics' customer list in all circumstances. However, given the incompleteness of Geokinetics' response and the lack of clarity of the response

at 1385; *Former Employees of Barry Callebaut v. Chao*, 357 F.3d 1377, 1382–83 (Fed. Cir. 2004)). However, in order for Labor to reasonably rely upon such statements to support its determination, those statements must be creditworthy. *See Marathon*, 370 F.3d at 1385; *Barry Callebaut*, 357 F.3d at 1382–83. Labor cannot deem a statement creditworthy unless it reasonably supports the facts Labor accepts those statements to establish. Here, given the ambiguity in Geokinetics' responses, as already discussed, Labor cannot reasonably consider those responses to support the notion that Geokinetics is not a supplier or downstream producer to a firm whose workers were certified for TAA benefits as primary workers or that Geokinetics' loss of business did not contribute importantly to Plaintiffs' separation or reconsider its determination.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that this action is remanded to Labor to clarify or reconsider, as appropriate, its remand redetermination on Plaintiffs' petition for certification for TAA benefits in accordance with this opinion; and it is further

ORDERED that Labor shall file its second remand redetermination with the court within 60 days of this date; and it is further

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

ORDERED that Labor shall have 15 days to file its reply to comments on the second remand redetermination.

Dated: April 3, 2017
New York, New York

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

Slip Op. 17–39

JACOBI CARBONS AB and JACOBI CARBONS, INC., Plaintiffs, NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., NINGXIA GUANGHUA CHERISHMET ACTIVATED CARBON CO., LTD., BEIJING PACIFIC ACTIVATED CARBON PRODS. CO., LTD., DATONG MUNICIPAL YUNGUANG ACTIVATED CARBON CO., LTD., CARBON ACTIVATED TIANJIN CO., LTD., JILIN BRIGHT FUTURE CHEMICALS CO., LTD., NINGXIA MINERAL AND CHEMICAL LTD., SHANXI DMD CORP., SHANXI INDUSTRY TECH. TRADING CO., LTD., SHANXI SINCERE INDUSTRIAL CO., LTD., TANCARB ACTIVATED CARBON CO., LTD., TIANJIN MAIJIN INDUSTRIES CO., LTD., and CHERISHMET INC., Plaintiff-

Geokinetics' did give to address the relevant questions to evaluating Plaintiffs' eligibility for certification as secondary workers, it is unreasonable for Labor to rely on Geokinetics' response here. *See* Second BDR Resp. at 128.

Intervenors, v. UNITED STATES, Defendant, and CALGON CARBON CORP. and CABOT NORIT AM., INC., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 15–00286

[Plaintiffs' motions for judgment on the agency record are granted in part, and the determination is remanded to the Department of Commerce. Plaintiffs' motion to supplement the administrative record is denied.]

Dated: April 7, 2017

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, argued for Plaintiffs. With him on the brief were *James P. Durling*, *Claudia D. Hartleben*, and *Tung Nguyen*.

Gregory S. Menegaz, DeKieffer & Horgan PLLC, of Washington, DC, argued for Plaintiff-Intervenors Carbon Activated Tianjin Co., Ltd., Jilin Bright Future Chemicals Co., Ltd., Ningxia Mineral and Chemical Ltd., Shanxi DMD Corp., Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tancarb Activated Carbon Co., Ltd., and Tianjin Maijin Industries Co., Ltd. With him on the brief were *J. Kevin Horgan*, *Alexandra H. Salzman*, and *Judith L. Holdsworth. Gregory S. Menegaz*, DeKieffer & Horgan PLLC, of Washington, DC, argued for Plaintiff-Intervenors Carbon Activated Tianjin Co., Ltd., Jilin Bright Future Chemicals Co., Ltd., Ningxia Mineral and Chemical Ltd., Shanxi DMD Corp., Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tancarb Activated Carbon Co., Ltd., and Tianjin Maijin Industries Co., Ltd. With him on the brief were *J. Kevin Horgan*, *Alexandra H. Salzman*, and *Judith L. Holdsworth*.

Jeffrey S. Grimson, *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, *Yuzhe Pengling*, and *James C. Beaty*, Mowry & Grimson, PLLC, of Washington, DC, for Plaintiff-Intervenor Ningxia Huahui Activated Carbon Co., Ltd.

Francis J. Sailor and *Dharmendra N. Choudhary*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for Plaintiff-Intervenors Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd, Beijing Pacific Activated Carbon Products Co., Ltd., Datong Municipal Yunguang Activated Carbon Co., Ltd, and Cherishmet Inc.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr* ., Assistant Director. Of counsel on the brief was *Heather Doherty*, Attorney-International, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Melissa M. Brewer, Kelley Drye & Warren LLP, of Washington, DC, argued for Defendant-Intervenors Calgon Carbon Corp. and Cabot Norit Americas, Inc. With her on the brief were *John M. Herrmann*, *David A. Hartquist*, and *R. Alan Luberda*.

OPINION

Barnett, Judge:

Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc. (together, "Jacobi"), and Plaintiff-Intervenors[1] (collectively, with Jacobi, "Plain-

[1] Plaintiff-Intervenors include: Ningxia Huahui Activated Carbon Co., Ltd. ("Huahui"); Carbon Activated Tianjin Co., Ltd., Jilin Bright Future Chemicals Company, Ltd., Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tancarb Activated Co., Ltd., and

tiffs"), move, pursuant to United States Court of International Trade ("USCIT") Rule 56.2, for judgment on the agency record, challenging the United States Department of Commerce's ("Defendant" or "Commerce") *Final Results* in the seventh administrative review ("AR7") of the antidumping duty order on certain activated carbon from the People's Republic of China ("PRC").[2] *See Certain Activated Carbon from the People's Republic of China*, 80 Fed. Reg. 61,172 (Dep't Commerce Oct. 9, 2015) (final results of antidumping duty administrative review; 2013–2014) ("*Final Results*"), PJA Tab 42, PR 414, ECF No. 85–4, and accompanying *Issues and Decision Memorandum*, A-570–904 (Oct. 2, 2015) ("*Final I&D Mem.*"), PJA Tab 39, PR 407, ECF No. 85–4.

Plaintiffs argue that Commerce erred in (1) rejecting the Philippines and selecting Thailand as the primary surrogate country, (2) using Thai import data as the surrogate value for carbonized material, and (3) reducing Jacobi's constructed export price ("CEP") by an amount for Chinese value added tax ("VAT"). *See generally* Confidential Pls. Jacobi Carbons AB and Jacobi Carbons, Inc.'s Mot. for J. on the Agency R. and Pls.' Br. in Supp. of their Mot. for J. on the Agency R. ("Jacobi Mem."), ECF No. 51; Pls. Carbon Activated Tianjin Co., Ltd., Jilin Bright Future Chemicals Company, Ltd., Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tancarb Activated Co., Ltd., and Tianjin Maijin Industries Co., Ltd. Mot. for J. on the Agency R., ECF No. 59; Pls. Carbon Activated Tianjin Co., Ltd., Jilin Bright Future Chemicals Company, Ltd., Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tancarb Activated Co., Ltd., and Tianjin Maijin Industries Co., Ltd. Mem. in Supp. of Mot. for J. on the Agency R. ("CATC Mem."), ECF No. 59–2 (incorporating Jacobi's arguments and providing additional arguments on all issues); Pl.-Intervenor Ningxia

Tianjin Maijin Industries Co., Ltd. (collectively, "CATC"); and Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Beijing Pacific Activated Carbon Products Co., Ltd, Cherishmet Inc., and Datong Municipal Yunguang Activated Carbon Co., Ltd., (collectively, "the GDLSK companies").

[2] The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 37–1, and a Confidential Administrative Record ("CR"), ECF No. 37–2. Parties submitted joint appendices containing all record documents cited in their briefs. *See* Public Joint App. ("PJA"), ECF Nos. 85, 85–1 to 85–4; Confidential Joint App. ("CJA"), ECF No. 86. There is an inconsistency in Parties' citations to record documents; in particular, Parties cite to different administrative record numbers. *See* CJA at 2 (preamble to the CJA). Defendants relied on the record indices filed with the court; Plaintiffs relied on record indices Commerce prepared for the purpose of litigation. *See Id.* For ease of reference, the court cites to the administrative record (and the corresponding document numbers) filed with the court. The court references the confidential versions of the relevant record documents, if applicable, throughout this opinion, unless otherwise specified.

Huahui Activated Carbon Co., Ltd.'s Rule 56.2 Mot. for J. on the Agency R. ("Huahui Mem."), ECF No. 58 (incorporating Jacobi's arguments regarding surrogate country and surrogate value selection, adopting Jacobi's arguments regarding VAT and making additional arguments thereto); Mot. of GDLSK Pl.-Intervenors for J. on the Agency R. under USCIT Rule 56.2 and Mem. of Law in Supp. of GDLSK Pls.' Rule 56.2 Mot. for J. on the Agency R. ("GDLSK Mem."), ECF No. 60 (adopting all arguments made by Jacobi and providing additional argument regarding the VAT).[3] For the following reasons, the court remands the determination to Commerce to clarify and, if necessary, revise its findings on the issues of the economic comparability and significant production of Thailand, and the irrecoverable VAT calculation. The court defers ruling on Plaintiffs' challenges to Commerce's surrogate value selections pending the results of the redetermination.

BACKGROUND

I. Preliminary Proceedings

On May 29, 2014, Commerce initiated AR7 on certain activated carbon from China for the period of review ("POR") April 1, 2013 to March 1, 2014. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 79 Fed. Reg. 30,809 (Dep't Commerce May 29, 2014), PJA Tab 6, PR 18, ECF No. 85–1.[4] Commerce selected Jacobi and Datong Juqiang Activated Carbon Co., Ltd. ("DJAC") as mandatory respondents for individual examination for AR7 "because they constitute the PRC exporters accounting for the largest volume of U.S. imports of subject merchandise that can reasonably be examined." Selection of Respondents for Individual Review (June 26, 2014) at 1, CJA Tab 10, CR 5, ECF No. 86.

On July 25, 2014, Commerce invited interested parties to comment on surrogate country selection and surrogate value data. *See* Request for Surrogate Country and Surrogate Value Comments and Information (July 25, 2014) ("Commerce SC Letter"), PJA Tab 43, PR 64, ECF No. 85–4. Commerce provided interested parties with a "non-exhaustive list of countries" that, based on 2012 per capita gross national income ("GNI"), Commerce's Office of Policy ("OP") consid-

[3] Plaintiffs Huahui, CATC, and the GDLSK companies also seek recalculation of the separate rate assigned to non-mandatory respondents in accordance with any remand. CATC Mem. at 23; Huahui Mem. at 1; GDLSK Mem. at 5–7.

[4] The scope of the antidumping duty order includes "all forms of activated carbon that are activated by steam or [carbon dioxide], regardless of the raw material, grade, mixture, additives, further washing or post-activation chemical treatment . . ., or product form." *Final I&D Mem.* at 2. "Unless specifically excluded, the scope of the order covers all physical forms of certain activated carbon . . . ." *Id.* Chemically activated carbons, reactivated carbons, and activated carbon cloth are excluded from the scope of the order. *Id*. at 2–3.

ered economically comparable to the PRC. *Id*. at 1; *see also id*., Attach. 1 ("OP SC List for AR7") (listing South Africa, Colombia, Bulgaria, Thailand, Ecuador, and Indonesia as economically comparable countries). Commerce invited interested parties to propose additional countries. *Id*. at 1.

On November 12, 2014, Jacobi submitted surrogate country comments. *See* Jacobi's Initial Comments on Surrogate County Selection (Nov. 12, 2014) ("Jacobi SC Comments"), PJA Tab 4, PR 178, ECF No. 85–1. Jacobi urged Commerce to rely on 2013 GNI data from the World Bank's "World Development Indicators Database," and asserted that data therein demonstrates the Philippines' economic comparability to China. *Id*. at 3. On March 31, 2015, DJAC submitted surrogate value information proposing Thai Harmonized System ("HS") code 4402.90.1000, "Of Coconut Shell," to value carbonized material. Second Surrogate Value Submission by Datong Juqiang Activated Carbon Co., Ltd. (March 31, 2015) ("DJAC Second SV Submission"), Ex. 2A ("Thai Import Statistics"), PJA Tab 15, PR 322, ECF No. 85–3.

On May 5, 2015, Commerce published its *Preliminary Results*. *See Certain Activated Carbon from the People's Republic of China*, 80 Fed. Reg. 25,669 (Dep't Commerce May 5, 2015) (prelim. results of antidumping duty admin. review: 2013–2014) ("*Prelim. Results*"), PJA Tab 23, PR 351, ECF No. 85–3, and accompanying *Issues and Decision Memorandum*, A-570–904 (Apr. 29, 2015) ("*Prelim. I&D Mem.*"), PJA Tab 17, PR 335, ECF No. 85–3. Commerce selected Thailand as the primary surrogate country. *Id*. at 17. Commerce explained that Bulgaria, Ecuador, Romania, South Africa, Thailand, and Ukraine are economically comparable to the PRC on the basis of 2013 GNI data; the Philippines are Indonesia are not. *Id*. at 14–15. Of the economically comparable countries, Commerce relied on Global Trade Atlas export data to find that Ecuador, Thailand, and South Africa are significant producers of comparable merchandise. *Id*. at 16; *see also* Surrogate Values for the Preliminary Results (Apr. 29, 2015) ("Prelim. SV Mem."), Attach. 1 ("Global Trade Atlas Reporting Country Export Statistics"), PJA Tab 18, PR 336–39, ECF No. 85–3.

Interested parties had placed Indonesian, Thai, Philippine, and Ukrainian surrogate value data on the record for Commerce's consideration. *Prelim. I&D Mem*. at 16. Commerce rejected the Philippine and Indonesian data because it did not find those countries to be economically comparable, and it determined it had "sufficiently reliable and useable [surrogate value] data" from a comparable country,

Thailand. *Id*. at 16–17, 27. Relevant here, Commerce selected the 2010 audited financial statement of Carbokarn Co., Ltd. ("Carbokarn"), a Thai activated carbon company, to value factory overhead, selling, general, and administrative expenses, and profit. *Id*. at 26.[5] Commerce selected Thai HS code 4402.90.9000, "Wood Charcoal (Including Shell Or Nut Charcoal), Excluding That Of Bamboo, Other," to value carbonized material. Prelim. SV Mem. at 5, Attach. 3a (Global Trade Atlas surrogate values for AR7); *see also Prelim I&D Mem.* at 24 (noting Commerce's reliance on Thai import data to value raw materials).

Finally, Commerce noted that, in nonmarket economy ("NME") cases, its practice "is to subtract from [export price] or the [constructed export price] the amount of any unrefunded (*i.e.*, irrecoverable) VAT ["Value Added Tax"]". *Prelim. I&D Mem*. at 23. After considering the Chinese VAT regulation placed on the record, Commerce reduced Jacobi's U.S. sales price "by the irrecoverable VAT rate of 17[%] of entered value." *Id*. at 23. Commerce calculated an estimated weighted-average dumping margin of 0.0 USD/kg for DJAC and a 0.53 USD/kg margin for Jacobi. *Prelim. Results*, 80 Fed. Reg. at 25,669. As the only non-zero or non-*de minimis* dumping margin, Commerce assigned Jacobi's rate to the separate rate-eligible companies. *Id.*; *Prelim. I&D Mem*. at 11.

II. Post-Preliminary Proceedings

In light of *Dupont Teijin Films v. United States*, 37 CIT ___, 931 F. Supp. 2d 1297 (2013),[6]and Jacobi's placement of 2013 GNI data on the record of this proceeding, Commerce placed on the record surrogate country lists from other proceedings using 2013 per capita GNI data. *Id*. at 13–14 (citing Prelim. SV Mem.). Commerce gave interested parties additional time to comment on the surrogate country lists and submit additional surrogate value data for consideration. *Id.* at 13–14; *see also* Clarification of Deadline to Submit SV Information (June 3, 2015), PJA 31, PR 372, ECF No. 85–4.

[5] Commerce rejected Carbokarn's 2013 financial statement because it lacked sufficient detail. *Prelim. I&D Mem*. at 26. Commerce also rejected the 2013 financial statement of C. Gigantic Carbon Co., Ltd. ("Gigantic") because it reflected "an exemption from corporate income tax under the [Thai] Investment Promotion Act," which Commerce had determined was a countervailable subsidy. *Id*. at 27; *see also* Pet'rs' Final Pre-Prelim. Submission of Surrogate Value Information (March 31, 2015), Attach. 3 ("2013 Gigantic Fin. Stmt."), PJA Tab 14, PR 321, ECF No. 85–3 (accrued income tax listed as "-").

[6] In *Dupont Teijin Films*, the court remanded the final results of an administrative review to Commerce for consideration of more recent GNI data which had been placed on the record. 931 F. Supp. 2d at 1298–99, 1307.

III. Final Results

On October 9, 2015, Commerce published the *Final Results*. *See Final Results*. Commerce affirmed its preliminary selection of Thailand as the primary surrogate country. *Final I&D Mem*. at 5–8. Commerce selected Carbokarn's 2011 financial statement to value financial ratios, which had been placed on the record during post-preliminary proceedings and which was more contemporaneous with the relevant POR than the 2010 Carbokarn statement used in the *Preliminary Results*. *Final I&D Mem*. at 13. Commerce selected Thai HS code 4402.90.1000 ("Of Coconut Shell") as the surrogate value for carbonized material because it is more specific to Jacobi's inputs than is Thai HS 4402.9000 ("Wood Charcoal"). *Id*. at 25, 26. As it did in the *Preliminary Results*, Commerce deducted 17 percent irrecoverable VAT from the U.S. price of Jacobi's CEP sales. *Id*. at 16–20. Commerce calculated a weighted-average dumping margin of $1.05 USD/kg for Jacobi and $0.00 USD/kg for DJAC. *Final Results*, 80 Fed. Reg. at 61,174. Because Jacobi's rate is not zero, *de minimis*, or based on facts available, it was assigned to the separate rate companies. *Id*.

Before this court is Plaintiffs' challenge to Commerce's *Final Results*. The arguments are fully briefed, and the court heard oral argument on December 21, 2016. *See* Docket Entry, ECF No. 93. For the reasons discussed below, the *Final Results* are remanded for further explanation and reconsideration, if necessary, of Commerce's determination of the economic comparability of Thailand and the Philippines, Commerce's determination that Thailand is a significant producer of activated carbon, and Commerce's calculation of the irrecoverable VAT. The court defers resolution of Plaintiffs' challenges to Commerce's particular surrogate values pending the results of the redetermination.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[7] and 28 U.S.C. § 1581(c) (2012).

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 is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d

[7] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition, and all references to the United States Code and the Code of Federal Regulations are to the 2012 edition, unless otherwise stated.

1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It "'requires more than a mere scintilla," but "less than the weight of the evidence." *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). In determining whether substantial evidence supports Commerce's determination, the court must consider "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 *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). However, that a plaintiff can point to evidence that detracts from the agency's conclusion or that there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)). The court may not "reweigh the evidence or . . . reconsider questions of fact anew." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)); *see also Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (citation omitted) (the court "may not reweigh the evidence or substitute its own judgment for that of the agency").

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), guides judicial review of the Department's interpretation of the antidumping and countervailing duty statutes. *See Nucor Corp. v. United States*, 414 F. 3d 1331, 1336 (Fed. Cir. 2005). First, the Court "must determine whether Congress has directly spoken to the precise question at issue." *Heino v. Shinseki*, 683 F.3d 1372, 1377 (Fed. Cir. 2012) (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, "that is the end of the matter." *Id.* (quoting *Chevron*, 467 U.S. at 842–43). However, "[i]f the statute is silent or ambiguous," the Court must determine "whether the agency's [action] is based on a permissible construction of the statute." *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1317 (Fed. Cir. 2012) (citing *Chevron*, 467 U.S. at 842–43).

DISCUSSION

I. Rule 56.2 Motions for Judgment on the Agency Record

A. Surrogate Country Selection

Plaintiffs contend that Commerce's surrogate country analysis was unlawful, and its decision to reject the Philippines as the primary surrogate country in favor of Thailand was not supported by substantial evidence. Jacobi Mem. at 9–30; CATC Mem. at 2–9. Commerce and Defendant-Intervenors Calgon Carbon Corp. and Cabot Norit Americas Inc. (together, "Calgon") argue that Commerce's selection of Thailand was lawful and supported by substantial evidence. Def.'s Resp. to Pls.' Rule 56.2 Mots. For J. Upon the Agency R. ("Gov. Resp.") at 15–43, ECF No. 92; Confidential Def.-Intervenors' Resp. in Opp'n to Consolidated Pls.' Mots. For J. Upon the Agency R. ("Calgon Resp.") at 10–33, ECF No. 73.

i. Legal Framework for Surrogate Country Selection

a. Statutory and Regulatory Framework

An antidumping duty is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. When, as here, "the subject merchandise is exported from a nonmarket economy country," Commerce determines "normal value" by valuing the "factors of production"[8] used in producing the subject merchandise, and "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses" in a surrogate market economy country. 19 U.S.C. § 1677b(c)(1).

Commerce values the factors of production using "the best available information regarding the values of such factors" in an "appropriate" market economy country or countries. 19 U.S.C. § 1677b(c)(1)(B). In deciding what is an "appropriate" market economy country, Commerce must utilize, "to the extent possible, the prices or costs of factors of production" in a market economy country that is at "a level of economic development comparable to that of the [NME] country," and is a "significant producer[] of comparable merchandise." 19 U.S.C. § 1677b(c)(4). "The process of choosing a market economy country to value the factors of production is known as surrogate

[8] 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).

country selection." *Jiaxing Bro. Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1293 (Fed. Cir. 2016) (citing *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010)). Commerce generally values all factors of production in a single surrogate country. *See* 19 C.F.R. § 351.408(c)(2) (excepting labor). *But see Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 (Dep't Commerce June 21, 2011) (expressing a preference to value labor based on industry-specific labor rates from the primary surrogate country).

b. Commerce Policy Bulletin 04.1

Commerce has adopted a four-step approach to implement the above-described statutory and regulatory framework. *See* Import Admin., U.S. Dep't of Commerce, Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (2004), http://enforcement.trade.gov/policy/bull04–1.html (last visited March 31, 2017) [hereinafter "Policy Bulletin 04.1"]. First, OP compiles a list of potential surrogate countries that are economically comparable to the NME based on per capita GNI as reported by the World Bank. Policy Bulletin 04.1 at 2. Potential surrogate countries "are not ranked" and are "considered equivalent in terms of economic comparability." *Id.* Second, among the potential surrogates, Commerce identifies countries that produce comparable merchandise. *Id.* Third, Commerce determines whether any of the potential surrogates identified in step two are significant producers of comparable merchandise. *Id.* at 3. Whether production is "significant" is generally determined in relation to "world production of, and trade in, comparable merchandise." *Id.* Finally, if two or more countries fulfill the first three criteria, Commerce selects as the primary surrogate the country with the best surrogate value data. *Id.* at 4; *see also Jiaxing Bro. Fastener Co., Ltd.*, 822 F.3d at 1293 (citation omitted) (describing the four-step process).

ii. Commerce's Sequential Approach to Surrogate Country Selection

a. Parties' Contentions

Jacobi contends that Commerce erred when it excluded the Philippines as a potential surrogate country solely on the basis of economic comparability and declined to consider its significant production of comparable merchandise and its data quality. *See* Jacobi Mem. at 9–13; *see also* CATC Mem. at 5 (asserting that "[Commerce] cannot lawfully make one criterion a threshold requirement . . . ."). CATC argues that the statutory mandate to use the "best available information" elevates Commerce's data criterion such that it "is, at a

minimum, equally as critical" as the economic comparability and significant comparable production criteria. CATC Mem. at 3. Jacobi and CATC point to several decisions from this court as support for the proposition that "economic comparability alone cannot be used to determine a reasonable primary surrogate country." Jacobi Mem. at 11–12 (citing *Vinh Hoan Corp. v. United States*, 39 CIT ___,49 F. Supp. 3d 1285, 1303 (2015), *Ad Hoc Shrimp Trade Action Committee v. United States*, 36 CIT ___, 882 F. Supp. 2d 1366, 1374–75 (2012), and *Allied Pac. Food (Dalian) Co. Ltd. v. United States*, 32 CIT 1328, 587 F. Supp. 2d 1330, 1357 (2008)); CATC Mem. at 3–4 (citing *Ad Hoc Shrimp*, 882 F. Supp. 2d at 1374, and *Amanda Foods (Vietnam) Ltd. v. United States* ("*Amanda Foods*"), 33 CIT 1407, 1413, 647 F. Supp. 2d 1368, 1376–78 (2009)).

Commerce contends that Plaintiffs failed to raise arguments related to its surrogate country methodology in the underlying administrative proceeding, and, thus, failed to exhaust their administrative remedies. Gov. Resp. at 20–23. Commerce further contends that it properly applied Policy Bulletin 04.1 in selecting Thailand as the primary surrogate country. Gov. Resp. at 18–20, 23–28.

b. Administrative Exhaustion

1. Legal Standard

"[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). Exhaustion of administrative remedies is a doctrine that holds "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (internal quotation marks and citation omitted). Commerce regulations require parties to raise all arguments they wish to preserve in their case briefs to the agency. *See* 19 CFR § 351.309.[9] This requirement permits the agency to address the issue in the first instance, in its final results, prior to being considered by the courts and the Court of Appeals for the Federal Circuit ("Federal Circuit") has confirmed the reasonableness of this approach. *See Qingdao Sea-Line Trading Co. Ltd. v. United States*, 766 F.3d 1378, 1388 (Fed. Cir. 2014) ("Commerce regulations require presentation of

[9] *See* 19 C.F.R. § 351.309(c)(2) ("The case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results."); *see also* 19 C.F.R. § 351.309(d)(2) ("The rebuttal brief may respond only to arguments raised in case briefs and should identify the arguments to which it is responding.")

all issues and arguments in a party's administrative case brief"); *Dorbest Ltd*, 604 F.3d at 1375 (insufficient for party to have raised an issue in a footnote in the rebuttal brief or during the ministerial comment period when the issue was not raised in the party's case brief). Issues not raised before the agency in case and rebuttal briefs are waived for failure to exhaust and cannot be raised on appeal before this court.[10] 28 U.S.C. § 2637(d). There are exceptions to the requirement of exhaustion, which may be applied at the court's discretion.[11]

2. Plaintiffs Adequately Exhausted Their Remedies

A careful review of the case briefs filed in the underlying administrative proceeding show that Plaintiffs sufficiently raised Commerce's sequential approach to surrogate country selection. *See Trust Chem Co. Ltd. v. United States*, 35 CIT ___. ___, 791 F. Supp. 2d 1257, 1268 & n.27 (2011) ("The determinative question [regarding administrative exhaustion] is whether Commerce was put on notice of the issue . . . ."). CATC squarely raised the issue in its case brief, asserting that:

> As demonstrated by [Commerce's] Preliminary Results, [Commerce] has *treated the economic comparability criteria of its surrogate country analysis as a threshold*. [Commerce] did not consider the relative quality of data in countries outside of the [per capita] GNI band nor did [Commerce] consider the relative significant production of countries outside of the GNI band. After determining the Philippines and Indonesia were not at the same level of economic comparability, [Commerce] stopped its analysis of these countries. This approach cannot be reconciled with the relevant statutory mandate.

CATC Case Br. (June 22, 2015) at 6, PJA Tab 33, PR 375, ECF No. 85–4 (emphasis added). Likewise, DJAC asserted that Commerce must "weigh the economic comparability, significant production and data quality considerations conjunctively, rather than disjunctively."

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[10] Parties are able to raise ministerial errors with the Department if such errors appear in the Final Results. *See* 19 C.F.R. 351.224(e).

[11] There is no exhaustive list of exceptions. Previously enumerated exceptions include futility, an intervening court decision such that the new interpretation would impact the agency's actions, pure question of law, or when plaintiff had no reason to believe the agency would not follow established precedent. *See Luoyang Bearing Factory v. United States,*26 CIT 1156, 1186, n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002) (collecting cases). The court has also found exceptions to exhaustion when a private party is denied access to critical information at a time when its case brief is due or when requiring exhaustion is burdensome such that it would result in "undue prejudice to subsequent assertion of a court action." *See Corus Staal BV v. United States,* 502 F.3d 1370, 1381 (Fed. Cir. 2007) (citation omitted).

Case Br. of Datong Juqiang Activated Carbon Co., Ltd. (June 22, 2015) at 4–5, PJA Tab 32, PR 374, ECF No. 85–4. For its part, Jacobi asserted that Commerce should select the Philippines because it "best meets *all* of the criteria outlined in [Commerce's] policy bulletin," and that Commerce has previously "conducted a broader analysis of what constitutes the best available surrogate country," and has "relied upon the totality of facts *rather than the proximity of the GNI* for the potential surrogate country." Jacobi's Case Br. for POR 7 (June 22, 2015) ("Jacobi Case Br.") at 5, 7, PJA Tab 34, PR 381, ECF No. 85–4 (second emphasis added). Accordingly, Commerce's exhaustion argument lacks merit.

c. Commerce's Sequential Surrogate Country Selection Methodology is Lawful

Plaintiffs argue that Commerce erred when it excluded the Philippines as a potential surrogate country on the basis of lack of economic comparability; instead, Plaintiffs contend, Commerce should have considered the degree to which the Philippines fulfilled all three statutory criteria before making its determination. The Federal Circuit, however, has rejected this same argument by parties in *Jiaxing Brother Fastener Co., Ltd.* Therein, the Federal Circuit addressed whether Commerce's decision to exclude India from consideration as a potential surrogate country on the basis of its lack of economic comparability conflicted with the express terms of 19 U.S.C. § 1677b. *Jiaxing Bro. Fastener Co., Ltd.*, 822 F.3d at 1298. Finding that it did not, the Federal Circuit reasoned that "nothing in the statute . . . requires Commerce to consider any particular country as a surrogate country." *Id*. The Federal Circuit noted that "[w]hen Congress does not mandate a procedure or methodology for applying a statutory test, 'Commerce may perform its duties in the way it believes most suitable.'" *Id.* (quoting *JBF RAK LLC v. United States*, 790 F.3d 1358, 1364 (Fed. Cir. 2015)).

Further, this court has affirmed Commerce's discretion to exclude countries from consideration on the basis of economic comparability. *See Fresh Garlic Producers Ass'n v. United States* ("*Fresh Garlic I*"), 39 CIT ___, ____, 121 F. Supp. 3d 1313, 1341 (2015) (recognizing that beginning its analysis with economically comparable countries, in normal cases, better enables Commerce to calculate normal value in a hypothetical market economy country; however, economic comparability should not be a first step when the subject merchandise is unusual or unique, is produced in only a few countries, or the major inputs are not widely traded); *Jiaxing Bro. Fastener Co., Ltd. v. United States*, 39 CIT ___, ___, 961 F. Supp. 2d 1323, 1331 (2014)

("India though cannot be a suitable primary surrogate country on this administrative record because it is not economically comparable to the PRC."); *Foshan Shunde Yongjian Housewares & Hardwares Co. v. United States*, 37 CIT ___, ___, 896 F. Supp. 2d 1313, 1321–22 (2013) (affirming Commerce's decision to exclude India from its surrogate country list when it had the lowest GNI relative to China as compared to other countries under consideration); *Clearon Corp. v. United States* ("*Clearon I*"), 38 CIT ___, ___, 2014 WL 3643332 at *11-*12, *15 (2014) (rejecting argument that Commerce wrongfully applied per capita GNI as a threshold consideration in rejecting India as a potential surrogate country; remanding for further explanation of how Commerce determined the range of GNIs reflected on OP's list of potential surrogate countries).

In asserting that Commerce should have weighed the Philippines' fulfillment of all three statutory criteria, Jacobi and CATC would misapply several opinions from this court addressing Commerce's selection of a surrogate country from among two countries on OP's list. For example, Jacobi relies on the following passage from *Ad Hoc Shrimp*:

> Because none of Commerce's three surrogate country eligibility criteria is preeminent, it follows that relative strengths and weaknesses among potential surrogates must be weighed by evaluating the extent to which the potential surrogates satisfy each of the three criteria.

Jacobi Mem. at 12 (citing *Ad Hoc Shrimp*, 882 F. Supp. 2d at 1371, 1374–75) (emphasis omitted); *see also* CATC Mem. at 4. However, *Ad Hoc Shrimp* addresses Commerce's policy of treating all countries on OP's list as equally economically comparable. 882 F. Supp. 2d at 1374. The passage Jacobi relies on reflects the court's finding that Commerce may not ignore relative differences in economic comparability and data quality when deciding which of the listed countries to select as the primary surrogate country. *Id.* at 1375 ("Because Commerce has provided no reasonable explanation as to why potentially slight differences in data quality necessarily outweigh potentially large differences in economic comparability, a blanket policy of simply refusing to engage in this inquiry does not amount to reasoned decision-making.").

CATC's reliance on a similar passage from *Amanda Foods* is also misplaced. *See* CATC Mem. at 4 (quoting *Amanda Foods*, 33 CIT at 1413, 647 F. Supp. 2d at 1376 ("Nor has Commerce explained why the difference between Bangladesh and Vietnam, in *per capita* GDP, is not relevant in this case or why the difference in economic similarity to Vietnam is outweighed by the differences in quality of data be-

tween Bangladesh and India.")). CATC omits the next sentence, however, in which the court admonishes Commerce for "adopt[ing] a policy of treating all countries *on the surrogate country list* as being equally comparable to Vietnam." *Amanda Foods*, 33 CIT at 1413, 647 F. Supp. 2d at 1376 (emphasis added). *Ad Hoc Shrimp* and *Amanda Foods* are inapposite when, as here, Plaintiffs are advocating for the selection of a country that OP did not include on its list.[12]

Allied Pac., another case relied on by Jacobi, addresses the conjunctive nature of the statutory selection criteria. In particular, *Allied Pac.* considers whether Commerce's use of "regression analysis [pursuant to 19 C.F.R. § 351.408(c)(3)[13]] based on a basket of countries not economically comparable to China" to determine the surrogate labor rate complies with Congress's instruction to value, "to the extent possible," factors of production in market economy countries that are economically comparable and significant producers of comparable merchandise. *Allied Pac.*, 32 CIT at 1352, 1357, 587 F. Supp. 2d at 1351, 1355 ("Congress's use of the conjunctive in § 1677b(c)(4)(A) to join the two criteria signifies congressional intent that, to the extent possible, Commerce must use prices or costs that satisfy the two

[12] Jacobi also seeks to rely on *Vinh Hoan Corp.*, which addresses "whether Commerce was required to, and did in fact, compare the relative economic comparability of the countries *on its OP List*." 49 F. Supp. 3d at 1302 (emphasis added). *Vinh Hoan Corp.* relied on *Ad Hoc Shrimp* in finding that selecting the best available information to value factors of production requires Commerce to "compare differences in economic comparability with differences in the other factors, including data quality, when the facts so require." *Id.* at 1305. However, as with *Ad Hoc Shrimp*, *Vinh Hoan Corp.* is inapposite here because both countries were included on the list in that case.

Jacobi claims that Policy Bulletin 04.1 supports its position because it "explicitly states that 'none of the three surrogate country eligibility criteria—economic comparability, significant production of comparable merchandise, and quality data—is preeminent.'" Jacobi Mem. at 10. Policy Bulletin 04.1, however, states no such thing. That sentence is the *Ad Hoc Shrimp* court's interpretation of Policy Bulletin 04.1 as it applies to the countries on OP's list. *See Ad Hoc Shrimp*, 882 F. Supp. 2d at 1374 ("Indeed, Commerce's own policy suggests that none of the three surrogate country eligibility criteria—economic comparability, significant production of comparable merchandise, and quality data—is preeminent.")(citing Policy Bulletin 04.1 ("[T]he relative importance that [Commerce] attaches to each [eligibility criterion] will necessarily vary depending on the specific facts in each case")) (first alteration added).

While Jacobi correctly notes that Policy Bulletin 04.1 acknowledges that it may be "more appropriate . . . to address economic comparability only after the significant producer of comparable merchandise requirement is met," Jacobi Mem. at 11 (quoting Policy Bulletin 04.1 at 4), that situation typically arises when the subject merchandise is "unusual or unique" because few countries produce it, or because "major inputs are not widely traded internationally, Policy Bulletin 04.1 at 4. Jacobi does not contend, nor is there record evidence suggesting, that activated carbon is unusual or unique, or is produced from inputs that are not widely traded.

[13] The regulation directed "[t]he Secretary [to] use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. The Secretary will calculate the wage rate to be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public." 19 C.F.R. § 351.408(c)(3).

criteria simultaneously."). After extensive analysis, the court held that 19 C.F.R. § 351.408(c)(3) conflicted with 19 U.S.C. § 1677b(c) and, thus, was invalid. *Allied Pac.*, 32 CIT at 1364, 587 F. Supp. 2d at 1361. *Allied Pac.* did not speak to the instant issue—whether Commerce must consider a country's fulfillment of each of the statutory criteria before excluding it from consideration.

Jacobi also attempts to rely on an opinion from this court analyzing whether Commerce must, in the event an "off-list" country is proposed, determine whether that country's data quality outweighs its lack of economic comparability. *See* Jacobi Mem. at 12–13 (citing *Clearon Corp. v. United States* ("*Clearon II*"), 39 CIT___, ___, 2015 WL 4978995, at *4 (2015)). In *Clearon II*, the court stated that

> [o]n the one hand, it is unreasonable for Commerce to acknowledge that the level of economic comparability and the quality of a country's data are two separate considerations, and then refuse to undertake a comparative analysis, of the type Commerce here implies it must undertake, in order to determine whether data quality outweighs the fact that a country is not on the surrogate country list.

2015 WL 4978995, at *4; *see also* Jacobi Mem. at 12–13. However, in *Clearon II*, the court further explained that "the party proposing a non-listed country [must first demonstrate] that no country on the surrogate country list provides the scope of 'quality' data that [Commerce] requires in order to make a primary surrogate country selection" before Commerce must consider the data quality of the non-listed country. *Clearon II*, 2015 WL 4978995, at *4. Jacobi's reliance on *Clearon II* is misplaced for several reasons.

First, the above-quoted passages essentially restate Commerce's policy to select a country on OP's list unless none are usable because "(a) they either are not significant producers of comparable merchandise, (b) do not provide sufficiently reliable sources of publicly available SV data, or (c) are not suitable for use based on other reasons." *Final I&D Mem.* at 6; *see also Clearon Corp. v. United States* ("*Clearon III*"), 40 CIT ___, ___, 2016 WL 6892556, at *3 (2016) (characterizing its statement in *Clearon II* as an examination of how Commerce "typically" approaches surrogate country selection). The *Clearon II* court did not conclude, as Plaintiffs here assert, that Commerce's sequential approach to surrogate country selection is unlawful.

Second, Jacobi's reliance on *Clearon II* appears to interject a "substantial evidence" issue into its argument that Commerce's surrogate country analysis was "not in accordance with law" by urging the court

to consider the sufficiency of Thai data for valuing factors of production as part of its consideration whether Commerce's sequential approach to surrogate country selection is lawful. *See* Jacobi Mem. at 9 (capitalization omitted). However, whether Commerce's *method* of selecting the primary surrogate country is lawful is an issue distinct from whether the *results* Commerce obtained are supported by substantial evidence. The court will not conflate the two.

Relatedly, and finally, it bears repeating that the issue Plaintiffs raise here is whether Commerce permissibly excluded the Philippines on the basis of lack of economic comparability, or whether Commerce should have considered the Philippines' fulfilment of the other statutory criteria—*irrespective of the quality of Thai data*—before excluding it. *Clearon II* is, thus, unsupportive of Plaintiffs' argument.

In sum, Commerce has discretion to develop a reasonable methodology to implement its surrogate country selection criteria. *Jiaxing Bro. Fastener Co., Ltd.*, 822 F.3d at 1298. This court has consistently rejected challenges to Commerce's exclusion of particular countries as potential surrogate countries based on their lack of economic comparability. *See Clearon I*, 2014 WL 3643332, at *11 (noting this court's consistent "approach [to] the selection process [that treats] per capita GNI ranking as a threshold statutory criterion that must be met before the other criteria are considered"). Plaintiffs offer nothing new that merits a different outcome here.[14]

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[14] CATC's argument that the statutory mandate to use the "best available information" elevates Commerce's data criterion such that it "is, at a minimum, equally as critical" as the economic comparability and significant production criteria, is a red herring. *See* CATC Mem. at 3. Use of the "best available information" is contingent upon Commerce first selecting an "appropriate" market economy country from which to value factors of production. 19 U.S.C. § 1677b(c)(1)(B). In other words, Congress has instructed Commerce to first select an appropriate market economy country (or countries), and then evaluate, from the range of data available *from those countries*, what constitutes the "best available information." Congress has not instructed Commerce to *first* look for the "best available information" from some unspecified list of countries and then decide which of that information comes from countries that are economically comparable significant producers of comparable merchandise, nor has Congress instructed Commerce to simultaneously weigh the statutory factors. Indeed, Commerce has expressly rejected such an approach as "unfeasible." Policy Bulletin 04.1 at 5 n.2 (declining to assign a "composite grade" on the basis of each country's fulfillment of the economic comparability and significant production of comparable merchandise criteria, which is then combined with "an assessment or grading of factors data quality and completeness"); *see also Fresh Garlic I*, 121 F. Supp. 3d at 1341. CATC cites no authority for its proposition and its argument is unavailing.

iii. Whether Substantial Evidence Supports Commerce's Selection of Thailand as the Primary Surrogate Country

a. Parties' Contentions

Jacobi contends that "Commerce's determination that Thailand was a better surrogate country than the Philippines" rests on unsupported factual findings regarding the Philippines' economic comparability, Thailand's status as a significant producer, and the quality of Thai data. Jacobi Mem. at 13. CATC asserts that Commerce should have selected the Philippines as the primary surrogate country because it "is the most significant producer of comparable merchandise" and has "critically superior" data than does Thailand. CATC Mem. at 2, 6, 7. Jacobi and CATC also contend that Commerce wrongly interpreted the term "significant producer." Jacobi Mem. at 13; CATC Mem. at 5–6.

Commerce argues that (1) its determination that the Philippines is not economically comparable to China is supported by substantial evidence, (2) its determination that Thailand is a significant producer is adequately supported and rests on a sound interpretation of the term, and (3) it reasonably relied on Thai data. Gov. Resp. at 28–43. Calgon asserts that record evidence establishes that Thailand meets each of the statutory criteria and, thus, Commerce need not have considered the Philippines. Calgon Resp. at 16, 29. The court addresses Parties' arguments as to each of the statutory criteria, in turn.

b. Economic Comparability

Jacobi contends that Commerce's determination that the Philippines' per capita GNI falls outside the range of countries economically comparable to China "is factually incorrect." Jacobi Mem. at 14. According to Jacobi, "the 2013 GNI data demonstrate that the Philippines is as economically comparable to China as in previous years when Commerce found the Philippines to be economically comparable"; that, in fact, the Philippines' 2013 per capita GNI "was even closer to China's than . . . in previous years." Jacobi Mem. at 14,15. In light of Commerce's previous selection of the Philippines as the primary surrogate country, Jacobi argues that Commerce's determination that it lacked economic comparability for this POR was "arbitrary and capricious." Jacobi Mem. at 15 (citing *Juancheng Kangtai Chem. Co. v. United States*, 39 CIT ___, 2015 WL 4999476 (2015)).

Commerce contends that it "is not required . . . to use the same surrogate country that it used in previous reviews," and it "selects the

primary surrogate country for each segment of a proceeding based on the record of that particular segment." Gov. Resp. at 29. Commerce further contends that it "dropped the Philippines from its surrogate country list" because 2013 GNI data demonstrated that it had become "less economically comparable to China over time," such that "the Philippines' and China's per capita GNI rankings had moved further apart." Gov. Resp. at 31.

While Jacobi acknowledges that Commerce must make its surrogate country determination on the basis of data submitted for this POR; it argues that "Commerce never explained why a permissible difference [from China's GNI] suddenly became impermissible." Pls.' Reply Br. ("Jacobi Reply") at 10, ECF No. 81.

1. Legal Framework

Section 1677b(c)(4)(A) does not define the phrase "economic comparability" or require a particular methodology to determine which countries are economically comparable. *See* 19 U.S.C. § 1677b(4); *Jiaxing Bro. Fastener Co., Ltd.*, 961 F. Supp. 2d at 1328. Thus, "Commerce may perform its duties in the way it believes most suitable.'" *Jiaxing Bro. Fastener Co., Ltd.*, 822 F.3d at 1298 (internal quotation marks and citation omitted). Commerce's regulations "emphasi[ze] . . . per capita GDP as the measure of economic comparability." 19 C.F.R. § 351.408(b). However, because per capita GNI is a 'consistent, transparent, and objective measure to determine economic comparability,'" *Jiaxing Bro. Fastener Co., Ltd.*, 961 F. Supp. 2d at 1328, Commerce's reliance on per capita GNI "is a reasonable interpretation of the statutory mandate to identify and select a primary surrogate country at a 'level of economic development comparable' to the nonmarket economy country," *Id.* at 1330 (quoting 19 U.S.C. § 1677b(c)(4)(A)); *see also Fresh Garlic I*, 121 F. Supp. 3d at 1337.

2. Commerce's Economic Comparability Determination Lacks Reasoned Analysis

Commerce is correct that "nothing in the statute [] requires [it] to consider any particular country as a surrogate country." *Jiaxing Bro. Fastener Co., Ltd.*, 822 F.3d at 1298. "[E]ach administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record." *Id.* at 1299 (quoting *Qingdao Sea-Line Trading Co. Ltd.*, 766 F.3d at 1387). Accordingly, the validity of Commerce's decision to exclude the Philippines from its list of potential surrogate countries for AR7 depends on the validity of Commerce's compilation of the list generally. *See Juancheng Kangtai Chem. Co.,* 2015 WL 4999476, at *18-*20 & n.29

("'[A]gency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently'"; however, the validity of Commerce's "departure from prior determinations finding that the high costs associated with transport of hazardous chemicals like chlorine makes import statistics therefor suspect" depends on "the validity of Commerce's ultimate conclusion" to rely on import data as the surrogate value for chlorine) (quoting *Dongbu Steel Co., Ltd. v. United States,*635 F.3d 1363, 1371 (Fed. Cir. 2011)).[15]

To that end, the court will uphold Commerce's determination when the path to that determination is reasonably discernable from the determination itself. *See NMB Singapore Ltd. v. United States,* 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court.") (internal citations omitted). Although the agency is not required to "make an explicit response to every argument made by a party," it is required to discuss "issues material to the agency's determination." *Timken U.S. Corp. v. United States,* 421 F.3d 1350, 1354 (Fed. Cir. 2005).

The path explaining the basis for OP's list of potential surrogate countries is not discernible to the court. In July 2014, Commerce sent interested parties a "non-exhaustive list of countries" that, based on 2012 per capita GNI, were deemed economically comparable to the PRC. Commerce SC Letter at 1; OP SC List for AR7 at 2. Thereafter, Commerce preliminarily selected Thailand as the primary surrogate country. *Prelim. I&D Mem*. at 17. Commerce explained that it selected Thailand on the basis of 2013 per capita GNI data that Jacobi had placed on the record; Commerce further explained that "none of the surrogate country lists . . . based on 2013 GNI data list . . . the Philippines as being [economically comparable] to the PRC." *Id*. at 13–15 (citing Prelim. SV Mem.). In the *Final Results*, Commerce again selected Thailand as the primary surrogate country. *Final I&D Mem*. at 5. Commerce responded to arguments favoring the Philip-

[15] Plaintiffs insert a comparative element framing the issue as whether substantial evidence supports Commerce's decision to select Thailand over the Philippines. *See* Jacobi Mem. at 13 (insufficient evidence supported "Commerce's conclusion that Thailand was a *better* surrogate country than the Philippines") (emphasis added) (capitalization omitted); CATC Mem. at 2 ("[Commerce] should select the Philippines . . . ."). Although the court must consider "evidence that fairly detracts from the substantiality of the evidence," *Nippon Steel Corp.*, 337 F.3d at 1379 (internal quotation marks and citation omitted), it may not reweigh the evidence, *Downhole Pipe*, 776 F.3d at 1377. The issue here, in the first instance, is whether substantial evidence supports Commerce's selection of Thailand as the primary surrogate country irrespective of the degree of evidence supporting the selection of the Philippines.

pines by reiterating that "[a]s stated in the *Preliminary Results*, the Philippines[']' GNI falls outside the range of GNI data represented by the countries on the surrogate country lists and is therefore not at the same level of economic development as the PRC." *Id*. Commerce further reiterated that "none of the surrogate country lists issued by the Department based on 2013 GNI data that are on the record of this review list the Philippines as being at the same level of economic development as the PRC." *Id*. at 6.

Commerce's conclusory assertions fail to enable the "court [to] consider whether [its compilation of the list] was based on a consideration of the relevant factors" because the *Final Results* did not explain what factors OP considered when it compiled the list. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (internal citations omitted) ("The agency must articulate a rational connection between the facts found and the choice made."). At oral argument, Defendant explained that OP relied on absolute percentage differences from China's GNI to determine the GNI range; Ukraine, at 39.7% of China's GNI represented the low end of the range; and the Philippines' GNI, which was "less than 50[%]" of China's GNI, thus fell outside the range. Oral Arg. at 46:51–47:40.[16] However, nowhere in the *Final Results* does Commerce discuss OP's reliance on absolute difference or mention the Philippines' actual GNI or its difference from China's GNI. *See Id*. at 42:44–43:30 (referring the court to page 5 of the *Final Results* for Commerce's explanation of the parameters upon which it relied to determine economic comparability, wherein it simply states that "the Philippines[']' GNI falls outside the range of GNI data represented by the countries on the surrogate country lists"); *Final I&D Mem*. at 5.

In its briefing to the court, Commerce explains that OP compiles the list by "compar[ing] the change in China's per capita GNI to the changes in the per capita GNIs of the existing set of surrogate countries," and "then determin[ing] whether it is necessary to re-center the GNI range in light of the year-to-year GNI changes, looking for GNI ranges that are "evenly distributed around [] [China's] GNI." Gov. Resp. at 30 (citing, *inter alia*, Remand Results, *Clearon Corp. v. United States*, Court No. 13–00073, at 9 (Ct. Int'l Trade Dec. 11, 2014), ECF No. 69 (final alteration original). "After centering the GNI range, Commerce searches for countries within that range that are suitable candidates for inclusion on the list." *Id.* at 30.[17] Commerce further explains that, in AR7, "the 2013 per capita GNI difference between the Philippines and China is greater than all the countries

[16] Citations to the Oral Argument reflect time stamps from the audio recording.

[17] Commerce explains that when "search[ing] for countries within [the centered range] . . .

on the surrogate country list." *Id.* at 31.[18]

The inadequacy of Commerce's explanation for its determination of the GNI range is demonstrated by its citation not to the *Issues and Decision Memorandum* or record evidence, but to its explanation in another case, post-remand. *See Id*. at 30; *Clearon I*, 2014 WL 3643332, at *13 (remanding for Commerce to "provide a reasoned explanation which permits the court to determine the process by which it [developed its potential surrogate country list] was logical and rational, and . . . supported by the administrative record" when "Commerce created the potential surrogate country list for the segment of the review at issue without explanation"). In any event, the court may not accept "post hoc rationalizations for agency action," and may only sustain the agency's decision "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). Thus, reasoning that is offered post hoc, in briefing to the court or during oral argument, is not properly part of this court's review of the agency's underlying determination when such reasoning is not discernable from the record itself. Although the record contains the raw data Commerce relied on to compile the list of countries it considers economically comparable to the PRC, *see* Surrogate Country Memos, Attach. 1 (identifying the 2014 World Bank Development Indicators database as the source for potential surrogate country GNIs); Jacobi SC Comments, Attach. B (2014 World Bank Development Indicators), OP's determinations regarding what constitutes "economic comparability" on the basis of that data is not discernible. Because Commerce's determination regarding economic comparability lacks reasoned analysis, the court remands this issue for Commerce to provide a reasoned explanation as to why the range of GNI data reflected on OP's list demonstrates economic comparability to the PRC, including

it takes into consideration that, in [*Dorbest Ltd.*], the Federal Circuit stated that, in valuing labor, Commerce could rely on market economy countries that were between half of China's GNI and between one to two times China's GNI." Gov. Resp. at 30 (citing *Dorbest Ltd*., 604 F.3d at 1372). However, Commerce paradoxically asserts that its "surrogate country lists *do not employ, or endorse, this particular ratio or bright-line*," before noting that "the GNIs of the surrogate countries selected for China's surrogate country list fall within or near this range." *Id.* at 30 (emphasis added). The explanation fails to explain. How Commerce "takes into consideration" judicial precedent that it does not "employ[] or endorse" is unclear. Thus, that the end result, by happenstance, apparently, complies (or nearly complies) with *Dorbest Ltd.* is not persuasive.

[18] In support, Commerce points to a table it created for the purpose of this action comparing the Philippines' per capita GNI to China's in relation to the other countries on OP's list. *See id.* at 31 (citing Prelim. SV Mem., Attach. 2 ("Surrogate Country Memos"), and Jacobi Case Br. at 8). However, as stated above, in the underlying proceeding Commerce failed to explain the basis upon which OP relied when it limited the GNI range to the six countries on the list, and thereby excluded the Philippines. Although Commerce's decision to exclude the Philippines ultimately may be reasonable, "Commerce must explain the basis for its decisions." *NMB Singapore Ltd.*, 557 F. 3d at 1319.

why the Philippines' GNI does not. *See Timken U.S. Corp.*, 421 F. 3d at 1354 (agency must discuss "issues material to [its] determination").

c. Significant Production

Jacobi contends that "Global Trade Atlas data for this POR demonstrate that the Philippines is, by far, the largest producer of activated carbon," and is "about eight times greater than the production volume of Thailand." Jacobi Mem. at 18–19 (emphasis omitted). Jacobi further argues that "Thailand does not meet the statutory definition of 'significant producer,'" and Commerce has impermissibly found that "any country with non-zero production" is a significant producer. *Id.* at 19, 21 (citing *Fresh Garlic I*, 121 F. Supp. 3d at 1338–40 (rejecting the proposition that "significant producer" means "any country with non-zero production")) (emphasis omitted); *see also* CATC Mem. at 6 ("[Commerce] found that countries with any amount of exports of activated carbon are presumed to be equally significant producers. 'Any' is a very broad interpretation of the term 'significant.'").

According to Jacobi, Commerce has previously relied on "significant *net* exports (exports minus imports)" and "significant exports to the United States when there was no information showing worldwide production of subject merchandise or production figures in potential surrogate countries." Jacobi Mem. at 19 (citation omitted). Jacobi points to the statute's legislative history, which states that "[t]he term 'significant producer' includes any country that is a significant net exporter and, if appropriate, Commerce may use a significant net exporting country in valuing factors." *Id*. at 19 (quoting *Conference Report to the 1988 Omnibus Trade & Competitiveness Act*, H. R. Conf. Rep. No. 100–576 at 590). Jacobi asserts that Thailand is not a significant producer because it had insignificant net exports in terms of quantity, negative net exports in terms of value, and insignificant exports to the United States. *Id*. at 20; *see also* Jacobi Reply at 12 (had Commerce relied on net exports, "Thailand would have failed the 'significant producer' requirement").

Commerce responds that it need not select "the *most* significant producer." Gov. Resp. at 32. Commerce asserts that although "'significant producer' *includes* any country that is a significant net exporter," the term is not limited to net exporting countries. *Id.* at 32. Moreover, because the legislative history does not define "net exporter" in terms of quantity, value, or both, Commerce argues, pursuant to *Chevron* the court must "defer to Commerce's reasonable

interpretation of the statutory provision." *Id.* at 33 (citing *Fresh Garlic I*, 121 F. Supp. 3d at 1338). Commerce contends it "exercised its discretion to define 'significant producer' based on export quantity rather than value," and notes that Thailand ranks ninth out of 27 activated carbon exporting countries. *Id.* at 34 (citing Global Trade Atlas Reporting Country Export Statistics).

Calgon argues that of the countries OP considered economically comparable to the PRC, Thailand is the largest exporter of activated carbon. Calgon Resp. at 16–17 (citing *Prelim. I&D Mem.* at 16 and Pet'rs' Comments on Surrogate Country Selection (Nov. 12, 2014) ("Pet'rs' SC Comments") at 3, PJA Tab 5, PR 179, ECF No. 85–1). Calgon further argues there is record evidence of significant production of activated carbon by Gigantic and Carbokarn. Calgon Resp. at 17–18.

1. Legal Framework

Neither the statute nor Commerce's regulations define "significant producer." *See* 19 U.S.C. § 1677b; 19 C.F.R. § 351.408; Policy Bulletin 04.1 at 3. Because the term "is not statutorily defined, and is inherently ambiguous," the court must assess "whether Commerce's definition of significant producer is based on a permissible construction of the statute." *Fresh Garlic I*, 121 F. Supp. 3d at 1338 (internal quotation marks and citation omitted); *see also United States v. Eurodif S. A.*, 555 U.S. 305, 316 (2009) ("[W]hen the Department exercises [its authority pursuant to § 1677(1)] in the course of adjudication, its interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.") (citation omitted).

In *Fresh Garlic I*, the court opined that

> an interpretation of 'significant producer' countries as those whose domestic production could influence or affect world trade would be a permissible construction of the statute. This follows from the plain meaning of the word 'significant' as something 'having or likely to have influence or effect.' This definition, however, necessarily requires comparing potential surrogate countries' production to world production of the subject merchandise.

121 F. Supp. 3d at 1338–39 (citation omitted). Agency policy is consistent with *Fresh Garlic I*. *See* Policy Bulletin 04.1 at 3 ("[A] judgement [*sic*] should be made consistent with the characteristics of work production of, and trade in, comparable merchandise."). Accordingly, whether production is "significant" is a case-specific determination

based on the "totality of the circumstances." *See Dorbest Ltd. v. United States*, 30 CIT 1671, 1683, 462 F. Supp. 2d 1262, 1274 (2006); Policy Bulletin 04.1 at 3.

2. Commerce's Determination that Thailand is a Significant Producer Lacks Substantial Evidence

In the *Issues and Decision Memorandum*, Commerce identified Thailand as a significant producer on the basis of its total export quantities. *Final I&D Mem*. at 7 (citing Global Trade Atlas Reporting Country Export Statistics). Commerce explained that it "prefer[s] to consider quantity, rather than value, in determining whether a country is a significant producer" because "the fact that a country is not a net exporter of a particular product, in value terms, does not necessarily mean that the country is not a significant producer of that good, given that the country *could* import more higher-valued products than it exports." *Id*. at 7 (emphasis added).

Commerce's reasoning falls short for several reasons. First, Commerce does not explain whether Thailand actually imports more higher-valued goods than it exports. Second, Commerce relied on Thailand's total exports—not net exports—to find that it is a "significant producer." Thus, Commerce's rationale for disfavoring net value as a measure of significant production does little to support (or explain) its preference for considering total export quantities. Finally, Commerce's reasoning fails to persuade that reliance on total exports, devoid of evidence of influence on world trade, is a permissible method of interpreting the term "*significant* producer," and, thus, identifying significant producer countries. *See Chevron*, 467 U.S. at 843; *Fresh Garlic I*, 121 F. Supp. 3d at 1338–39. The record evidence Commerce relies on demonstrates the inadequacy of its justification.

In 2013, Thailand exported 7,871,321 kilograms of activated carbon. *See* Global Trade Atlas Reporting Country Export Statistics; *Final I&D Mem*. at 7 n.24. However, the court's calculations show that Thailand's proportion of 2013 global exports (which collectively equaled 554,263,223 kilograms) was just 1.4% including the PRC, and 2.6% excluding the PRC. *See* Global Trade Atlas Reporting Country Export Statistics. Commerce has not explained the significance of Thailand's contribution to global exports sufficiently well so as to enable the court to conclude that its determination that Thailand is a "significant producer" is supported by substantial evidence.

See generally Final I&D Mem. at 7–8;[19] *cf. Fresh Garlic Producers Ass'n v. United States* ("*Fresh Garlic II*"), 40 CIT ___, ___, 180 F. Supp. 3d 1233, 1244 (2016) (noting the Philippines represented 0.2% of fresh garlic exports excluding the PRC, and Commerce's failure to explain how "such data [was] suitable for a fair comparison between export price and normal value").

Nor is Commerce's post hoc argument that Thailand ranks ninth out of the 27 activated carbon exporting countries included in its data set sufficient. *See* Gov. Resp. at 33–34 (citing Global Trade Atlas Reporting Country Export Statistics); *Burlington Truck Lines, Inc.,* 371 U.S. at 168–69. Although Policy Bulletin 04.1 contemplates that in the event there are "ten large producers and a variety of small producers, 'significant producer' could be interpreted to mean one of the top ten," Policy Bulletin 04.1 at 3, Commerce has not established that that is the situation here. In fact, there appears to be no clear delineation between the top ten and remaining exporters; rather, the top five exporters (China, India, United States, the Philippines, and Indonesia) collectively account for more than 90% of global exports. *See* Global Trade Atlas Reporting Country Export Statistics. Thereafter, listed countries contribute relatively little to global exports. *See id.* (Canada, for example, is the sixth largest exporter and is responsible for just 1.8% of global exports). Further, the mere fact of Thailand's ranking on a list of exporters does not override Commerce's responsibility to explain, with substantial supporting evidence, the significance of that ranking in terms of its effect on global trade. *Cf. Fresh Garlic II*, 180 F. Supp. 3d at 1243 ("Determining that because the Philippines is in the top half of fresh garlic producers it is a significant producer is arbitrary and unreasonable."). Accordingly, the court remands this issue for reconsideration and further explanation.[20]

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[19] When pressed at oral argument to provide record evidence supporting the significance of Thailand's exports in terms of world production and trade, Defendant argued there is no record evidence *disputing* its significance. Oral Arg. at 55:05–55:10. That is not the correct inquiry. Commerce bears the burden of ensuring its determination regarding significant production is supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

[20] Commerce also concluded, without elaboration, that Thailand is a significant producer on the basis of "production of comparable merchandise as evidenced by the financial statements on the record." *Final I&D Mem*. at 7–8. Commerce supports its conclusion with citations to November 12, 2014 letters submitted by the Domestic Industry and DJAC. *Id*. at 8 n.26 (citing "Letter from Petitioner, dated November 12, 2014, at page 3" and "Letter from [DJAC], dated November 12, 2014, at Exhibit 1"). Those letters appear to constitute surrogate country comments, not financial statements. *See* Gov. Resp. at 4 (noting that on November 12, 2014 interested parties submitted surrogate country comments). The record documents, however, fail to provide sufficient (if any) support for Commerce's conclusion regarding Thai production of activated carbon. *See* Pet'rs' SC Comments at 3 (discussing Indonesian export volume); Surrogate Country Comments by Datong Juqiang Activated Carbon Co., Ltd. (Nov. 12, 2014), Ex. 1, PJA Tab 7, PR 180, ECF No. 85–1 (Philippine and

d. Data Quality/Surrogate Value Selections

Plaintiffs present several challenges to Commerce's selection of a Thai financial statement to value financial ratios and Thai HS code 4402.90.1000 to value carbonized material.[21] *See* Jacobi Mem. at 24–30, 34–44; CATC Mem. at 7, 9–18.[22]

To value the NME respondent's factors of production, Commerce must select the "best available information" from one or more market economy countries that are economically comparable to the NME country and are significant producers of comparable merchandise. 19 U.S.C. § 1677b(c)(1)(B), (c)(4). Because the court is remanding the issues of economic comparability and significant production to the agency, on remand, Commerce may decide to select a different country as the primary surrogate country and, thus, may need to reconsider its surrogate value selections. This is particularly true given Commerce's regulatory preference for using data from a single surrogate country. *See* 19 CFR § 351.408(c)(2). Accordingly, to avoid rendering an essentially advisory opinion, the court defers consideration of Plaintiffs' surrogate value challenges pending the results of the redetermination.[23]

B. Adjustment for Chinese Value Added Tax

Plaintiffs contend that Commerce lacks authority to deduct irrecoverable VAT from Jacobi's U.S. sales price, and Commerce's method of

Thai activated carbon import and export statistics).

Calgon also urges the court to sustain Commerce's finding on the basis of Thai production of activated carbon. Calgon Resp. at 17–18. In support, Calgon relies on the 2013 financial statements of Thai producers Gigantic and Carbokarn in conjunction with the average unit values of Thai imports and exports to estimate Gigantic's and Carbokarn's total sales and production volume. *See Id*. at 17–18 (citing 2013 Gigantic Fin. Stmt., Second Surrogate Value Submission by Datong Juqiang Activated Carbon Co., Ltd. (March 31, 2015) ("DJAC Second SV Submission"), Ex. 8, PJA Tab 16, PR 323, ECF No. 85–3 (Carbokarn's 2010 financial statement), and Filipino and Thai Export Statistics).

The suppositions embedded in Calgon's analysis notwithstanding, it is the agency's responsibility to "explain the basis for its decisions." *See NMB Singapore Ltd.*, 557 F.3d at 1319. On remand, should Commerce rely on production (instead of or in addition to export quantity) to seek to justify Thailand as a significant producer, it must provide reasoned analysis supported by substantial record evidence.

[21] "Carbonized material is a charred, intermediate input used in the production of activated carbon." Calgon Resp. at 34 n.18.

[22] Plaintiffs challenge Commerce's determination that data considerations generally favor selecting Thailand as the primary surrogate country by focusing on the financial statements used to value financial ratios, and Commerce's separate decision to use Thai HS 4402.90.1000 to value carbonized material. *See, e.g.*, Jacobi Mem. at 24–44. However, because Commerce's assessment of all factor of production data is influenced by its determinations regarding economic comparability and significant production, it is appropriate to defer reaching all of Plaintiffs' SV arguments. *See* 19 U.S.C. § 1677b(c)(1)(B), (c)(4).

[23] In relation to its argument that the average unit value for Thai HS 4402.90.1000 is aberrant, Jacobi moved to supplement the administrative record with evidence of the nature of the Thai imports. The court will deny that motion. *See infra* Discussion Section II.

calculating the VAT adjustment is not supported by substantial evidence. Jacobi Mem. at 44; CATC Mem. at 18; Huahui Mem. at 2; GDLSK Mem. at 7. Commerce contends its deduction of irrecoverable VAT from Jacobi's CEP was lawful and supported by substantial evidence. Gov. Resp. at 54; *see also* Calgon Resp. at 44.

i. Overview of Commerce's VAT Adjustment

Pursuant to 19 CFR § 351.401 and a 2012 change in methodology for calculating export price or CEP, Commerce generally will deduct price adjustments "that are reasonably attributable to the subject merchandise." 19 CFR § 351.401(c); *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings*, 77 Fed. Reg. 36,481 (Dep't Commerce June 19, 2012) ("*Methodological Change*"); *Final I&D Mem*. at 17. Finding that "[t]he PRC's VAT regime is product-specific [and, thus, 'attributable to the subject merchandise'], with VAT schedules that vary by industry and even across products within the same industry," Commerce applied a 17% "irrecoverable VAT" adjustment to Jacobi's CEP for activated carbon. *Final I&D Mem*. at 16–17 & n.67 (citing Jacobi's Suppl. Sect. C Resp. (Oct. 21, 2014) ("Jacobi Suppl. Sect. C Resp."), Ex. SC-54 ("Chinese VAT Regulations"), CJA Tab 2, CR 124, CR 133, ECF No. 86.).[24]

Commerce's adjustment for irrecoverable VAT consists of two steps: "(1) determining the irrecoverable VAT on subject merchandise, and (2) reducing U.S. price by the amount determined in step one." *Final I&D Mem*. at 17. Commerce defines "irrecoverable VAT" as "(1) the FOB ['free on board'] value of the exported good, applied to the difference between (2) the standard VAT levy rate and (3) the VAT rebate rate applicable to exported goods." *Id*. "The first variable, export value, is unique to each respondent while the rates in (2) and (3), as well as the formula for determining irrecoverable VAT, are each explicitly set forth in Chinese law and regulations." *Id*. Here, the PRC levies a 17% VAT on inputs and raw materials used in the production of activated carbon, for which there is no VAT rebate. *Id*. at 17 & n.68 (citing Chinese VAT Regulations). Thus, Commerce concluded, "the irrecoverable rate is equal to the full VAT percentage." *Id*. at 17.

ii. Parties' Contentions

Jacobi argues the Chinese VAT is not a statutory "export tax or other charge" and, thus, Commerce lacked authority to reduce Jaco-

[24] The relevant Chinese regulation provides that "[e]ntities and individuals engaged in the . . . import of goods within the territory of the [PRC] are taxpayers of value added tax . . . , and shall pay VAT in accordance with this Regulation." Chinese VAT Regulations, Art. 1). For importers, "the tax rate shall be 17%." *Id.*

bi's U.S. sales price by the amount of VAT Jacobi paid and was not refunded. Jacobi Mem. at 45–47. Assuming Commerce had such authority, Jacobi contends that Commerce erroneously applied the VAT adjustment to a "fictitious entered value." *Id.* at 45, 47–55. CATC adopts Jacobi's argument, and further contends that a recent case in this court affirming Commerce's adjustment methodology, *Fushun Jinly Petrochemical Carbon Co. v. United States* ("*Fushun Jinly*"), 40 CIT ___, 2016 WL 1170876 (2016), did not resolve the issue. CATC Mem. at 18–19; *see also* Huahui Mem. at 2–3 (*Fushun Jinly* does not resolve the matter and "was predicated on the particular facts of that case"); GDLSK Mem. at 8 (*Fushun Jinly* was wrongly decided and did not examine the relevant Chinese regulation). CATC also contends that Commerce erroneously applied the VAT adjustment to Jacobi's U.S. price, and not the lesser cost of the raw materials upon which Jacobi paid the VAT. CATC Mem. at 21–22.

Commerce argues that it reasonably interpreted an ambiguous statutory provision when it applied its irrecoverable VAT methodology adopted after notice and comment in 2012, and its calculation is supported by substantial evidence. Gov. Resp. at 54–55, 56–68. Commerce further argues that Jacobi failed to exhaust administrative remedies regarding its arguments about Commerce's method of calculating the VAT adjustment. *Id.* at 55, 64–65; *see also* Calgon Resp. at 49–50. Calgon argues that judicial precedent and Commerce's past practice supports the deduction of irrecoverable VAT. Calgon Resp. at 46–49 & n.28. Calgon further argues that Commerce properly calculated Jacobi's VAT adjustment. *Id*. at 51–57.

iii. Legal Framework

Pursuant to 19 U.S.C. § 1677a(c), Commerce may deduct from export price or CEP "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 1677(6)(C) of this title."[25] 19 U.S.C. § 1677a(c)(2)(B). Such price adjustments must be "reasonably attributable to the subject merchandise." 19 C.F.R. § 351.401(c). Before addressing Parties' contentions about Commerce's authority pursuant to § 1677a(c)(2)(B), a brief overview of the relevant legal landscape is merited.

In *Magnesium Corp. of Am. v. United States*, the Federal Circuit affirmed Commerce's then-current practice in cases involving non-

[25] Section 1677(6)(C), which concerns "export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received," is not relevant here.

market economy countries of not deducting export taxes paid to the Russian Federation. 166 F.3d 1364 (Fed. Cir. 1999). Relying on the "plain meaning" of the statute, the court noted that "the statute requires export taxes to be deducted from the [U.S. price] 'if [the export tax is] included in such price.'" *Id.* at 1370 (first alteration added). Because "no reliable way exists to determine whether or not an export tax has been included in the price of a product from [an] [NME country], . . . [e]xport taxes must be treated as an intra-[NME] expense under these circumstances." *Id.* at 1370–71. Accordingly, the court rejected plaintiff's argument that "any export tax imposed must be deducted from the [U.S. sales price]" because that "interpretation would impermissibly read the phrase 'if included in such price' out of the statute.'" *Id.* at 1370.

Consistent with *Magnesium Corp*., Commerce had declined to apply § 1677a(c)(2)(B) "in NME antidumping proceedings because pervasive government intervention in NMEs precluded proper valuation of taxes paid by NME respondents to NME governments." *Methodological Change*, 77 Fed. Reg. at 36,482. After deciding that subsidies provided by China and Vietnam to their respective domestic companies could be "identified and measured," Commerce reconsidered its practice with respect to export taxes, duties, and other charges. *Id*. Pursuant to this change in practice, Commerce now considers whether the PRC "has imposed 'an export tax, duty, or other charge' upon export of the subject merchandise during the period of investigation or the period of review," including, for example, a "VAT that is not fully refunded upon exportation." *Id.* If it has, Commerce will "reduce the respondent's export price and constructed export price accordingly, by the amount of the tax, duty or charge paid, but not rebated." *Id.* at 36,483.

When, as Commerce contends here, the VAT is "a fixed percentage of the price," Commerce "will adjust the export price or constructed export price downward by the same percentage." *Id*. "[B]ecause these are taxes affirmatively imposed by the Chinese and Vietnamese governments," Commerce "presume[s] that they are also collected." *Id*. According to Commerce, "[t]he unrefunded VAT or affirmatively imposed export tax only arises through the fact that there were export sales." *Id*. Therefore, "because the liability arises as a result of export sales, this is where payment originates." *Id*. Deducting irrecoverable VAT "is consistent with the Department's longstanding policy," and "with the intent of the statute, that dumping comparisons be tax-neutral." *Id*.

As noted above, the court recently addressed a challenge to Commerce's authority to deduct irrecoverable VAT. In *Fushun Jinly*,

plaintiffs argued that *Magnesium Corp.*'s "plain meaning" determination still controls such that Commerce may not deduct export taxes, duties, or other charges imposed by an NME government. 2016 WL 1170876, at *9. The court disagreed, reasoning that the Federal Circuit's "plain meaning" analysis simply means that "the statute does not require all export taxes to be deducted from the U.S price but requires only deduction of those amounts that are included in the price of the merchandise." *Id.* (citing *Magnesium Corp.*, 166 F.3d at 1370–71). Accordingly, "whether VAT and export taxes are included in, and should be deducted from, the U.S. price is within Commerce's discretion to determine." *Id.*

The court noted that "neither the governing statute nor its legislative history defines 'export tax, duty or other charge imposed' for the purpose of adjusting U.S. price," which is aside from the significance of the statutory terms "'if included in the price'" that *Magnesium Corp.* considered unambiguous. *Id.* at *11. Finding the terms "export tax, duty or other charge imposed" ambiguous, the court concluded that Commerce's interpretation of the terms in the *Methodological Change*, "achieved through notice and comment, compels *Chevron* deference." *Id.* (citing *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009)). According to the *Fushun Jinly* court, "the plaintiffs do not persuade that deduction of the portion of the PRC's VAT that was unrefunded or irrecoverable upon export of their subject merchandise to the United States was contrary to law and not supported by substantial evidence." *Id.*

iv. Commerce Properly May Adjust for Irrecoverable VAT

Jacobi contends that Commerce's interpretation of its authority pursuant to 19 U.S.C. § 1677a(c)(2)(B) is not entitled to *Chevron* deference because "[t]he statute reflects the clear intent of Congress and leaves no room for Commerce's discretion." Jacobi Mem. at 45 (citing *Chevron*, 467 U.S. at 837); Jacobi Reply at 24 (citing *Magnesium Corp.*, 166 F.3d at 1370–71). Commerce contends that its "irrecoverable tax methodology is entitled to *Chevron* deference." Gov. Resp. at 56–60. In other words, Parties disagree whether *Chevron* step one or step two applies. As discussed below, the relevant statutory phrase is ambiguous; *Chevron* step two applies.

In order to determine whether Commerce's statutory construction is permissible, the court considers whether the construction is reasonable, consistent with statutory goals, and reflects agency practice. *Apex Exps. v. United States*, 777 F.3d 1373, 1379 (Fed. Cir. 2015). If the agency's interpretation is permissible, then the court must accord

it deference, even if the agency's construction is not the "reading the court would have reached if the question initially had arisen in a judicial proceeding." *Koyo Seiko Co., Ltd. v. United States*, 66 F.3d 1204, 1210 (Fed. Cir. 1995).

Section 1677a(c)(2)(B) authorizes the deduction of (1) "the amount, *if included in such price*," (2) "of any *export tax, duty, or other charge* imposed by the exporting country" (3) "*on the exportation of* the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(2)(B) (emphasis added). *Magnesium Corp*. interpreted the first italicized phrase, finding the phrase to be unambiguous, and accepting Commerce's analysis of the facts (that it was not then able to determine if the taxes were included in the export price from the NME country); however, *Magnesium Corp*. did not preclude a finding that the latter two italicized phrases are ambiguous. *See Magnesium Corp.*, 166 F.3d at 1370 ("Because the plain language of the statute does not require all export taxes to be deducted from the USP, but requires deduction of only those that are included in the price of the merchandise, the statute clearly contemplates a situation where the export tax is not included in the price of the merchandise."). *Fushun Jinly* thus correctly held that *Magnesium Corp*. did not control the issue of Commerce's authority to deduct irrecoverable VAT. *See Fushun Jinly*, 2016 WL 1170876, at *9. However, although *Fushun Jinly* correctly held that "export tax, duty or other charge imposed" was ambiguous, it did not interpret the phrase "by the exporting country on the exportation of the subject merchandise." *See id.* at *9-*11. Plaintiffs contest Commerce's interpretation of both phrases. *See, e.g.*, CATC Mem. at 18 ("Chinese VAT is not an export tax, and VAT is not imposed on subject merchandise when it is exported.").

a. Whether the Chinese VAT is an "export tax, duty or other charge"

As this case demonstrates, the scope of the phrase "[e]xport tax, duty, or other charge" is ambiguous. Commerce does not expressly define the Chinese VAT as one or the other; rather, it describes the VAT generally as an "export tax, duty, or other charge imposed." *Final I&D Mem*. at 17 (it is "reasonable to interpret *these terms* as encompassing irrecoverable VAT because" it "is a cost that arises as a result of export sales") (emphasis added) (citations omitted). The relevant Chinese regulation imposes a tax on imported goods; it does not explicitly tax exports. *See* Chinese VAT Regulations, Art. 1. However, the catchall phrase "other charge" captures any financial obligation provided it is "imposed by the exporting country on the exportation of the subject merchandise," regardless of whether the imposing country

explicitly labels the charge as one pertaining to exports. Commerce's interpretation of Chinese VAT as, if not an "export tax," an "other charge," is a permissible construction of those statutory terms. *See Dominion Res., Inc.*, 681 F.3d at 1317.

b. Whether the Chinese VAT is Imposed on the Exportation of the Subject Merchandise

Interpreting the Chinese VAT as an "other charge" does not fully resolve the issue; it must also reasonably be construed as one that is "imposed by the exporting country on the exportation of the subject merchandise." 19 U.S.C. § 1677a(c)(2)(B).

With respect to Chinese domestic sales, a "company can credit the VAT they pay on input purchases ["input VAT"] . . . against the VAT they collect from customers ["output VAT"]" before remitting VAT to the government. *Final I&D Mem*. at 16. And, "[i]n a typical VAT system," companies receive on export a full rebate of the input VAT paid in relation to "purchases of inputs used in the production of exports." *Id*. However, in the PRC, "the input VAT . . . is not refunded" on the exportation of the goods. *Id*. Thus, the input VAT remains recoverable until such time as the product is exported; only then does it become irrecoverable. According to Commerce, "[t]his amounts to a tax, duty or other charge imposed on exports that is not imposed on domestic sales." *Id.* at 16–17 ("Irrecoverable VAT, as defined in PRC law, is a net VAT burden that arises solely from, and is specific to, exports").

Because the VAT is stated in Chinese law, it is "'imposed by the exporting country." *Id.* at 17; *see also* Chinese VAT Regulations. However, the key inquiry is whether a VAT paid on inputs and not refunded on export is "imposed" on the exportation of the subject merchandise. In the *Methodological Change*, Commerce concluded generally that "because the liability arises as a result of export sales, this is where payment originates." 77 Fed. Reg. at 36,483. This is not entirely accurate as to the facts before the court. Payment originates—i.e., is made—when Jacobi pays the Chinese government any difference between the input VAT and the output VAT. *See* Jacobi Suppl. Sect. C Resp. at 29–30 (describing the Chinese VAT system; noting that "[w]hen the output VAT is higher than the input VAT, Jacobi is subject to output VAT payable"); *Webster's Third New Int'l Dictionary of the English Language Unabridged ("Webster's")*1659 (2002) (defining "payment" as "the act of paying or giving compensation: the discharge of a debt or an obligation"). There is no record evidence that Jacobi pays VAT at the time of exportation; rather, the input VAT is not refunded upon export as occurs in a "typical VAT system" and, thus, at that time, it becomes irrecoverable because it

cannot be used to offset payments of output VAT. *See Final I&D Mem*. at 16; Jacobi Suppl. Sect. C Resp. at 30 ("Jacobi does not pay any export taxes on activated carbons . . . ").

To understand the parameters of what it means for something to be "imposed," and, thus, to determine whether Commerce's statutory construction is permissible, the court considers the term's plain meaning. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning.") (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)) (surveying dictionary definitions to define "interpreter"). The Oxford English Dictionary, "one of the most authoritative on the English language," *Taniguchi*, 132 S. Ct. at 2003, defines "impose" as "[t]o put or subject (a person, etc) to a penalty." *The Oxford English Dictionary* 731 (1989). Webster's defines "imposed" as "to cause to be burdened." *Webster's*, *supra*, 1136. The American Heritage Dictionary of the English Language defines "impose" as "[t]o apply or make prevail by or as if by authority." *The American Heritage Dictionary of the English Language* 881 (2000).

The ordinary meaning of the term "imposed" demonstrates the reasonableness of Commerce's interpretation. Because the Chinese VAT is refunded in the context of domestic sales but not exports, it constitutes a "penalty" that is "applied," and with which Jacobi is forever "burdened," at the time of exportation. Further, accounting for irrecoverable VAT is consistent with Commerce's policy and the statute to calculate accurate tax-neutral dumping margins. *See Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1581–82 (Fed. Cir. 1995) (affirming Commerce's practice of calculating tax neutral dumping margins by accounting for VAT when determining U.S. sales price); *Methodological Change*, 77 Fed. Reg. at 36,483 (citations omitted); *Final I&D Mem*. at 17 & n.66. Accordingly, the Chinese VAT is permissibly construed as an "other charge" that is "imposed by [China] upon the exportation of the subject merchandise."

v. Commerce's VAT Calculation in This Case

a. Overview of Commerce's Methodology

Commerce calculates irrecoverable VAT by determining the amount of VAT applicable to exports (defined as "the standard VAT levy rate" minus any VAT rebate on exports) and applying that value to "the FOB value of the exported good." *Final I&D Mem.* at 17. Here, China levies a 17% VAT on inputs and does not refund any VAT on exports of activated carbon. *Id.*; *see also* Jacobi Suppl. Sect. C Resp. at 29–30. Thus, Commerce determined that "the irrecoverable VAT rate is . . .

17[%]." *Final I&D Mem*. at 17. Additionally, although "[e]ntered values reported by respondents are a reasonable reflection of the FOB value of the exported goods," here, Commerce concluded that Jacobi's entered values were "not representative of commercial export values when compared to an ex-factory net U.S. price and/or an estimated customs value"[26] because "a significant percentage of Jacobi's entered values [were] less than the estimated customs values." *Id.* at 18–19 (citing Margin Analysis for the Final Results (Jacobi) (Oct. 2, 2015) ("Jacobi Final Margin Analysis Mem."), CJA Tab 3, CR 357–58, ECF No. 86). Because Jacobi's entered values resulted in "an inappropriately low VAT adjustment," Commerce relied on an estimated customs value as a substitute for the FOB China port value to calculate the irrecoverable VAT adjustment. *Id.* at 18–19.

b. Parties' Contentions

Jacobi contends that Commerce should have applied the 17% VAT adjustment to its actual entered values and not "some sort of concocted estimated customs value." Jacobi Mem. at 48–50 (underline omitted). According to Jacobi, to assess the reliability of its entered values Commerce should have compared its entered values to its net U.S. sales price, as it had done for the purpose of assessing duties in the second administrative review ("AR2"). *See Id.* at 49–50; Jacobi Mem., Attach. A ("Jacobi VAT Comparison") (chart comparing Jacobi's entered values and U.S. sales price); Calgon Resp. at 51 (noting "the basis for Jacobi's claim is a comparison of the VAT adjustment Commerce applied in the underlying proceeding . . . with Commerce's duty assessment analysis in [AR2]," which concerned Commerce's decision to calculate duties on the basis of a per-unit assessment rate rather than on an *ad valorem* basis). In support, Jacobi points to a spreadsheet contained in Commerce's margin analysis for Jacobi's final results comparing Jacobi's "entered value[s] to a new version of "NETPRI" (the Commerce acronym for the calculated *net* U.S. selling price) which Commerce has labelled "*NETPRI1*." Jacobi Mem. at 50 (citing Jacobi Final Margin Analysis Mem., Attach IV ("Commerce VAT Comparison"). Jacobi further explains that during AR2 Commerce concluded its entered values were unreliable because 58% "of total sales had a reported entered value that was less than half of Jacobi's reported net unit price." *Id*. at 51 (citation omitted). In contrast, here, Jacobi contends, its entered value was less than half the net sales

[26] Estimated customs value is "defined as ex-factory net U.S. price plus foreign movement expenses." *Final I&D Mem*. at 18. To determine an ex-factory net U.S. price, Commerce begins with a respondent's gross unit price, and then deducts "expenses associated with selling the product in the United States[,] . . . international movement expenses[,] and profit." *Id.* at 18 n.73 (citation omitted).

price in only 3.6% of the transactions. *Id.* at 52; Jacobi VAT Comparison at 1. Jacobi also contends that Commerce erred when it relied on Carbokarn's profit to calculate the estimated customs value. *Id.* at 53–55.

CATC contends that Commerce erred when it applied the 17% VAT rate to the "higher . . . cost of the finished subject merchandise rather than the lower . . . cost of raw materials." CATC Mem. at 21–22.

Commerce asserts that it relied on the same methodology it used in AR2 to assess the reliability of Jacobi's entered values for the purpose of determining "the most reliable base values upon which to calculate the VAT adjustment." Gov. Resp. at 62; *see also id.* at 63 ("In both reviews, Commerce analyzed the difference between Jacobi's entered values reported to Customs [a]nd Border Protection [('CBP')] and the estimated customs values, and found that substantial differences existed between the two values."). Different from AR2, however, in AR7, Commerce had to apply a VAT adjustment to that base value. *Id.* at 62. "Therefore, to avoid confusion in its calculations, Commerce referred to [what it had called] the 'net unit price' in [AR2] as the 'estimated customs value' in this review." *Id.* at 63; *see also id.* at 64 (noting the field labelled "USNETPRI1" has the label "Estimated Customs Value" above it "to indicate that the field labelled U.S. Net Price is being calculated as an estimated customs value without the inclusion of VAT") (citing Commerce VAT Comparison). Commerce then derived the "final 'net unit price'" by applying the VAT rate to the estimated customs value. *Id*. at 64. In so doing, "Commerce treated the 'estimated customs value' the same as it treated the 'net unit price' in [AR2]." *Id*.

Commerce further asserts its reliance on Carbokarn's profit is consistent with agency policy, which requires CEP profit in NME cases to be based on surrogate information instead of "financial report data of [an NME] respondent." *Id.* at 67 (citing Import Admin., U.S. Dep't of Commerce, Calculation of Profit for Constructed Export Price Transactions, Policy Bulletin 97.1 (1997), http://enforcement.trade. gov/policy/bull97–1.htm (last visited March 31, 2017) ("Policy Bulletin 97.1")); *see also* Calgon Resp. at 55 ("market distortions" render Commerce's use of profit data from an NME company inappropriate, and "Jacobi's argument goes to the heart of the surrogate value methodology, which is directed by the statute and has been judicially upheld") (citing 19 U.S.C. § 1677b(c)(1) and *CP Kelco US, Inc. v. United States*., 39 CIT ___, 2015 WL 1544714, at *1 (2015).

Defendant also contends that Jacobi failed to exhaust administrative remedies with regard to its comparison of entered values to net price and its arguments about Commerce's profit calculation. Gov.

Resp. at 64; *see also* Calgon Resp. at 50 (asserting "Jacobi had ample opportunity to raise this argument before Commerce" because "the VAT adjustment was a live issue"). Defendant further contends that Jacobi's "calculations [in Jacobi VAT Comparison] are not on the record of this review," and, thus, should not be considered by this court. Gov. Resp. at 64–65; *see also* Calgon Resp. at 49–50.

Jacobi asserts it lacked the opportunity to respond to Commerce's use of "fictitious entered values" in the *Final Results* because Commerce had relied on Jacobi's actual entered values in the *Preliminary Results*; thus, "[t]he exhaustion doctrine does not apply." Jacobi Reply at 27 n.2 (citing *Prelim I&D Mem*. at 23; *Corus Staal BV*, 502 F.3d at 1381).

c. Comparison of "Entered Value" to "Estimated Customs Value"

1. Administrative Exhaustion

"This court has discretion to determine when it will require the exhaustion of administrative remedies." *Blue Field (Sichuan) Food Indus. Co., Ltd. v. United States* ("*Blue Field*"), 37 CIT ___, ___, 949 F. Supp. 2d 1311, 1321–22 (2013) (citing 28 U.S.C. § 2637(d) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.")). Parties may raise arguments on appeal provided they raised them "during agency proceedings." *Id.* at 1322 (citations omitted). "The determinative question is whether Commerce was put on notice of the issue, not whether Plaintiff's exact wording below is used in the subsequent litigation." *Trust Chem Co. Ltd.*, 791 F. Supp. 2d at 1268 & n.27.

In the *Preliminary Results*, Commerce derived the final net U.S. Price by "reduc[ing] each of [Jacobi's] sale's U.S. price by the irrecoverable VAT rate of 17 [%] of entered value." *Prelim. I&D Mem*. at 23 (citing Prelim. Results Analysis Mem. for Jacobi Carbons AB (Apr. 29, 2015), CJA Tab 4, CR 351, ECF No. 86). Thereafter, the Domestic Industry argued that Jacobi's entered values were unreliable as the basis for calculating VAT; thus, Commerce "should use a recalculated entry based on estimated customs value [] when the reported [entered value] is understated." Pet'rs' Rev. Case Br. (June 30, 2015) ("Pet'rs' Rev. Case Br.") at 13–15, CJA Tab 5, CR 353, ECF No. 86. In rebuttal, Jacobi argued that its entered values were reliable and disputed the Petitioners' comparison of entered values and net U.S. price. Jacobi's Rebuttal Br. for POR 7 (July 2, 2015) ("Jacobi Rebuttal Br.") at 9–16, CJA Tab 6, CR 354, ECF No. 86. Jacobi also disputed Commerce's use of Carbokarn's financial statement for deriving the profit portion of the estimated customs value. Jacobi Rebuttal Br. at 15. Commerce

agreed with the Petitioners, and, "for the final results, . . . revised Jacobi's irrecoverable VAT adjustment" when the entered value was less than the estimated customs value. *See* Jacobi Final Margin Analysis Mem. at 3; Commerce VAT Comparison.

Based on the foregoing, Jacobi had no reason to contest Commerce's comparison methodology or use of estimated customs value in its case brief because Commerce did not rely on an estimated customs value until issuing the *Final Results*. *See* Jacobi Final Margin Analysis Mem. at 3. The Domestic Industry first raised the issue in its case brief, to which Jacobi responded in rebuttal. Pet'rs' Rev. Case Br. at 13–15; Jacobi Rebuttal Br. at 9–16; *see also* 19 C.F.R. § 351.309(d)(2) ("The rebuttal brief may respond only to arguments raised in case briefs and should identify the arguments to which it is responding."). Jacobi relied on data from the "same U.S. sales database that Commerce used for its [antidumping] margin calculation" to compile the chart appended to its motion, which pertains to an issue about which Commerce had notice. *See* Jacobi Mem. at 52; Jacobi VAT Comparison. On these facts, Jacobi's arguments are not barred by the exhaustion doctrine. *See Trust Chem Co. Ltd.*, 791 F. Supp. 2d at 1268 & n.27 (finding the exhaustion doctrine satisfied when the information was before the agency and Commerce was on notice).

2. Commerce's Determinations Regarding Jacobi's Entered Values Were Supported by Substantial Evidence.

Jacobi challenges three aspects of Commerce's VAT calculation: (1) Commerce's comparison of Jacobi's entered values to an estimated customs value, (2) Commerce's subsequent decision that Jacobi's entered values were unreliable, and (3) Commerce's reliance on Carbokarn's profit amount to derive the estimated customs value. The court addresses each, in turn.

First, as to Commerce's methodology, what Jacobi characterizes as a "concocted estimated customs value" is the same estimated customs value Commerce used to determine reliability in AR2. *See Final I&D Mem.* at 18 (noting that Commerce "performed a similar comparison in this review" as it had in the 2AR, "comparing Jacobi's entered values to the estimated customs values"); Gov. Resp. at 63–64 (explaining that, "to avoid confusion in its calculations, Commerce referred to [what it had called] the 'net unit price' in [AR2] as the 'estimated customs value' in this review"). Commerce labeled the relevant field "USNETPRI1," and, above it, "Estimated Customs Value," to indicate that it is using net price as the estimated customs value for comparison purposes and to distinguish it from Jacobi's final

net price, which included a VAT adjustment. Commerce VAT Comparison; Gov. Resp. at 63–64. Commerce's methodology was reasonable.

Second, substantial evidence supported Commerce's conclusion that Jacobi's entered values were unreliable. Preliminarily, Commerce prefaced its explanation about its determination by noting that, during AR2, it had "found substantial differences between Jacobi's estimated customs value for its entries of certain activated carbon and the entered values reported to CBP." *Final I&D Mem*. at 18. Commerce thus determined that Jacobi's entered values "were being systematically understated," which, if relied upon, "would result in the under-collection of antidumping duties by CBP." *Id*. at 18. Commerce therefore "performed a similar comparison in this review," and, likewise, found that "a significant percentage of Jacobi's entered values [were] less than the estimated customs values." *Id.* at 18–19 (citing Jacobi Final Margin Analysis Mem.); *see also* Commerce VAT Comparison. Its identical comparison methodology notwithstanding, Commerce did not purport to be conducting identical analyses in AR2 and AR7; rather, Commerce discussed AR2 for the purpose of explaining its past practice of comparing Jacobi's entered values to an estimated customs value to assess the reliability of those entered values. *See Id.* at 18; *see also* Calgon Resp. at 52 (noting Commerce's explanation "that issues concerning Jacobi's reported entered values dated back to [AR2]").

Here, record evidence shows that, in 98% of transactions, the entered value was lower than the estimated customs value. Commerce VAT Comparison; *see also* Gov. Resp. at 66. Even had Commerce relied on Jacobi's actual net price as Jacobi contends it should have, according to the court's calculations, the entered value was lower than the net price for 75% of transactions. *See* Jacobi VAT Comparison. That Commerce determined unreliability in AR2 on the basis of transactions where the entered value was less than half the net price does not mean that Commerce was required to use the same standard here. Record evidence shows that Jacobi's entered values were consistently understated; thus, Commerce's conclusion is reasonable and supported by substantial evidence.

Finally, Commerce properly relied on Carbokarn's financial statement for the profit portion of the estimated customs value. Antidumping duties are derived from the difference between the normal value and the CEP for the subject merchandise. 19 U.S.C. § 1673. In the NME context, Commerce determines normal value using financial information from a surrogate market economy country-based com-

pany. 19 U.S.C. § 1677b(c)(1); *see also Jiangsu Jiasheng Photovoltaic Technology Co., Ltd. v. United States*, 38 CIT ___, ___, 28 F. Supp. 3d 1317, 1334 n.65 (2014); *CP Kelco U.S., Inc.*, 2015 WL 1544714, at *1. Correspondingly, agency policy provides that "that a CEP profit deduction must [] be made in cases involving [NME] countries," and that the profit deduction must be based on financial data provided by a surrogate producer. Policy Bulletin 97.1 at 4.

Here, Commerce deducted profit (designated "CEPROFIT") in its calculation of Jacobi's net price. Jacobi Final Margin Analysis Mem. at 3. Record evidence shows that "CEPROFIT" is derived from Carbokarn's 2011 financial statement. Surrogate Values for the Final Results (Oct. 2, 2015) ("Final SV Mem."), Attach. II, PJA Tab 40, PR 408, ECF No. 85–4 (non-Global Trade Atlas surrogate value sources). During oral argument, Jacobi asserted it had provided financial information derived from its domestic affiliate, thereby rendering resort to Carbokarn's financial statement unnecessary. Oral Arg. at 1:53:40–54:15. However, the financial statement Jacobi placed on the record appears to include financial information regarding the "Jacobi Carbons Group" of companies, not just the domestic importer, Jacobi Carbons, Inc. *See* Jacobi's Sect. C Resp. (Aug. 18, 2014), Ex. C-21 ("Jacobi Sales Reconciliation"), CJA Tab 9, CR 48, ECF No. 86; *see also* Jacobi Mem. at 1 (distinguishing Jacobi Carbons AB as the foreign exporter from Jacobi Carbons, Inc. as the U.S. importer); *Id.* at 53 (citing Jacobi Sales Reconciliation in support of its argument that Commerce should have relied on Jacobi's profit from the relevant POR). Jacobi offers no other reason why Commerce should have departed from its policy and practice, which has statutory and judicial support.

Accordingly, Commerce's determination that Jacobi's entered values were unreliable, and, thus, unsuitable as a basis for the VAT adjustment, and its methodology for arriving at that conclusion, were reasonable and supported by substantial evidence, as was Commerce's use of a surrogate financial ratio to calculate CEP profit.

d. Commerce's VAT Calculation Was Not Supported By Substantial Evidence

CATC contends that Commerce erroneously applied the 17% VAT adjustment to the cost of the finished subject merchandise rather than the cost of Jacobi's raw materials. CATC Mem. at 21–22. CATC asserts that the "calculation essentially assumes that the raw materials imported by Jacobi [and upon which it paid the VAT] cost the same as the retail price of subject merchandise exported by Jacobi," which it describes as an "untenable theory." CATC Mem. at 22. Commerce did not respond to CATC's argument in its brief before the

court. *See* Gov. Resp. at 65–68. During oral argument, Defendant was unable to explain the reasoning behind Commerce's methodology on the basis of the record before the court. *See* Oral Arg. at 1:56:40–2:02:59.

The statute provides for reducing the starting price used to calculate CEP by "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(2)(B). Correspondingly, the *Methodological Change* states that when an NME government, such as the PRC, imposes "an export tax, duty or other charge on subject merchandise . . ., from which the respondent was not exempted, [Commerce] will reduce the respondent's . . . [CEP] accordingly*, by the amount of the tax, duty or charge paid, but not rebated*." 77 Fed. Reg. at 36,483 (emphasis added). Additionally, the *Methodological Change* "anticipates that, *in many instances*, the export tax, VAT, duty, or other charge will be a fixed percentage of the price. In such cases, [Commerce] will adjust the export price or constructed export price downward by the same percentage." *Id.* (emphasis added). The *Methodological Change* thus contemplates that often, *but not always*, the VAT will be a fixed percentage of the price of the exported merchandise.

In the *Issues and Decision Memorandum* Commerce recognizes that an NME government may "impose[] an export tax, duty, or other charge on subject merchandise *or* on inputs used to produce the subject merchandise," and insists Commerce "will reduce the respondent's EPs or CEPs accordingly *by the amount . . . paid*, but not rebated." *Final I&D Mem.* at 16 (emphasis added) (citation omitted). Commerce also recognizes that, "[i]rrecoverable VAT, as defined in PRC law, is a . . . VAT paid on inputs and raw materials (used in the production of exports)." *Id.* at 16–17 (citations omitted); *see also id.* at 20 (the "irrecoverable VAT adjustment does not entail deducting VAT paid on the sale of activated carbon, but rather the portion of VAT paid on inputs to produce activated carbon that is not rebated by the PRC government"). Though recognizing that the Chinese VAT applies to (and, thus, is calculated as a percentage of the cost of) inputs and not the finished subject merchandise, here, Commerce applied the VAT rate to the value of the finished goods. *See* Jacobi Final Margin Analysis Mem. at 3 (applying the 17% irrecoverable VAT adjustment to Jacobi's entered values or its estimated customs values as a proxy for entered values); *Prelim. I&D Mem*. at 18 ("[F]or the purposes of these preliminary results of review, for Jacobi's CEP sales, we reduced each sale's U.S. price by the irrecoverable VAT rate of 17% of entered value. . . .").

As discussed above, the irrecoverable VAT deducted from Jacobi's CEP must be "the amount" of VAT included in the price. 19 U.S.C. § 1677a(c)(B)(2); *see also Methodological Change*, 77 Fed. Reg. at 36,483 (accounting for the amount "paid"). Here, the amount of VAT included in Jacobi's net price is the 17% input VAT. *See* Chinese VAT Regulations; Jacobi Suppl. Sect. C Resp. at 29–30. The *Final Results* lacked reasoned explanation as to why Commerce's application of the VAT rate to the value of the finished goods did not overstate the VAT amount Jacobi actually paid, and was not supported by substantial evidence. Accordingly, the court is remanding the issue of Commerce's VAT calculation for further explanation and reconsideration in accordance with this opinion.

II. Motion to Supplement the Administrative Record

Jacobi moves to supplement the administrative record with evidence it contends demonstrates that the average unit value for Thai HS 4402.90.1000 is aberrant. *See* Confidential Jacobi Mem. to Suppl. the Admin. R. ("Jacobi's Mot."), ECF No. 49. Defendant and Defendant-Intervenor oppose Jacobi's motion. *See* Def.'s Resp. to Pl.'s Mot. to Suppl. the Admin. R., ECF No. 66; Def.-Intervenors' Opp'n to Pl.'s Mot. to Suppl. the Admin. R., ECF No. 65.

"Except in very limited circumstances, this court's review of Commerce's determination is limited to the record before it," *Assoc. of Am. School Paper Suppliers v. United States* ("*AASPS*"), 34 CIT 31, 33, 683 F. Supp. 2d 1317, 1320 (2010) (citing 19 U.S.C. § 1516a(b)(2)(A)), which interested parties bear the burden of creating, *Essar Steel Ltd. v. United States*., 678 F.3d 1268, 1277 (Fed. Cir. 2012) (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)). Efficiency and finality considerations disfavor reopening the record. *Essar Steel*, 678 F.3d at 1277. However, the Federal Circuit has recognized that supplementation may be permitted "when the original record was tainted by fraud" or "when the underlying agency decision was based on inaccurate data that the agency generating those data indicates are incorrect." *Id.* at 1277–78 (internal quotation marks and citations omitted). Additionally, this court has permitted supplementation "when at the time that supplementation of the record is sought, there is new, changed, or extraordinary information available that was not available during the investigation," or "when the party makes a strong showing of bad faith or improper behavior by agency decision makers." *AASPS*, 34 CIT at 36, 683 F. Supp. 2d at 1322–23 (citations omitted).

Jacobi does not rely on the exceptions recognized by the Federal Circuit; rather, Jacobi seeks supplementation on the basis of new

information that was not "publicly available during the underlying administrative proceeding." Jacobi Mem. at 2, 3–12. In sum, Jacobi contends that supplementation is merited because of "a mid-proceeding change in surrogate country [(Thailand)]," "limited time . . . to address data for that new country," "a last minute change" to Thai HS 4402.90.1000 as the surrogate value for carbonized material, "no time . . . to address" the surrogate value, and aberrant data in the surrogate value that distorted the dumping margin. *Id.* at 11.

Jacobi, however, had the opportunity to obtain the information it now seeks to submit. As early as July 25, 2014, Jacobi had notice that Thailand was a potential primary surrogate country. *See generally* Commerce SC Letter. On March 31, 2015, DJAC timely proposed Thai HS 4402.90.1000 as the surrogate value for carbonized material. *See* Thai Import Statistics.

On May 5, 2015, Commerce preliminarily selected Thailand as the primary surrogate country and Thai HS 4402.90.9000 as the surrogate value for carbonized material. *Prelim. I&D Mem*. at 17, 24. Commerce's preliminary selections gave interested parties additional notice that Commerce may rely on Thai import data for the Final Results, and, thus, the impetus to address that data. Jacobi had until June 2, 2015 to submit additional data. *See* Jacobi's Post-Prelim. Submission of Factual Information Concerning Appropriate Surrogate Values (June 2, 2015), PJA 30, PR 37071, ECF No. 85–4. However, Jacobi declined to submit surrogate value information regarding carbonized material. *See id.* at 2.

Accordingly, Jacobi had about 10 months from the time it first had notice that Thailand was a potential surrogate country, and more than two months from when DJAC first proposed Thai HS 4402.90.1000 as the surrogate value for carbonized material, to obtain and submit the information it now seeks to submit. According to Jacobi's own motion, this should have been ample time. *See* Jacobi Mem. at 9 (noting that Jacobi spent two months—November and December 2015—researching imports into Thailand under Thai HS 4402.90.1000). Jacobi has not shown that it *could not* have obtained the information in question in time to submit it to the agency, but rather, that it *did not* obtain the information until it had the financial incentive to do so. *See id.* at 2, 11, 14–15 (describing the financial consequences on Jacobi of an increased dumping margin due to Commerce's reliance on Thai HS 4402.90.1000 to value carbonized material). Because the information is not new and formerly unavailable, permitting supplementation now would be "tantamount to [permitting] *de novo* review through the back door." *AASPS*, 34 CIT at 37, 683 F. Supp. 2d at 1324 (internal quotation marks and citation omit-

ted) (denying motion to supplement when party failed to show that it could not have taken steps to introduce the document at issue into the record during the underlying investigation).

Nor is the court persuaded by Jacobi's appeal to the court's inherent authority to provide an equitable remedy. *See* Jacobi Mem. at 12–15. Pursuant to 28 U.S.C. § 1585, this court "shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." However, "in the federal courts equity has always acted only when legal remedies were inadequate" or unavailable. *Canadian Lumber Trade All. v. United States*, 30 CIT 892, 894–98, 441 F. Supp. 2d 1259, 1261–68 (2006) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959)) (granting equitable relief when U.S. Customs and Border Protection had violated plaintiffs' legal rights). Jacobi has not shown that it lacks a legal remedy or that Commerce acted contrary to its authority. *See* Jacobi Mem. at 14 (emphasizing financial considerations). Jacobi also relies on *Borlem S.A.-Empreedimentos Industriais v. United States*, *id*. at 13, but in that case, the Federal Circuit recognized this court's authority to order the International Trade Commission to reconsider its decision in light of new information "the agency generating those data indicates are incorrect," *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990). It is, thus, inapposite. Jacobi's motion is denied.

Nevertheless, on remand, Commerce may decide whether to reopen and supplement the record. *See Essar Steel*, 678 F.3d at 1278 ("The decision to reopen the record is best left to the agency, in this case Commerce."); *Fresh Garlic Producers Ass'n v. United States*, 40 CIT ___, ___,190 F. Supp. 3d 1302, 1306 (2016) ("As long as the Court does not forbid Commerce from considering new information, it remains within Commerce's discretion to request and evaluate new data on remand.") (internal quotations marks and citation omitted).

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Results* are remanded to Commerce to further address the issue of economic comparability, as set forth in Discussion Section I.A.iii.b above; it is further

ORDERED that Commerce's *Final Results* are remanded to Commerce to further address the issue of significant production, as set forth in Discussion Section I.A.iii.c above; it is further

ORDERED that Commerce's *Final Results* are remanded to Commerce to further address the issue of its calculation of the irrecoverable VAT adjustment, as set forth in Discussion Section I.B.v.d above; it is further

ORDERED that Commerce's *Final Results* are remanded to Commerce for reconsideration of the separate rate assigned to non-mandatory respondents in accordance with any redetermination of the antidumping margin assigned to Jacobi; and it is further

ORDERED that the court defers ruling on Plaintiffs' challenges to Commerce's determinations regarding Thai data quality and surrogate value selection; it is further

ORDERED that Commerce shall file its remand results on or before July 6, 2017; it is further

ORDERED that the deadlines provided in USCIT Rule 56.2(h) shall govern thereafter; it is further

ORDERED that any comments or responsive comments must not exceed 6000 words; it is further

ORDERED that Jacobi's motion to supplement the administrative record (ECF No. 49) is **DENIED**.

Dated: April 7, 2017
New York, New York

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

Slip Op. 17–40

RZBC GROUP SHAREHOLDING CO., LTD., RZBC CO., LTD., RZBC IMP. & EXP. CO., LTD., and RZBC (JUXIAN) CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and ARCHER DANIELS MIDLAND COMPANY, CARGILL, INCORPORATED, and TATE & LYLE INGREDIENTS AMERICAS LLC, Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 15–00022

[The court sustains Commerce's decisions.]

Dated: April 10, 2017

Michael S. Holton and *Jeffrey S. Neeley*, Husch Blackwell LLP, of Washington, DC, for plaintiffs.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Meen Geu Oh*, Trial Attorney, *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Stephen A. Jones and *Patrick J. Togni*, King & Spalding LLP, of Washington, DC, for defendant-intervenors.

OPINION AND ORDER

Goldberg, Senior Judge:

This case concerns challenges to the fourth administrative review of a countervailing duty order on citric acid and certain citrate salts from the People's Republic of China (the "PRC"). *See Citric Acid and Certain Citrate Salts from the People's Republic of China*, 79 Fed. Reg. 78,799 (Dep't Commerce Dec. 31, 2014) (final admin. review) ("*Final Results*") (covering imports from January 1, 2012 to December 31, 2012).

Plaintiffs RZBC Group Shareholding Co. and related companies ("RZBC") moved for judgment on the agency record under USCIT Rule 56.2. Mem. of Law in Supp. of Pls. Mot. for J. on Agency R. Under USCIT R. 56.2, ECF No. 29 ("RZBC Br."). On June 30, 2016, this court resolved RZBC's motion by remanding for reconsideration a single issue to the U.S. Department of Commerce ("Commerce"): whether Commerce can avoid the application of adverse facts available ("AFA") by using RZBC's records to verify non-use of the Buyer's Credit program. *RZBC Group Shareholding Co. v. United States*, Slip Op. 16–64, 2016 WL 3880773, at *14 (CIT June 30, 2016). In the ensuing remand, Commerce maintained that it cannot verify non-use with RZBC. Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 56–1 ("Remand Results").

RZBC now contends that the Remand Results are incorrect. Pls. Comments on Remand Results, ECF No. 62 ("RZBC Comments"). Alternatively, RZBC insists that, if the Remand Results are correct, Commerce nevertheless erred in calculating a 10.54% AFA rate. *Id.* Defendant-Intervenors, Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Ingredients Americas LLC ("ADM"), insist that Commerce made no errors. Def.-Intervenor's Comments in Supp. of Remand Redetermination, ECF No. 64; Def.-Intervenor's Resp. in Opp'n to Pls. Mot. for J. on Agency R., ECF No. 37. After carefully reviewing the briefs and record, the court sustains Commerce's determinations on both issues.

GENERAL BACKGROUND

The court assumes familiarity with the facts and law as discussed in its prior opinion and briefly summarizes details relevant to reviewing the issues now before the court.

Countervailing duties ("CVDs") exist to offset the net benefit received from a foreign government's subsidy. 19 U.S.C. § 1671(a). In the review at issue, Commerce imposed a 17.55% CVD rate. *Final Results*, 79 Fed. Reg. at 78,800. "With this duty, Commerce aimed to

offset the benefit RZBC received from concessional loans, steam coal, sulfuric acid, limestone flux, land purchases, and other subsidies from the PRC." *RZBC*, Slip Op. 16–64, 2016 WL 3880773, at *1; I&D Mem. 14–32, PD 226 (Dec. 23, 2014).

To ascertain the above CVD rate, "Commerce adversely inferred that RZBC benefited from the Buyer's Credit program, a concessional-loan program instituted by the Government of China ("GOC") owned EXIM Bank. I&D Mem. 75." *RZBC*, Slip Op. 16–64, 2016 WL 3880773, at *2. Commerce based the decision to apply AFA on the GOC's noncooperation in refusing to allow Commerce to access information necessary for verifying non-use of the program. I&D Mem. 73–75. Commerce ascribed an AFA rate of 10.54%. *Id.*

Among other arguments in its subsequent appeal to this court, RZBC first argued that Commerce erred when adversely inferring that RZBC benefited from the Buyer's Credit program. RZBC Br. 2. Second, RZBC argued that, even if Commerce was correct to adversely infer that RZBC benefited from the program, Commerce incorrectly calculated the AFA rate of 10.54%. *Id.* at 2–3. In its opinion on June 30, 2016, this court remanded the first issue and reserved judgment on the second issue. *RZBC*, Slip Op. 16–64, 2016 WL 3880773, at *6 & n.1.

With regard to the first issue—the application of AFA—the court found that the GOC had in fact failed to cooperate to the best of its ability. *Id.* at *4. Nonetheless, the court also held that "Commerce's obligation when drawing an adverse inference based on a lack of cooperation by a foreign government is to avoid collaterally impacting respondents to the extent practicable by examining the record for replacement information." *Id.* at *5. The court then explained that "Article 5 of the *Administrative Measures* suggests that the Buyer's Credit program is unavailable with respect to sales contracts under $2 million." *Id.* at *6 (citing GOC NSA Resp. Ex. C-1, at art. 5, PD 78 (Mar. 19, 2014)). Further, "[a]s far as the court [was] aware, no other evidence on the record contradicts Article 5's $2 million dollar requirement during the period of review." *Id.* "And when Commerce asked whether RZBC had 'signed any single sales contract exceeding two million U.S. dollars for a sale that included, in whole or in part, subject merchandise to the United States,' the company said no." *Id.* (citing I&D mem. 73; RZBC NSA Resp. 9, PD 76 (Mar. 19, 2014)). In light of this record evidence, the court concluded that "Commerce never explained why it could not verify RZBC's non-use of the Buyer's Credit program by checking the firm's audited financial statements or other books and records for the value of RZBC's sales contracts." *Id.* at *4. Given that Commerce "had an obligation to heed any verifiable

evidence that RZBC never used the Buyer's Credit program," Commerce should have tried to verify non-use by examining "the firm's audited financial statements or other books and records for the value of RZBC's sales contracts." *Id.* The failure to do so rendered the application of AFA unsupported by substantial evidence. *Id.* The court then provided the following directives on remand:

> Commerce must reconsider whether it can verify RZBC's non-use of the Buyer's Credit program by inspecting RZBC's audited financial statements or other books and records for sales contracts valued over $2 million. If the agency continues to conclude that verifying non-use with RZBC is impossible, then it must explain how this can be the case in light of the $2 million threshold laid out in the *Administrative Measures*. If, on the other hand, Commerce concludes that RZBC is in a position to verify non-use, then the agency must either make an attempt at doing so or explain why not.

Id. at *6.

On remand, Commerce continued to find that it cannot verify non-use with RZBC and, therefore, Commerce continued to apply AFA. Remand Results 2. As explained below, the court sustains that decision. The court also addresses the issue on which it reserved judgment in the June 30 opinion—the 10.54% AFA rate—and likewise sustains Commerce's rate decision.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction under 28 U.S.C. § 1581(c). The court will sustain Commerce's results 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). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citation omitted). In other words, "substantial evidence" "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (citation omitted). The court also reviews Commerce's Remand Results for "compliance with the court's remand order." *Tai Shan City Kam Kiu Aluminum Extrusion Co. v. United States*, 39 CIT __, __, 125 F. Supp. 3d 1337, 1341 (2015) (citation omitted).

DISCUSSION

For the reasons set forth below, the court sustains Commerce's decision to apply AFA. In addition, the court considers and sustains Commerce's decision to use a 10.54% AFA rate.

I. The Court Sustains the Decision to Apply AFA.

Substantial evidence supports Commerce's decision to apply AFA on remand. Moreover, the decision to apply AFA complies with both the law and this court's remand order.

In its Remand Results, Commerce continued to apply an adverse inference that RZBC benefited from the Buyer's Credit program. Remand Results 2. Commerce made this determination because the "decree governing the Buyer's Credit program is ambiguous." *Id.* at 4. Accordingly, "reviewing the RZBC Companies' contracts will not conclusively illuminate whether or not its customers used the Buyer's Credit program." *Id.*

Commerce provides two primary reasons for its determination that the conditions of the Buyer's Credit program are ambiguous.

First, Commerce focuses on the language in the *Administrative Measures*. Commerce concedes that the GOC stated that, "[a]ccording to the *Administrative Measures*, the contract value shall exceed USD 2 million." *Id.* (citing GOC NSA Resp. 17). But Commerce argues that the translation of the *Administrative Measures* that the GOC provided contradicts the GOC's statement that the $2 million threshold is mandatory. *Id.* at 4–5. Article 5 of the *Administrative Measures* reads:

> The business contract supported by export buyer's credit must be recognized by EIBC and meet the following basic conditions:
>
> i. contract amount **should** be over 2 million dollars; ii. the Chinese components contained in exported goods **shall** not [be] less than 50%; iii. the proportion of cash payment paid by importer **generally** is not less than 15% of contract value, and such payment for ship projects **shall** not [be] less than 20% of the contract value.

GOC NSA Resp. Ex. C-1, at art. 5 (emphasis added). Based on this translation, Commerce determined that the "word 'should' does not establish a minimum requirement, therefore making the minimum contract value discretionary [and not mandatory]. Moreover, the GOC's translation of the *Administrative Measures* demonstrates that the usage of 'should' in Article 5(i) was intentional because the subsequent two program conditions utilize the term 'shall.'" Remand Results 5. From this, Commerce concluded that, "notwithstanding the language in the GOC's narrative response, a more complete examination of the GOC's response indicates that what is required under the program's first condition is ambiguous." *Id.*

Second, Commerce asserts that "other record evidence relating to [the Buyer's Credit program] was likewise unclear as to the minimum

amount required for" program eligibility. *Id.* Commerce cites two working papers that discuss concessional loans by EXIM Bank. *Id.* The papers suggest that the terms of EXIM Bank's concessional loans are ambiguous or discretionary. *Id.* Commerce also cites Article 9 of the *Administrative Measures*, which states: "the loan currency shall be Dollar or other currencies approved by [EXIM Bank.]" *Id.* (citation omitted). Commerce explains that, "[i]f the currency denomination is not established, then the minimum contract or loan amount can fluctuate pursuant to the exchange rate, creating yet more ambiguity as to how [Commerce] can identify a clear and consistent avenue to conduct a verification of RZBC Companies' sales contracts and other books and records." *Id.* at 11. To Commerce, this "evidence is relevant to [its] finding that the program's minimum sales contract requirement is ambiguous." *Id.* at 5–6.

Based on Commerce's first argument alone, the court finds that the above determination is supported by substantial evidence and is consistent with both the law and this court's remand order. The $2 million threshold is ambiguous, and for that reason Commerce cannot ensure non-use of the Buyer's Credit program simply by examining the value of RZBC's contracts. Nevertheless, RZBC offers a number of unconvincing reasons that this court should send the issue back to Commerce. The court briefly considers each in turn.

First, RZBZ claims that "Commerce's redetermination is outside the scope of the Remand Order." RZBC Comments 3. In the remand order, the court explained that, "as far as the court [was] aware," nothing in the record "contradicts Article 5's $2 million" threshold requirement. *RZBC*, Slip Op. 16–64, 2016 WL 3880773, at *6. The court then ordered Commerce to either (1) use RZBC's records to "verify RZBC's non-use of the Buyer's Credit program" or (2) explain why it cannot verify non-use in this way. *Id.* In its Remand Results, Commerce explained why it cannot use RZBC's records to verify non-use. Thus, Commerce complied with the remand order.

Second, RZBC argues that Commerce's failure to consider the $2 million threshold requirement prior to the Remand Results, "whether pursuant to 19 U.S.C. § 1677m(d) or through additional questions concerning RZBC's certified claims, means the evidence on the record from RZBC and the GOC regarding the threshold is undisputed and Commerce's *Redetermination* is not supported by substantial evidence." RZBC Comments 9. In response, Commerce explained that it "attempted to clarify any ambiguities with regard to the requirements and administration of the Buyer's Credit program; however, it was denied that opportunity when the GOC refused to provide the

requested information, *i.e.*, 'sample contracts and documentation that would help [Commerce] understand the disbursement of funds and its timeline.'" Remand Results 7–8 (citation omitted). Commerce then asserts that it cannot find a $2 million threshold requirement simply because the GOC and RZBC promised that such a requirement exists, especially when, as here, the "certified translation provided by the GOC" contradicts the promises. *Id.* at 8. Commerce's explanation is reasonable and RZBC's argument is unconvincing.[1]

Third, RZBC argues that Commerce erred in failing to "review the full translation of Article 5" of the *Administrative Measures*. RZBC Comments 9. Had it done so, RZBC contends, it would have found that the provision unambiguously creates a mandatory $2 million threshold. *Id.* at 10. As stated above, Article 5 begins: "The business contract supported by export buyer's credit must be recognized by EIBC and meet the following basic conditions." GOC NSA Resp. Ex. C-1, at art. 5. It then states (i) that the contract "should be over 2 million dollars," (ii) that "the Chinese components contained in exported goods shall not [be] less than 50%," and (iii) that "the proportion of cash payment[s] . . . for ship projects shall not [be] less than 20% of the contract value." *Id.* RZBC maintains that the phrase "'meet the following basic conditions' is the 'shall' requirement and supersedes the so-called 'should' that Commerce alleges to be ambiguous." RZBC Comments 10. Yet this does nothing to remove, and in fact amplifies, the ambiguity in the *Administrative Measures*. So this argument is likewise unavailing.

Fourth, RZBC argues that "Commerce's *Redetermination* is based on *new factual* findings which pursuant [to] 19 C.F.R. § 351.301(c)(4) provided RZBC with the opportunity to rebut, clarify, or correct Commerce's *new factual* statement concerning the *Administrative Measures*." RZBC Comments 16. For this reason, on remand "RZBC submitted an updated translation that is clearer regarding the meaning of the Chinese version in English to correct Commerce's misunder-

[1] RZBC also argues the following: "Not only was Commerce silent with respect to the statements by the parties concerning the $2 million contract threshold requirement, but itself 'manifested a belief, by its words and conduct, in the statement's truth' when it asked RZBC whether it had any contracts over the $2 million contract threshold." RZBC Comments 9 (citation omitted). Commerce explained that its question "was not indicative of a finding by [Commerce] that the program in fact had such a requirement, but rather was an inquiry into the requirements and administration of the program as applicable to the RZBC Companies based on information available at the time" Commerce issued the question. Remand Results 8. Commerce is correct. Asking if RZBC had contracts over $2 million is not tantamount to declaring that the Buyer's Credit program includes a $2 million mandatory threshold. For this reason, the court also rejects RZBC's request for the court to remand Commerce's determinations "under the equitable doctrine of judicial estoppel." RZBC Comments 18.

standing of the inclusion of 'should' in the translation of part (i) of Article 5 that simply is not found in the Chinese language on the record." *Id.* Commerce rejected the new translation as untimely new factual information. Remand Results 12. RZBC insists that this was an error and requests a remand to correct it.

But Commerce did not err. Under 19 C.F.R. § 351.301(c)(4), a party "is permitted one opportunity to submit factual information to rebut, clarify, or correct factual information placed on the record of the proceeding by" Commerce. "Factual information" is "[e]vidence, including statements of fact, documents, and data placed on the record by" Commerce." 19 C.F.R. § 351.102(b)(21)(iv). "RZBC believes that this *new* finding by Commerce that the minimum contract value for the Buyer's Credit program is 'discretionary' is a new factual statement pursuant to" 19 C.F.R. § 351.102(b)(21)(iv). RZBC Comments 17. As a result, RZBC contends that, under 19 CFR § 351.301(c)(4), it should have been "given the opportunity to" submit an alternative translation to "rebut, clarify, or correct Commerce's new factual statement concerning the *Administrative Measures*."[2] *Id.* at 17–18. Commerce argued that it "did not place any 'evidence, including statements of fact, documents and data,' on the record of this remand proceeding. Rather, [it] made a preliminary, and now final, *determination* based on factual information previously submitted in the course of the administrative review." Remand Results 13. This, Commerce concludes, "does not trigger the factual information deadline of" 19 C.F.R. § 351.301(c)(4). *Id.* The court agrees. Commerce offered no new evidence; it offered a new conclusion on old evidence. Thus, the court finds that Commerce did not err in rejecting the new translation.[3]

In short, the court finds that Commerce offered substantial evidence to support a decision to apply AFA that was consistent with the law and the remand order.[4]

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[2] RZBC also separately argues that the new translation was not "*new* factual information." RZBC Comments 17. In its Remand Results, Commerce concluded that "translations of factual information submitted in a foreign language [are] factual information." Remand Results 12. Commerce's conclusion is reasonable, and RZBC provides no authority to show that Commerce's conclusion is incorrect.

[3] What is more, as Commerce correctly explained, RZBC had an opportunity to submit an alternative translation. The GOC submitted its translation of Article 5 of the *Administrative Measures* in its questionnaire response on March 19, 2014. Remand Results 12. 19 C.F.R. § 351.301(c)(1)(v) allowed RZBC to submit information (*i.e.*, a translation) "to rebut, clarify, or correct [the GOC's] questionnaire responses." RZBC failed to do so.

[4] In addition, RZBC attacks Commerce's use of the working papers. RZBC Comments 11–12. Moreover, RZBC insists that, if Commerce considered Article 9 of the *Administrative Measures*, Commerce should have also considered Articles 2 and 6 of the *Administrative Measures*, which allegedly indicate that RZBC could not have benefited from the Buyer's

II. The Court Sustains the 10.54% AFA Rate.

RZBC next insists that, if Commerce acted properly in applying AFA, it nevertheless acted improperly in determining the AFA rate. RZBC provides a list of reasons that the 10.54% rate lacks the support of substantial evidence and violates the law. The court finds otherwise.

A. Background

19 U.S.C. § 1677e governs Commerce's selection of information for calculating an AFA rate in CVD proceedings. Commerce can rely on information from (1) "the petition," (2) "a final determination in the investigation under this subtitle," (3) "any previous review under section 1675 of this title or determination under section 1675b of this title," or (4) "any other information placed on the record." *Id.* § 1677e(b)(2).

Under § 1677e(c), Commerce must corroborate any secondary information relied on to calculate the AFA rate. Specifically, when, as here, Commerce "relies on secondary information rather than on information obtained in the course of an investigation or review, . . . [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." § 1677e(c)(1); *see also* Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–316, vol. 1., at 870 (1994). To "corroborate" the information, Commerce must "examine whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d). This entails "examining the reliability and relevance of the information." *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007).

In corroborating its information, Commerce need not prove that it chose the best information. SAA 869–70. That said, "[t]he sources used to calculate an AFA rate should 'be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance.'" *Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1373 (Fed. Cir. 2014) (citation omitted).

Here, Commerce began its explanation by summarizing its method for calculating an AFA rate in a CVD proceeding in the PRC:

> [Commerce] has an established practice for selecting AFA rates for programs for which no verified usage information was provided. According to that practice, for programs other than those involving income tax exemptions and reductions, we will apply

Credit program. *Id.* at 15–16. The court does not address this argument because, even if Commerce improperly used the working papers and Article 9 to support its finding, Commerce had substantial alternative evidence for concluding that the $2 million threshold is ambiguous and potentially discretionary.

> the highest calculated rate for the identical program in the same proceeding if another responding company used the identical program. If no other company used the identical program within the proceeding, we will use the rate from the identical program in another CVD proceeding involving the country under investigation, unless the rate is *de minimis*. If there is no identical program match in any CVD proceeding involving the country under investigation, we will use the highest rate calculated for a similar program in another CVD proceeding involving the same country.

I&D Memo 75. No party disputes Commerce's explanation of the practice that was in effect at the time of the review.

Commerce next reasoned that, because it "has not calculated a rate for the Export Buyer's Credits program in this review, and has not calculated a rate for the program in another CVD PRC proceeding, [Commerce's] practice is to identify the highest rate calculated for a similar program in another CVD PRC proceeding." *Id.* Commerce determined "that a lending program is similar to the program at issue because the credits function as short-term or medium-term loans."[5] *Id.* From this, Commerce concluded "that the highest calculated rate for a comparable lending program is 10.54 percent calculated for preferential policy lending in" *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China*, 75 Fed. Reg. 70,201 (Dep't Commerce Nov. 17, 2010) (amended final determ.) ("*Coated Paper from the PRC*"). *Id.* To corroborate its finding, Commerce explained:

> In this case, the preferential policy lending rate of 10.54 percent is an appropriate rate to apply because it is a rate calculated in a CVD PRC final for a similar program based on the treatment of the benefit. In the absence of information from the responding party, the rate calculated in another proceeding provides the most reliable and relevant information about the government's practices regarding these kinds of programs. Many factors go into the calculation of a rate in any proceeding. For lending programs these may include, among other things, the size of the loan, the interest rate on the loan, the term of the loan, the benchmark interest rate selected, and the size of the company's sales. When selecting an AFA rate, [Commerce] is, by definition, operating with a lack of verifiable and reliable evidence about

[5] To support this decision, Commerce cited its practice in *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, 77 Fed. Reg. 63,788 (Dep't Commerce Oct. 17, 2012) (final determ.) and accompanying I&D memo ("*Solar Cells from the PRC*"). I&D Mem 75.

> the impact of such factors in the case at hand. In the absence of reliable information to control for a comparison of such factors between another case and the case at hand, [Commerce] corroborated the rate selected to the extent practicable, *i.e.*, by relying on a rate calculated for a similar program in a prior proceeding pertaining to the PRC.

Id. at 76–77.

B. Discussion

RZBC contends that Commerce's corroboration of the 10.54% AFA rate lacks the support of substantial evidence. RZBC provides four primary reasons that Commerce was wrong to use the 10.54% rate from *Coated Paper from the PRC*. The court rejects all four reasons and finds that Commerce's AFA rate is consistent with the law and has the support of substantial evidence.

First, RZBC argues that "the 10.54 percent rate does not reflect a 2012 interest rate or RZBC's sales value for the period" and, therefore, Commerce erred in selecting the 10.54% rate. RZBC Br. 32. RZBC explains that "the SAA warns against the use of secondary information that is outdated." *Id.; see* SAA 870 ("Secondary information may not be entirely reliable because, for example, as in the case of the petition, it is based on unverified allegations, or as in the case of information from prior section 751(a) reviews, it concerns a different time frame than the one at issue."). RZBC explains that Commerce calculated the 10.54% rate in *Coated Paper from the PRC* "using information from 2008, a full four years prior to the" period of review in this case. RZBC Br. 33. RZBC insists that "the use of an older rate inflates the benefit that would have applied to RZBC had it benefited from this loan in 2012." *Id.*

In response, Commerce explained that:

> In *Coated Paper from the PRC*, the policy lending program covered loans from banks in the PRC (whether policy banks or state-owned commercial banks). Likewise, the Export Buyer's Credit program involves loans from a PRC bank. A government lending program in one proceeding is a reasonable proxy for a government lending program in another proceeding.

I&D Mem. 75. Commerce also stated that, "[a]lthough the rate from *Coated Paper from the PRC* is a few years old, [Commerce has] used that rate as an adverse rate in other proceedings, and therefore the GOC has been on notice regarding it." *Id.* at 76. What is more, Commerce explains that, because the GOC "has been on notice" regarding the 10.54% AFA rate but nevertheless persevered in being

uncooperative, it is reasonable to infer that the GOC "knows that the actual usage of this program would lead to a rate at least as high as 10.54 percent." *Id.* Thus, in choosing the rate of 10.54%, Commerce argues that it is advancing the purpose of AFA—"to ensure that a party does not achieve a better result by not cooperating than if it had cooperated fully." *Id.* (citing SAA 870). The court concludes that Commerce's response to RZBC's challenge amounts to a reasonable explanation of its determination.

Second, RZBC argues that the 10.54% rate from *Coated Paper from the PRC* "was an uncreditworthy rate," and "inclusion of [this] uncreditworthy rate is not supported by substantial evidence." RZBC Br. 34. The rate for an uncreditworthy company is higher than the rate for a creditworthy company. RZBC Br. 34. The record is devoid of any finding concerning the creditworthiness of either RZBC or the buyers using the Buyer's Credit program. Nonetheless, Commerce defended its use of an uncreditworthy rate:

> [Commerce] does not have the necessary information about the operation of the Buyer's Credit program to calculate a subsidy rate. This program differs from other subsidy programs typically examined by [Commerce] in that the government provides funds to the buyers of respondents' merchandise with the goal of increasing respondents' sales. At verification, the GOC refused to provide information concerning buyers that participated in this program during the POR. Therefore, because we lack information regarding the specifics of the companies that benefit, it would be inappropriate to make speculative adjustments to the AFA hierarchy on the basis of alleged company-specific factors. In other words, even if such an adjustment for creditworthiness makes sense, the agency lacks the necessary information on the record regarding the companies that received this credit including, for example, the GOC's analysis of these companies' creditworthiness, to make any adjustment to the rate. Even though the RZBC Companies, as the producer, directly benefitted through the production and the distribution of their products, that benefit was based on the creditworthiness of the buyers.

I&D Mem. 76. Though the above explanation appears reasonable, RZBC insists that it proves that Commerce violated 19 U.S.C. § 1677m(d), which requires Commerce to "inform the person submitting the response of the nature of the deficiency and . . ., to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." RZBC Br. 35. Commerce never informed

RZBC of any deficiency.[6] On that basis, RZBC asserts that the 10.54% AFA rate "cannot be corroborated" and lacks the support of substantial evidence. *Id.*

But RZBC is wrong. As the Government explains, "prior to the [GOC's] refusal to allow verification, and Commerce's inability to verify non-use, Commerce had no reason to request RZBC buyers' information." Def. Resp. in Opp'n to Pls. Mot. for J. on Agency R. 24 n.7, ECF No. 34 ("Gov't Br."). In short, there was no known deficiency about which Commerce had to inform the parties. And Commerce provides a reasonable explanation for its decision to rely on an uncreditworthy rate: given the GOC's failure to cooperate, Commerce had no information with which to analyze the credit of buyers.

Third, RZBC claims that "programs more similar to EXIM Buyer's Credit are on the record of this review." RZBC Br. 36. In particular, RZBC cites the 0.64% rate that Commerce calculated for RZBC's use of the EXIM Export Seller's Credit program. *Id.* RZBC explains that the EXIM Bank of China administers both the Export Seller's Credit program and the Export Buyer's Credit program, and states that the two programs are "nearly the same." *Id.* Both exist "to assist companies in exporting their products." *Id.* at 37. And the EXIM Bank of China issued loans to RZBC during the period of review. *Id.* at 36–37. As a result, RZBC concludes that the 0.64% rate from the Export Seller's Credit program "is clearly more representative [of] RZBC's commercial reality during the POR than a rate from [a] different year with different sales values." *Id.* at 36. RZBC concedes that "Commerce has developed a practice for selecting AFA rates first by looking at identical programs within a case and second by looking at similar programs in previous cases." *Id.* at 37. Following this practice yields the selected 10.54% AFA rate from *Coated Paper from the PRC*. Yet RZBC insists that "[a] comparison of [the seller's credit and buyer's credit programs] demonstrates that the application of the 10.54 per-

[6] Commerce did, however, ask the GOC about the details of the program. GOC NSA Resp. 16. Commerce asked the GOC to "Provide a sample application for each type of financing provided under Export Buyer Credit's along with the application's approval and the agreement between the respondent's customer and the [EXIM] Bank, which establish the terms of the financing provided." *Id.* Commerce also asked the GOC to:

> Report the interest rate(s) established during the POR for the Export Buyer's Credits for all types of financing provided, for all loan terms (*e.g.*, loans ranging from 0 to 180 days and 180 to 270 days, etc.), and all denominations (*i.e.*, RMB and foreign currency). Please provide documentation to support your answer.

Id. In addition, Commerce asked the GOC to "Please explain and provide example[s] of the types [of] documentation and paperwork that participating companies in the PRC must supply to the GOC when their buyers receive [EXIM Bank] financing under this program." *Id.*

As stated above, the GOC refused to allow Commerce to verify adequately any of the answers provided in response to these questions. GOC Verification Report 3, PD 207 (Oct. 8, 2014).

cent rate is clearly not probative." *Id.* at 36. Consequently, RZBZ maintains that Commerce erred by failing to corroborate the 10.54% AFA rate. *Id.* at 37.[7]

Commerce responded that the Seller's Credit program "is not an identical program." I&D Mem. 75. Commerce reasoned that, "[b]ecause [Commerce] has not calculated a rate for the Export Buyer's Credits program in this review, and has not calculated a rate for the program in another CVD PRC proceeding, [Commerce's] practice is to identify the highest rate calculated for a similar program in another CVD proceeding." *Id.* Commerce then cites *Solar Cells from the PRC* as the basis for its determination that "a lending program is similar to the program at issue because the credits function as short-term or medium-term loans." *Id.* Commerce, "therefore, determine[d] that the highest calculated rate for a comparable lending program is 10.54 percent calculated for preferential policy lending in *Coated Paper from the PRC." Id.*

The court rejects RZBC's argument. In essence, RZBC argues that, though Commerce complied with its established practice, Commerce should have selected the 0.64% rate because it more accurately reflects RZBC's commercial reality. But there is a problem with this logic—there is no record evidence on the Buyer's Credit program with which to compare the 0.64% rate to conclude, as RZBC does, that 0.64% is preferable. And RZBC demonstrates neither (1) why the 0.64% rate is "clearly more representative [of] RZBC's commercial reality" nor (2) why the Seller's Credit program is more similar to the Buyer's Credit program than the program in *Coated Paper from the PRC*. The SAA recognized this problem when it explained that, "where Commerce uses the facts available to fill gaps in the record, proving that the facts selected are the best alternative facts would

[7] RZBC also raises a new argument: "As admitted by Commerce, the size, benchmark rate, total sales value and term of the loan are relevant to any subsidy determination. Commerce in the final results, however, ignores the fact that all four elements are on the record." RZBC Br. 37. RZBC then concludes that Commerce could have used record evidence to determine the AFA rate by selecting values for the four foregoing elements. For example, RZBC explains that Commerce could have used RZBC's verified export sales total as "the highest loan amount possible during the POR." *Id.* And it "could have selected the highest interest among the U.S. dollar denominated interest rates as AFA." *Id.* at 38. RZBC then insists that it is contrary to the corroboration statute to follow Commerce's established practice rather than use record evidence of the above four elements to calculate an AFA rate. *Id.* 37–38.

In response, the Government insists that RZBC's argument is speculative and "provides no insight as to why" the record evidence that RZBC cites is "somehow relevant to a *buyer's* loan program or undermine[s] the rate selected by Commerce." Gov't Br. 25–26. According to the Government, "one of the reasons that Commerce determined to rely on facts available for this program was that it lacked information about loan recipients, the associated risk, and the resulting terms on which such loans were granted." *Id.* at 26. Therefore, the Government concludes that "there is no evidence to support RZBC's contention that the selected rate must bear some relationship to" the cited record evidence on the four elements above. *Id.* The Government is correct, and thus RZBC's new argument is unsuccessful.

require that the facts available be compared with the missing information, which obviously cannot be done." SAA 869–70. What is more, it is not inevitably problematic even if, as RZBC argues, the 10.54% AFA rate fails to accurately reflect RZBC's commercial reality. After all, the "AFA rate should 'be a reasonably accurate estimate of the respondent's actual rate, *albeit with some built-in increase intended as a deterrent to noncompliance." Essar Steel,* 753 F.3d at 1373 (emphasis added) (citation omitted). Accordingly, RZBC's argument fails to show that Commerce erred in using its established methodology to arrive at the 10.54% AFA rate.

Fourth, RZBC argues that the 10.54% AFA rate "used by Commerce does not represent the commercial reality of RZBC loan programs and as such is punitive." RZBC Br. 39. RZBC explains that courts "have held that the purpose of the AFA rate . . . 'is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.'" RZBC Br. 39 (quoting *Essar Steel Ltd. v. United States*, 37 CIT __, __, 908 F. Supp. 2d 1306, 1310 (2013)). RZBC argues that, "[i]n light of the above facts covering corroboration and the fact that it was not RZBC which failed to cooperate but allegedly the GOC, the 10.54 percent rate is excessively punitive." RZBC Br. 39. And so RZBZ asks the court to remand this issue.

This argument is unconvincing. Commerce has authority to apply AFA when, as here, a government is uncooperative but a respondent is cooperative. *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1372 (Fed. Cir. 2014) (explaining that "a collateral impact on a cooperating party does not render the application of adverse inferences in a CVD investigation improper"). More important, RZBC fails to demonstrate that the selected rate is punitive. As proof that the 10.54% AFA rate is "excessively punitive," RZBC cites the rates for its policy loans and the Seller's Credit loan. RZBC Br. 40–41. RZBC is correct that the 10.54% AFA rate exceeds the cited rates of other loans. But RZBC never explains why the rate for the Buyer's Credit program is necessarily comparable to the rates of the other cited loans. By extension, a significant disparity between these rates does not indicate that the chosen rate of 10.54% is even slightly inaccurate, much less "excessively punitive."[8]

[8] RZBC also argues that Commerce has "announced a change to its methodology and practice of selecting the highest rate from a similar program in another CVD proceeding involving the country under investigation, when there is no rate calculated for an identical program available." RZBC Br. 38. RZBC cites *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, 80 Fed. Reg. 41,003 (Dep't Commerce July 14, 2015) (final admin. review) ("*Solar Cells II*") and accompanying I&D Mem. at cmt. 1. RZBC asserts that, "[r]ather than use the rate from a similar program from a different CVD proceeding involving the country, Commerce explained that it was more appropriate to use 'the highest calculated rate from a similar program in the

In the end, none of RZBC's arguments demonstrate that Commerce's determination lacked the support of substantial evidence or was not in accordance with the law. And Commerce found that, without information from the GOC concerning the Buyer's Credit program, the 10.54% rate from another proceeding "provides the most reliable and relevant information about the government's practices regarding" this program. I&D Mem. 76. Given the limited record evidence available, Commerce corroborated the 10.54% rate to "the extent practicable." 19 U.S.C. § 1677e(c)(1). The court sustains Commerce's decision.

CONCLUSION

For the above reasons, the court sustains the *Final Results* and the Remand Results and will enter judgment accordingly.

Dated: April 10, 2017
New York, New York

/*s*/ *Richard W. Goldberg*
RICHARD W. GOLDBERG
SENIOR JUDGE

proceeding at issue, unless the rate is *de minimis*.'" RZBC Br. 38 (citation omitted). The 0.64% rate from the Seller's Credit program is the "highest rate calculated in the proceeding at issue." *Id.* at 38–39. Consequently, RZBC contends that this allegedly new practice required Commerce to use as AFA the 0.64% rate. *Id.* at 39.

This argument fails for two reasons. First, it is unclear whether Commerce's conclusions in *Solar Cells II* constitute an established agency practice. Second, *Solar Cells II* did not exist during the proceeding now on appeal before this court. Thus, Commerce had no reason to, nor will this court now order it to, apply the practice from *Solar Cells II*. *See, e.g., QVD Food Co. v. United States*, 658 F.3d 1318, 1324–25 (Fed. Cir. 2011) ("Judicial review of antidumping duty administrative proceedings is normally limited to the record before the agency in the particular review proceeding at issue and does not extend to subsequent proceedings."); *Co-Steel Raritan, Inc. v. ITC*, 357 F.3d 1294, 1316 (Fed. Cir. 2004) ("[I]f litigants could demand rehearing as a matter of law because of new circumstances, new trends or new facts, 'there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.'" (citation omitted)).

Slip Op. 17–41

IRWIN INDUSTRIAL TOOL COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 14–00285

[Denying Defendant's motion for summary judgment.]

Dated: April 12, 2017

Frances Pierson Hadfield, Crowell & Moring LLP, of New York, NY, and *Daniel J. Cannistra*, Crowell & Moring LLP, of Washington, DC, for plaintiff.

Guy R. Eddon and *Jamie L. Shookman*, Trial Attorneys, U.S. Department of Justice, International Trade Field Office, of New York, NY, for defendant. With them on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Michael W. Heydrich*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection.

OPINION

Kelly, Judge:

The case before the court involves the classification of various hand tools, referred to by the Plaintiff, Irwin Industrial Tools, as locking pliers. Am. Compl. ¶ 15, May 4, 2015, ECF No. 13 ("Am. Compl."). Defendant, United States Customs and Border Protection ("CBP" or "Customs"), moved for summary judgment on January 6, 2017. Def.'s Mot. Summ. J., Jan. 6, 2017, ECF No. 43 ("Def.'s Mot."); Mem. Supp. Def.'s Mot. Summ. J., Jan. 6, 2017, ECF No. 43 ("Def.'s Br."). Plaintiff opposes this motion. Pl.'s Resp. Opp'n Def.'s Mot. Summ. J., Feb. 6, 2017, ECF No. 44 ("Pl.'s Resp."). For the reasons that follow, Defendant's motion is denied.

BACKGROUND

The dispute concerns the proper classification of four styles of Plaintiff's hand tools: "large jaw locking pliers," "curved jaw locking pliers," "long nose locking pliers with wire cutter," and "curved jaw locking pliers with wire cutter." Am. Compl. ¶¶ 17(A)–(D); Def.'s Rule 56.3 Statement of Material Facts ¶ 1, Jan. 6, 2017, ECF No. 43–1 ("Def.'s 56.3 Statement"); *see* Am. Compl. Exs. B–E. Plaintiff is the importer of record of the subject merchandise in the 46 entries at issue, which entered between the period of November 11, 2012 and June 11, 2013. Am. Compl. ¶¶ 3, 7. CBP liquidated all subject entries under subheading 8204.12.00, Harmonized Tariff Schedule of the United States (2013) ("HTSUS"),[1] which provides as follows:

[1] All references to the HTSUS refer to the 2013 edition, the most recent version of the HTSUS in effect at the time of Plaintiff's entries of subject merchandise. *See* Am. Compl. ¶ 7. The 2012 edition of the HTSUS, in effect at the beginning of the period during which Plaintiff entered the subject merchandise, is the same in relevant part to the 2013 edition.

> Hand-operated spanners and wrenches (including torque meter wrenches but not including tap wrenches); socket wrenches, with or without handles, drives or extensions; base metal parts thereof: Hand-operated spanners and wrenches, and parts thereof: Adjustable, and parts thereof.

Subheading 8204.12.00, HTSUS, dutiable at 9 percent. *Id.*

Plaintiff timely filed 14 administrative protests challenging CBP's classification of the subject merchandise under subheading 8204.12.00, HTSUS. Am. Compl. ¶ 9; Def.'s 56.3 Statement ¶ 24. CBP denied Plaintiff's protests. Am. Compl. ¶ 9; Def.'s 56.3 Statement ¶ 25.

Plaintiff commenced this action to contest CBP's denial of its protests. Am. Compl. ¶ 1. Plaintiff alleges that the subject merchandise was improperly classified under subheading 8204.12.00, HTSUS, and is properly classifiable under subheading 8203.20.6030, HTSUS, subheading 8203.20.6060, HTSUS, or subheading 8205.70.0060, HTSUS. Am. Compl. ¶¶ 55, 57, 61. Specifically, Plaintiff contends that its long nose locking pliers and curved jaw locking pliers with or without wire cutter features are classifiable under subheading 8203.20.60, HTSUS, Pl.'s Resp. 14–20, 41–49, which provides:

> Files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipe cutters, bolt cutters, perforating punches and similar hand tools, and base metal parts thereof: Pliers (including cutting pliers), pincers, tweezers and similar tools, and parts thereof.

Subheading 8203.20.60, HTSUS, dutiable at 12 cents per dozen plus 5.5 percent.[2] Alternatively, Plaintiff contends that its long nose locking pliers, curved jaw locking pliers with wire cutter features, and

[2] More specifically, Plaintiff contends that its long nose locking pliers and curved jaw with wire cutter features locking pliers are classifiable under subheading 8203.20.6030, HTSUS, Pl.'s Resp. 14–17, 41–48, which provides:

> Files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipe cutters, bolt cutters, perforating punches and similar hand tools, and base metal parts thereof: Pliers (including cutting pliers), pincers, tweezers and similar tools, and parts thereof. Other: Other (except parts): Pliers.

Subheading 8203.20.6030, HTSUS. Plaintiff argues in the alternative that its long nose, curved jaw, and curved jaw with wire cutter features locking pliers are classifiable under subheading 8203.20.6060, HTSUS, Pl.'s Resp. 17–20, 48–49; which provides:

> Files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipe cutters, bolt cutters, perforating punches and similar hand tools, and base metal parts thereof: Pliers (including cutting pliers), pincers, tweezers and similar tools, and parts thereof: Other: Other (except parts): Other.

Subheading 8203.20.6060, HTSUS.

curved jaw locking pliers, as well as its large jaw locking pliers,[3] are classifiable under subheading 8205.70.0060, HTSUS, Pl.'s Resp. 20–24, 49–53, which provides:

> Handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand-or pedal-operated grinding wheels with frameworks; base metal parts thereof: Vises, clamps and the like, and parts thereof: Vises: Other.

Subheading 8205.70.0060, HTSUS, dutiable at 5 percent ad valorem. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [Tariff Act of 1930, as amended, 19 U.S.C. § 1515 (2012)]," 28 U.S.C. § 1581(a) (2012), and reviews such actions de novo. 28 U.S.C. § 2640(a)(1) (2012).

The court will grant summary judgment when "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). In order to raise a genuine issue of material fact, it is insufficient for a party to rest upon mere allegations or denials, but rather that party must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248– 49 (1986); *Processed Plastic Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

UNDISPUTED FACTS

Plaintiff is the importer of record of the subject merchandise in the 46 entries at issue, which entered during the period of November 11, 2012 through June 11, 2013. Am. Compl. ¶¶ 3, 7; Answer to Am.

[3] Both Plaintiff and Defendant state that there are four styles of hand tools at issue in this case, and that those styles are referred to as "large jaw locking pliers," "curved jaw locking pliers," "long nose locking pliers with wire cutter," and "curved jaw locking pliers with wire cutter." Am. Compl. ¶¶ 17(A)–(D); Def.'s Answer ¶ 17; Def.'s 56.3 Statement ¶ 1. However, in Plaintiff's response, Plaintiff also references "straight jaw locking pliers," contending that these styles of pliers are also classifiable within subheading 8205.70.0060, HTSUS. *See* Pl.'s Resp. 22–23. It is unclear whether Plaintiff's reference to "straight jaw locking pliers" is an alternate description of one of the four styles of tools that are undisputedly at issue or if this reference is intended to cover a fifth style of tools. To the extent that it is the latter, it is not undisputed that the merchandise at issue includes "straight jaw locking pliers" styles of hand tools.

Compl. ¶¶ 3, 7, Aug. 7, 2015, ECF No. 19 ("Def.'s Answer"); Def.'s 56.3 Statement ¶ 22; Pl.'s Resp. Appendix 1, ¶ 22, Feb. 6, 2017, ECF No. 44 ("Pl.'s Resp. Def.'s 56.3 Statement"). CBP liquidated all subject entries under subheading 8204.12.00, HTSUS. Am. Compl. ¶ 8; Def.'s Answer ¶ 8; Def.'s 56.3 Statement ¶ 23; Pl.'s Resp. Def.'s 56.3 Statement ¶ 23. Plaintiff paid all liquidated duties, charges, exactions, and fees on the entries at issue prior to the commencement of this action. Am. Compl. ¶ 5; Def.'s Answer ¶ 5. Plaintiff timely filed 14 protests challenging the classification of the merchandise at issue. Def.'s 56.3 Statement ¶ 24; Pl.'s Resp. Def.'s 56.3 Statement ¶ 24.

The subject merchandise consists of four styles of locking hand tools: "large jaw locking pliers," "curved jaw locking pliers," "long nose locking pliers with wire cutter," and "curved jaw locking pliers with wire cutter." Am. Compl. ¶ 17; Def.'s Answer ¶ 17. All of the subject tools at issue in this case are locking tools, referred to as "locking pliers,"[4] Am. Compl. ¶ 15; Def.'s Answer ¶ 15; Def.'s 56.3 Statement ¶ 9; Pl.'s Resp. Def.'s 56.3 Statement ¶ 9, such that the tool may remain locked on an object without applying continuous hand force. Def.'s 56.3 Statement ¶¶ 8, 9; Pl.'s Resp. 8; *see* Pl.'s Resp. Def.'s 56.3 Statement ¶ 8. The subject merchandise has two opposing metal jaws with metal teeth. Am. Compl. ¶ 20; Def.'s Answer ¶ 20.

DISCUSSION

I. The Meaning of the Tariff Terms

The court discerns the common and commercial meaning of the tariff terms at issue, which are "wrenches," "pliers," and "vises, clamps and the like."

A. The Meaning of the Tariff Term "Wrenches"

The court discerns the common and commercial meaning of "wrenches" as found in subheading 8204.12.00, HTSUS, aided by dictionary definitions and industry standards. The court has also

[4] Plaintiff owns various U.S. Trademarks for the term "VISE-GRIP." Def.'s 56.3 Statement ¶ 2; Pl.'s Resp. Def.'s 56.3 Statement 55, ¶ 2. Plaintiff avers that, while it applies the "VISE-GRIP®" trademark to the merchandise at issue in this case, Pl.'s Resp. 7, n.1, "vise grip" is not the product name for these tools. Pl.'s Resp. Def.'s 56.3 Statement ¶ 1. Plaintiff refers to the products at issue as styles of "locking pliers." Pl.'s Resp. 7; Am. Compl. ¶ 15. Nonetheless, throughout its papers, Defendant refers to the merchandise as "vise grips," rather than "locking pliers." *See, e.g.*, Def.'s Br. 2 ("[Plaintiff] asks this Court to classify its vise grips as pliers."), 3 ("The models of vise grips covered by the protests and entries at issue differ primarily in the shape of their jaws . . . "). Plaintiff objects to Defendant's description of its products as "vise grips," noting that "[t]here is no such thing as a 'vise grip'—there are only Plaintiff's VISE-GRIP® tools, such as VISE-GRIP® pliers, VISE-GRIP® locking pliers, VISE-GRIP® wrenches, and so forth." Pl.'s Resp. Def.'s 56.3 Statement 56.

considered whether use is implicated by the tariff term. For the reasons that follow, the term "wrench" refers to a hand tool[5] composed of a head with jaws or sockets[6] having surfaces adapted to snugly or exactly fit and engage the head of a fastener (such as a bolt-head or nut) and a frame with a singular handle with which to leverage hand pressure to turn the fastener without damaging the fastener's head.

Customs classification is governed by the General Rules of Interpretation ("GRI"), which are part of the HTSUS statute. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). When determining the correct classification for merchandise, the court first construes the language of the headings in question "and any relative section or chapter notes."[7] GRI 1. The terms of the HTSUS "are construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)); *see BenQ Am. Corp.*, 646 F.3d at 1376. The court defines HTSUS tariff terms relying upon its own understanding of the terms and may "consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc.*, 195 F.3d at 1379. The court may also be aided by the Harmonized Commodity Description and

[5] Although a wrench can also be a power tool, *see The American Heritage Dictionary of the English Language* 1985 (Houghton Mifflin Co. 4th ed. 2000) (*Wrench*: Any of various hand or power tools, often having fixed or adjustable jaws, used for gripping, turning, or twisting objects such as nuts, bolts, or pipes.); *McGraw Hill Dictionary of Scientific and Technical Terms* 2305 (McGraw-Hill 6th ed. 2003) (*Wrench*: a manual or power tool with adapted or adjustable jaws or sockets either at the end or between the ends of a lever for holding or turning a bolt, pipe, or other object.), the tariff provision at issue is limited to "hand-operated spanners and wrenches." Heading 8204, HTSUS. The common and commercial meaning of "wrench" discerned here is accordingly limited to wrenches operated by hand.

[6] Most of the sources consulted by the court refer to a "wrench" as a hand tool having a head with jaws or sockets. *See, e.g., McGraw Hill Dictionary of Scientific and Technical Terms* 2305 (McGraw-Hill 6th ed. 2003) (*Wrench*: a manual or power tool with adapted or adjustable jaws or sockets either at the end or between the ends of a lever for holding or turning a bolt, pipe, or other object.). However, the relevant tariff heading provides separately for socket wrenches, *see* Subheading 8204.20.00, HTSUS ("Hand-operated spanners and wrenches (including torque meter wrenches but not including tap wrenches); socket wrenches, with or without handles, drives or extensions; base metal parts thereof: Socket wrenches, with or without handles, drives and extensions, and parts thereof"), and there is no claim here that the subject merchandise is a socket wrench. Accordingly, the court does not undertake to define the tariff term "socket wrenches."

[7] Determining the correct classification of merchandise involves two steps. First, the court determines the proper meaning of any applicable tariff provisions, which is a question of law. *See Link Snacks, Inc. v. United States*, 742 F.3d 962, 965 (Fed. Cir. 2014). Second, the court determines whether the subject merchandise properly falls within the scope of the tariff provisions, which is a question of fact. *Id.* Where no genuine "dispute as to the nature of the merchandise [exists], then the two-step classification analysis collapses entirely into a question of law." *Id.* at 965–66 (citation omitted). Finally, the court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

Coding System's Explanatory Notes ("Explanatory Notes").[8] *StoreWALL, LLC v. United States*, 644 F.3d 1358, 1363 (Fed. Cir. 2011). In determining the common and commercial meaning of an eo nomine tariff term, the court should also consider if the tariff term nonetheless implicates the use of the article. *See GRK Canada, Ltd. v. United States*, 761 F.3d 1354, 1358–59 (Fed. Cir. 2014) ("*GRK II*").

The court must first look to the words of the tariff to discern its meaning. Defendant's preferred subheading of the HTSUS provides as follows:

> Hand-operated spanners and wrenches (including torque meter wrenches but not including tap wrenches); socket wrenches, with or without handles, drives or extensions; base metal parts thereof: Hand-operated spanners and wrenches, and parts thereof: Adjustable, and parts thereof.[9]

Subheading 8204.12.00, HTSUS.

Here, several dictionary definitions aid the court in discerning the common and commercial meaning of a wrench. Plaintiff offers a dictionary definition which defines "wrench"[10] as "a hand tool that usually consists of a bar or a lever with adapted or adjustable jaws, lugs, or sockets either at the end or between the ends and is used for holding, twisting or turning a bolt, nut screw head, pipe or other object." Pl.'s Resp. 33 (quoting *Webster's Third New International Dictionary* 2639 (Philip Babcock Gove, Ph. D. and Merriam-Webster

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[8] The Explanatory Notes, while not controlling, provide interpretive guidance. *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004). All citations to the Explanatory Notes are to the 2013 version, the most recently promulgated edition at the time of the entries of the subject merchandise. The 2012 version of the Explanatory Notes is the same in relevant part.

[9] The Explanatory Notes provide:

> 82.04 Hand operated spanners and wrenches (including torque meter wrenches but not including tap wrenches); interchangeable spanner sockets, with or without handles.
>
> Hand operated spanners and wrenches:
>
> This heading covers the following hand tools:
>
> (1) Hand operated spanners and wrenches (e.g., with fixed or adjustable jaws; socket, box or ratchet spanners; crank handle spanners); wrenches or spanners for bicycles or cars, for coach screws, hydrants or piping (including chain type pipe wrenches); torque meter wrenches. The heading does not, however, cover tap wrenches (heading 82.05).
>
> (2) Interchangeable spanner sockets, with or without handles, including drives and extensions.

Explanatory Notes Chapter 82, 82.04.

[10] Although Defendant's preferred subheading names spanners and wrenches, *see* Subheading 8204.12.00, HTSUS, there is no claim that the subject merchandise is a spanner; Defendant claims only that the merchandise is a wrench. *See* Def.'s Br. 9–21; Mem. L. Further Supp. Def.'s Mot. Summ. J. 5–10, Feb. 21, 2017, ECF No. 47.

Editorial Staff eds., 2002)).[11] The court has consulted several dictionaries which provide similar definitions for a wrench, generally, to that offered by the Plaintiff. *See, e.g.*, 20 *The Oxford English Dictionary* 619 (J.A. Simpson and E.S.C. Weiner eds., 2nd ed. 1989) (*Wrench*: A tool or implement of various forms, consisting essentially of a metal bar with (freq. adjustable) jaws adapted for catching or gripping a bolt-head, nut, etc., to turn it; a screw-key, screw-wrench, or spanner.); *McGraw Hill Dictionary of Scientific and Technical Terms* 2305 (McGraw-Hill 6th ed. 2003) (*Wrench*: a manual or power tool with adapted or adjustable jaws or sockets either at the end or between the ends of a lever for holding or turning a bolt, pipe, or other object.).[12] The definitions generally include reference to a handle such as a "bar" or "lever,"[13] attached to "jaws" or "sockets" which are adapted to hold and turn a fastener such as a "bolt" or "nut."

Other industry sources and standards elaborate upon the characteristics of a wrench provided in the dictionary definitions. For example, the *Guide to Hand Tools: Selection, Safety Tips, Proper Use and Care* emphasizes the need for the jaws to fit snugly around the

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[11] Defendant did not provide a dictionary definition for "wrench" in its motion for summary judgment, instead relying almost entirely on a prior case of this Court, *Assoc. Consumers v. United States*, 5 CIT 148, 565 F. Supp. 1044 (1983), in which the court determined that merchandise described as "vise grips" was properly classified as wrenches. *See* Def.'s Br. 12–21; *Assoc. Consumers v. United States*, 5 CIT 148, 565 F. Supp. 1044 (1983). However, *Assoc. Consumers* is a case interpreting the TSUS, a different statute which was replaced by the HTSUS in 1989. The two provisions at issue in *Assoc. Consumers* were 648.97, TSUS, and 648.85, TSUS:

> Item 648.97, TSUS, as modified by Proclamation No. 4707: "Pipe tools (except cutters), wrenches, and spanners, and parts thereof ..... 10.8% ad val"
>
> A Item 648.85, TSUS: "Pliers, nippers, and pincers, and hinged tools for holding and splicing wire, and parts of the foregoing: A Item 648.85 Other (except parts) ..... Free"

See Assoc. Consumers, 5 CIT at 149, ns.1, 2, 565 F. Supp. at 1044, ns.1, 2. The court cited two dictionaries to support the common meaning of the terms at issue under that statute (*Audel's New Mechanical Dictionary for Technical Trades* (1960) and *Webster's Third New International Dictionary* (1963)). It would be inappropriate for this court to rely on *Assoc. Consumers* rather than to independently consider the words of the headings in the HTSUS statute and follow the case law which governs this Court's approach in classification cases.

[12] *See also The American Heritage Dictionary of the English Language* 1985 (Houghton Mifflin Co. 4th ed. 2000) (*Wrench*: Any of various hand or power tools, often having fixed or adjustable jaws, used for gripping, turning, or twisting objects such as nuts, bolts, or pipes.); Howard H. Gerrish, *Gerrish's Technical Dictionary* 365 (The Goodheart-Willcox Co., Inc. 1976) (*Wrench (metal)*: One of many varieties and types of tools used to turn nuts. Some wrenches are for fixed sizes and others are adjustable.); *Wrench*, Merriam-Webster.com, https://www.merriamwebster.com/dictionary/wrench (last visited Apr. 7, 2017) (*Wrench:* a hand or power tool for holding, twisting, or turning an object (as a bolt or nut).).

[13] The reference to "lever" suggests that the bar is designed to leverage pressure exerted upon it. *See, e.g., Lever, Webster's Third New International Dictionary of the English Language* 1300 (Philip Babcock Gove, Ph. D. and Merriam-Webster Editorial Staff eds., 1993) (*Lever:* 2a: a rigid piece that transmits and modifies force or motion when forces are applied at two points and it turns about a third; specifically: a bar of metal, wood, or other rigid substance used to exert a pressure or sustain a weight at one point of its length by the application of a force at a second and turning at a third on a fulcrum.).

fastener by explaining that "[w]renches are designed for holding and turning nuts, bolts, cap screws, plugs and various threaded parts. Quality wrenches, regardless of their type, are designed to keep leverage and intended load in safe balance." *Guide to Hand Tools: Selection, Safety Tips, Proper Use and Care* 1–1 (Hand Tools Institute 4th ed. 2007). This guide advises users to "[s]elect a wrench whose opening exactly fits the nut. If the wrench is not exactly the correct size for the fastener, it may damage the corners of the fastener, slip, or break." *Id.* Further, the American Standards for Mechanical Engineering ("ASME") provides standards for wrenches,[14] including for adjustable wrenches. *Flat Wrenches*, B107.100–2010 (The American Society of Mechanical Engineers 2010).[15] The ASME standards instruct that all types of flat wrenches shall have openings with "across-flats" or "across-corner shape," to allow engagement of the surfaces with hexagonal or square fasteners. *See, e.g.*, ASME B107.6, Combination Wrench, at 2. ASME provides that an adjustable wrench design shall consist:

> essentially of a frame (fixed jaw and handle), a movable jaw, and a jaw opening adjustment mechanism. The angle of the opening of the jaw shall [allow parallel engagement of the upper and lower jaw with the object held]. When the wrench is in the full open position, the jaw shall extend to provide full contact across the flat hexagonal bar of a size that fits the full jaw opening specified for [standard opening] wrenches. The wrench shall be

[14] Specifically, ASME provides standards for: combination wrenches (ASME B107.6); adjustable wrenches (ASME B107.8); box wrenches, double head (ASME B107.9); wrench, crowfoot (ASME B107.21); open end wrenches, double head (ASME B107.39); wrenches, flare nut (ASME B107.40); and ratcheting box wrenches (ASME B107.66). *See Flat Wrenches*, B107.100–2010 (The American Society of Mechanical Engineers 2010).

[15] Defendant argues that the ASME standard for "adjustable wrench" is not relevant because the tariff term in subheading 8204.12.00 is not "adjustable wrench," and the subheading therefore is not limited only to wrenches marketed as "adjustable wrenches" but covers wrenches which possess any adjustable feature (*i.e.*, torque meter wrenches, whose head is fixed but can be adjusted to provide specific torque to an object.). Mem. L. Further Supp. Def.'s Mot. Summ. J. 15–16, Feb. 21, 2017, ECF No. 47. Defendant argues that the adjective "adjustable" "serves to distinguish the '[h]and-operated spanners and wrenches' covered in this subheading from the nonadjustable tools covered in subheading 8204.11.00." *Id.* at 15. The standards published by ASME do not mirror the HTSUS. The ASME standards are reactive documents that the industry group publishes to respond to specific needs raised by the industry. *See About ASME Standards and Certification*, ASME, https://www.asme.org/about-asme/standards (last visited Apr. 7, 2017) ("ASME develops and revises standards based on market needs through a consensus process"). Nonetheless, the ASME standard for an adjustable wrench can aid the court here because the adjustable wrench described by those standards is a tool which would fall within subheading 8204.12.00, HTSUS, even though the standard may not describe all the types of wrenches with some adjustable aspect that are covered under subheading 8204.12.00, HTSUS.

> designed to allow free movement of the working parts. The wrench may be provided with or without a movable, jaw-locking device.

Id. at B107.8 at 11. The ASME standards discuss that the surface should be smooth and well defined, *see id.* at 14, and that "[t]he adjusting mechanism shall allow the movable jaw to be positioned at any point in its range and shall include means to hold the movable jaw in position." *Id.* at 13. The figures provided in the ASME chapter on adjustable wrenches illustrate a tool with a singular handle. *See id.* at Figs. 1, 2, 3, 5. These industry standards for an adjustable wrench focus on the presence of adjustable jaws shaped to tightly engage parallel sides of a fastener (such as a bolt or nut) and a handle which provides leverage to turn the fastener.

The court must consider whether use is implicated by the tariff terms at issue, even when the term under consideration appears to be an eo nomine term. *GRK II*, 761 F.3d at 1358–59. An eo nomine tariff term may implicate use in one of two ways: 1) a tariff term written as an eo nomine provision may nonetheless be controlled by use and, if it is, the court should declare it as such,[16] *id.* at 1359, n.2; *see also StoreWALL, LLC*, 644 F.3d at 1365–67 (Dyk, J., concurring); or 2) a tariff term may imply that the use of the object is of "paramount importance" to its identity such that articles with the requisite physical characteristics will nonetheless be excluded if they are in fact designed and intended for another use.[17] *GRK II*, 761 F.3d at 1358 (citing *United States v. Quon Quon Co.*, 46 CCPA 70, 73 (1959).[18]

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[16] In *GRK II*, the Court of Appeals for the Federal Circuit stated that, in such cases, "[c]lassification of subject articles may then need to reach the Additional Rules of Interpretation, which distinguish the treatment of articles based on whether tariff classifications are controlled by principal or actual use." *GRK II*, 761 F. 3d at 1359, n.2 (citing *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363 (Fed. Cir. 1999); *see also StoreWALL, LLC v. United States*, 644 F.3d 1358, 1365–67 (Fed. Cir. 2011) (Dyk, J., concurring)); *GRK Canada, Ltd. v. United States*, 773 F.3d 1282, 1287 (Fed. Cir. 2014) (Wallach, J., dissenting from denial of rehearing en banc):

> [I]f an eo nomine heading did "inherently suggest[ ] a type of use," it would be proper to convert it to a use provision. Therefore, if, as the majority holds, the subheadings at issue are truly defined by use, the majority should have reconsidered the parties' legal stipulation that the relevant subheadings are eo nomine.

GRK Canada, Ltd., 773 F.3d at 1287 (Wallach, J., dissenting from denial of rehearing en banc) (internal citation omitted); *see, e.g., BASF Corp. v. United States*, 30 CIT 227, 245, 427 F. Supp. 2d 1200, 1216 (2006) (explaining that "[u]se may be implied from the phrase 'for gasoline,' for without the implied term the statutory phrase has no meaning.").

[17] If the court determines that the intended use is of paramount importance, the use should be considered along with the physical characteristics as part of the definition of the tariff term. *GRK II*, 761 F.3d at 1358–61; *United States v. Quon Quon Co.*, 46 CCPA 70, 73–74 (1959); *see also StoreWALL, LLC*, 644 F.3d at 1365–67 (Dyk, J., concurring) (discussing *Processed Plastic*, 473 F.3d at 1169–70).

[18] A tariff provision is one controlled by use when the definition of the term turns on its use, such that the language in the tariff term (or the Section or Chapter Notes) indicates that the

Here, although a wrench may indeed be designed for a use, nothing about the tariff term for "wrenches" suggests a type of use such that the court should declare the tariff term one controlled by use. *GRK II*, 761 F.3d at 1358–59 (quoting *Carl Zeiss, Inc.*, 195 F.3d at 1379). The word "use" or similar words such as "for" or "of a kind" do not appear in the tariff term. *See Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998). Furthermore nothing in the term itself, including the Section and Chapter Notes or the Explanatory Notes,[19] indicates that, as a matter of law, the use of articles classified under the provision would outweigh the importance of the physical characteristics of the item. *See Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363–64 (Fed. Cir. 1999); *see GRK II*, 761 F.3d at 1359, n.2 (citing *StoreWALL*, 644 F.3d at 1365–67 (Dyk, J., concurring)). Nothing indicates that an object must be considered a wrench if it can be used to wrench or turn a fastener. Therefore, as a matter of law, the tariff term for "wrenches" is an eo nomine term, not one controlled by use.

This court must also consider whether use is of "paramount importance." *See GRK II*, 761 F.3d at 1358–59 (quoting *Quon Quon Co.*, 46 CCPA at 73). To say that use is of paramount importance is not to say that a product has a use. All products have uses. Indeed the physical characteristics of a product will normally reflect the fact that a product has been designed for a use. Therefore, the court may need to explore the design and intended use of the article conveyed by a tariff term to identify the requisite physical characteristics and exclude articles with overlapping physical characteristics that are nonetheless designed and intended for other uses. *See Quon Quon Co.*, 46 CCPA at 73–74 (finding that woven rattan imports were not baskets because they were designed for use as patio furniture).[20] Although design and intended use is implicated in all tariff terms, it will only

use of covered articles is more important than any physical characteristics. *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363–64 (Fed. Cir. 1999) (finding strands of electric lights with certain decorative plastic covers not classifiable in a subheading for "lighting sets of a kind used for Christmas trees," because use in connection with Christmas trees must be the predominant or principal use of goods classifiable within that subheading, and commercially fungible goods were predominantly used for decorating not associated with the Christmas holidays or Christmas trees.).

[19] The pertinent provision of the Explanatory Notes states that the heading covers tools including "Hand operated spanners and wrenches (*e.g.*, with fixed or adjustable jaws; socket, box or ratchet spanners; crank handle spanners)." Explanatory Notes Chapter 82, 82.04.

[20] In *Quon Quon*, the Court of Customs and Patent Appeals construed the tariff term "baskets" to imply a use for carrying or containing objects, thus excluding woven rattan imports designed for use as table tops. *Quon Quon Co.*, 46 CCPA at 73–74. The court did not discuss the proper use of products actually covered by the "baskets" provision, instead focusing on the fact that the imported products at issue were used as patio furniture to determine that the imports were not classifiable as baskets. Implicit in this analysis is an understanding of "baskets" to be used for something other than as patio furniture. *Id.*

be of paramount importance when, as a factual matter, a product that satisfies the physical requirements of a tariff term is in fact designed and intended for another use. *See id.* A wrench is designed for turning fasteners without damaging the fastener's head. A wrench must possess certain physical characteristics (a frame with a singular handle; a head with jaws or sockets having surfaces that snugly or exactly fit and engage the head of a fastener) that are a function of the intended use of a wrench to exert pressure on the fastener to turn it without damaging the fastener's head.[21]

Based on the foregoing, the court finds as a matter of law that a wrench is a hand tool that has a head with jaws or sockets having surfaces adapted to snugly or exactly fit and engage the head of a fastener (such as a bolt-head or nut) and a singular handle[22] with which to leverage hand pressure to turn the fastener without damaging the fastener's head.

B. The Meaning of the Tariff Term "Pliers"

The court discerns the common and commercial meaning of "pliers" as it appears in subheading 8203.20.6030, HTSUS, aided by dictionary definitions and industry standards. The court has also considered whether use is implicated by the tariff term. As discussed below, the term "pliers" refers to a versatile hand tool with two handles and two jaws that are flat or serrated and are on a pivot, which must be squeezed together to enable the tool to grasp an object.

Subheading 8203.20.6030, HTSUS, provides as follows:

> Files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipe cutters, bolt cutters, perforating punches and similar hand tools, and base metal parts thereof: Pliers (including cutting pliers), pincers, tweezers and similar tools, and parts thereof: Other (except parts): Pliers.

Subheading 8203.20.6030, HTSUS.[23] Dictionary definitions aid the court in discerning the common and commercial meaning of pliers.

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[21] Use would be of paramount importance in a classification involving the tariff term for "wrench" if, as a factual matter, at issue was an article possessing the requisite physical characteristics of a wrench and an intended use departing from the intended use implicit in the design of a wrench. *See Quon Quon Co.*, 46 CCPA at 73–74.

[22] Defendant emphasizes that this Court previously determined that a wrench does not necessarily have only one handle. Mem. L. Further Supp. Def.'s Mot. Summ. J. 13–15, Feb. 21, 2017, ECF No. 47 (citing *Assoc. Consumers*, 565 F. Supp. at 1045 (finding that the "presence of two handles is not inconsistent with classification as wrenches" under the TSUS). As previously discussed, *Assoc. Consumers* is not binding on this court. Further, this court has surveyed current definitions and industry standards which instruct that a wrench has a singular handle.

[23] The Explanatory Notes provide:

(B) Pliers (including cutting pliers), pincers, tweezers and similar tools, including:

Plaintiff offers the following definition for "pliers": "a small instrument with two handles and two grasping jaws, usually long and roughened, working on a pivot; used for holding small objects and cutting, bending, and shaping wire."[24] Pl.'s Resp. 42 (quoting *McGraw-Hill Dictionary of Scientific and Technical Terms* 1618 (McGraw-Hill 6th ed. 2003)). The court has also consulted various additional dictionaries which provide similar definitions for pliers to the definition offered by Plaintiff. *See, e.g., The American Heritage Dictionary of the English Language* 1349 (Houghton Mifflin Co. 4th ed. 2000) (*Pliers*: A variously shaped hand tool having a pair of pivoted jaws, used for holding, bending, or cutting.); *Pliers*, Oxford English Dictionary, oed.com, http://www.oed.com/view/Entry/145833?redirectedFrom=pliers#eid (last visited Apr. 7, 2017) (*Pliers*: Pinchers with gripping jaws, usually having serrated surfaces which close flat, used for bending or cutting wire, gripping or turning small objects, etc.).[25] The definitions center around two long, often-serrated jaws on a pivot which close together to grasp an object.

Industry sources and standards confirm the characteristics of pliers emphasized in the dictionary definitions. The *Guide to Hand Tools* provides that "[t]here are many types and sizes; each designed for specific uses, although their versatility makes some pliers adaptable for many jobs." *Guide to Hand Tools: Selection, Safety Tips, Proper Use and Care* 2–1 (Hand Tools Institute 4th ed. 2007). ASME provides standards for many types of pliers, specifying the general and distin-

(1) Pliers (e.g., seal closers and pliers, sheep ear and other animal marking pliers, gas pipe pliers, pliers for inserting or extracting cotter pins, eyelet and eyelet closing pliers; plier type saw sets).

Explanatory Notes Chapter 82, 82.03.

[24] Although Defendant did not proffer a definition of the term "pliers," Defendant claims in its Statement of Facts as a fact that "A plier is 'a hand tool that grips objects by means of an input force [that] is applied by hand' and the operator's hand 'force is transmitted to the [gripped] object.'" Def.'s 56.3 Statement ¶ 4 (citing Deposition testimony of Brett Lucus, the principal design engineer at Irwin Tools, of June 14, 2016 (Def.'s Br. Ex. 2)). Plaintiff denies that this information is factual and points out that the deponent offering the definition was not qualified as an expert. Pl.'s Resp. Def.'s 56.3 Statement ¶ 4 (citing Lucus Deposition (Def.'s Br. Ex. 2)).

[25] *See also Webster's Third New International Dictionary* 1741 (Philip Babcock, Ph.D. and Merriam-Webster Editorial Staff eds., 1993) (*Pliers*: A small pincers usu. with long roughened jaws for holding small objects or for bending and cutting wire — often used with pair); 11 *The Oxford English Dictionary* 1050 (J.A. Simpson and E.S.C. Weiner eds., 2nd ed. 1989) (*Pliers*: Pincers, usually small, having long jaws mostly with parallel surfaces, sometimes toothed; used for bending wire, manipulating small objects, etc.); Howard H. Gerrish, *Gerrish's Technical Dictionary* 257 (The Goodheart-Willcox Co., Inc. 1976) (*Pliers (metal)*: A pincer like tool for holding small objects. They are manufactured in a large variety of shapes, types and sizes for special purposes. Some have cutting edges.); *Pliers*, Merriam-Webster.com, https://www.merriamwebster.com/dictionary/pliers (last visited Apr. 7, 2017) (*Pliers:* a small pincers for holding small objects or for bending and cutting wire.).

guishing physical characteristics of each.[26] *Pliers*, B107.500–2010 (The American Society of Mechanical Engineers 2010). For all types of pliers, ASME instructs that plier handles "shall be shaped as to afford a comfortable grip, and shall be free from rough edges and sharp corners" and specifies that "[h]andle surfaces shall be smooth, knurled, impressed, or furnished with comfort grips." *See, e.g.*, ASME B107.23, Pliers: Multiple Position, Adjustable, at 95. Further, the standards for several types of pliers emphasize the existence of a permanent fastener connecting the handles of the pliers. *See, i.e., id.* at 95 ("Pliers' halves shall be joined in a permanent manner using a fastener, rivet, or other suitable means."); ASME B107.11, Pliers: Diagonal Cutting and End Cutting, at 3 ("There shall be no excessive sideways movement, play, or other indication of looseness when pliers are opened or closed that will affect their function."); ASME B107.20, Pliers: Lineman's, Iron Worker's, Gas, Glass, Fence, and Battery, at 64 ("Pliers shall be joined in a permanent manner with a fastener. The joint shall ensure uniform smooth movement with minimum looseness and sideplay when opening the jaw.").[27]

[26] Specifically, the ASME standards on pliers include specifications for: diagonal cutting and end cutting pliers (ASME B107.11); long nose, long reach pliers (ASME B107.13); metal cutting sheers (ASME B107.16); wire twister pliers (ASME B107.18); retaining ring pliers (ASME B107.19); lineman's, iron worker's, gas, glass, fence, and battery pliers (ASME B107.20); electronic cutters and pliers (ASME B107.22); multiple position, adjustable pliers, including adjustable joint, angle nose pliers, including those with straight, serrated jaws; curved, serrated jaws; parrot nose jaws; and straight, smooth jaws; as well as slip joint, combination jaw pliers with straight or bent nose pliers (ASME B107.23); and locking, clamp, and tubing pinch-off pliers (ASME B107.24). *See Pliers*, B107.500–2010 (The American Society of Mechanical Engineers 2010).

[27] ASME also provides industry standards for locking pliers. *See Pliers*, B107.500–2010 (B107.24) (The American Society of Mechanical Engineers 2010). Defendant contends that the ASME standards for locking pliers are not helpful guidance in this instance, Mem. L. Further Supp. Def.'s Mot. Summ. J. 16–17, Feb. 21, 2017, ECF No. 47 ("The fact that a tool once primarily known as a 'wrench' is now described by ASME as a 'locking plier' should not change how the Court analyzes this tool for classification purposes."), and contends that the court should look only to the ASME standards on conventional pliers. Def.'s Mot. 23. ASME does not mirror the HTSUS, and is a reactive document, developed and revised based on industry needs. *See About ASME Standards and Certification*, ASME, https://www.asme.org/about-asme/standards (last visited Apr. 7, 2017) ("The ASME standards are created by volunteers in the industry with relevant technical expertise . . . . ASME develops and revises standards based on market needs through a consensus process"); *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1361 (Fed. Cir. 2001). The HTSUS does not mention locking pliers. Nonetheless, ASME provides standards on all types of pliers and the standards for locking pliers are included within the general section on pliers. *See Pliers*, B107.500–2010 (B107.24). The court may rely on industry standards to guide in the definition of tariff terms. *Rocknel Fastener, Inc.* at 1361 ("Standards promulgated by industry groups such as ANSI, ASME, and others are often used to define tariff terms. . ."). ASME instructs that locking pliers

> shall have straight, curved, long nose, or bent nose jaws. . . . Pliers shall have one fixed jaw and one adjustable jaw. The jaws shall be integral with or securely fixed to the pliers. There shall be no motion of the gripping surface of either jaw other than that produced by manual operation of the pliers. The design of the toggle or cam mechanism

There is no indication that the tariff term for pliers is controlled by use. *See GRK II*, 761 F.3d at 1358–59 (quoting *Carl Zeiss, Inc.*, 195 F.3d at 1379). The words "use," "for," or other words or phrases that imply use do not appear in the provision to indicate that covered tools must be put to a certain use. *Clarendon Mktg., Inc. v. United States*, 144 F.3d at 1467. Furthermore, nothing in the term itself, including the Section and Chapter Notes or the Explanatory Notes, indicates that, as a matter of law, the use of an article classified under the provision would outweigh the importance of the physical characteristics of the article.[28] *See Primal Lite, Inc.*, 182 F.3d at 1363–64; *GRK II*, 761 F.3d at 1359, n.2. Therefore, as a matter of law, the tariff term for pliers is an eo nomine term, not one controlled by use.

As discussed above, although design and intended use is implicated in all tariff terms, use will only be of paramount importance when, as a factual matter, a product that satisfies the physical requirements of a tariff term is designed and intended for another use. *See id.* at 1358–59 (quoting *Quon Quon Co.*, 46 CCPA at 73–74). Pliers possess certain physical characteristics (two handles that can be squeezed together; two jaws that are flat or serrated and on a pivot, which may be locked or continuously gripped together to hold the object while using the tool) that are a function of their design and intended use to grasp an object.

The court finds as a matter of law that the common and commercial meaning of "pliers" refers to a versatile hand tool with two handles and two jaws that are flat or serrated and are on a pivot, which must be squeezed together to enable the tool to grasp an object; the jaws may, or may not, lock together to hold the object while using the tool.

C. The Meaning of the Tariff Terms "Vises, Clamps and the Like"

The term "vises, clamps and the like" refers to tools with a frame and two opposing jaws, at least one of which is adjustable, which are tightened together with a screw, lever, or thumbnut, to press firmly on an object and thereby hold the object securely in place while the user is working. Plaintiff's proposed alternative, subheading 8205.70.0060, HTSUS, provides:

shall be such that when the movable handle is released from the closed and locked position, the jaw tips shall move apart to the full open position.

ASME B107.500–2010 (B107.24). The standards specify that "[t]here shall be no motion of the gripping surface of either jaw other than that produced by manual operation of the pliers," and that locking "[p]liers shall be provided with a toggle or cam device having an adjustable mechanism designed so that the jaws can be clamped and locked." *Id.*

[28] The pertinent provision of the Explanatory Notes states that the heading covers tools including "Pliers (e.g., seal closers and pliers, sheep ear and other animal marking pliers, gas pipe pliers, pliers for inserting or extracting cotter pins, eyelet and eyelet closing pliers; plier type saw sets)." Explanatory Notes Chapter 82, 82.03.

> Hand tools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand-or pedal-operated grinding wheels with frameworks; base metal parts thereof: Vises, clamps and the like, and parts thereof: Vises: Other.

Subheading 8205.70.0060, HTSUS, dutiable at 5 percent.[29]

Defendant and Plaintiff supplied the same definition for "vise," *See* Pl.'s Resp. 51 (citing *McGraw-Hill Dictionary of Scientific and Technical Terms* 2263 (McGraw-Hill 6th ed. 2003)); Def.'s Br. 26 (citing *McGraw-Hill Dictionary of Scientific and Technical Terms* 1588 (Daniel N. Lapedes ed., 1st ed. 1974)) (*Vise*: a tool consisting of two jaws for holding a workpiece; opened and closed by a screw, lever, or cam mechanism.), and essentially the same definition for "clamp." *See* Pl.'s Resp. 51 (citing *McGraw-Hill Dictionary of Scientific and Technical Terms* 401 (McGraw-Hill 6th ed. 2003) (*Clamp:* a tool for binding or pressing two or more parts together, by holding them firmly in their relative positions.)); Def.'s Br. 25–26 (citing *McGraw-Hill Dictionary of Scientific and Technical Terms* 274 (Daniel N. Lapedes ed., 1st ed. 1974) (*Clamp:* a tool for binding or pressing two or more parts together, holding them firmly in their relative position.)). The court has consulted several additional dictionaries which provide similar definitions for vises and clamps to those offered by the parties. *See, e.g., The American Heritage Dictionary of the English Language* 1923 (Houghton Mifflin Co. 4th ed. 2000) (*Vise*: a clamping device, usually consisting of two jaws closed or opened by a screw or lever, used in carpentry or metalworking to hold a piece in position); *The American Heritage Dictionary* 341 (Houghton Mifflin Co. 4th ed. 2000) (*Clamp*: 1: any of various devices used to join, grip, support, or compress mechanical or structural parts; 2: any of various tools with opposing, often adjustable sides or parts for bracing objects or holding them

[29] In contending that its subject merchandise is alternatively classifiable within subheading 8205.70.0060, HTSUS, Plaintiff describes this subheading as "Vises, clamps and the like, and parts thereof: Other," and throughout its brief Plaintiff contends that this alternative is suitable because Plaintiff's merchandise possesses certain characteristics of vises and clamps, emphasizing the clamping qualities of Plaintiff's tools. *See, e.g.*, Pl.'s Resp. 21–23. However, subheading 8205.70.0060, HTSUS, is specific to vises: "Vises, clamps and the like, and parts thereof: Vises: Other." Subheading 8205.70.0060, HTSUS.

It is unclear to the court whether Plaintiff argues: that its merchandise is vises, classifiable under subheading 8205.70.0060, HTSUS; that its merchandise is "clamps and the like," classifiable under 8205.70.0090 ("Vises, clamps and the like, and parts thereof: Other (including parts))"; or that its merchandise is either vises or clamps, and thus classifiable under either subheading 8205.70.0060, HTSUS, or 8205.70.0090, HTSUS.

together.).[30] Further, the *Guide to Hand Tools* provides that vises are usually mounted on "firm support, to hold the material to be worked on," noting that vises "can be used for a wide variety of work." *Guide to Hand Tools: Selection, Safety Tips, Proper Use and Care* 7–1 (Hand Tools Institute 4th ed. 2007). The *Guide to Hand Tools* elaborates upon various types of vises, most of which are secured to a bench or table top for use but some, such as the hand vise, are not. *See id.* at 7–1–7–6. The *Guide to Hand Tools* describes clamps as "tools that are used for temporarily holding work securely in place," and elaborates upon various types of clamps, most of which are comprised of a frame and a screw which is tightened on an object held between the two sides of the frame. *Id.* at 8–1–8–4.[31] The definitions for both vises and clamps center on a frame or brace with two sides that are tightened together, usually using a screw, on an object to hold it firmly in place.

There is no indication that the tariff term for vises and clamps, subheading 8205.70.0060, HTSUS, is controlled by use. *See GRK II*, 761 F.3d at 1358–59 (quoting *Carl Zeiss, Inc.*, 195 F.3d at 1379). The words "use," "for," or other words that imply a certain use do not appear in the provision to indicate that covered tools must be put to a certain use. *See BASF Corp. v. United States*, 30 CIT at 245, 427 F. Supp. 2d at 1216; *Clarendon Mktg., Inc.*, 144 F.3d at 1467. The Explanatory Notes provide that subheading 8205.70.0060, HTSUS, covers "Vi[s]es, clamps and the like, including hand vi[s]es, pin vi[s]es, bench or table vi[s]es, for joiners or carpenters, locksmiths, gunsmiths, watchmakers, etc." Explanatory Notes Chapter 82, 82.05. Although the phrase mentions the provision covers tools "for" certain craftsmen, the description does not indicate an intended limitation of the use of the product. *See BASF Corp. v. United States*, 30 CIT at 245, 427 F. Supp. 2d at 1216. Nothing in the language of the provision

[30] *See also Vise*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/vise (last visited Apr. 7, 2017) (*Vise*: 1: any of various tools with two jaws for holding work that close usually by a screw, lever, or cam.); *Clamp*, Merriam-Webster.com, https://www.merriamwebster.com/dictionary/clamp (last visited Apr. 7, 2017) (*Clamp*: 1: a device designed to bind or constrict or to press two or more parts together so as to hold them firmly; 2: any of various instruments or appliances having parts brought together for holding or compressing something.); 2 *Shorter Oxford English Dictionary* 3526 (Oxford University Press 6th ed. 2007) (*Vice*: 3: a device consisting of two jaws moved by turning a screw, used to clamp an object being filed, sawn, etc., in position and freq. attached to a workbench.); 1 *Shorter Oxford English Dictionary* 421 (Oxford University Press 6th ed. 2007) (*Clamp*: a brace, clasp, or band, usu. of rigid material, used for strengthening or fastening things together; . . . [a]n appliance or tool with parts which may be brought together by a screw etc. for holding or compressing.); Howard H. Gerrish, *Gerrish's Technical Dictionary* 78, 168 (The Goodheart-Willcox Co., Inc. 1976) (*Hand vise (metal)*: a clamping device for holding small objects in the hand while working on them; *Clamp (metal)*: a slotted metal strap, used for holding work during machining.).

[31] The parties did not provide an ASME industry standard for either vises or clamps, and the court has been unable to locate such a standard.

itself, including the Section and Chapter Notes or the Explanatory Notes, indicates that, as a matter of law, the use of articles classified under the provision would outweigh the importance of the physical characteristics of the item. *See Primal Lite, Inc*, 182 F.3d 1363–64; *GRK II*, 761 F.3d at 1359, n.2. Therefore, as a matter of law, subheading 8205.70.0060, HTSUS, covering "vises, clamps and the like" is an eo nomine term, not one controlled by use.

Vises and clamps are designed to close tightly on an object to hold the object in place. This intended use is reflected in the articles' physical features, consisting of a frame with two opposing jaws that tighten securely together with a screw or nut. *See id.* (citing *Quon Quon Co.*, 46 CCPA at 73–74).

The court finds as a matter of law that the common and commercial meaning of the tariff term for "vises, clamps and the like" is a tool composed of a frame and two opposing jaws, at least one of which is adjustable, which are tightened together usually with a screw, lever, or thumbnut, to press firmly on an object and hold the object securel in place while the user is working.

II. Defendant Is Not Entitled to Summary Judgment

Defendant has not established undisputed facts showing that the subject merchandise possesses the qualities of a wrench.[32] Specifically, Defendant has not established that Plaintiff's tools have a head with jaws having surfaces adapted to snugly or exactly fit and engage the head of a fastener (such as a bolt-head or nut). Defendant has not

[32] Despite moving for summary judgment, Defendant has denied information sufficient to form a belief with respect to many factual assertions in Plaintiff's complaint that relate to the physical attributes of the products in question. *See, e.g.*, Am. Compl. ¶ 21 ("The jaws of the subject merchandise are connected by a joint."); Def.'s Answer ¶ 21 ("Denies for lack of information or knowledge sufficient to form a belief as to what plaintiff means by '[t]he jaws . . . are connected by a joint.'"); Am. Compl. ¶ 22 ("The subject merchandise includes a spring mechanism."); Def.'s Answer ¶ 22 ("Denies for lack of information or knowledge sufficient to form a belief as to what plaintiff means by 'spring mechanism.'"); Am. Compl. ¶ 23 ("The subject merchandise does not have a jaw opening adjustment mechanism."); Def.'s Answer ¶ 23 ("Denies for lack of information or knowledge sufficient to form a belief as to what plaintiff means by a 'jaw opening adjustment mechanism.'"); Am. Compl. ¶ 24 ("The subject merchandise does not have an adjusting mechanism that allows a movable jaw to be positioned at various points in a range."); Def.'s Answer ¶ 24 ("Denies for lack of information or knowledge sufficient to form a belief as to what plaintiff means by an 'adjusting mechanism that allows a movable jaw to be positioned at various points in a range.'"); Am. Compl. ¶ 25 ("The subject merchandise does not have a fixed frame."); Def.'s Answer ¶ 25 ("Denies for lack of information or knowledge sufficient to form a belief as to what plaintiff means by a 'fixed frame.'")

Moreover, Defendant's Rule 56.3 Statement of Material Facts asserts very little by way of describing the physical attributes of the subject merchandise, instead including statements that amount to legal argument. *See, e.g.*, Def.'s 56.3 Statement ¶¶ 3 ("Since at least 1983, CBP has classified vise grips as wrenches"), 4 ("A plier is 'a hand tool that grips objects by means of an input force [that] is applied by hand' and the operator's hand force is transmitted to the [gripped] object,'" quoting the deposition testimony of Plaintiff's principal design engineer (Lucus Deposition, Def.'s Br. Ex. 2)).

established that Plaintiff's tools have a singular handle[33] with which to exert pressure to turn a fastener without damaging the fastener's head.

Defendant's entire argument rests upon its reliance on *Assoc. Consumers v. United States*, 5 CIT 148, 565 F. Supp. 1044 (1983), in which the court determined that merchandise described as "vise grips" was properly classified as wrenches. *See* Def.'s Br. 12–21; *Assoc. Consumers v. United States*, 5 CIT 148, 565 F. Supp. 1044 (1983).[34] However, *Assoc. Consumers* is a case interpreting the TSUS, a different statute which was replaced by the HTSUS in 1989. The Court of Appeals for the Federal Circuit has held that the Court's prior determination of a common meaning of a term, based on an interpretation of a tariff provision under the TSUS, is not controlling as to a determination under the HTSUS. *JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1354–55 (Fed. Cir. 2000); *see Mitsubishi Int'l Corp. v. United States,* 182 F.3d 884, 886 (Fed. Cir. 1999).

Defendant cites *GRK II* to support its argument that heading 8204, HTSUS, the tariff provision for wrenches, "inherently suggests the use of wrenching" such that Plaintiff's merchandise is properly classified within the term because the tools "are designed to be used to wrench." Def.'s Br. 23; *see* Mem. L. Further Supp. Def.'s Mot. Summ. J. 7–8, Feb. 21, 2017, ECF No. 47 ("Def.'s Reply"). It is not clear

[33] Defendant cites the deposition testimony of Plaintiff's affiant Mr. Lucus to suggest that Plaintiff has admitted that its tools have only one handle. Mem. L. Further Supp. Def.'s Mot. Summ. J. 13–14, Feb. 21, 2017, ECF No. 47. In his deposition, Mr. Lucus referred to one model of the tools as having "one top handle and a bottom lever." *See id.*, quoting Lucus Deposition (Def.'s Br. Ex. 2). Plaintiff emphasizes that Mr. Lucus was not qualified as an expert. Pl.'s Resp. Def.'s 56.3 Statement ¶ 4. The court has inspected Plaintiff's physical samples which are admissible for the purposes of summary judgment and finds Defendant has not established that the styles of tools at issue have only one handle. *See* Pl.'s Cert. of Filing and Service of Physical Exhibit or Item, Jan. 3, 2017, ECF No. 40 (providing photographs of each of the physical samples submitted).

[34] The opinion itself is fewer than 700 words the pertinent part of the court's analysis provides "In making its determination of common meaning, the court has reviewed the case law, examined dictionaries and evaluated the testimony of the witnesses. *See Schott Optical Glass, Inc. v. United States*, 67 CCPA 32, C.A.D. 1239, 612 F.2d 1283 (1979). This case is not binding on the court, and the fact that it interpreted a different statute relying upon lexicographic sources from over 50 years ago serves to diminish its persuasive authority. Defendant correctly notes that the decision was affirmed by the Court of Appeals for the Federal Circuit, but the Federal Circuit affirmed without opinion and the affirmance is therefore nonprecedential pursuant to Federal Circuit Local Rule 32.1(d). *See* Fed. Cir. Local R. 32.1(d) (nonprecedential decisions by the Federal Circuit do not have the effect of non-binding precedent); *see also* Federal Rule of Civil Procedure 32.1 ("A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as . . . 'non-precedential,' 'not precedent,' or the like; and (ii) issued on or after January 1, 2007."). "It is error to assume that a nonprecedential order or opinion provides support for a particular position or reflects a new or changed view held by this court." *Hamilton v. Brown*, 39 F.3d 1574, 1581 (Fed. Cir. 1994).

whether Defendant is arguing that the term "wrench" makes the provision controlled by use or that the mere use of a product to perform a task of a wrench makes a product a wrench. *See* Def.'s Br. 23; Def.'s Reply 7–8. Nonetheless, Defendant's argument misunderstands *GRK II*. A tariff provision is not one controlled by use per *GRK II* simply because the definition of the covered article may reference the article's use. *GRK II* faulted the Court of International Trade for failing to consider whether the tariff provision for "wood screws" suggested either a provision controlled by use or one where use was of paramount importance.[35] *GRK II*, 761 F.3d at 1358–61. Here, there is no indication in the tariff provision that "wrenches" is controlled by use. Nor is paramount use as envisioned by *GRK II* implicated here.

Defendant also fails to establish as a matter of law that the subject merchandise is not pliers or vises, clamps or the like. Pliers are a hand tool with two handles and two flat or serrated jaws on a pivot, which are squeezed together with the handles to enable the tool to grasp an object. Vises, clamps and the like are tools with a frame or brace and two opposing jaws, at least one of which is adjustable, which are tightened together with a screw, lever, or thumbnut, to press firmly on an object and hold the object securely in place while working. Although Plaintiff has not moved for summary judgment and very few facts are undisputed,[36] the court has examined Plaintiff's physical samples of the subject merchandise and, for purposes of summary judgment, the court deems these samples admissible.[37] *See* Pl.'s Cert. of Filing and Service of Physical Exhibit or Item, Jan. 3,

[35] But as the Court's citation to *StoreWALL*makes clear, merely acknowledging that the Court should consider whether use is implicated is not the same as determining that a provision is controlled by use. *See also StoreWALL v. United States*, 644 F.3d 1358, 1365–66 (Fed. Cir. 2011) (Dyk, J., concurring) (explaining that a tariff provision that does not include the language "used for" may still be controlled by use if the provision turns on use.).

[36] Plaintiff has not moved for summary judgment to determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). Nonetheless, the Plaintiff counters against the Defendant's motion by arguing that, not only is the classification for wrench inapposite, but that other classifications are correct.

[37] Plaintiff provided ten physical samples of its merchandise, *see* Pl.'s Cert. of Filing and Service of Physical Exhibit or Item, Jan. 3, 2017, ECF No. 40, including a sample of each of the four styles of tools at issue (*i.e.*, large jaw locking pliers, curved jaw locking pliers, long nose locking pliers with wire cutter, and curved jaw locking pliers with wire cutter). *See, e.g.*, Physical Samples 1, 5, 9, 10.

The subject merchandise appears to include many models of tools within these four styles although the exact number of models is not clear from the documents submitted by the parties. *See* Pl.'s Resp. Def.'s 56.3 Statement ¶ 15; Def.'s 56.3 Statement ¶ 15. Nine of the ten physical samples have model numbers which the parties agree are covered by the protests. *See* Def.'s 56.3 Statement ¶ 15; Pl.'s Resp. Def.'s 56.3 Statement ¶ 15. Defendant alleges that Plaintiff incorrectly avers that models of its "multi-tool" are at issue in this case; Defendant also takes issue with Plaintiff's inclusion of Physical Sample 7, a multi-tool, arguing that "Irwin Tools failed to identify the multi-tool either by name or by part number in its protests, summons or complaint," and that the court accordingly "lacks subject matter

2017, ECF No. 40 (providing photographs of each of the physical samples submitted). Upon inspection of the samples, the court determines that the tools may fit within the tariff subheadings 8203.20.6030 or 8203.20.6060, HTSUS, for "Pliers," or 8205.70.0060 or 8205.70.0090, HTSUS, for "Vises, clamps and the like." The court need not reach that issue as all that is before the court is the Defendant's motion, which is denied.

CONCLUSION

The Defendant has failed to show that undisputed facts support summary judgment in its favor. Although the court has determined that the relevant tariff terms are defined in a manner that would suggest that the subject merchandise is classifiable within one of the Plaintiff's preferred terms, the Plaintiff has neither moved for summary judgment pursuant to USCIT Rule 56 nor filed a statement of material facts as to which there are no genuine issues to be tried pursuant to USCIT Rule 56.3. Accordingly, pursuant to USCIT Rules 1 and 56(b), the court will grant leave to the Plaintiff to file a motion for summary judgment, and corresponding statement of material facts as to which there are no genuine issues to be tried, out of time, should the Plaintiff wish to do so.

In accordance with the foregoing, it is hereby

ORDERED that Defendant's motion for summary judgment is denied; and it is further

ORDERED that Plaintiff shall inform the court in writing within 7 days whether it intends to move for summary judgment; and it is further

ORDERED that:

1) If Plaintiff intends to move for summary judgment, Plaintiff shall so move on or before 21 days from the date Plaintiff notifies the court of its intention to so move; or

2) If Plaintiff does not intend to move for summary judgment, the parties shall consult and file an order for further proceedings in this matter on or before 21 days from the date Plaintiff notifies the court of its intention not to move for summary judgment.

Dated: April 12, 2017
New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

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jurisdiction over any claim that plaintiff may raise in this case regarding the multi-tool under § 1581(a)." Def.'s Br. 3, n.2. Plaintiff's Physical Sample 7 appears to have a stock keeping unit number (SKU # 4935579) that Plaintiff states is included in the protests. *See* Pl.'s Resp. Def.'s 56.3 Statement ¶ 15; Pl.'s Resp. 81.