U.S. Customs and Border Protection

AGENCY INFORMATION COLLECTION ACTIVITIES:

Emergency Revision; Collection of Advance Information From Certain Undocumented Individuals on the Land Border

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

ACTION: General notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for emergency review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). CBP is requesting OMB approve this emergency revision by Friday, August 23, 2024.

SUPPLEMENTARY INFORMATION:

Overview of This Information Collection

Title: Collection of Advance Information from Certain Undocumented Individuals on the Land Border

OMB Number: 1651–0140

Abstract: The emergency clearance requested will allow CBP to make certain changes to this information collection, allow the Government of Mexico access to a tool which will permit certain Government of Mexico personnel to validate an individual's CBP One appointment and change the locations in Mexico from which individuals can request appointments via CBP One. These changes are needed to ensure that the process remains a safe, orderly, and humane way to manage migration in the region; and respond to requests from the Government of Mexico—a critical regional partner in these efforts. During the next renewal or revision, CBP will seek public comment as stipulated under 5 CFR 1320.5(d) of the Paperwork Reduction Act.

Dated: August 19, 2024.

SETH D RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

U.S. Court of International Trade

Slip Op. 24–93

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, and AMERICAN SHRIMP PROCESSORS ASSOCIATION, Intervenor-Plaintiff, v. UNITED STATES, Defendant, and MEGAA MODA PRIVATE LIMITED, Intervenor-Defendant.

Senior Judge Aquilino
Consol. Court No. 23–00202
PUBLIC VERSION

[Granting motion of plaintiff and intervenor-plaintiff for judgment on agency record; remanded to defendant for reconsideration.]

Dated: August 15, 2024

Nathaniel M. Rickard and *Zachary J. Walker*, Picard, Kentz & Rowe, LLP, Washington, D.C., for the Ad Hoc Shrimp Trade Action Committee.

Roger B. Schagrin and *Nicholas J. Birch*, Schagrin Associates, Washington D.C., for the American Shrimp Processors Association.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for the defendant United States. With her on the brief *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades. Jr*., Assistant Director. Of counsel *Ruslan Klafehn*, Office of the Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce, Washington, D.C.

Robert G. Gosselink, *Aqmar Rahman*, and *Sezi Erdin*, Trade Pacific PLLC, Washington, D.C., for Megaa Moda Private Limited.

Opinion & Order

AQUILINO, Senior Judge:

Two challenges to *Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review; 2021–2022*, 88 Fed.Reg. 60431 (Dep't Commerce Sept. 1, 2023) ("*Final Results*"), P.R. 205, are addressed in this consolidated action, covering the 17th administrative review period February 1, 2021, through January 31, 2022 ("POR"). An issues and decision memorandum ("IDM"), P.R. 202, and a proprietary decision memorandum ("Proprietary Decision Memo"), P.R. 204, C.R. 130, accompany the *Final Results*. Ad Hoc Shrimp Trade Action Committee ("AHSTAC"), with the support of American Shrimp Processors Association ("ASPA"), contends the International Trade Administration, U.S. Department of Commerce ("ITA"), improperly included certain sales in its determination of the normal value of respondent Megaa Moda Private Lim-

ited ("Megaa Moda") that were allegedly not made for consumption in the home market during the administrative review of the antidumping-duty order. *See* Complaint, Court No. 23–00202, ECF No. 6.

In a second action, Megaa Moda contests ITA's refusal to offset its financial expenses with its short term capital interest received. *See* Complaint, Court No. 23–00205, ECF No. 5.

For reasons that follow, the *Final Results* will be remanded in part.

I

Defendant's concise statement of facts relates much of the following. In April 2022, ITA initiated administrative review of 261 exporters of subject merchandise, including Megaa Moda. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 87 Fed.Reg. 21619 (Dep't Commerce April 12, 2022), P.R. 12. Initially, Nekkanti Sea Foods Limited ("Nekkanti") as well as one other prominent exporter were selected as mandatory respondents. *See* Respondents Selection Mem., P.R. 34, C.R. 4. After ITA received Nekkanti's responses to its questionnaire, it also received timely submissions withdrawing all review requests for 74 exporters, including the initial mandatory respondent selections. ITA then selected Megaa Moda and another exporter as mandatory respondents.[1] *See Certain Frozen Warmwater Shrimp From India*, 88 Fed.Reg. 13430 (Dep't Commerce March 3, 2023) ("*Preliminary Results*"), P.R. 168), and accompanying preliminary decision memorandum ("PDM") at 2 (Dep't Commerce April 29, 2022), P.R. 159); Add'l Respondents Selection Mem., P.R. 81, C.R. 32.

On July 21, 2022, ITA issued its initial questionnaire to Megaa Moda. P.R. 82, C.R. 32. Megaa Moda's timely Section A questionnaire response reported that it had a viable home market and supported this response with a quantity and value chart showing that the volume of sales in the home market was [[ ]] of the volume of sales in the U.S. market. Megaa Moda Section A Questionnaire Resp. ("AQR") at Exhibit A.1, P.R. 115–17, C.R. 36–41. In its Section B and C responses, Megaa Moda provided ITA information covering comparison market sales and U.S. sales. Megaa Moda Section B&C Questionnaire Resp. ("BCQR"), P.R. 118–127, C.R. 52–58.

On December 21, 2022, AHSTAC submitted comments alleging that [[ ]] of Megaa Moda's claimed home market sales (accounting for [[ ]] kilograms of its total home market sales quantity of [[ ]] kilograms) were intended for the export market because the sales were made to [[ ]] and were aberrational

[1] That other exporter is not relevant to this opinion.

compared to Megaa Moda's other home market sales. AHSTAC Comments on Megaa Moda's Resp. to Sections A, B, and C of the Questionnaire ("AHSTAC Comments on IQR"), P.R. 134, C.R. 73. On January 13, 2023, ITA issued a supplemental questionnaire to Megaa Moda seeking, among other things, clarification of the sales to that customer and Megaa Moda's reason for reporting them as home market sales. ITA Supplemental Section A-C Questionnaire ("Supp. ABCQ") at 7, P.R. 139, C.R. 75. In response, Megaa Moda provided sample documentation for transaction "SEQU 76" that showed "the material was destined to be delivered in the domestic market" and "were packed in Unbranded [*sic*] pouches and cartons which under any situation may not be suitable for U.S. market." Megaa Moda Supp. ABCQR at 19, P.R. 149–50, C.R. 82–86. Megaa Moda also provided other documentation that showed the sale was made to a customer in India (located in [[ ]]) with ex-works delivery terms. *Id*.

On September 22, 2022, Megaa Moda timely responded to Section D of the Initial Questionnaire. Megaa Moda Section D Questionnaire Resp. ("DQR"), P.R. 129–31, C.R. 63–66. In this response, Megaa Moda provided its cost allocation for the POR and its net interest expense ("INTEX[2] ") ratio calculation. *Id*. at Exhibit D-7 (cost allocation), P.R. 129–130, C.R. 63, and Exhibit D-14 (INTEX ratio calculation), P.R. 130, C.R. 64. Megaa Moda calculated its INTEX ratio by dividing its net interest expenses by its cost of the goods sold. To determine its net interest expenses, Megaa Moda offset its total interest expenses (related to both short- and long-term liabilities) by its interest income related only to short-term assets. Specifically, Megaa Moda summed its interest expenses during the POR and offset these expenses with financial income related to (1) foreign exchange gains, (2) "interest on FD with FBL", and (3) "interest subvention received". *See id*. at Exhibit D-12, P.R. 129, C.R. 63.

ITA thereafter issued a supplemental Section D questionnaire asking Megaa Moda to "explain the nature of the interest subvention received of [[ ]] INR." ITA Supp. Section D Questionnaire (Jan. 19, 2023) at 8 ("Supp. DQ"), P.R. 140, C.R. 76. ITA also requested Megaa Moda to "provide supporting documentation that the interest income offset is derived from interest income earned on short term assets." *Id*. In its (timely) response, Megaa Moda explained the interest subvention program and provided the regulations governing that program, a webpage explaining the nature of the loans underlying the interest refunds, a bank statement identifying the interest subvention income received, and screenshots from its accounting sys-

[2] *I.e.*, ITA's field name for net interest expense. *See*, *e.g.*, Megaa Moda DQR at D-47.

tem linking the refunded payments to the bank statement. Megaa Moda Section D Supp. Questionnaire Resp. (“SDQR”) at Exhibits SD1–12 (regulations and webpage), SD1–12(a) (bank statement), and SD-12(b) (screenshots), P.R. 154, C.R. 92.

On March 3, 2023, ITA published its *Preliminary Results* determining that Megaa Moda had made sales of shrimp at prices below normal value and calculated a preliminary weighted-average dumping margin of 7.92 percent. *Certain Frozen Warmwater Shrimp From India*, 88 Fed.Reg. at 13430. ITA determined that “the aggregate volume of [Megaa Moda’s] home market sales of the foreign like product was sufficient to permit a proper comparison with U.S. sales of the subject merchandise”, PDM at 9, and it relied on all of Megaa Moda’s reported home market sales in its preliminary calculation of normal value. *See* PDM at 10, 14.

In doing so, ITA denied Megaa Moda’s requested subvention program offset as well as the “interest on FD with FBL”[3] offset claim. *Id.* at 13. Specifically, ITA determined, with regard to the subvention program, that the interest earned did not relate to short-term investments of the company’s working capital. *Id.*; *Preliminary Results* Calculations, P.R. 164, C.R. 105. With respect to the “interest on FD with FBL” offset claim, ITA determined that Megaa Moda had not provided evidence that the interest was earned on short-term investments of the company’s working capital. *Id.*

For companies not selected for individual review, as mentioned, ITA calculated a preliminary weighted-average dumping margin of 3.76 percent. *Certain Frozen Warmwater Shrimp From India*, 88 Fed.Reg. at 13430.

Megaa Moda and AHSTAC timely filed administrative case and rebuttal briefs. AHSTAC Case Br., P.R. 172, C.R. 115; Megaa Moda Revised Case Br., P.R. 197. C.R. 127; AHSTAC Rebuttal Case Br., P.R. 176, C.R. 119; Megaa Moda Rebuttal Case Br., P.R. 188, C.R. 124. ASPA also timely filed a rebuttal brief. ASPA Rebuttal Br., P.R. 178, C.R. 120.

In its administrative case brief, AHSTAC argued that ITA should have excluded certain of Megaa Moda’s home market sales from the calculation of normal value. AHSTAC’s Case Br. at 1–17. ASPA agreed with AHSTAC on this issue. ASPA Rebuttal Br. at 1–6. AHSTAC claimed that a review of the record demonstrates that the sales in question were meant for export, not for consumption in the home market. AHSTAC Case Br. at 3–14. AHSTAC also argued that ITA should apply facts available with an adverse inference as to how to

[3] According to the defendant, across all of Megaa Moda’s record submissions “interest on FD with FBL” was never defined.

treat those sales because "Megaa Moda's willful inaccurate representations regarding the nature of these home market sales has significantly impacted this proceeding and has, in particular, prevented the Department from developing a meaningful understanding of these sales." *Id*. at 14. Lastly, AHSTAC argued that because "correcting" the normal value calculation with the change it asserted would have necessarily resulted in a change in the dumping margin, ITA must recalculate the rate assigned to companies not selected for individual review. *See id*. at 17–18.

In rebuttal, Megaa Moda argued that ITA correctly treated the sales in question as home market sales. Megaa Moda Rebuttal Case Br. at R-4--R-12. It claimed that AHSTAC completely ignored certain parts of the record that support ITA's determination that the sales in question were for consumption in the home market. *See id*.

In its administrative case brief, Megaa Moda argued that ITA should grant two short term interest income offsets. *See* Megaa Moda Revised Case Br. With respect to the interest subvention program, Megaa Moda argued that based on record information it had proven the short-term nature of income generated from the interest subvention program and therefore an offset should have been granted. *Id*. at 6–9. With respect to "interest on FD with FBL," Megaa Moda again argued that because the income is grouped under cash and cash equivalents in an audited financial statement, ITA should have granted an offset. *Id*. at 9–13.

In rebuttal, AHSTAC argued that ITA was correct to deny both requested short-term interest income offsets. AHSTAC Rebuttal Case Br. at 1–10. With respect to the interest subvention program, AHSTAC argued that the income generated by the program is not a gain on investments but is rather an export subsidy program that should be separately investigated in a countervailing duty investigation. *Id*. at 2–8. With respect to the "interest on FD with FBL" claim, AHSTAC argued that Megaa Moda had failed to build an adequate administrative record to support the claimed offset. *Id*. at 8–10. ASPA additionally argued that the interest the subvention program income generated was not a part of Megaa Moda's working capital assets. ASPA Rebuttal Br. at 7–9. It also argued that ITA was correct in finding that Megaa Moda had not met its burden to support the claimed offset of "interest on FD with FBL." Id. at 10–12.

On September 1, 2023, ITA published the *Final Results*, calculating a weighted average dumping margin of 7.92 percent for Megaa Moda. 88 Fed.Reg. at 60432. It continued to rely on all of Megaa Moda's reported home market sales to calculate normal value. IDM at 6–9. ITA explained that, "to determine whether a sale should be included

in the home market sales data," its practice is to consider whether the "producer knew or should have known at the time of sale that the merchandise was for consumption in the home market." *Id.* at 8–9 (citing *Certain Lined Paper Products from India: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2020–2021*, 88 Fed.Reg. 21971 (Dep't Commerce April 12, 2023) ("*Lined Paper from India*") and accompanying issues and decision memorandum ("I&D Memo") at Comment 1. In applying that standard, ITA claims to have assessed "documentary or physical evidence" and determined that there was no evidence on the record that Megaa Moda had knowledge at the time of the certain sales that those sales were destined for export. *Id.* at 9; *see also* Proprietary Decision Memo.[4]

ITA also continued to deny Megaa Moda's requested interest subvention program offset, consistent with its "well-established practice". IDM at 13–14. ITA explained that, based on Megaa Moda's explanation of the program, it determined that the interest subvention was generated from the refund of interest expenses from export credit, not from Megaa Moda's current assets and working capital accounts. *Id.*

Next, ITA continued to deny Megaa Moda's requested interest on "FD with FBL" offset claim. *Id.* at 14. It explained that it had specifically asked Megaa Moda to demonstrate the short-term nature of the interest income offset and found that because Megaa Moda did not provide supporting documentation for the short-term nature of the interest income offset purportedly derived from interest on "FD with FBL", Megaa Moda did not fully substantiate the interest income offset and, therefore, was not entitled to it. *Id.*

Finally, ITA calculated a weighted average dumping margin of 3.88 percent for companies not selected for individual review. *Id.* at 4; *Certain Frozen Warmwater Shrimp From India*, 88 Fed.Reg. at 60432.

II

Both complaints predicate jurisdiction herein on 28 U.S.C. §1581(c), which confers this Court's exclusive jurisdiction to review ITA final antidumping-duty determinations under 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii).

By statute, such actions require judicial review for "substantial evidence on the record", 19 U.S.C. §1516a(b)(1)(B), as compiled by

[4] ITA generated this document concurrently with the IDM and other disclosure documents because the arguments raised by AHSTAC and ASPA in their respective case and rebuttal briefs relied extensively on business proprietary information. *See* IDM at 6 n.27.

ITA, which means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”, in light of “the entire record, including whatever fairly detracts from the substantiality of the evidence.” *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed.Cir. 1984) (footnote omitted).

“At least once during each 12-month period” from the date an antidumping-duty order is published, ITA must review the dumping margin of imported merchandise subject to that order. 19 U.S.C. §1675(a)(1). In this consolidated action, the margin is the amount by which the “normal value” of subject merchandise exceeds its “export price.” *See* 19 U.S.C. §1677(35)(A)[5] . While “export price” is the agreed-upon price at which the subject merchandise is sold, 19 U.S.C. §1677a, the statute provides three methods for determining normal value. ITA’s default method is the average price of the “foreign like product”[6] sold for consumption in the respondent’s home market. 19 U.S.C. §1677b(a)(1)(B)(i). If the home market is not viable (*i.e.*, is less than five percent of aggregate U.S. sales), ITA may instead average the prices of the merchandise in a third country. 19 U.S.C. §1677b(a)(1)(C).

In that consideration of pricing, if questions arise over a respondent’s characterization of particular sales (as either export or home market), ITA tests the extent to which the respondent “knew or should have known” that its sales are “for export” or “for consumption” in the home market, depending on the question of disposition raised. *See, e.g.*, *Allegheny Ludlum Corp. v. United States*, 24 CIT 1424, 1433–34, 215 F.Supp.2d 1322, 1330–31 (2000) and cases cited.[7] And “[w]hile the burden of creating an adequate record lies with [interested parties, ITA] must, nonetheless, support its decision with substantial evidence.” *SeAH Steel VINA Corp. v. United States*, 950

[5] *See also* 19 U.S.C. §1673 (“there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise”); *see*, *e.g.*, *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1353 (Fed.Cir. 2010) (citing 19 U.S.C. §1677(35)(A)).

[6] *See* 19 U.S.C. §1677(16) (definition).

[7] ITA’s knowledge tests for exportation and normal value appear confusing at times. *See*, *e.g., LG Semicon Co. v. United States*, 23 CIT 1074 (1999) (relying on legislative history to support finding that the respondent “knew or should have known” that merchandise it sold was destined for the United States); *compare INA Walzlager Schaeffler KG*, 21 CIT 110, 123–24, 957 F.Supp. at 263–64 (2020) (in implementing 19 U.S.C. §1677b(a), ITA examines sales within the home market database for the producer’s knowledge of whether it “knew or should have known that the merchandise was . . . for home consumption based upon the particular facts and circumstances of the case”) *with Coalition of American Flange Producers v. United States*, 44 CIT ___, ___, 448 F.Supp.3d 1340, 1354 (2020) (in implementing 19 U.S.C. §1677b(a), “a producer need not know the final destination of merchandise sold so long as the producer has actual or constructive knowledge it will be exported outside the home market”).

F.3d 833, 847 (Fed.Cir. 2020), citing *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed.Cir. 2011). That is, "[t]o the extent that [ITA] finds relevant information missing from the record, it is incumbent on [ITA] to solicit that information from the party in possession of the information". *Nucor Corp. v. United States*, 47 CIT ___, ___, 653 F.Supp.3d 1295, 1310 (2023), citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed.Cir. 2002).

As for respondents not selected for individual review, ITA generally looks to the statutory "all others" rate in investigations for guidance. *See* 19 U.S.C. §1673d(c)(5)(A); *see*, *e.g., Albemarle Corp. v. United States*, 821 F.3d 1345, 1352 (Fed.Cir. 2016) ("the statutory framework contemplates that [ITA] will employ the same methods for calculating a separate rate in periodic administrative reviews as it does in initial investigations"). Based thereon, ITA generally assigns non-selected respondents the weighted average of the dumping margins determined for individually-examined companies, excluding any zero and *de minimis* margins and margins determined entirely on the basis of facts available. *See* 19 U.S.C. §1677e.

III

AHSTAC's complaint claims that ITA improperly included sales not made "for consumption" in Megaa Moda's home market of India when determining "normal value" sales. Complaint, Court No. 23–00202, ¶¶ 15–19. If substantiated, the claim would impact both Megaa Moda's margin and the margin assigned to the non-selected companies subject to the review. *See id*. ¶¶ 20–22.

A

Megaa Moda's Section A response stated that its home market sales were usable as a basis for normal value because the volume of those sales during the POR was more than five percent of the volume of its sales to the United States.[8] Megaa Moda AQR at A-3. Megaa Moda included a table reporting the quantity and value of its sales in the home market and the United States. *Id*. at Exhibit A.1. This information indicated that Megaa Moda sold [[ ]] kilograms in the home market compared to [[ ]] kilograms to the United States market and was the basis for Megaa Moda's claim that its home market shipments were [[ ]] percent of its shipments to the

[8] ITA generally considers sales in the home market to be an appropriate basis for determining normal value "if the Secretary is satisfied that sales of the foreign like product . . . are of sufficient quantity." 19 C.F.R. §351.404(b)(1). "'Sufficient quantity' normally means that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by an exporter or producer in a country is 5 percent or more of the aggregate quantity (or value) of its sales of the subject merchandise to the United States." *Id*., §351.404(b)(2).

United States by volume, or [[

]][9] . *See id.*

AHSTAC took issue with Megaa Moda's initial questionnaire response, specifically as to certain comparison market sales that Megaa Moda reported as having been made "for consumption" in its home market. *See* AHSTAC Comments on IQR at 9–13. In its comments, AHSTAC noted that [[ ]] home market sales observations reported by Megaa Moda accounted for [[ ]] of the respondent's home market sales by quantity and that the [[ ]] sales observations correspond to [[ ]] that were each made to [[

]]. Id. at 9.

Prior to [[

]]. Given that [[

]], AHSTAC's comments therefor asked ITA to further inquire whether Megaa Moda knew or should have known that its sales to [[ ]] were not sold for consumption in the home market.

AHSTAC's comments on Megaa Moda's home market sales further described the various ways in which Megaa Moda's sales to [[ ]] were apparently aberrational compared to the other home market sales reported by the company. *See* AHSTAC Comments on IQR at 9–10. For example, the [[ ]] home market sales observations that seem to correspond to [[ ]] compared to [[ ]] home market sales observations reported by Megaa Moda. *Id.* at 9. AHSTAC also highlighted the fact that the [[ ]] reported by Megaa Moda for its sales to [[ ]] corresponded to a [[

]]. *Id.* at 11–12 (citations omitted).

ITA's January 13, 2023 supplemental questionnaire to Megaa Moda sought additional information on the company's sales to [[ ]] and an explanation as to why it believed such sales "were for con-

[9] Megaa Moda's Section B response further informed as to its home market shipments. *See* Megaa Moda BCQR. In that response, Megaa Moda assigned each home market sales record a unique sequential number (*i.e.*, "sequence number" or "SEQH"). *See id.* at B-10--B-11, P.R. 118, C.R. 52. For each sales observation, Megaa Moda reported transaction specific information, including the sale invoice number, type of shrimp product sold (including packaging), customer name, and place of delivery. *See, e.g., id.* at Exhibit B.1 (sample printout of Megaa Moda's home market sales database).

sumption in India, rather than for export to another market." Supp. ABCQ at 7. ITA specifically asked Megaa Moda the following:

> The vast majority of your home market sales were to [[ ]]. Provide a detailed explanation of why you believe your sales of shrimp to [[ ]] were for consumption in India, rather than for export to another market.

Id. In response, Megaa Moda stated that it

> is submitting sample documentation for SEQU 76 pertaining to sales made to [[ ]] as Exhibit S1–8. From purchase order (Page-1) it can be seen that the destination of the sale is [[ ]]. From the copy of Tax Invoice (Page-2) it can be seen that the place of delivery is [[ ]]. From e-way bill it can also be seen that the place of delivery is [[ ]]. Thus, from all the three documentation it can be seen that the material was destined to be delivered in the domestic market. Further the order was Ex-works [*sic*] and the material was picked by the customer. As the material was delivered in India and was also destined in India, Megaa classified the same as domestic sales. Megaa has no indication, knowledge or documentation to suggest that the material was destined to be consumed in export market. Moreover, the goods were packed in Unbranded [*sic*] pouches and cartons which under any situation may not be suitable for U.S. market. So we can safely say that goods were sold domestically in India.

Megaa Moda Supp. ABCQR at 13–14. Megaa Moda also provided documentation that included customer correspondence, a tax invoice, an e-way bill, accounting records showing the recording of the sale, and payment documentation. *Id.* The information confirmed that Megaa Moda made the sale to [[ ]], a customer in India (*i.e.*, in [[ ]]), with ex-works delivery terms. *Id.*

Here, at this point in the narrative, AHSTAC interjects that Megaa Moda's response to ITA did not address the differences AHSTAC highlighted between Megaa Moda's sales to [[ ]] or why it was reasonable for Megaa Moda to believe that the merchandise it sold in "unbranded pouches and cartons" was consumed in the home market. *See* Megaa Moda Supp. ABCQR. AHSTAC also points out that Megaa Moda did not acknowledge that the sales documentation submitted as part of its

supplemental response showed that [[

]]. *Compare id.* at Exhibit S1–8, P.R. 150, C.R. 83 (tax invoice for sale to [[ ]]), *with* Megaa Moda AQR at Exhibit A.8 ([[ ]]), P.R. 116, C.R. 37.

ITA's *Preliminary Results* used the complete universe of Megaa Moda's reported home market sales as the basis for normal value, *see* PDM at 9–10, and ultimately calculated a preliminary weighted-average dumping margin of 7.92 percent for Megaa Moda. 88 Fed. Reg. at 13431.

AHSTAC's case brief argued *inter alia* that ITA's determination of the normal value of Megaa Moda's merchandise should be revised to exclude certain home market sales (i.e., [[ ]]) (hereinafter the "contested sales") that AHSTAC contends were not made for consumption in India. AHSTAC Case Br. at 3–14. ASPA also submitted written argument drawing further attention to record evidence showing that Megaa Moda knew, or at the very least should have known, that the contested sales were not for consumption in the home market. ASPA Rebuttal Br. at 1–6. Agreeing with AHSTAC, ASPA argued that the contested sales could not be used to determine normal value for Megaa Moda. *Id.* at 6. AHSTAC's and ASPA's arguments compared and analyzed the tax invoices on the record and argued that the [[ ]] demonstrated that the respondent knew or should have known that the contested sales were destined for export. AHSTAC Case Br. at 10–14; ASPA Rebuttal Br. at 4–5.

In its rebuttal brief, Megaa Moda disputed that it knew or should have known that the contested sales were not for consumption in the home market. *See* Megaa Moda Rebuttal Br. Megaa Moda's rebuttal focused on the fact that "the material was delivered in India" and packaged in "unbranded pouches and cartons." *Id.* at R-5. It also claimed that sales of "unbranded shrimp" are exempted from GST. *Id.* at R-9--R-11.[10]

ITA's *Final Results* rejected AHSTAC's and ASPA's arguments that Megaa Moda's sales to [[ ]] should not be considered a part of normal value. *See* IDM at Comments 3 & 4; *see also* Proprietary Decision Memo. The agency concluded "no evidence" on the record

[10] The sole support on the administrative record for Megaa Moda's claim that GSTs are only charged on "branded" shrimp and scrap is its own declarations. No citation to the governing Indian law or regulation is provided on the record of this proceeding to support that rejoinder. *See* Megaa Moda Rebuttal Br. at R-9--R-11.

that "Megaa Moda knew or should have known that certain of its home market sales of shrimp were not sold for consumption in India." IDM at 8–9; *see also id*. at 9 (asserting "no evidence that Megaa Moda had knowledge at the time of sale these sales were destined for export").

ITA's analysis reasoned that this Court has held that the "trade patterns" of a company's customers do not provide an adequate basis for establishing that sales to such customers are not representative[11]; that the record "[s]pecifically" shows that "(1) the destination of these sales was a location in India; and [that] (2) there was no specific packaging or labeling for these sales indicating that they were destined for export." *Id*. Accordingly, ITA continued to rely on all of Megaa Moda's reported home market sales as the basis for normal value. *Id*.

ITA thus made no change to the margin calculated for Megaa Moda in the *Final Results*. Accordingly, the agency continued to assign the company a weighted-average dumping margin of 7.92 percent. That rate was then used to calculate one for firms not selected for individual review.

B

ITA concluded for the *Final Results* that Megaa Moda neither knew nor should have known that certain of its sales to a customer [[ ]] were being exported to the United States because Megaa Moda claimed that it did not have actual knowledge, and ITA's examination of the evidence led it to finding that there was neither actual nor constructive knowledge that certain sales were being exported to the United States. *See* IDM at 8–9; Proprietary Decision Mem. at 3–5. ITA therefore relied on all of Megaa Moda's claimed home market sales for the calculation of normal value.

ITA thus determined that Megaa Moda met the "five percent" baseline of minimal home market sales volume necessary for determining normal value. *See* 19 C.F.R. §351.404(b)(1). AHSTAC targets that determination by contending the proper reading of the record is that Megaa Moda knew or should have known that the contested sales were not "for consumption" in India's domestic market but would be exported, and that those home market sales should therefore have been excluded from the calculation of normal value. Pl's Br. at 13–18. AHSTAC also argues that ITA improperly rejected documentary evi-

[11] *Id*. at 9, citing *Z.A. Sea Foods Pvt. Ltd. v. United States*, 46 CIT ___, ___, 569 F.Supp.3d 1338, 1351 (2022), *remand results sustained*, 48 CIT ___, 606 F.Supp.3d 1335, *aff'd*, 2024 WL 2873428 (Fed.Cir. 2024) (not reported in Federal Reporter).

dence showing that Megaa Moda must have certainly known or should have known that its sales to [[ ]] were not meant for consumption in the domestic market. *Id.* at 18–23. This information included the following:

- The tax invoice included with the sample sales documents that Megaa Moda provided for SEQH 76 in response to ITA's request shows that Megaa Moda [[ ]][12], which is obviously unlike Megaa Moda's other domestic market sales[13], and rather like sales documents relating to Megaa Moda's sales to purchasers in the United States showing that [[ ]][14].

- The contested sales were made to a particular customer that ITA acknowledged was an exporter[15], while home market sales to all other home market customers [[ ]]; in other words, despite Megaa Moda's contention that sales of "unbranded shrimp" are exempted from GSTs[16], the very fact that [[ ]] indicates that these taxes are collected based on where the shrimp is to be consumed, with "unbranded shrimp" treated as if it were to be consumed elsewhere, outside of India.

- In addition, the [[ ]], which at the very least indicates that

[12] *See* Megaa Moda Supp. ABCQR at Exhibit S1–8.

[13] *See, e.g.*, *id.* at Exhibits S1–6 (tax invoice showing the [[ ]]) and S1–7 (tax invoice showing the [[ ]]); Megaa Moda BCQR at Exhibit B.5.b (tax invoice showing the [[ ]]).

[14] For example, Megaa Moda invoice number MMPL/2122/ISL044 identifies the United States as the "country of final destination" and includes a note stating "Supply Meant for Export Under Bond or Letter of Undertaking without Payment of Integrated Tax (IGST)". *See, e.g.*, *id.* at Exhibit C.6.b, P.R. 120, C.R. 54. The related packing list includes the same "supply meant for export" language exempting Megaa Moda from payment of domestic consumption taxes. *Id.* In addition to the language expressly stating that payment of IGST is not required for export sales, the commercial invoice itself [[ ]]. *Id.*; *see also* Section A Response at Exhibit A.7 (sample U.S. market sales documents with invoice language stating "Supply Meant for Export Under Bond or Letter of Undertaking without Payment of Integrated Tax (IGST)"), P.R. 115, C.R. 36. Thus, according to AHSTAC, invoices prepared by Megaa Moda in the ordinary course of business and on the record of this matter show that the company [[ ]]. The tax invoice associated with SEQH 76 (*i.e.*, [[ ]]) is unique from other tax invoices relating to home market sales on the record herein because it [[ ]].

[15] IDM at 9.

[16] *See* Megaa Moda Rebuttal Br. at R-3.

Megaa Moda must have been clearly aware that its sales to [[ ]] were unlike the [[ ]] of the company's sales to other customers in the home market.

- The contested sales were the [[ ]] sales of product sold in [[ ]] in the home market, whereas [[ ]] home market sales reported by Megaa Moda were of [[ ]], so the [[ ]] of Megaa Moda's sales to [[ ]] was entirely dissimilar to any other home market sale.

- Noteworthy also is that the contested sales were the only sales of [[ ]] in the home market; therefore, because all the other [[ ]] home market sales observations report [[ ]][17], and since Megaa Moda reported [[ ]] to customers in the United States[18], similar to the [[ ]] not only in terms of volume but consisting of [[ ]], the inference from these circumstances should be obvious.

- AHSTAC further contended that the documentation for one of the contested sales shows that it was [[ ]], which therefore provided Megaa Moda with knowledge that its customer was [[ ]]. AHSTAC here argues there is no rational explanation on the record for why it would be reasonable to believe that sales made to a [[ ]] were for consumption in the home market.

AHSTAC 56.2 Br. at 14–18.

Here summarizing defendant's main position:

- The record evidence demonstrated that [[ ]] were not applicable to domestic sales of unbranded shrimp such that imputing knowledge to Megaa Moda that its sales were meant for export to the U.S. would be unreasonable.

- Because [[ ]], the fact that [[ ]] was an exporter was not sufficient to impute knowledge to Megaa Moda that its sales to [[ ]] were meant for export to the U.S.

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[17] *See* Home Market Sales Database ([[ ]] field).

[18] *See* U.S. Market Sales Database ([[ ]] field).

- Given [[ ]], the volume sold to [[ ]] was not aberrational such that it would be improper to impute knowledge to Megaa Moda that its sales were meant for export to the U.S.

- Given that Megaa Moda made sales to the U.S. of both [[ ]] and [[ ]] shrimp, imputing knowledge to Megaa Moda that its [[ ]] were meant for export to the U.S. would be unreasonable.

- Imputing knowledge to Megaa Moda based on its U.S. sales of [[ ]] shrimp would be unreasonable.

- The use of a [[ ]] with the word "[[ ]]" was insufficient to impute knowledge to Megaa Moda that its sales were meant for export to the U.S. when the facilitated sales were made to an Indian company at an Indian address.

Def's Resp. at 14–25.

Megaa Moda also contends:

- It had no reason to believe that any of its domestic sales would not be consumed in India; AHSTAC has not identified sufficient evidence that would have allowed ITA to substantiate the allegation that Megaa Moda knew or should have known that that was not the case.

- It recorded the contested sales as domestic sales in its normal books and records.

- Under long-standing ITA practice, merchandise sold to a market, even if ultimately destined for export, is "consumed" in the market if it is used there to produce non-subject merchandise prior to exportation.[19]

Megaa Moda Resp. at 9–16.

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[19] Megaa Moda Resp. at 9, referencing *inter alia Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Corrosion Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From Korea*, 58 Fed.Reg. 37176, 37182 (Dep't Commerce July 9, 1993), and *Final Determination of Sales at less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea*, 58 Fed.Reg. 15467, 15473 (Dep't Commerce March 23, 1993) ("where a product within the scope of an investigation has been transformed into a product outside that scope before exportation, we consider that product to have been 'consumed' within the country").

C

Considering the parties' points as a whole, the court concludes that remand of the matter is necessary. The main question here is whether substantial evidence supports ITA's determination on whether Megaa Moda knew or should have known the final disposition of the contested sales at the time they were transacted, *i.e*, in accordance with ITA's knowledge test. If the record supported a conclusion on the final destination of the contested sales, either "for consumption" or "for export," that determination would go far towards settling this matter. However, evidence that would definitively resolve that issue is missing from the record. Therefore, the question of what Megaa Moda knew or should have known with respect to whether the contested sales were "for consumption" or "for export" cannot be concluded.

ITA accepted Megaa Moda's certification of the contested sales, but, when it applied its knowledge test(s), it did not explicitly apply 19 U.S.C. §1677e (determination on the basis of facts available), it implicitly determined that the contested sales were indeed "for consumption" in India. It is an open question whether proper application of that §1677e would have yielded a satisfactory answer; AHSTAC, at any rate, persuades that ITA's assumption is not based on or amounts to substantial evidence, and the matter must therefore be remanded to ITA for further proceedings consistent with this opinion, which may include reopening the administrative record for additional fact finding.

ITA explains in its IDM that its "general practice in conducting the 'knowledge test' is to consider documentary or physical evidence that the producer knew or should have known at the time of sale that the merchandise was for consumption in the home market[,] because this type of evidence is more probative, reliable, and verifiable than unsubstantiated statements or declarations." IDM at 8–9, citing *Lined Paper from India*, 88 Fed.Reg. 21971, and accompanying I&D Memo at Comment 1. To ITA, the record shows that Megaa Moda sold shrimp in the home market to a domestic customer that is also an exporter, "but nothing indicates that Megaa Moda's sales to this customer were not for consumption in India." *Id.* at 9.

The latter statement does not fully address AHSTAC's arguments with respect to ITA's "knowledge test". Moreover, it is inaccurate to state that there is "nothing to indicate[ ] that Megaa Moda's sales to this customer were not for consumption in India." AHSTAC's recounting, taken as a whole, of the documentary record, provides sufficient circumstantial indication that it would be unreasonable to conclude, without more, that the contested sales were "for consumption" in India. On that basis, it is likewise questionable whether Megaa Mo-

da's position that it neither knew nor should have known that the contested sales were or might have been destined for export was reasonable, notwithstanding its normal accounting of the contested sales in its books and records.

First off, the IDM points out (at page 9) that this Court "has held that the trade patterns of a company's customers do not provide an adequate basis for establishing that sales to such customers are not representative", *see Z.A. Foods Private Limited v. United States*, 46 CIT ___, 569 F.Supp.3d 1338 (2022) ("*ZASF I*"), which is not this case, as it would be unreasonable to entirely disregard Megaa Moda's certain knowledge of the business of the particular customer of the contested sales, a larger competitor whose operations overwhelmingly consist of shrimp exportation.

Along that line, ITA implies that because [[

]], that statement necessarily means that the contested sales were not exported -- and yet, at the same time, ITA's Proprietary Memo for the IDM separately acknowledged AHSTAC's assertion that [[

]]. *See* Proprietary Decision Memo at 2. ITA's discussion does not provide a rational resolution of this apparently contradictory information of record.

ITA also states that it found [[ ]] "not to be significant" because a [[

]]. *Id*. at 4 (emphasis added). The logical inference ITA would have the reader draw here is that [[ ]] was still of greater significance than Megaa Moda's.

The record is sparse in this regard, but what data there are do not support this inference. Megaa Moda reported total home market sales amounting to USD [[ ]]. Megaa Moda AQR at Exhibit A.1. It is also clear that the contested sales account for the "vast majority" ([[ ]]) of Megaa Moda's home market sales during the POR. By contrast, [[

]] Assuming the average INR to USD conversion rate[20] for 2021 was 1:0.01353, those INR amounts convert to USD [[ ]] and USD [[ ]],

[20] *See, e.g.*, https://www.exchange-rates.org/exchange-rate-history/inr-usd-2021 (last visited this date).

respectively. This implies that, if the entirety of [[ ]]'s domestic market sales for [[ ]] had consisted of the contested sales, then the contested sales would have been sold at a loss in excess of 90% as compared with the price paid to Megaa Moda. The contested sales fell into the [[ ]][21], but, as mentioned, [[

]]. *See id*.

Nonetheless, Megaa Moda and ITA claim that [[ ]]'s production of breaded shrimp "might" account for the contested sales. If that is the case, it is not discernible from the record. The claim is thus speculative, which is not substantial evidence.

As mentioned, ITA relies on *ZASF I* in its IDM to dispose of AHSTAC's main arguments. That case presented the question of whether the relevant statutes permitted ITA to employ "constructed value" as the basis for normal value when ITA rejects Vietnam, a "third-country nonmarket economy"[22], as the embodiment of "representative" sales values for purposes of 19 U.S.C. §1677b(a)(1)(B)(ii)(I). In AHSTAC's rebuttal to ZASF's claim of Vietnam as a viable alternative to ZASF's non-viable Indian home market sales, AHSTAC noted that "the overwhelming majority" of ZASF's shipments to Vietnam were to shrimp exporters who were subject to the antidumping duty order on certain frozen warmwater shrimp from Vietnam ("Order") and that the majority of ZASF's shipments were to three companies that are part of a "Group" in Vietnam. AHSTAC explained that the Group had been subject to the Order, and, in the course of that Group's participation in the investigation, it had reported that it had used imported shrimp as a raw material input in its exports to the United States. In light thereof, AHSTAC thus argued to ITA that it was likely that ZASF's shrimp shipments to Vietnam are sold or resold through Vietnam and shipped to the United States and that the proceeding was thus owed a "more fulsome [*sic*] and comprehensive explanation" of why ZASF believed that its submitted export documentation was sufficient to prove the "ultimate market" for its shrimp and why ZASF claimed to be "unaware" of any resale or re-shipment of its shrimp from Vietnam to the United States. *ZASF I*, 46 CIT at ___, 569 F.Supp.3d at 1345.

Before ITA reached its final results in that case, U.S. Customs and Border Protection ("CBP") undertook an Enforce and Protect Act

[21] *See* Megaa Moda SQR at Exhibit S1–8 (complete sales documentation for sample sale SEQH 76); *see also* AHSTAC Comments on IQR at 9 ([[ ]]).

[22] ITA recently confirmed Vietnam's status as a non-market economy. *See Raw Honey From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Changed Circumstances Review*, 89 Fed.Reg. 64411 (Aug. 7, 2024).

("EAPA") proceeding to consider the possibility of circumvention of the antidumping duty order on shrimp from India via Vietnam transhipment. *See generally* 19 U.S.C. §1517. CBP determined that the Group "purchased Indian-origin shrimp for processing and supplemented orders to the United States with Indian-origin shrimp", and that, because Indian origin shrimp are subject to AD duties while Vietnamese-origin shrimp are not, the Group thus "has sufficient reason to disguise the true country of origin of its shrimp or to comingle [*sic*] Indian-origin shrimp with Vietnamese-origin shrimp and claim only Vietnam as the country of origin":

> Although CBP acknowledged that the . . . Group claims to maintain a "tracing system [which] ensures that imported shrimp never loses its identity as such," it also noted the . . . Group's "inability to trace specific imports of Indian-origin shrimp through the production facility to specific sales," as well as its inadvertent one-time export of "commingled Indian-origin and Vietnamese-origin shrimp into the customs territory of the United States." . . .. Ultimately, because specific orders of imported shrimp could not be traced to specific orders of exported shrimp, CBP concluded that the . . . Group had failed to cooperate to the best of its abilities with the EAPA investigation, and applied adverse inferences to reach a finding of evasion.

ZASF I, 46 CIT at ___, 569 F.Supp.3d at 1345–46 (citations omitted). In the end, ITA agreed with AHSTAC that questions remained unanswered, resulting in its rejection of ZASF's claim that its Vietnamese sales were "representative". *See id.*, 46 CIT at ___, 569 F.Supp.3d at 1346.

However, ZASF challenged that rejection, and it prevailed upon this Court's conclusion that "[n]either [ITA]'s initial assessment of the record evidence nor its subsequent analysis of CBP's EAPA determination of evasion by ZASF's primary Vietnamese purchaser provide a rational basis for its conclusion that ZASF's Vietnamese sales were unrepresentative and thus unsuitable as a third country benchmark." *Id.*, 46 CIT at ___, 569 F.Supp.3d at 1353.

Here, ITA relies on *ZASF I* to deny AHSTAC's claim regarding the contested sales. *See* IDM at 9 ("The CIT has held that the trade patterns of a company's customers do not provide an adequate basis for establishing that sales to such customers are not representative") & n.9. That interpretation, as applied in this instance, is unduly restrictive.

The facts of *ZASF I*, seemingly complex, essentially reduce to a lack of substantial evidence to support the conclusions ITA drew in deter-

mining that ZASF's third country sales to Vietnam were unrepresentative[23] and thus justified resort to constructed value in the calculation of normal value. *ZASF I*, 46 CIT at ___, 569 F.Supp.3d at 1353. In a nutshell: the Court deemed the claim AHSTAC raised in that case too tenuous for ITA to have pursued. But, the main point for purposes of the matter at bar is that *ZASF I* reiterated that ITA looks to whether a producer "knew or should have known that the merchandise was . . . for home consumption" in determining the universe of sales that should be included in the home market database. *Id.*, 46 CIT at ___, 569 F.Supp.3d at 1352 (citation omitted). And, if the record contradicts imputing knowledge that merchandise was for home consumption, obviously ITA may not suppose that the merchandise was in fact sold for home consumption.[24]

Be that as it may, regardless of the outcome of *ZASF I*, its facts regarding "trade practices" do not readily extrapolate to curtail ITA's consideration of other independent facts in other instances that may bear on ITA's knowledge test, such as those at bar.[25] The general rule remains that ITA must diligently examine the circumstances surrounding a transaction, when questions arise, in order to determine whether the respondent knew or should have known that the sale is for consumption in the exporting country and can be used to determine normal value. *See INA Walzlager Schaeffler KG v. United States*, 21 CIT 110, 122–25, 957 F.Supp. 251, 263–64 (1997) ("*INA Walzlager*"); *Yue Pak, Ltd. v. United States ITA*, 20 CIT 495, 498 (1996), *aff'd*, 111 F.3d 142 (Fed.Cir. 1997); *Stupp Corp. v. United States*, 43 CIT ___, ___, 359 F.Supp.3d 1293, 1310 (2019) (citations omitted), *aff'd in part, vacated in part, remanded on other grounds*, 5 F.4th 1341 (Fed.Cir. 2021).

All in all, considering the matter at bar, the way in which ITA probed whether Megaa Moda knew or should have known whether the contested sales were "for consumption" in India (or "for export", for that matter) leaves a record inconclusive as to whether the contested sales are properly considered part of normal value, for the following reasons:

- The unusual nature of the contested sales as compared with Megaa Moda's other home market sales merited greater scru-

[23] *See* 19 U.S.C. §1677b(a)(1)(B)(ii)(I).

[24] It is well-settled that mere speculation does not amount to substantial evidence. *See, e.g.*, *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed.Cir. 2009).

[25] For example, ITA implies that the case tied its hands because it limited its ability to consider "trade practices" in assessing a petitioner's questioning of particular sales transactions.

tiny of them in their own right, regardless of the concerns AHSTAC raised with respect towards them.

• ITA's mere reliance on the fact that the "destination" of the contested sales "was a location in India" ignores the points AHSTAC made with respect to that location; namely, the fact that it corresponds to a location where [[ ]]. *See* AHSTAC Comments on IQR at 11–12. In *INA Walzlager*, this Court held that ITA reasonably excluded sales from the respondent's home market database even in the absence of evidence showing that the respondent knew the "actual destination of the merchandise." *INA Walzlager*, 21 CIT at 124–25, 957 F.Supp. at 264–65.

• Contrary to defendant's claim that [[ ]] "was not a unique characteristic," Def's Resp. at 17, the [[ ]] of the contested sales were unique and [[ ]] home market sale made during the 12-month period of review. The available evidence in this regard therefore does not suggest a rational "likelihood" that the [[ ]] contested sales were "for consumption" in the Indian market, particularly when compared against Megaa Moda's other domestic market sales and when comparing Megaa Moda's total domestic sales with the information indicated on the record for [[ ]].

• Megaa Moda's commercial invoices reflect the fact that [[ ]]. *See* Megaa Moda BCQR at Exhibit C.6.b ([[ ]]), P.R. 120, C.R. 54. AHSTAC argues that the fact that Megaa Moda did not [[ ]] on the contested sales refutes Megaa Moda's claim that their commercial documents fail to provide any reason for Megaa Moda to know that these sales would not be consumed in India. AHSTAC Reply at 12, referencing Megaa Moda 56.2 Br. at 10.

• However, the court notes that the opposite could be true as well (*i.e.*, that Megaa Moda could be correct regarding unbranded products as being exempt from [[ ]]). Still, ITA cites to no factual information on the record that supports Megaa Moda's claim that [[ ]] apply only to certain types of shrimp product and are inapplicable to the unbranded shrimp

sold to [[ ]],[26] as there is no document of record to answer that question, only Megaa Moda's uncorroborated statement. *Cf. Lined Paper from India*, *supra*, I&D Memo at Comment 1 (ITA's "general practice in conducting the 'knowledge test' is to consider documentary or physical evidence that the producer knew or should have known at the time of sale, because this type of evidence is more probative, reliable and verifiable than unsubstantiated statements or declarations").

• In addition, AHSTAC argues that "the fact that the shrimp sold to [[ ]] was unbranded, coupled with the fact that [[ ]], refutes ITA's claim that there was 'no evidence' that Megaa Moda's sales were not for consumption in India." AHSTAC Reply at 12. AHSTAC claims that unbranded shrimp cannot be sold "for consumption" in India but "would need to undergo repackaging before being sold for consumption". *Id*. There is no discussion in the IDM of whether that is the case, but it is a point that needs to be addressed on remand.[27]

At this point, however, the court can neither re-weigh the evidence before ITA, *see Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed.Cir. 2015), nor sustain ITA's determination on grounds other than as it articulates, *see SEC v. Chenery Corp*., 332 U.S. 194, 196–97 (1947)("in dealing with a determination or judgment which an administrative agency alone is authorized to make, [a reviewing court] must judge the propriety of such action solely by the grounds invoked by the agency"). While the court can "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp. Inc. v. Arkansas–Best Freight System*, 419 U.S. 281, 286 (1974), that is not the case here: "the agency must examine the relevant data and articulate a satisfactory explanation for its action" on its own, without any attempt by a court upon review to "make up for [any] deficiencies." *Motor Vehicle Mfrs. Assn. of U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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[26] Instead, the defendant simply accepts the assertion that Megaa Moda, for the first time, made in its rebuttal brief that "unbranded shrimp in India is exempted . . . by law" from [[ ]]. *See* Megaa Moda Rebuttal Brief at R-3, P.R. 188, C.R. 124.

[27] In passing, the court also notes that when the question as to the contested sales first arose later in the proceeding, due to the fact that [[ ]], if ITA had simply asked and received an honest answer from [[ ]] as to the disposition of the contested sales — either for export or for domestic consumption — that might have avoided this kerfuffle entirely. As mentioned, "[t]o the extent that [ITA] finds relevant information missing from the record, it is incumbent on [ITA] to solicit that information from the party in possession of the information". *Nucor Corp. v. United States*, 47 CIT ___, ___, 653 F.Supp.3d 1295, 1310 (2023) (citation omitted).

The matter will therefore be remanded to ITA for further proceedings consistent with this opinion.

IV

In the *Final Results*, ITA denied Megaa Moda's requested "interest subvention program" offset. IDM at 14. Megaa Moda claims the decision was unlawful as it deprived its financial expenses of offsetting the entire amount of so-called "short term capital interest" that it received. *See* Complaint, Court No. 23-00205, ¶¶ 17–23. Its Rule 56.2 brief characterizes subvention not as "earned" interest but as "refunds of interest expenses that stemmed from the company's working capital." Megaa Moda 56.2 Br. at 9; *see generally id.* at 7–14.

A

Megaa Moda argues that ITA's decision was arbitrary and an abuse of discretion, resulting in a determination unsupported by substantial evidence and contrary to more than 30 years of ITA reliance on short-term interest offsets to calculate the proper amount of net interest expenses. Megaa Moda contends that an assessment of the law and the administrative record in this case demonstrates that ITA's actions and conclusions in this matter cannot be sustained.

According to Megaa Moda, ITA unlawfully deviated from both 19 U.S.C. §1677b(b)(3)(B) and 19 U.S.C. §1677b(e)(2)(A).

19 U.S.C. §1677b(b)(3)(B) provides that, in calculating a respondent's cost of production for determining sales at less than the cost of production, that cost shall include "an amount for selling, general, and administrative expenses based on *actual data* pertaining to production and sales of the foreign like product by the exporter in question" (emphasis added). 19 U.S.C. §1677b(e)(2)(A) provides that, when ITA resorts to constructed value, such value of the imported merchandise is to be an amount equal to the sum including "the *actual amounts* incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country" (emphasis added). Both statutes define the proper cost of production and constructed value to include an amount for selling, general, and administrative expenses based on actual data pertaining to a respondent's production and sales of the merchandise under consideration.

ITA's interpretation of these provisions treats "net interest expenses as a component of general and administrative expenses." *See Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 Fed.Reg. 15539 (Dep't Com-

merce April 2, 2002), and accompanying I&D Memo at Comment 15. The interpretation is a "long-maintained ITA practice of calculating net interest expenses that allows an offset for short-term interest income when a respondent demonstrates that the short-term income was generated from its manufacturing and selling operations." *See Final Determination of Sales at Less Than Fair Value: Sweaters Wholly or in Chief Weight of Man-Made Fiber from the Republic of Korea*, 55 Fed.Reg. 32659, 32667 (Dep't Commerce Aug. 10, 1990) (total interest expense reduced by portion attributed to investment activity; short-term investments related to company's current operations offset against remaining interest income)[28]. Ostensibly, the practice is based on recognizing that companies require a certain amount of working capital to conduct normal production activities and to meet daily payment requirements like material purchases and payroll. *See, e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada*, 70 Fed.Reg. 12181 (Dep't Commerce March 11, 2005), and accompanying I&D Memo at Comment 2.

To determine whether to allow or deny this requested offset, ITA "applied its practice" on offsetting financial expenses with short-term interest income if the record supports it. IDM at 14. The defendant argues that ITA's practice allows interest income earned on working capital to offset expenses in the financial expenses calculation included in the cost of production. IDM at 14. ITA assumes that working capital interest income derives from the interest on short-term interest-bearing assets. *See id.*, citing *Certain Frozen Warmwater Shrimp from Thailand*, 74 Fed.Reg. 47551 (Dep't Commerce Sept. 16, 2009) (final admin. review). Accordingly, because short-term interest-bearing assets are presumed to be in a company's current operations account and thus readily available for day-to-day cash requirements, a respondent may use the interest income earned on a short-term interest-bearing asset to offset financial expenses. *Id*. This practice has been repeatedly affirmed both by this Court and the Federal Circuit. *See, e.g.*, *Pakfood Pub. Co. Ltd. v. United States*, 453 F.App'x

[28] *See, e.g.*, *Chlorinated Isocyanurates From Spain: Notice of Final Determination of Sales at Less Than Fair Value*, 70 Fed.Reg. 24506 (Dep't Commerce May 10, 2005), and accompanying I&D Memo at Comment 10 (citation omitted):

> [I]t is the Department's longstanding practice to offset interest expense by short-term interest income generated from a company's working capital. In calculating a company's cost of financing, we recognize that, in order to maintain its operations and business activities, a company must maintain a working capital reserve to meet its daily cash requirements (*e.g.*, payroll, suppliers, etc.). The Department further recognizes that companies normally maintain this working capital reserve in interest-bearing accounts. The Department, therefore, allows a company to offset its financial expenses with the short-term interest income earned on these working capital accounts[.]

986, 989–90 (Fed.Cir. 2011) (unpublished); *Pakfood Pub. Co. Ltd. v. United States*, 34 CIT 1122, 1148–53, 724 F.Supp.2d 1327, 1353–58 (2010); *Hyundai Elecs. Indus. Co., Ltd. v. United States*, 28 CIT 517, 539–40, 342 F.Supp.2d 1141, 1161–62 (2004); *Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 350–51, 966 F.Supp. 1230, 1239–40 (1997); *NTN Bearing Corp. of America v. United States*, 19 CIT 1221, 1236–37, 905 F.Supp. 1083, 1096–97 (1995).

The burden of proof is on "the respondent to substantiate and document the nature of accounts when making a claim for an offset, and [ITA] will not allow an offset when a respondent cannot demonstrate that the interest income in question is short-term in nature." *Jiangsu Senmao Bamboo and Wood Indus. Co., Ltd. v. United States*, 47 CIT ___, ___, 651 F.Supp.3d 1348, 1364 (2023).

Although Megaa Moda agrees with this description of ITA's practice, its Rule 56.2 brief contends that ITA's determination in this review is inconsistent with its well-established practice. Megaa Moda 56.2 Br. at 8–12. It maintains that ITA is mistaken to think that the interest subvention was not generated from Megaa Moda's working capital accounts, characterizing the subvention income as relating to the refund of interest expenses that have been paid on certain export-financing loans, *id*. at 9–10, and it spends much of its brief identifying various places in the record and asserting that the information identified demonstrates the short-term nature of the income earned from the interest subvention program. *See, e.g.*, *id*. at 9 (website screenshot explaining loans); *id*. at 10 (regulations governing subvention program). Megaa Moda also attaches various record excerpts that ITA has already considered and relied upon in deciding to deny the interest subvention income offset in the underlying administrative decision. *Id*. at 11–12.

The defendant's response is that Megaa Moda's argument "fundamentally misunderstands" ITA's analysis of what constitutes short-term interest income. Def's Resp. at 28. The defendant highlights ITA's explanation in the *Final Results* that interest income is short-term "if generated from the company's current assets and working capital accounts."[29]

Megaa Moda argues that the packing credit loans were part of its

[29] IDM at 14. In Section D of the initial questionnaire, Megaa Moda was instructed:

> In calculating net interest expense for {cost of production} and {constructed value}, include interest expense relating to both long- and short-term borrowings made by your company. Reduce the amount of interest expense incurred by any interest income earned by your company on short-term investments of its working capital. Demonstrate the short-term nature of the short-term interest.

Megaa Moda DQR at D-41.

working capital. *See* Megaa Moda 56.2 Br. at 9 ("packing credit can also be extended as working capital assistance to meet expenses such as wages, utility payments, travel, expenses, etc."). Megaa Moda argues further that the interest payments it made on those loans constituted interest expenses. *Id*. Finally, Megaa Moda argues that refunds it received for some of its interest payments on those loans constituted short-term interest income. *Id*. at 9–10.

Responding, the defendant contends that Megaa Moda's arguments fail when viewed in light of ITA's analysis. For example, the packing credit loans are not generating income for Megaa Moda; they are a liability. *Id*. at 10 ("interest expenses paid on the short-term packing credit loans"). The defendant argues Megaa Moda is simply receiving refunds for what is essentially an overpayment of the interest owed. *Id*. ("some of those interest expenses were refunded"). Despite Megaa Moda's statement that "it is axiomatic that such subvention necessarily also related to [Megaa Moda's] working capital and also were short-term in nature," *id*., its own explanation of the subvention program cuts against its erroneous notion that interest payment refunds are related to any short-term investment of its working capital, *id*., and supports ITA's determination to deny the subvention offset. *See* IDM at 13–14.

Nor does the "time limitation" for realization of export proceeds substantiate the short-term nature of the loans and interest subvention received. *See* Megaa Moda 56.2 Br. at 10. Even if those loans are quick to be settled, as Megaa Moda argues, the funds to pay the interest are committed; therefore, the funds cannot be used to meet the company's daily cash-flow requirements. As explained above, interest income is short term in nature only if the underlying asset (in this case, the interest payments) is liquid enough to meet the company's daily cashflow requirements. *Apex Exps. v. United States*, 37 CIT 1823, 1828–29 (2013); IDM at 14. ITA "determine{d} that this interest subvention was generated from the refund of interest expenses from export credit, not from the company's current assets and working capital accounts." IDM at 14. In essence, Megaa Moda is attempting to treat borrowed money, in the form of packing loans, the same as if that money were its own, and then Megaa Moda argues that because it has overpaid its interest payments, that the loan has somehow generated money for Megaa Moda. *See id*.

Lastly, Megaa Moda's reliance on the several attachments appended to its brief is similarly not compelling because ITA has already examined that information and determined in the *Final Results* that

it was unconvincing. *See id*. For example, attachments 1 and 2 identify and itemize Megaa Moda's interest expenses on "short-term borrowings" while Megaa Moda highlights the line item for the subvention program. Megaa Moda 56.2 Br. at 11; *see also* Megaa Moda's Revised Case Br. at Att. 2; Megaa Moda Supp. ABCQR at Exhibit S1–1. Attachments 3 and 4 identify and itemize Megaa Moda's total short-term borrowings while Megaa Moda highlights the line item for the packaging credit loans. Megaa Moda 56.2 Br. at 11; *see also* Megaa Moda's Revised Case Br. at Att. 4; Megaa Moda's Supp. ABCQR at Exhibit S1–1.

In any event, the only facts these attachments demonstrate is Megaa Moda's incurred short term liabilities, interest paid, and interest refunded. *See* Megaa Moda 56.2 Br. at 11. In Section D of the initial questionnaire, ITA instructed respondents to "reduce the amount of interest expense incurred by any interest income earned by your company on short-term investments of its working capital." Initial Questionnaire at D-15. Those attachments do not demonstrate that the loans were invested or somehow generated interest income; they are only excerpts of record evidence that ITA has already considered in its determination to deny the interest subvention offset. IDM at 14. The refunds that Megaa Moda received may be related to the packing credit loans, but not necessarily in the manner for ITA to lawfully grant a short-term interest income offset, *i.e.*, the refunds were not generated by Megaa Moda's assets or investments of its working capital. *See id*.

Finally, Megaa Moda cannot argue, given the record, that it should be entitled to a short-term interest income offset for the interest subvention program because it has not demonstrated that it has "earned" any "short-term" interest income from that program. *Id*. In denying the requested offset, ITA appropriately found that the interest subvention was generated from the refund of interest expenses from export credit, not from the company's current assets and working capital accounts. *Id*. Thus, following its well-established practice, ITA denied the offset, and this determination is supported by substantial evidence. *See id.*; *Jiangsu*, 46 CIT at ___, 651 F.Supp.3d at 1364.

B

ITA also claims it reasonably excluded Megaa Moda's claimed "interest on FD with FBL" interest income offset. IDM at 14. ITA found that Megaa Moda did not satisfy its burden of proof to demonstrate the short-term nature of the interest income, and thus could not

substantiate its request for an offset. *Id.*; *see also Jiangsu*, 46 CIT at ___, 651 F.Supp.3d at 1364. The defendant also notes that nowhere in Megaa Moda's reporting is "FD with FBL" even defined. *See generally* Megaa Moda AQR, P.R. 115–117, C.R. 36–40; Megaa Moda BCQR, P.R. 118–127, C.R. 52–58; Megaa Moda DQR, P.R. 129–31, C.R. 63–66); Megaa Moda Supp. ABCQR, P.R. 149–50, C.R. 82–86; Megaa Moda SDQR, P.R. 153–55, C.R. 90–94.

ITA determined in the *Preliminary Results* and continued to determine in the *Final Results* that Megaa Moda failed to fulfill its evidentiary burden to demonstrate the short-term nature of the income "interest on FD with FBL" because it did not provide supporting documentation after being specifically asked. *See* PDM at 13; IDM at 14. Megaa Moda challenges this determination and its challenge is two-fold. First, Megaa Moda claims that the administrative record "already fully supported the treatment of Megaa Moda's interest income on FD with FBL as short-term in nature." Megaa Moda 56.2 Br. at 13. Second, it argues that ITA's practice militates toward finding that the income "interest on FD with FBL" is short-term in nature. *Id.* at 13–14.

As ITA explained in the *Final Results*, it specifically asked Megaa Moda to demonstrate the short-term nature of the interest income offset. Supp. DQ at 8, P.R. 140, C.R. 76. However, Megaa Moda did not define "interest on FD with FBL" or provide supporting documentation. *See* Megaa Moda SDQR at SD1–21, P.R. 153, C.R. 90. Nor does Megaa Moda explain what "interest on FD with FBL" stands for in its initial brief to this court. *See generally* Megaa Moda 56.2 Br. ITA determined that Megaa Moda did not fully substantiate the interest income offset, as ITA had requested. IDM at 14.

In addition, Megaa Moda's cite to *Glycine from India* does not support its claim. Megaa Moda 56.2 Br. at 14, citing *Glycine from India*, 84 Fed.Reg. 18487 (Dep't Commerce May 1, 2019) (final LTFV determ.), and accompanying I&D Memo at Comment 3. In that case, the respondent classified fixed deposits and value-added tax payments, that generated interest income, as "cash and cash equivalents," and, in doing so, the respondent fully substantiated its requested short term interest income offset. Although Megaa Moda argues that "the same situation existed, and that it was lawfully incorrect for ITA not to have adopted the same approach in this case and treat the interest income on FD with FBL as an appropriate offset to financial expenses," *id.*, Megaa Moda glosses over that none of its submissions at the administrative stages nor the attachments to its brief define "interest on FD with FBL," let alone provide supporting

documentation for it. ITA, therefore, argues that it reasonably denied Megaa Moda's requested interest income offset for "interest on FD with FBL." *See* IDM at 14.

In its reply brief, however, Megaa Moda appears to argue that it should have been obvious that "FD" means fixed deposit and that repeated references to "FBL" in its papers is further-obvious shorthand for the banking institution holding that deposit. Megaa Moda Reply at 9–16. That argument is belated. It is also not obvious what the tenure of that deposit is (*i.e.*, even if "FD" is construed as a fixed deposit, it is not obvious that such an account was a "ready" source of working capital). As the party making a claim and in possession of information needed to support the claim, Megaa Moda was responsible for demonstrating the short-term nature of the interest income offset. In this instance, ITA found that it failed to do so. *See* IDM at 14; *see also QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed.Cir. 2011) (holding that parties, not ITA, have the burden of building the record); *Jiangsu*, 46 CIT at ___, 651 F.Supp.3d at 1364.

Nonetheless, because this matter is being remanded for reconsideration of AHSTAC's claim with respect to Megaa Moda's normal value, ITA retains the authority, of course, to revisit Megaa Moda's short-term interest claim of "FD with FBL" on remand, should it chose to do so. *See, e.g.*, *ABB, Inc. v. United States*, 41 CIT ___, ___ n.14, 273 F.Supp.3d 1186, 1199 n.14 (2017), *aff'd*, 920 F.3d 811 (Fed. Cir. 2019); *Laclede Steel Co. v. United States*, 19 CIT 1076, 1078 (1995).

V

Lastly, AHSTAC argues that because ITA allegedly "erred in determining Megaa Moda's weighted-average dumping margin, the margin assigned to the non-selected companies under review also requires revision as this margin was determined, in part, on the margin calculated for Megaa Moda." AHSTAC Br. at 23.

Since the defendant agrees that ITA would be statutorily obligated to recalculate the rate assigned to companies not selected for individual review if it were required to calculate a new rate for Megaa Moda, 19 U.S.C. §1677b(a), *see* Def's Resp. at 33, this issue will be remanded as well.

VI

In accordance with the foregoing, the *Final Results* must be, and hereby are, remanded to the International Trade Administration, U.S. Department of Commerce, for further proceedings not inconsistent with this opinion.

Results of remand shall be due November 15, 2024. Upon the filing of such results, the parties shall confer and submit a proposed scheduling order for comments, if any, on them 14 days thereafter.

So ordered.

Dated: New York, New York
August 15, 2024

/s/ Thomas J. Aquilino, Jr.
SENIOR JUDGE

Slip Op. 24–94

RISEN ENERGY, CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN ALLIANCE FOR SOLAR MANUFACTURING, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 23–00153

[The court remands Commerce's Ninth Administrative Review for results consistent with this opinion.]

Dated: August 16, 2024

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, for the plaintiff, Risen Energy, Co., LTD. With him on the brief were *Alexandra H. Salzman*, *Judith L. Holdsworth*, and *Vivien J. Wang*.

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

Timothy C. Brightbill, Wiley Rein, LLP, of Washington, DC, for the defendant-intervenor, the American Alliance for Solar Manufacturing. With him on the brief was *Laura El-Sabaawi*.

OPINION

Restani, Judge:

This action is a challenge to the final determination made by the United States Department of Commerce ("Commerce") in the Ninth Administrative Review of the countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells"), from the People's Republic of China ("China") covering the period from January 1, 2020, to December 31, 2020. Plaintiff Risen Energy, Co., LTD., ("Risen") requests that the court hold aspects of Commerce's final determination unsupported by substantial

evidence or otherwise not in accordance with law. The United States ("Government") asks that the court sustain Commerce's final determination.

BACKGROUND

Commerce published a countervailing duty order on solar cells from China on December 7, 2012. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012). In February 2022, Commerce began its Ninth Administrative Review of this countervailing duty order, covering the period of January 1, 2020, to December 31, 2020. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 87 Fed. Reg. 6,487 (Dep't Commerce Feb. 4, 2022). On March 22, 2022, the U.S. International Trade Administration selected Risen as one of two mandatory respondents in this review. *Dep't Commerce, Respondent Selection Memorandum*, P.R. 47 (Mar. 22, 2022).

Commerce published the preliminary results on January 3, 2023, *see Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2020*, 88 Fed. Reg. 1,355 (Dep't Commerce Jan. 3, 2023), along with the accompanying Preliminary Issues and Decision Memorandum, *Decision Memorandum for the Preliminary Results of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, C-570–980, POR 01/01/2020–12/31/2020 (Dep't Commerce Jan. 3, 2023) ("*PDM*").

Commerce published its final determination on June 29, 2023. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2020*, 88 Fed. Reg. 44,108 (Dep't Commerce July 11, 2023); *see also Issues and Decision Memorandum for Final Results of the Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, C-570–980, POR 01/01/2020–12/31/2020 (Dep't Commerce June 29, 2023) ("*IDM*").

In the final results, Commerce included the Government of China's ("GOC") Export Buyer's Credit Program ("EBCP") in its calculation of Risen's countervailing duty ("CVD") rate. *IDM* at 15–16. EBCP promotes exports by providing credit at preferential interest rates to

qualifying foreign purchasers of Chinese goods. *See Clearon Corp. v. United States*, 359 F. Supp. 3d 1344, 1347 (CIT 2019). As in prior reviews, during the Ninth Administrative Review, Risen reported that none of its customers used the EBCP during the Period of Review ("POR") and confirmed that it had never been involved in assisting customers in obtaining loans under the program; it also provided certifications of non-use from all but one of its U.S. customers attesting to this fact. *See Risen, Section III Questionnaire Response* at 40–41, Ex. 18, P.R. 119–124, C.R. 169–177 (May 27, 2022) ("*Risen Questionnaire Response*"). The GOC, however, did not provide all of the initially requested information to Commerce, stating that Commerce's questions about which partner banks were involved in the EBCP program were inapplicable because to the best of the GOC's knowledge "none of the respondents applied for, used, or benefitted from" the EBCP program. *GOC, Response to Section II Initial Questionnaire* at 147–48, P.R. 125–149, C.R. 205–242 (May 27, 2022) ("*GOC Questionnaire Response*").

In the *IDM*, Commerce explained that, based on the record before it, it was including the EBCP subsidy in its calculation of the CVD rate it applied to Risen because Risen had failed to supply it with sufficient record evidence to determine non-use and thus fill the gap caused by the GOC's noncooperation. *IDM* at 15–16. Risen then sought review of this decision at this court, arguing that Commerce's decision was not based on substantial evidence and was otherwise not in accord with the law. Compl. at 5–6, ECF No. 8 (Sept. 11, 2023).

JURISDICTION & STANDARD OF REVIEW

The court's jurisdiction is pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018) and 28 U.S.C. § 1581(c) (2018). The court sustains Commerce's final redetermination results unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Risen argues that Commerce's decision to include EBCP in Risen's rate is unsupported by record evidence and is contrary to law. Mot. for J. on the Agency Record at 3, ECF No. 30 (Jan. 31, 2024) ("Risen Br."). Specifically, Risen argues that the record in this case does not support that a gap exists which would merit a finding that Risen used EBCP, and argues that, if such a gap exists and continues to persist despite Risen's submissions, Commerce should have notified Risen that its response was deficient and given Risen the opportunity to remedy the deficiency. Risen Br. at 5. Further, Risen argues that, if the record does support a gap, because Risen has supplied non-use certificates

for the majority of its customers representing nearly all of its sales, Commerce should pro-rate the EBCP subsidy amount to account for the fact that, for such sales, the gap has been filled. Risen Br. at 7, 14–15. Commerce replies that a gap continues to exist, that Risen's deficient submission was not requested by Commerce and so no notice of deficiency was merited, and that it is not Commerce's practice to pro-rate the EBCP subsidy in the way that Risen requests and so it should not pro-rate here. Resp. in Opp. to Mot. for J. on the Agency Record at 5–6, 17, ECF No. 33 (Apr. 10, 2024) ("Gov. Br."). The court addresses each of these arguments below in turn.

I. *A gap exists that may support the application of adverse facts available*

Risen contends that the GOC substantially complied with Commerce's requests for information in this case, and that therefore no gap in the record exists for Risen to fill. Risen Br. at 10. Risen further argues that, if such a gap exists, it has substantially filled that gap. *Id.* at 8. Government asserts that because the GOC has not supplied Commerce with the list of partner banks that it requested, a gap exists that supports the application of adverse facts available. Gov. Br. at 8–10. Further, Government argues that, because Risen has not supplied non-use certificates for all of its customers, it has not filled that gap. *Id.* at 15–16.

If "necessary information is not available on the record" or if a responding party "withholds information" requested by Commerce, Commerce shall "use the facts otherwise available in reaching the applicable determination." 19 U.S.C § 1677e(a) (2018). Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" when information is missing from the record because a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information" from Commerce. *Id.* § 1677e(b). Commerce determines when a gap exists and when to apply adverse facts available ("AFA"), though it must be reasonable in making that determination. *See id.* § 1677e(b)(1); *see also Guizhou Tyre Co. v. United States*, 523 F. Supp. 3d 1312, 1361 (CIT 2021). In order for an application of AFA to be reasonable, Commerce must: (1) define the gap in the record by identifying what necessary information has been withheld; (2) explain the reason that the withheld information is necessary; and (3) show that only the withheld information could fill the gap. *See Guizhou Tyre*, 523 F. Supp. 3d at 1361.

In its attempt to verify non-use of EBCP, Commerce found that the GOC did not provide the information necessary to analyze usage of

the EBCP because, while the GOC did provide some information in answer to Commerce's questions,[1] the GOC refused to provide Commerce with a list of partner banks participating in the EBCP. *PDM* at 45. Commerce determined that it could not verify non-usage of the EBCP without this list because it would not know which banks to look for in a customer's books that could indicate an EBCP loan. *Id.* Thus, Commerce determined that the GOC's noncooperation created a gap in the record. *Id.*

The court has previously found that this explanation is reasonable. *Cooper (Kunshan) Tire Co. v. United States*, 539 F. Supp. 3d 1316, 1328–1334 (CIT 2021). It is still reasonable here. Commerce has supported that a gap exists.

II. *Risen has not filled the gap*

Risen argues that the combination of non-use certificates and the sales contract for the non-cooperative customer shows non-use of the EBCP program. Risen Br. at 13. Commerce has responded that the sales contract is not a sufficient substitute for a non-use certificate, and that it cannot verify non-use of EBCP without the full composite of non-use certificates. Gov. Br. at 9, 11.

Where a respondent is able to fill the gap caused by the noncooperation of another party, AFA may become inappropriate. *See Risen Energy Co. v. United States*, 665 F. Supp. 3d 1335, 1342 (CIT 2023) ("*Risen II*"). Parties have previously filled the gap by supplying Commerce with certificates from all customers indicating that each customer did not use the program. *Id.* Commerce has then proceeded to verify the non-use certificates and, on the basis of that verification, has removed the EBCP subsidy.[2] Non-use certificates represent verifiable statements from U.S. customers to the U.S. government that are generally "punishable under 18 U.S.C. § 1001 if . . . a customer is lying." *Risen II*, 665 F. Supp. 3d at 1343.

Risen supplied Commerce with non-use certificates for all but one of its customers. *Risen Questionnaire Response* at 40. Risen claims that this customer declined to supply the certificate due to an unrelated

[1] Specifically, the GOC supplied screenshots of what it described as a search of the Export-Import Bank's database for the customers' names. *GOC Questionnaire Response* at Ex. F-4. The search did not turn up any results, and the GOC indicated that this was evidence of non-use. *GOC Questionnaire Response* at 147–48. This is certainly stronger evidence than silence; but, given the unverifiable nature of this submission, Commerce is reasonable in seeking the list of banks to better enable it to verify whether EBCP has been used. *See Cooper (Kunshan) Tire Co. v. United States*, 539 F. Supp. 3d 1316, 1330 (CIT 2021); *see also RZBC Grp. Shareholding Co. v. United States*, Slip Op. 16–64, 2016 WL 3880773, at *4 (CIT 2016) (holding that because screenshots can be fabricated they are not sufficient evidence of non-use).

[2] This is the process that another mandatory respondent followed in this administrative review, and Commerce removed the EBCP subsidy for that respondent. *See IDM* at 8, 18.

business dispute.[3] Risen Br. at 6. Risen argues that because the contract with the non-complying customer does not contain any mention of the EBCP program the contract itself should serve as sufficient evidence of non-use. *Id.* Commerce found that this contract did not provide sufficient evidence of non-use and, because it did not have a full compilation of non-use certificates from Risen's customers, Commerce declined to attempt to verify any of the non-use certificates. *IDM* at 15–16. Instead, Commerce determined that the gap was not filled. *Id.* at 14.

As an initial matter, the court finds Commerce's determination that the contract was not an adequate substitute for a non-use certificate to be reasonable. Risen has presented no record evidence to demonstrate that its theory that the absence of mention of EBCP from a contract in fact demonstrates that EBCP was not used. Further, as previously noted by this court, the non-use certifications are significant because they are statements made by U.S. customers to the U.S. government, and are thus "punishable under 18 U.S.C. § 1001 if . . . a customer is lying." *Risen II*, 665 F. Supp. 3d at 1343. Without the non-use certificate, no statement that the customer did not use the program exists for Commerce to verify. Further, given the customer's non-compliance, it would not be reasonable to require Commerce to further engage a customer that has already, at this extremely early stage, declined to participate. Risen has failed to fill the entire gap in this case.

III. *Risen was entitled to notice of its submission's deficiency, but because there is no evidence that notice would have made any difference in this case the court does not order Commerce to reopen the record here*

Section 1677m(d) requires that if Commerce "determines that a response to a request for information . . . does not comply with the request, [Commerce] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy." 19

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[3] Although Commerce declines to explicitly explain the non-use demonstration requirement and argues that the respondents have produced these certificates spontaneously so as to make a 19 U.S.C. § 1677m(d) notice inapplicable, *see* Gov. Br. at 6, Commerce's practice has nonetheless long reflected that non-use certificates are required as at least one step in the process of demonstrating non-use. *Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1317 (CIT 2017) (discussing the use of non-use certificates in the 2013 POR). As this requirement is becoming extremely predictable, if Risen is having difficulty getting compliance because it is relying on customers' good will, Risen Reply Br. at 6, perhaps it might consider contracting for this need. Commerce, however, declines to make this requirement explicit and has failed to argue in this case that Risen, itself, did not do all that it should have done to comply with Commerce's requirement. Thus, this issue is not before the court here.

U.S.C. § 1677m(d). The court has previously held that § 1677m(d) does not require Commerce to ask respondents for supplemental information when the GOC's response is deficient because § 1677m(d) only provides the deficient party with the opportunity to remedy, not affected third-parties. *See Cooper (Kunshan) Tire Co. v. United States*, 610 F. Supp. 3d 1287, 1317 (CIT 2022). Nevertheless, the court has also held that once Commerce has issued a questionnaire to third-parties, and a third-party has responded attempting to demonstrate non-use, if the third-party's response is deficient due to incompleteness, the third-party is entitled to notice and an opportunity to remedy that deficiency. *Risen Energy Co. v. United States*, 658 F. Supp. 3d 1364, 1371 (CIT 2023). Here, Commerce should have informed Risen that its incomplete collection of non-use certificates was a deficient response. Nonetheless, unlike in *Risen II*, here Risen has given no indication that it would be able to remedy this deficiency and has failed to show any ability to remedy it at any subsequent stage of litigation. Thus, as Commerce is reasonable in finding Risen's contract submission deficient, it would be futile to ask Commerce to inform Risen of a deficiency of which Risen is already well aware and which Risen has given no indication that it will be able to remedy. Accordingly, the court will not require Commerce to reopen the record. Commerce has discretion to accept or reject any new evidence offered on remand.

IV. *Commerce must account for the portion of non-use certificates that Risen has provided to Commerce*

Risen argues that, if it has not completely filled the gap, Commerce should either remove EBCP from the CVD rate calculation because Risen has nonetheless substantially filled the gap by accounting for the majority of its sales through non-use certificates or it should pro-rate the subsidy to account for the proportion of its customers who turned in non-use certificates. Risen Br. at 14–15. Government replies a gap persists and so AFA remains appropriate. Gov. Br. at 6, 17. Government further argues that to pro-rate the CVD rate where most, but not all, of a party's customers have cooperated runs counter to its practice and mistakes the nature of the gap to be filled. Gov. Br. at 17. Government asserts that the because the gap is created by the GOC's noncooperation, not Risen's, as long as some gap remains, the application of AFA is still appropriate, as the statute authorizes AFA in response to a gap created by the noncooperation of an interested party. Gov. Br. at 16–17. According to Government, filling the gap, or failing to fill the gap, is a zero-sum game; it cannot be partially done. *See id.*

Use of AFA is only appropriate where information is otherwise not available on the record, and should not be used "simply to punish" a non-cooperative party. *Guizhou Tyre Co., Ltd. v. United States*, 348 F. Supp. 3d 1261, 1270 (CIT 2018) (citations omitted). Commerce must consider all information placed on the record. *GPX Int'l Tire Corp. v. United States*, 37 CIT 19, 58–59, 893 F. Supp. 2d 1296, 1332 (2013), *aff'd*, 780 F.3d 1136 (Fed. Cir. 2015) ("When Commerce has access to information on the record to fill in the gaps created by the lack of cooperation by the government, as opposed to the exporter/producer, however, it is expected to consider such evidence."). Where information has been submitted on the record that may fill the gap such that it makes the use of AFA inappropriate, Commerce must show that the information submitted is not reasonably verifiable before it applies AFA. *Risen II*, 665 F. Supp. 3d at 1342; *see also Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316, 1327 (CIT 2018) (citing 19 U.S.C. § 1677m(e)). In order to find that information is not verifiable, Commerce must at least attempt to complete verification. *Risen II*, 665 F. Supp. 3d at 1342; *Guizhou Tyre Co. v. United States*, 415 F. Supp. 3d 1402, 1405 (CIT 2019) ("The adverse use of facts otherwise available can only be used to fill gaps necessary to complete the factual record. . . . But until these reasons are grounded in facts supported by the record—that is, until the Department actually attempts verification and adequately confronts these (purportedly) insurmountable challenges, there is little for the Department to hang its hat on when it 'continues to find a "gap" in the record.'") (emphasis omitted) (citations omitted). Where verification is only able to confirm nonuse from some customers, but not all, pro-rating the EBCP subsidy to account for the proportion of non-use that is verifiable may be reasonable and appropriate. *Dalian Meisen Woodworking Co. v. United States*, Slip Op. 24–83, 2024 WL 3580510 (CIT 2024).

Risen has supplied Commerce with non-use certifications from all of its customers but one. *Risen Questionnaire Response* at 40. That one customer accounts for less than two percent of Risen's total sales. *Id.* Commerce, however, has declined to attempt verification of any portion of the non-use certificates that Risen has turned in, because it does not have non-use certificates from all of Risen's customers. *IDM* at 15–16. Commerce asserts that attempting verification without the full cooperation of all of Risen's customers would be futile, as it clearly could not result in a finding of one-hundred percent non-use. *Id.* at 15–16; Gov. Br. at 16.

Commerce may reasonably apply AFA to Risen as regards the sales of the customer that did not supply a non-use certificate,[4] but the approach it has taken here, applying AFA to Risen as regards all sales from all customers, regardless of whether or not that customer has turned in a certificate of non-use, is not reasonable. Commerce is correct that the gap in this case is created by the GOC's noncooperation, and that the question at issue is whether Risen has been able to fill that gap. But by applying AFA to all of Risen's sales, based on Risen's inability to account for a sliver of them, Commerce has mistaken the nature of AFA in the EBCP context. AFA, in CVD cases, is only appropriate so long as a gap in the record exists because the point of AFA is to allow Commerce to make a decision where a record is otherwise incomplete. *See* 19 U.S.C. § 1677e(b); *GPX*, 37 CIT at 58–59, 893 F. Supp. 2d at 1332. AFA does not exist to punish noncooperative parties. *Guizhou Tyre*, 348 F. Supp. 3d at 1270. So, while it is true that the GOC's noncooperation continues to create the portion of the gap in the record that Risen is unable to fill, Commerce cannot ignore that Risen has managed to fill substantial portions of the record such that for almost all of its sales there may no longer be a gap.[5] The statute does not permit Commerce to substitute an adverse presumption that is contrary to the actual facts on the record where actual facts exist.

The record before the court currently contains the statements of most of Risen's U.S. customers, claiming that none have used the EBCP program and that all are willing to participate in verification proceedings. While Commerce is not required to verify those statements—as verification is discretionary[6]—it cannot treat the statements as unverifiable without at least attempting to verify them. *See Risen II*, 665 F. Supp. 3d at 1342. If Commerce chooses to attempt verification, verification attempts might result in the discovery of information that counters these certifications, or it may result in an absence of record information that fails to support the attestations of non-use, either of which might reasonably lead Commerce to discount the certificates and thus might support AFA. *See* 19 U.S.C. § 1677m(e). At this stage, however, Commerce has declined to attempt any verification of these submissions. Without attempting verification, Commerce may not reasonably determine that the non-use of

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[4] *See supra* Section I.

[5] Even in the EAPA context, where whether an adverse inference may be used without regard to whether a gap exists, if other information on the record "so undermines the determination that it is rendered arbitrary, the determination cannot stand." *CEK Grp. LLC v. United States*, 633 F. Supp. 3d 1369, 1379 n.7 (CIT 2023).

[6] *See, e.g.*, *IDM* at 14 n.46.

the customers that turned in non-use certificates is unverifiable. *See Risen II*, 665 F. Supp. 3d at 1342. If Commerce wishes to apply AFA against Risen for the sales of any customers that have supplied non-use certificates, it must attempt to verify the information that Risen has submitted.

Commerce argues that verification in this case would be futile, since in order to remove AFA Commerce must be certain that Risen received no benefit from EBCP. Def.'s Resps. to the Court's Written Questions at 3–4, ECF No. 40 (Aug. 1, 2024). As Risen was unable to supply complete non-use certificates, Commerce knows that it will not be able to verify complete nonuse, and so attempting verification in this case is futile. *Id.* This explanation is particularly unreasonable given Commerce's own explanation of the EBCP program.[7] Commerce has explained the relevance of the gap caused by the GOC's refusal to supply it with the list of partner banks by emphasizing its need to check each importer's individual financing. Gov. Br. at 15. EBCP, Commerce has explained, is a program that each importer might engage with on an individual level, and so as a result Commerce must have information on which banks are used by the GOC and, in the alternative, must individually verify each importer's financing to determine that no importer was financed by EBCP. *Id.* Any subsidy Risen might or might not have received through the program is therefore tied to its customers' financing, and thus, Risen itself can only be subsidized by any individual customer proportionate to its sales to that customer. Customers accounting for over 98 percent of Risen's sales have placed non-use certifications on the record. Risen Br. at 14–15. Therefore, even if EBCP funded 100 percent of the non-cooperating party's sales, 100 percent of two percent of sales does not support an application of a CVD rate that includes EBCP to all of Risen's product sales. The math does not add up. Based upon Commerce's own explanation of how EBCP works, even if the non-

[7] In supplemental briefing, Government and Defendant-Intervenor suggest that it is necessary to know whether a single sale benefited from EBCP in order to know that no benefit was conferred by subsidization, so as to calculate a final overall CVD rate. Def.'s Resps. to the Court's Written Questions at 3–4, ECF No. 40 (Aug. 1, 2024); Def.-Intervenor Answers to Oral Argument Questions at 1–2, ECF No. 41 (Aug. 1, 2024). This suggests an accuracy in calculating a countervailing duty rate that does not reflect what is actually occurring. As no party has ever been shown to use EBCP there is no subsidy rate calculated for it. *See IDM* at 18–19. A rate for another program is used and that program may or may not be very similar to EBCP. *Id.* In any case if Commerce concludes something like 98 percent of sales did not benefit from EBCP then a rate that indicates all sales did benefit would not be reflective of a proper CVD rate.

-compliant customer did use EBCP, at most substantial evidence only supports that two percent of Risen's overall sales were subsidized.[8]

AFA exists to complete an incomplete record. The record before the court currently contains the statements of most of Risen's U.S. customers, claiming that none have used the EBCP program and all are willing to participate in verification proceedings. Therefore, as the record stands, customers accounting for 98 percent of Risen's sales have given every indication that they are able to reasonably fill the gap. At this stage, AFA is not appropriate as applied to the 98 percent of sales for which the cooperative customers account. Commerce must therefore either attempt verification, to determine more accurately what proportion of the sales Risen is able to account for, or it must remove at least the portion of the EBCP rate attributable to the customers demonstrating non-use from the calculation of Risen's overall CVD rate. Should Commerce choose to attempt verification, the court does not intend, at this stage, to limit Commerce from utilizing a particular method to pro-rate or any rate or rates that are otherwise reflective of the record evidence. Commerce must grapple with all evidence on the record; how it chooses to account for that evidence is discretionary, so long as its method is reasonable.

CONCLUSION

For the foregoing reasons, the court remands to Commerce for verification of the non-use certificates or for a determination otherwise consistent with this opinion on the issues. The government remand shall be issued within 90 days hereof. Comments may be filed 30 days thereafter and any response 10 days thereafter.

Dated: August 16, 2024
New York, New York

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

[8] In supplemental filings, Commerce argues that pro-rating is hypothetically inappropriate because in order to pro-rate it would need to have definite information as to the benefit Risen received from EBCP. Def.'s Resps. to the Court's Written Questions at 3–4. The information on the record, however, does make clear that, assuming the non-use certificates are verifiable, no benefit in this case could be greater than two percent of Risen's sales. Thus, for 98 percent of sales, the benefit is knowable. How Commerce wishes to account for whatever benefit was conferred by the remaining two percent is for remand.

Slip Op. 24–95

RESOLUTE FP CANADA INC., Plaintiff, v. UNITED STATES, Defendant, and COMMITTEE OVERSEEING ACTION FOR LUMBER INTERNATIONAL TRADE INVESTIGATIONS OR NEGOTIATIONS, and SIERRA PACIFIC INDUSTRIES, Defendant-Intervenors.

Before: Jane A. Restani, Judge
Court No. 23–00095

[Sustaining the U.S. Department of Commerce's final results of the first expedited sunset review of the antidumping duty order on softwood lumber from Canada.]

Dated: August 19, 2024

Elliot J. Feldman, *Ronald J. Baumgarten, Jr.*, *Michael S. Snarr*, and *Tung A. Nguyen*, Baker & Hostetler, LLP, of Washington, DC, for the plaintiff Resolute FP Canada Inc.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Deputy Director. Of Counsel on the brief was *Jared M. Cynamon*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Zachary J. Walker, *Andrew W. Kentz*, and *Jessica M. Link*, Picard, Kentz & Rowe, LLP, of Washington, DC, for the defendant-intervenor Committee Overseeing Action for Lumber International Trade Investigations or Negotiations.

David J. Ross, *Jeffrey I. Kessler*, and *Stephanie E. Hartmann*, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of Washington DC, for the defendant-intervenor Sierra Pacific Industries.

OPINION AND ORDER

Restani, Judge:

Before the court are the United States Department of Commerce's ("Commerce") Final Results of the Expedited First Sunset Review of the Antidumping Duty Order on softwood lumber from Canada. *See Certain Softwood Lumber Products from Canada: Final Results of the Expedited First Sunset Review of the Antidumping Duty Order*, 88 Fed. Reg. 20,479 (Dep't Commerce Apr. 6, 2023) ("*Final Results*") and accompanying *Issues and Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Antidumping Duty Order on Softwood Lumber from Canada*, A-122–857, Sunset Review (Dep't Commerce Mar. 31, 2023) ("*IDM*"). Plaintiff Resolute FP Canada Inc. ("Resolute"), a foreign producer of softwood lumber, challenges Commerce's determination that revocation of the antidumping order would be likely to lead to continuation or recurrence of dumping. Broadly, Resolute argues that Commerce's methodology and use of the Cohen's d test in the original investigation was flawed, and that

without it Resolute's dumping margin would have been zero. Accordingly, Resolute argues that Commerce should have used its discretion in the expedited sunset review to amend this error, report a zero-dumping margin, and revoke the order as to Resolute.[1] The government asserts that Commerce's use of the Cohen's d test has been repeatedly upheld by this court and the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), and thus Commerce was correct to reject Resolute's arguments.

BACKGROUND

I. The History of the Relevant Antidumping Order

On November 25, 2016, the domestic softwood lumber industry, namely the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations ("COALITION"), filed antidumping petitions with Commerce and the U.S. International Trade Commission ("ITC") concerning imports of softwood lumber from Canada. Commerce investigated, and issued a final affirmative determination that subject merchandise was being sold in the United States at less-than-fair value. *See Certain Softwood Lumber Products From Canada: Initiation of Less-Than-Fair-Value Investigation*, 81 Fed. Reg. 93,892 (Dep't Commerce Dec. 22, 2016); *Certain Softwood Lumber Products From Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 82 Fed. Reg. 51,806 (Dep't Commerce Nov. 8, 2017). Subsequently, Commerce published an antidumping duty ("AD") order, assigning Resolute a weighted average dumping margin of 3.2 percent. *See Certain Softwood Lumber Products From Canada: Antidumping Duty Order and Partial Amended Final Determination*, 83 Fed. Reg. 350 (Dep't Commerce Jan. 3, 2018). Since the original AD order, Resolute has participated in each annual administrative review in differing capacities, as either a mandatory respondent or a non-examined company. *See* Rule 56.2 Mot. for J. on Agency R. by Pl. Resolute at 5–7, ECF No. 28 (Nov. 6, 2023) ("Resolute Br."). At issue here, is the first expedited sunset review of this AD order.

[1] Resolute asserts that Commerce has the discretion to revoke an antidumping order on a company-specific basis, and that Commerce should have done so here. Rule 56.2 Mot. for J. on Agency R. by Pl. Resolute at 22, ECF No. 28 (Nov. 6, 2023) ("Resolute Br."). This argument is premised on Resolute's assertion that absent the use of Cohen's d in Commerce's methodology, its rate would have been zero or de minimis. *Id.* at 18. The court concludes, however, that Commerce's use of Cohen's d was reasonable here. *See infra* at pp. 6–10. Thus, assuming arguendo that Commerce can revoke an AD order on a company specific basis, the conditions for such theoretical revocation would not be met here as Resolute would have a rate greater than the de minimis standard. Accordingly, Commerce's decision not to recommend revocation of the AD order as to Resolute was not arbitrary or capricious.

II. Framework of Sunset Reviews and Expedited Sunset Reviews

Sunset reviews of duty orders are mandated reviews that occur five years after the publication of an antidumping duty order to determine whether termination of the order would be likely to lead to continuation or recurrence of dumping or injury. 19 U.S.C. § 1675(c) (2018). If Commerce finds no likelihood of continuation or recurrence of dumping, the order must be revoked.[2] 19 U.S.C. § 1675(d). The statute provides that Commerce publish a notice of initiation of a sunset review no later than thirty days before the fifth anniversary of the date of publication of an antidumping order. 19 U.S.C. § 1675(c)(2). Interested parties may then submit information expressing their willingness to participate in the review, state the likely effects of revocation, and provide any other information or industry data they deem relevant. *Id.* If no interested party responds, the order is revoked. 19 U.S.C. § 1675(c)(3)(A). If interested parties respond, Commerce will either conduct a full or expedited review depending on the adequacy of said response.[3] 19 U.S.C. § 1675(c)(3)(B); *see Neenah Foundry Co. v. United States*, 25 CIT 287, 142 F. Supp. 2d 1008 (2001).

Expedited reviews differ from full-fledged sunset reviews, which involve more fact gathering. *See AG der Dillinger Huttenwerke v. United States*, 26 CIT 298, 305, 193 F. Supp. 2d 1339, 1348 (2002) (stating that "in a 'full review,' Commerce must engage in an analysis that is at least somewhat more searching than simply continuing to apply the [duty] rate determined in the original investigation"). Expedited reviews, by contrast, are based on facts available, and normally rely on calculated dumping rates from prior determinations and information contained in the parties' responses.[4] *See* 19 C.F.R. § 351.308(f) (2022).

Commerce is required to consider certain factors in its sunset review of an AD order: namely, the weighted average dumping margins

[2] Sunset reviews also involve separate proceedings conducted by the ITC which determines whether material injury to a U.S. industry is likely to continue or recur if an order is revoked. *See* 19 U.S.C. § 1675a. Resolute does not challenge the ITC proceedings. *See* Resolute Br. at 43 n.15.

[3] Under the applicable regulation, a response may be inadequate if the substantive responses from respondent interested parties account for 50 percent or less of the total exports of subject merchandise to the United States over the five calendar years preceding the year of the publication of the notice of initiation. *See* 19 C.F.R. § 351.218 (2022).

[4] Expedited reviews are justified because "[i]f parties provide no or inadequate information in response to a notice of initiation, it is reasonable to conclude that they would not provide adequate information if the agencies conducted a full-fledged review." Uruguay Round Agreements Act, Statement of Administrative Action, H.R.Rep. No. 103–316, vol. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4206 ("SAA").

determined in the investigation and subsequent reviews, and the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order. 19 U.S.C. § 1675a(c)(1); *see also* Uruguay Round Agreements Act, Statement of Administrative Action, H.R.Rep. No. 103–316, vol. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4213–14 ("SAA"). If "good cause" is shown, Commerce shall also consider such other price, cost, market, or economic factors as it deems relevant. 19 U.S.C. § 1675a(c)(2). Commerce then reports to the ITC the magnitude of dumping that is likely to prevail if the order is revoked. 19 U.S.C. § 1675a(c)(3). Normally, Commerce will select the dumping margin determined in the original investigation because that is the only calculated rate that reflects the behavior of exporters without the discipline of an order in place. SAA at 4214.

III. The Expedited Sunset Review at Issue

On December 1, 2022, Commerce initiated a sunset review of the AD order on softwood lumber from Canada as required by 19 U.S.C. § 1675(c). *See Initiation of Five-Year (Sunset) Reviews*, 87 Fed. Reg. 73,757 (Dep't Commerce Dec. 1, 2022). The COALITION and Sierra Pacific Industries ("Sierra Pacific") (collectively, "defendant-intervenors") filed their notices of intent to participate in the sunset review as domestic interested parties. *Notice of Intent to Participate*, P.R. 10 (Dec. 5, 2022); *Notice of Intent to Participate in Sunset Review*, P.R. 21 (Dec. 16, 2022). Similarly, Resolute submitted a substantive response as a respondent interested party. *Substantive Response of Resolute*, P.R. 28–29, C.R. 1–2 (Jan. 5, 2023). No other respondent interested party submitted a substantive response. *See IDM* at 2. Commerce determined that the responses from respondent interested parties were inadequate and thus conducted an expedited sunset review.[5] *Id.*

On March 3, 2023, Resolute submitted a case brief arguing that Commerce should find no likelihood of continuation or recurrence of dumping as to Resolute due to alleged flaws with the Cohen's d methodology underlying previous findings of dumping. *Resolute's Case Brief* at 7, P.R. 36 (Mar. 3, 2023). Commerce disagreed, finding that the use of the Cohen's d test was reasonable and in accordance

[5] Here, Resolute was the only respondent interested party that responded to the notice of initiation. *IDM* at 1–2. Thus, to provide an adequate response, Resolute alone would have needed to account for more than 50 percent of total exports of subject merchandise to the United States from Canada during the five years preceding the year of the initiation of this sunset review. *See IDM* at 2; 19 C.F.R. § 351.218(e)(1)(ii)(A) (2022). Commerce determined that Resolute failed to meet this standard and Resolute did not dispute that determination. *IDM* at 2.

with law. *IDM* at 10. Deciding to follow its practice of "select[ing] the weighted-average dumping margins from the final determination in the original investigation," Commerce reported to the ITC that "revocation of the *Order* would be likely to lead to the continuation or recurrence of dumping, and the magnitude of the weighted-average dumping margin likely to prevail is up to 7.28 percent." *Final Results*, 88 Fed. Reg. at 20,480; *IDM* at 22. Commerce did not report a margin specific to Resolute. *See IDM*.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2018). The court shall hold unlawful any determination, finding, or conclusion in an expedited sunset review unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(ii) (2018).

DISCUSSION

A. The Cohen's d Test Has Not Been Overruled By Recent Jurisprudence

Resolute contends that "[c]hanges in jurisprudence" have illustrated that Commerce's differential pricing methodology ("DPM" or "methodology") underlying the 7.28 percent rate is flawed, and that Commerce's refusal to reconsider the rate was arbitrary and capricious. Resolute Br. at 10–11. Specifically, Resolute takes issue with the use of the "Cohen's d test" in Commerce's methodology and asserts that had Commerce not used a methodology that utilizes said test, Resolute's rate would have been zero.[6] *Id.* at 1–3, 15. The government responds that any concerns the Federal Circuit has had with the Cohen's d test were specific to the facts of those cases, and that neither the Federal Circuit nor this court have "set aside Commerce's use of the Cohen's d test." Def.'s Opp'n to Pl.'s Mot. for J. on the Administrative R. at 16, ECF No. 32 (Feb. 26, 2024) ("Gov. Br.").

In an antidumping investigation, Commerce typically compares "the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise" unless it determines another method is appropriate. 19 U.S.C. § 1677f-1(d)(1)(A)(i); 19 C.F.R. § 351.414(c)(1) (2022). This is referred to as an average-to-average ("A-to-A") calculation as it compares the average normal prices in a producer's home market to the

[6] Resolute fleetingly challenges Commerce's use of the ratio and meaningful difference tests in its differential pricing methodology but fails to substantiate these arguments in binding law. Resolute Br. at 16–17, 35–36; *Resolute's Case Br.* at 34–35, P.R. 36 (Mar. 3, 2023); *see also* infra at 13–15.

average export prices in the United States. *See Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1337, 1340–41 (Fed. Cir. 2017). The A-to-A calculation, however, can fail to identify dumping in instances of "targeted" or "masked" dumping, which occurs when an exporter sells at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions. *See id.* Higher-priced products can thereby offset or mask dumped products in an A-to-A calculation.

To address this concern, Commerce may use an average-to-transaction ("A-to-T") calculation instead of A-to-A if certain criteria are met.[7] *See* 19 U.S.C. § 1677f-1(d)(1)(B). An A-to-T calculation compares the "weighted average of the normal values to the export prices . . . of individual transactions." *Id.* To ensure that the statutory criteria allowing an A-to-T calculation are met, Commerce utilizes its differential pricing methodology consisting of three tests: (1) the Cohen's d test;[8] (2) the ratio test;[9] and, (3) the meaningful difference test.[10] *See Apex Frozen Foods Priv. Ltd. v. United States*, 144 F. Supp. 3d 1308, 1323–32 (CIT 2016), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017). Further, along with these calculations, Commerce employs a method of "zeroing"[11] to "precisely examine[] the impact of the amount of dumping which is hidden." *See IDM* at 14. These steps, all together, determine whether a pattern of significant price differences exist

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[7] The statute allows Commerce to compare "the weighted average of the normal values to the export prices . . . of individual transactions for comparable merchandise, if-- (i) there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions or periods of time, and (ii) [Commerce] explains why such differences cannot be taken into account using [the A-to-A method]." 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii) (emphasis added).

[8] Commerce performs the Cohen's d test by calculating the difference between the weighted-average sales prices of a test group and its corresponding comparison group, and subsequently comparing that difference in relation to the pooled standard deviation of the two groups. *Apex Frozen Foods Priv. Ltd. v. United States*, 144 F. Supp. 3d 1308, 1324 (CIT 2016). The resulting value is known as the Cohen's d coefficient. *Id.* Commerce considers test group sales to pass the Cohen's d test if the resulting Cohen's d coefficient is equal to or greater than 0.8, which Commerce deems to be a strong indication of significant price differences. *Id.*

[9] Under the ratio test, if 33% of respondent's sales or less pass the Cohen's d test, Commerce uses the A-to-A method, and if 66% or more pass, Commerce uses the A-to-T method. *Stupp Corp. v. United States*, 619 F. Supp. 3d 1314, 1322 (CIT 2023). In those cases where between 33% and 66% of the value of a respondent's U.S. sales pass the Cohen's d test, Commerce applies a hybrid methodology. *Id.*

[10] If Commerce has not selected the A-to-A method for all sales, it applies the "meaningful difference" test to determine whether the A-to-A method could nevertheless account for the disparate pricing. *Stupp*, 619 F. Supp 3d at 1322–23.

[11] "Zeroing" is a practice by which negative dumping margins (i.e., margins of sales of merchandise sold at nondumped prices) are given a value of zero and only positive dumping margins (i.e., margins for sales of merchandise sold at dumped prices) are aggregated. *Union Steel v. United States*, 713 F.3d 1101, 1104 (Fed. Cir. 2013).

among purchasers, regions, or periods of time such that an A-to-T calculation is warranted. *See Apex*, 862 F.3d at 1342 n.2.

In the underlying investigation, Commerce "calculated a margin of 3.20 percent [as to Resolute] using its standard A-to-T comparison methodology." *IDM* at 18. Commerce explained that the A-to-A method could not account for the pattern of significant price differences among Resolute's sales and that the A-to-T method was therefore warranted. *Id.* at 13. Nevertheless, several opinions by the Federal Circuit and this court have questioned Commerce's choice of methodology in certain circumstances. *See, e.g.*, *Stupp Corp. v. United States*, 5 F.4th 1341, 1357–60 (Fed. Cir. 2021) (questioning the usefulness of Commerce's application of the Cohen's d test to data that do not satisfy the assumptions on which the test is based). Thus, the question before the court is whether recent jurisprudence regarding specific applications of Commerce's DPM— the first step of which is the Cohen's d test—undermines Commerce's use of DPM in the original investigation that Commerce relied on in the sunset review.

Based upon the present record, the court cannot conclude that Commerce abused its discretion in carrying out its statutory objective in this sunset review. The two cases Resolute primarily relies upon are *Stupp* and *Mid Continent. See* Resolute Br. at 28–31. As Commerce illustrates in the *IDM*, each of these are distinguishable. *See IDM* at 16–18. In *Stupp*, the Federal Circuit was concerned with the efficacy of Cohen's d in specific statistical scenarios; namely, when assumptions regarding sample size, normality, and distribution were in question.[12] *See Stupp*, 5 F.4th at 1357–60. The Federal Circuit thus remanded the case to Commerce for further explanation, and this court has affirmed said explanation. *Id.* In *Mid Continent*, the Federal Circuit remanded due to academic literature undermining Commerce's preference for using a simple average in the denominator of the Cohen's d test. *Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367 (Fed. Cir. 2022) (holding that Commerce needs a reasonable justification for departing from what the published literature teaches about Cohen's d). No such academic literature exists on this

[12] Resolute does not allege any of these statistical assumptions were violated here. In its supplemental briefing, Resolute reaffirms its objection to Commerce's use of Cohen's d in its methodology *at all*, rather than under specific statistical circumstances. Resolute Resp. to Questions of the Ct. at 5–6, ECF No. 57 (Aug. 5, 2024) (stating that, "[t]he issue here is the methodology, not the peculiar facts of any particular case," and that "[t]he differences from one case to another . . . are irrelevant"). Because the Federal Circuit has not invalidated the use of Cohen's d in Commerce's DPM, Resolute's argument fails.

record,[13] and this court has subsequently affirmed Commerce's updated explanation defending its preference for using a simple average. *See Mid Continent Steel & Wire, Inc. v. United States*, 680 F. Supp. 3d 1346 (2024).

Resolute's reliance on Federal Circuit precedent to question the reasonableness of Commerce's methodology is overstated. If and until the Federal Circuit invalidates the standard use of Cohen's d in Commerce's DPM, Commerce is free to utilize it if adequately explained. *See, e.g.*, *Apex*, 144 F. Supp. 3d at 1322 (finding Commerce's adoption of the alternative A-to-T methodology as not arbitrary); *Stupp*, 619 F. Supp. 3d at 1328 (holding Commerce's use of Cohen's d, when applied as a component of its differential pricing analysis, to be reasonable); *NEXTEEL Co. v. United States*, 676 F. Supp. 3d 1345, 1357 (CIT 2023) (holding that Commerce adequately explained how its use of the Cohen's d test was reasonable). Accordingly, the court concludes that recent precedent does not prohibit the standard application of the Cohen's d test.

B. There Was Not Good Cause to Consider Other Factors

Resolute argues that Federal Circuit precedent and a submitted expert report questioning the "reasonableness" of Commerce's application of Cohen's d constitutes "good cause" under 19 U.S.C. § 1675a(c)(2) for Commerce to consider "other factors" in this sunset review. Resolute Br. at 25–35; 19 U.S.C. § 1675a(c)(2) (providing that "[i]f good cause is shown, [Commerce] shall also consider such other price, cost, market, or economic factors as it deems relevant").[14] Resolute argues it made the requisite showing of good cause for Commerce to abandon its reliance on the dumping rate calculated in the original investigation using an A-to-T methodology and find a zero dumping margin as to Resolute. Resolute Br. at 25–27.

The government responds that Resolute's disagreement with Commerce's choice of using A-to-T methodology in the original investigation does not amount to "good cause" to reconsider it in an expedited sunset review. Gov. Br. at 15. The government argues that Commerce's methodology, including the use of Cohen's d, was lawful and

[13] Although Resolute argues that the Hedges Report constitutes academic literature, it is not a published paper but instead a report specially prepared for the Government of Canada. *See* Review and Analysis of the Cohen's d Test as Used in the U.S. Department of Commerce's Differential Pricing Methodology by Prof. Larry V. Hedges, ECF No. 40 at Ex. 9 (May 16, 2024) ("Hedges Report"). As the court later explains, for the purposes of an expedited sunset review Commerce has sufficiently addressed and refuted the claims made by the report here. *See infra* pp. 15–17. This court does not address whether this explanation would be sufficient during an initial investigation, annual review, or full sunset review.

[14] This list of factors is illustrative, and Commerce will analyze such information on a case-by-case basis. SAA at 4214.

remains intact even after recent judicial decisions. *Id.* at 15–17; *see also* Sierra Pacific Industries' Mem. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R. at 20, ECF No. 33 (Feb. 26, 2024) (arguing that "unsettled case law that involves ongoing judicial and administrative proceedings does not meet the high threshold for "good cause").

Although the statute does not define what constitutes "good cause" in a sunset review, the Statement of Administrative Action[15] ("SAA") accompanying this statute states that interested parties may "provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping. The list of ["other"] factors is illustrative, and the Administration intends that Commerce will analyze such information on a case-by-case basis." SAA at 4214. In prior proceedings, Commerce has rejected certain "good cause" arguments which it determined to be speculative or unsupported. *See, e.g.*, *Preliminary Results Issues and Decision Memorandum for the Full Sunset Review of the Antidumping Duty (AD) Order on Lightweight Thermal Paper from Germany*, A-428–840, Sunset Review (Dep't Commerce Feb. 10, 2014).

In the expedited sunset review, Commerce rejected Resolute's argument that ongoing litigation at the Federal Circuit should stop Commerce from using Cohen's d in its DPM and found that "the methodology [] relied on to calculate Resolute's margin in the underlying investigation of the *Order* was in accordance with the law" because Commerce had used "standard A-to-T comparison methodology." *IDM* at 18.

Commerce's decision that there was not "good cause" to abandon Resolute's dumping margin calculated in the original investigation was not arbitrary and capricious. As the court has already concluded, the Federal Circuit and the CIT have not set aside Commerce's use of Cohen's d in *Stupp*, *Mid Continent*, or any subsequent decision at the time of this opinion. *See supra* at pp. 9–10. Accordingly, Resolute's argument that ongoing litigation invalidates (or will invalidate) Commerce's use of Cohen's d is merely speculative. In the light of the line of cases from this court affirming Commerce's use of Cohen's d and its larger DPM, the court concludes that Commerce's decision to not find "good cause" on this basis was reasonable.

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[15] Congress has recognized the SAA as "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements." 19 U.S.C. § 3512(d) (2018); *see Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294, 1310 (Fed. Cir. 2004).

C. Extraordinary Circumstances Were Not Present

Similar to its argument under "good cause," Resolute asserts that "extraordinary circumstances" exist to allow Commerce to rely on dumping margins other than those calculated in prior determinations.[16] Resolute Br. at 43–44 (citing SAA at 4214). The extraordinary circumstances here, Resolute contends, are, again, the recent challenges to Cohen's d in ongoing litigation at the Federal Circuit and the CIT. *Id.* Further, Resolute argues Commerce failed to address this argument in the *IDM*. *Id.* at 45. The government contends that Commerce addressed these arguments by finding a lack of "good cause" on the same issues and that "extraordinary circumstances," therefore, do not and cannot exist. Gov. Br. at 19–21.

The "extraordinary circumstances" exception cited by Resolute is found in the legislative history accompanying 19 U.S.C. § 1675a(c)(2): "[o]nly under *the most extraordinary circumstances* should Commerce rely on dumping margins . . . other than those it calculated and published in its prior determinations."[17] SAA at 4214 (emphasis added). "Extraordinary circumstances" have been found by Commerce where there have been explicit changes in departmental policy or jurisprudence, or when outside factors create a very high likelihood that existing margins are inaccurate. *See Certain Preserved Mushrooms from Chile, India, Indonesia and the People's Republic of China: Final Results of Expedited Third Sunset Reviews of the Antidumping Duty Orders*, 80 Fed. Reg. 39,053 (Dep't Commerce July 8, 2015); *and Corrosion-Resistant Carbon Steel Flat Products From Germany and the Republic of Korea: Final Results of Full Sunset Reviews*, 77 Fed. Reg. 72,827 (Dep't Commerce Dec. 6, 2012) (finding

[16] Additionally, Resolute highlights multiple World Trade Organization ("WTO") decisions as relevant to its claim of "extraordinary circumstances." Resolute Br. at 44–45. In these instances, however, Commerce instituted a policy specific to those cases to not utilize methods that were inconsistent with the WTO. *See Certain Preserved Mushrooms from Chile, India, Indonesia, and the People's Republic of China: Final Results of the Expedited Third Sunset Reviews of the Antidumping Duty Orders*, 80 Fed. Reg. 39,053 (Dep't Commerce July 8, 2015) ("[I]n accordance with the *Final Modification* for Reviews, the Department did not rely on weighted-average dumping margins that were calculated using a WTO-inconsistent methodology."); *Corrosion-Resistant Carbon Steel Flat Products from Germany and the Republic of Korea: Final Results of Full Sunset Reviews*, 77 Fed. Reg. 72,827 (Dep't Commerce Dec. 6, 2012) ("The *Final Modification* of Reviews states that the Department will not rely on a rate based on a methodology found to be WTO-inconsistent."). Here, however, Commerce has not instituted any policy or statement to condemn A-to-T analysis, Commerce's methodology, or the use of Cohen's d. On the contrary, Commerce routinely implements—and the government successfully defends—these methods in both this court and in the Federal Circuit. Accordingly, it was reasonable here for Commerce to distinguish those reviews and disregard the WTO opinions.

[17] The regulation pertaining to full sunset reviews parallels this language, stating that "[e]ven where the Department conducts a full sunset review, only under the most extraordinary circumstances will the Secretary rely on a [duty] rate . . . other than those it calculated and published in its prior determinations . . . ." 19 C.F.R. § 351.218(e)(2)(i) (2022).

that Commerce's announcement that it would not rely on certain dumping margins found to be WTO inconsistent amounted to "extraordinary circumstances," leading Commerce to calculate new margins); *see also Government of Uzbekistan v. United States*, 25 CIT 1084, 1088 (2001) (stating that the dissolution of the Soviet Union and subsequent creation of Uzbekistan as a country amounted to "extraordinary circumstances" requiring Commerce to "consider factors outside the norm").

Assuming arguendo that a change in law could constitute "the most extraordinary circumstances," such circumstances are not present here. The Federal Circuit has not set aside Commerce's use of Cohen's d the way Resolute alleges. The court rejects Resolute's argument that the circumstances in *Uzbekistan* (involving the fall of the Soviet Union and birth of Uzbekistan as a country) "are no more extraordinary than Commerce's continued insistence on an unreasonable methodology." Pl. Resolute Reply in Supp. of its Rule 56.2 Mot. for J. on the Agency R. at 21, ECF No. 38 (May 2, 2024). As previously discussed, Commerce's use of Cohen's d has been repeatedly upheld by this court and the Federal Circuit. Commerce also adequately explained its reasoning for relying upon the original margin calculations, which utilized Cohen's d, in this expedited sunset review. *See* IDM at 10–19. For the aforementioned reasons, the court concludes that Commerce did not abuse its discretion in finding that there were no "extraordinary circumstances" to justify abandoning its prior methodology in place of Resolute's preferred methodology.

D. Commerce Adequately Addressed the Expert Report

Resolute contends that Commerce failed to address statistical literature challenging the "reasonableness of Commerce's Cohen's d test" that was placed on the record.[18] Resolute Br. at 34–36, 41–43.

[18] Resolute also contends that WTO rulings on certain applications of its methodology amount to "good cause" and were left unaddressed. Resolute Br. at 35–36. Resolute, however, admits that WTO decisions are not binding on this court. *See* 19 U.S.C. § 1516a(b)(3); *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1325–26 (Fed. Cir. 2020) ("WTO decisions are 'not binding on the United States, much less this court.'") (citation omitted); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005) ("[W]e therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such [a report] has been adopted pursuant to the specified statutory scheme."). As previously stated, the Federal Circuit and the CIT have recently and repeatedly affirmed the use of zeroing in A-to-T analysis. "Good cause" will not be found in this case when the application of zeroing is supported by binding precedent. Resolute also argues that Commerce is "[a]t a minimum" required to "explain why it rejected the WTO jurisprudence rather than dismiss it because it is not binding." Resolute Br. at 36. Commerce, however, need not address every argument or explain every possible reason for its conclusions. *See Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1322 (Fed. Cir. 2016). Thus, Commerce was not required to explicitly address the WTO jurisprudence after already considering precedent from the CIT and the Federal Circuit.

The government argues that “no academic literature on the record” exists that might warrant “good cause,” and that Resolute’s arguments were adequately addressed by Commerce in the *IDM*. Gov. Br. at 17.

In an administrative review, an agency is not free to dismiss relevant evidence. *See Seneca Foods Corp. v. United States*, 663 F. Supp. 3d 1325, 1339–40 (CIT 2023). Nevertheless, Commerce does not need to address “every argument raised by a party or explain every possible reason supporting its conclusion.” *See Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1322 (Fed. Cir. 2016)); *see Al Ghurair Iron & Steel LLC v. United States*, 65 F.4th 1351, 1362 (Fed. Cir. 2023) (“While Commerce must reasonably explain its findings, its explanations [are only required to be] sufficient to afford adequate review.”).

Resolute submitted an expert report “exposing issues in Commerce’s use of the Cohen’s d test when performing antidumping calculations.” Resolute Br. at 34. The report discusses several components of Cohen’s d at length, including the importance of same standard deviations in a population or sample and statistical assumptions such as normality and equal variances. *See* Hedges Report.

Commerce did not explicitly address the Hedges Report in its sunset review. *See IDM*. Commerce did respond, however, to the substance of the report in the *IDM* and included analysis of ongoing case law. *See IDM* at 8–15 (discussing at length the justification for using the A-to-T methodology and how it utilizes the precursor Cohen’s d test and accounts for potential deficiencies); *see also IDM* at 16–18 (discussing *Stupp*, 619 F. Supp. 3d at 1323–26 (explaining that Cohen’s d operates “together with the ratio test and the ‘meaningful difference’ test to hedge against potential inaccuracies due to standard deviation differences in populations”) and *Mid Continent*, 380 F. Supp 3d at 1356–57 (“Commerce has explained its rationale as based on the equal reliability of both full populations and equal sized samples. It has also explained that standard deviation is specific to the mean to which it relates.”)).

The court concludes that considering this is an expedited sunset review, Commerce adequately addressed the concerns raised by the Hedges Report.[19] The Hedges Report questions components of Cohen’s d such as standard deviation requirements and other statistical assumptions. *See* Hedges Report. These components are discussed at length by Commerce in the *IDM*, and by the cases that Commerce

[19] The court does not address whether this explanation would be sufficient during an initial investigation, annual review, or full sunset review.

relied upon for support in the *IDM*. Accordingly, the Hedges Report was adequately addressed by Commerce.

CONCLUSION

In sum, Commerce did not abuse its discretion in conducting this expedited sunset review based on facts available. Per its normal practice, Commerce relied upon dumping margins calculated in the original investigation in its determination of continuance or recurrence of dumping. Resolute's challenge to Commerce's DPM utilized in the original investigation based on ongoing litigation at the Federal Circuit is strained—the Federal Circuit has not invalidated the use of Cohen's d full stop, the way Resolute alleges. If and until such a decision is issued, Commerce's reliance upon its previously utilized methodology in the context of an expedited sunset review does not amount to an abuse of discretion.

For the foregoing reasons, Commerce's *Final Results* are in accordance with law and are therefore sustained. Judgment will enter accordingly.

Dated: August 19, 2024
New York, New York

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

Slip Op. 24–96

TRINA SOLAR CO., LTD. et al, Plaintiffs, v. UNITED STATES, Defendant, AMERICAN ALLIANCE FOR SOLAR MANUFACTURING, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 23–00213

[Remanding U.S. Department of Commerce's final results and final determination.]

Dated: August 20, 2024

Jonathan M. Freed, *MacKensie R. Sugama*, *Kenneth N. Hammer*, and *Robert G. Gosselink*, Trade Pacific PLLC, of Washington, D.C., for plaintiffs Trina Solar Co., Ltd., Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd. d/b/a Yangcheng Trina Solar Guoneng Science & Technology Co., Ltd., Trina Solar Yiwu Technology Co., Ltd., Trina Solar (Su Qian) Technology Co., Ltd., Trina Solar (Yancheng Dafeng) Co., Ltd., Changzhou Trina Hezhong Photoelectric Co., Ltd. d/b/a Changzhou Trina Hezhong PV Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd.

Kristin Elaine Olson, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel

was *Joseph Grossman-Trawick*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Timothy C. Brightbill, *Elizabeth S. Lee*, *Kimberly A. Reynolds*, *Laura El-Sabaawi,Paul A. Devamithran*, and *Theodore P. Brackemyre*, Wiley Rein, LLP, of Washington, D.C., for defendant-intervenor American Alliance for Solar Manufacturing.

OPINION AND ORDER

Kelly, Judge:

Before the Court is a motion for judgment upon the agency record filed by Trina Solar Co., Ltd., Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd. d/b/a Yancheng Trina Solar Guoneng Science & Technology Co., Ltd., Trina Solar Yiwu Technology Co., Ltd., Trina Solar (Su Qian) Technology Co., Ltd., Trina Solar (Yancheng Dafeng) Co., Ltd., Changzhou Trina Hezhong Photoelectric Co., Ltd. d/b/a Changzhou Trina Hezhong PV Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., and Turpan Trina Solar Energy Co., Ltd. (collectively "Trina"). *See generally* Pls.' Mot. J. Agency Rec., Feb. 29, 2024, ECF No. 19 ("Pls. Mot."). Specifically, Trina argues that the Department of Commerce ("Commerce") should have adjusted Trina's U.S. price to account for countervailing duty ("CVD") rates for eleven, rather than only five, subsidy programs for which CVDs were imposed in the most recently completed companion CVD review. Pls. Mot. at 6–10. For the following reasons, Commerce's determination is remanded for further consideration.

BACKGROUND

On April 12, 2022, Commerce published the initiation notice of antidumping duty ("ADD") and CVD administrative reviews of certain crystalline silicon photovoltaic products from the People's Republic of China ("China") concerning the period of review ("POR") of February 1, 2021, through January 31, 2022. *See generally Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 87 Fed. Reg. 21,619 (Dep't Commerce Apr. 12, 2022). On July 22, 2022, Commerce issued its initial ADD and double remedies questionnaires to Trina for the administrative review. *See generally* Letter re: Administrative Review of the Antidumping Duty Order on Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Request for Information, PD 36, bar code 4266959–01 (July 22, 2022); *see also* Letter re: Administrative Review of the Antidumping Duty Order on Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Double Remedies Questionnaire at 3–9, PD 40, bar code 4266977 01 (July 22, 2022), (collectively

"Questionnaires").

On March 9, 2023, Commerce published its preliminary determination. *See Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China; 2021–2022*, 88 Fed. Reg. 14,602 (Dep't of Commerce Mar. 9, 2023) (preliminary results, partial rescission, and preliminary determination of no shipments) ("*Preliminary Results*") and accompanying Prelim. Decision Memo. ("Prelim. Decision Memo."). Commerce preliminarily determined that in accordance with Section 772(c)(1)(C) of the Tariff Act,[1] as amended, 19 U.S.C. § 1677a(c)(1)(C), Trina's U.S. sales price should be increased by the amount of any CVD imposed on solar products as needed to offset an export subsidy. Prelim. Decision Memo. at 23.

In the final determination of the CVD review in 2017, the most recently completed review, Commerce found eleven programs to be countervailable by applying an adverse inference while selecting from the facts otherwise available in accordance with 19 U.S.C. § 1677e(a)–(b). *See Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China; 2017*, 84 Fed. Reg. 56,765, 56,766 (Dep't Commerce Oct. 23, 2019) (final results of CVD administrative review) ("*CVD Final Results 2017*") and accompanying Issues and Decision Memo. ("CVD Final Decision Memo. 2017"); *see also* Domestic and Export Subsidy Adjustments Analysis Memo. at 2, PD 153, bar code 4351986–01 (March 10, 2023) ("Subsidy Adjustment Memo."); *see also Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China; 2017*, 84 Fed. Reg. 15,585 (Dep't of Commerce April 16, 2019) (preliminary results) and accompanying Prelim. Decision Memo. at App'x I ("CVD Prelim. Decision Memo. 2017"). In the present ADD review, Commerce concluded that five of those programs had previously been found to be export contingent. *Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China; 2021–2022*, 88 Fed. Reg. 62,049 (Dep't Commerce Sept. 8, 2023) (final results of ADD review and final determination of no shipments) ("*Final Results*") and accompanying Issues and Decision Memo. at 9 ("Final Decision Memo.") (collecting sources). However, Commerce concluded that for the remaining six 5 programs ("Subject Programs"),[2] "Commerce did not indicate that it based the

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

[2] Those programs are: (1) Income Tax Reductions for Export-Oriented Enterprises; (2) Tax Refunds for Reinvestment of FIE Profits in Export-Oriented Enterprises; (3) Awards for Jiangsu Famous Brand Products; (4) Export Product Research and Development Fund; (5) Subsidies for Development of "Famous Brands" and China World Top Brands; and (6) Funds for Outward Expansion of Industries in Guangdong Province. Final Decision Memo. at 9 n.44 (citing Trina Case Br. at 10–11).

specificity determination on a finding that the programs were export contingent." Final Decision Memo. at 10. Commerce thus "adjusted Trina's U.S. prices by the export subsidy rates assigned to 'non-selected' companies" for the five programs previously found to be export contingent. Prelim. Decision Memo. at 23; *see also* CVD Prelim. Decision Memo. 2017 at App'x I.

Trina submitted its case brief commenting on Commerce's preliminary determination in the ADD review on April 17, 2023. *See generally* [Trina's] Case Brief, PD 163, CD 90, bar code 4366918–01 (Apr. 17, 2023) ("Trina Case Br."). Trina argued that in addition to offsetting the U.S. sales price of the five programs identified by Commerce as export subsidies in the *Preliminary Results*, Commerce should have also offset its U.S. sales price for the Subject Programs. *See id.* at 9–11.

Commerce issued its final determination on September 1, 2023. *See generally Final Results*, 88 Fed. Reg. 62,049. Commerce rejected Trina's argument and continued to calculate the export subsidy adjustment based on only the five programs identified in the *Preliminary Results* pursuant to 19 U.S.C. § 1677a(c)(1)(C). Final Decision Memo. at 10. Commerce excluded the Subject Programs identified by Trina because the evidence in the record provided no indication that the Subject Programs are export contingent and Commerce had not found the Subject Programs to be export contingent in earlier segments of the solar products CVD proceeding. *Id.*

On February 29, 2024, Trina filed the instant motion before the Court, arguing that Commerce's determination is unsupported by substantial evidence. *See* Pls. Mot. at 9. Defendant filed its corrected response to Trina's motion on May 3, 2024, requesting that the Court deny Trina's motion and sustain Commerce's *Final Results*. *See generally* Def.'s Resp. [Pls. Mot.], May 3, 2024, ECF No. 23 ("Def. Resp."). Defendant-Intervenor American Alliance for Solar Manufacturing similarly filed its response in opposition to Trina's motion on May 13, 2024. *See generally* Def.-Int. Am. All. Solar Manufacturing Resp. [Pls. Mot.], May 13, 2024, ECF No. 24. Trina filed its reply on June 28, 2024. *See generally* Pls. Reply Br., June 28, 2024, ECF No. 29 ("Pls. Reply").

JURISDICTION AND STANDARD OF REVIEW

The Court exercises jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final determination in an administrative review of an ADD order. Commerce's determination will be sustained unless it is "unsupported by substantial evidence on

the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "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 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

Trina argues that Commerce's determination is unsupported by substantial evidence because Commerce failed to offset the U.S. sales price by the CVD imposed on Subject Programs in the companion CVD review. Pls. Mot. at 9. Defendant rejects Trina's argument, reasoning that Commerce never determined that the Subject Programs were export contingent and thus should not be offset pursuant to 19 U.S.C. § 1677a(c)(1)(C). Def. Resp. at 10. *Id.* Based on the following considerations, Commerce's refusal to offset the U.S. sales price by the duty imposed by reason of the Subject Programs is unsupported by substantial evidence.

This case involves the intersection of ADD and CVD law. Commerce shall impose ADD on foreign merchandise that is sold or likely to be sold within the United States for "less than its fair value" ("LTFV"). 19 U.S.C. § 1673(1). Sales are LTFV where the normal value (the price a producer charges in its home market)[3] exceeds the export price (the price of the product in the United States).[4] 19 U.S.C. § 1677b(a)(1)(B)(i); 19 U.S.C. § 1677a(a); *see also Changzhou Trina Solar Energy Co. v. United States*, 975 F.3d 1318, 1322 (Fed. Cir. 2020) ("*Trina II*"). In an ADD case, Commerce determines whether merchandise is being sold at LTFV in the United States "by comparing the weighted average of the normal values to the weighted aver-

[3] Under the statute, normal value refers to:

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

19 U.S.C. § 1677b(a)(1)(B)(i).

[4] Under the statute, export price means:

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

19 U.S.C. § 1677a(a).

age of the export prices . . . for comparable merchandise." 19 U.S.C. § 1677f1(d)(1).[5]

In a CVD case, where Commerce "determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy" that causes injury to a U.S. industry, it imposes a CVD on such merchandise. 19 U.S.C. § 1671(a)(1). A "countervailable subsidy is a subsidy . . . which is specific."[6] 19 U.S.C. § 1677(5)(A). A specific subsidy is (i) a subsidy "that is, in law or in fact, contingent upon export performance"; (ii) an import substitution subsidy which is "contingent upon the use of domestic goods over imported goods"; or (iii) a domestic subsidy which is limited, "in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy." 19 U.S.C. § 1677(5A)(B)–(D).

When merchandise under review is subject to both ADDs and CVDs, Commerce shall, when calculating a respondent's ADD rate, increase the respondent's export price or constructed export price by the amount of any CVD imposed to offset an export subsidy. 19 U.S.C. § 1677a(c)(1)(C); *Trina II*, 975 F.3d at 1322. "The offset is designed to prevent the double application of duties when the subsidies and dumping are related." *Trina II*, 975 F.3d at 1330 (quoting *Dupont Teijin Films USA, LP v. United States*, 273 F. Supp. 2d 1347, 1349 n.4 (Ct. Int'l Trade 2003)); *see also Jinko Solar Co., Ltd. v. United States*, 961 F.3d 1177, 1182 (Fed. Cir. 2020) ("*Jinko II*") (reasoning that the purpose of the dumping offset is to "avoid the double application of duties"). The rationale behind Section 1677a(c)(1)(C) presumes that an export subsidy contributes to the antidumping violation. *See Jinko II*, 961 F.3d at 1182. Thus, where there are companion ADD and CVD proceedings and Commerce determines that there are countervailable export contingent subsidies, Commerce will offset the duty imposed to countervail those export contingent subsidies in the companion ADD proceeding. *See* 19 U.S.C. § 1677a(c)(1)(C).

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[5] When determining normal value, Commerce need not consider sales made outside of the "ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). Pursuant to the statute, "ordinary course of trade" specifically excludes sales made below the cost of production. 19 U.S.C. § 1677(15)(A).

[6] A subsidy exists where a government

> (i) provides a financial contribution,
>
> (ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or
>
> (iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments[.]

19 U.S.C. § 1677(5)(B).

Where information necessary for Commerce to assess whether there is a countervailable subsidy is missing from the record, Commerce uses statutory tools to select facts otherwise available to fill in the missing information and make its determination. 19 U.S.C. § 1677e(a)–(b). As this Court has previously explained,

> During the course of an investigation or review, Commerce may have difficulty accessing and verifying the information it needs to satisfy the statutory elements for imposing a CVD. Subject to 19 U.S.C.§ 1677m(d), Commerce shall use facts otherwise available to reach its final determination when "necessary information is not available on the record," a party "withholds information that has been requested by [Commerce]," fails to provide the information timely or in the manner requested, "significantly impedes a proceeding," or provides information Commerce is unable to verify. 19 U.S.C. § 1677e(a). Further, under certain circumstances, such as a party's failure to comply to the best of its ability with a request for information, Commerce may "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

Changzhou Trina Solar Energy Co. v. United States, 359 F. Supp. 3d 1329, 1338 (Ct. Int'l Trade 2019) ("*Trina I*"). Where Commerce uses an adverse inference when selecting among facts available, it engages in a two-step process that requires Commerce to identify (i) information missing from the record so that it may select from facts otherwise available to replace that missing information, and, if appropriate, (ii) use an adverse inference when selecting among the facts otherwise available. 19 U.S.C. § 1677e(a)–(b). Thus, when information concerning the specificity of a subsidy is missing from the record, Commerce uses facts otherwise available, with or without an adverse inference, to determine whether a particular program is a countervailable subsidy, because it is either an export contingent subsidy, a domestic substitution subsidy or a domestic specific subsidy. *See, e.g.*, *Risen Energy Co., Ltd. v. United States*, 477 F. Supp. 3d 1332, 1347–48 (Ct. Int'l Trade 2020). Commerce's use of facts otherwise available with an adverse inference does not obviate the need for it to satisfy the elements of the statute, including a determination of what type of subsidy is involved. *Trina I*, 359 F. Supp. 3d at 1338–39.

Thus, even where Commerce determines a subsidy is countervailable using facts otherwise available with an adverse inference, it necessarily determines the type of subsidy involved. The Court of Appeals has explained,

> [facts available with an adverse inference] allows Commerce to "reach[]" a "determination" on an incomplete record. It does not obviate Commerce's obligation to make "the applicable determination." Nor does it obviate Commerce's obligation to support any such determinations "[with] substantial evidence." Before imposing a [CVD], Commerce must necessarily determine that a subsidy is "specific"—that it is an "export subsidy," "import substitution subsidy," or a "[d]omestic subsidy" meeting certain requirements—even if it must use [facts available with an adverse inference] to do so. Otherwise, Commerce cannot impose a [CVD] to offset that subsidy.

Trina II, 975 F.3d at 1328–29 (internal citations omitted).

Moreover, consistent with its statutory mandate, Commerce, as a matter of practice, offsets the export price in companion antidumping investigations or reviews even when it uses facts otherwise available with an adverse inference, when the facts otherwise available indicate the program was an export subsidy. *See, e.g.*, *Risen*, 477 F. Supp. 3d at 1347–48; *Jinko Solar Co., Ltd. v. United States*, 229 F. Supp. 3d 1333, 1358 (Ct. Int'l Trade 2017) ("*Jinko I*"), *aff'd*, *Jinko II*, 961 F.3d 1177. In *Risen*, the Court concluded that Commerce reasonably offset subsidies which it previously determined were countervailable using facts otherwise available with an adverse inference. 477 F. Supp. 3d at 1347–48. In the companion ADD decision, Commerce determined that the preliminary CVD decision had concluded the subsidies were tied to exports, even though the final determination only indicated that the program was countervailable using facts otherwise available with an adverse inference. *Risen*, 477 F. Supp. 3d at 1348 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2015*, 83 Fed. Reg. 34,828 (Dep't Commerce July 23, 2018) (final results)).[7]

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[7] In *Risen*, Commerce had determined that the program at issue was export contingent in the preliminary determination. 477 F. Supp. 3d at 1347. Here, Commerce distinguishes between the five programs for which it provides an offset and the Subject Programs by noting that the former had "previously been found to be countervailable and specific because they were export contingent," Final Decision Memo at 9, while this record lacks evidence as to whether the latter were export contingent. *Id.* at 10. By implication, Commerce seems to argue that there was never a determination made as to whether the Subject Programs were export contingent. That argument fails. Commerce made a determination. It explained in the preliminary determination in the CVD case that it based its determination on the descriptions in the record. *See* CVD Prelim. Decision Memo. 2017 at 17, App'x I; Final Decision Memo. at 9–10. Commerce's failure to state underlying basis of that determination as supported by the descriptions in the record only obscures, rather than negates, the determination that it made.

Likewise, in *Jinko I*, Commerce offset the cash deposit rate in a companion antidumping investigation by the export subsidy in the CVD case, which was calculated based on facts otherwise available using an adverse inference. *See Jinko I*, 229 F. Supp. 3d at 1358. In its determination in that case, Commerce stated that it offsets export subsidies and it "adheres to this practice regardless of whether the export subsidy rate is based on AFA." *Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China*, 79 Fed. Reg. 76,970 (Dep't Commerce Dec. 23, 2014) (final determination) and accompanying Issues and Decision Memo. at 39 (first citing *Pre-Stressed Concrete Steel Wire Strand From the People's Republic of China*, 75 Fed. Reg. 28,560, 28,563 (Dep't Commerce May 21, 2010); then citing *Pre-Stressed Concrete Steel Wire Strand From the People's Republic of China*, 75 Fed. Reg. 28,557 (Dep't Commerce May 21, 2010) (final determination) and accompanying Issues and Decision Memo. at "Grant Programs Treated as Export Subsidies Pursuant to [facts available with an adverse inference]"; then citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 63,791, 63,796 (Dep't Commerce Oct. 17, 2012) (final ADD determination); and then citing *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 CVD determination) and accompanying Issues and Decision Memo. at Cmt. 18). The Court of Appeals affirmed the Court's decision that the offset was reasonable, stating that Commerce's practice to offset the cash deposit rates "reasonably implements" the purpose of the statute while avoiding an inequitable double application of duties. *Jinko II*, 961 F.3d at 1183.

Therefore the statutory scheme, the Court of Appeals, and Commerce's past practice make clear that where Commerce imposes a CVD, it necessarily determines, inter alia, that a subsidy is either (i) a subsidy "that is, in law or in fact, contingent upon export performance" (ii) an import substitution subsidies which are "contingent upon the use of domestic goods over imported goods" or (iii) a domestic subsidy which is limited, "in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy." 19 U.S.C. § 1677(5A)(B)–(D); *see also Trina II*, 975 F.3d at 1329. Commerce may resort to facts otherwise available to reach its conclusion, *see* 19 U.S.C. § 1677e(a), and it may even apply an adverse inference in choosing among the facts otherwise available to reach its conclusion, but it nonetheless necessarily determines why the sub-

sidy is specific and thus countervailable. *See Trina II*, 975 F.3d at 1329.

Here, Commerce declined to adjust Trina's reported export prices to offset subsidies for the Subject Programs, i.e.,: (1) Income Tax Reductions for Export-Oriented Enterprises; (2) Tax Refunds for Reinvestment of FIE Profits in Export-Oriented Enterprises; (3) Awards for Jiangsu Famous Brand Products; (4) Export Product Research and Development Fund; (5) Subsidies for Development of "Famous Brands" and China World Top Brands; and (6) Funds for Outward Expansion of Industries in Guangdong Province. Final Decision Memo. at 9–10. Commerce explains there is "no information on the record of this review indicating that these programs at issue are export contingent or that Commerce determined that these programs were export-contingent[.]"[8] Final Decision Memo. at 10. Yet Commerce preliminarily determined in the CVD case that, when applying facts available with an adverse inference, it "look[ed] to the Initiation Checklist, which provides descriptions of these subsidy programs, including the basis on which we found that reasonably available information indicated that these programs constituted a financial contribution and were specific." CVD Prelim. Decision Memo. 2017 at 17; *see also* Def. Resp. at 9 (noting that Commerce used the descriptions in the Initiation Checklist to determine whether programs were countervailable).

Commerce's decision not to offset the remaining subsidy programs is unsupported by substantial evidence because Commerce's claim that it did not determine how the subsidy was specific for these remaining programs is unsupported by the record. Commerce referred to the "Initiation Checklist" in its 2017 preliminary CVD determination, and used "descriptions of these subsidy programs, including the basis on which we found that reasonably available information indicated that these programs constituted a financial contribution and were specific." CVD Prelim. Decision Memo. 2017 at 17. The Initiation Checklist for the CVD proceeding may not be on the record of this case, but it was on the record of the CVD case and the record in this case suggests that Commerce relied upon the descriptions in that checklist to make the determination that it was required to make. *See* Final Decision Memo. at 9–10. Commerce's generic description of its determination fails to mask that a determination

[8] Commerce's statement is a bit perplexing. First, it identifies four out of the six programs using the word "export." Final Decision Memo. at 9. Second, it states there is no indication on the record "of this review," suggesting that there is information on the record of the CVD review. *Id.* Although the Court must review this case on the record before it, Commerce's statement suggests that Commerce recognizes that it had the information before it in the CVD proceeding and used that information as facts otherwise available. *See* Final Decision Memo. at 10.

was made. Accordingly, Commerce must explain what determination it made in the CVD case. Commerce may point to evidence in the record or reopen the record to explain its determination. Commerce should then apply 19 U.S.C. § 1677a(c)(1)(C), if appropriate.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Commerce's refusal to offset Trina's U.S. sales price by the CVD imposed on Subject Programs in the CVD review because they were not export contingent is remanded for further explanation or consideration consistent with this opinion; and it is further

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

ORDERED that the parties shall have 30 days after the filing the remand to file comments in opposition to the remand redetermination; and it is further

ORDERED that the parties shall have 30 days after filing the comments in opposition to file replies in support of the remand redetermination; and it is further

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

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

Dated: August 20, 2024
New York, New York

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

Slip Op. 24–97

UNITED STATES, Plaintiff, v. KOEHLER OBERKIRCH GMBH, f/k/a PAPIERFABRIK AUGUST KOEHLER SE, f/k/a PAPIERFABRIK AUGUST KOEHLER AG; and KOEHLER PAPER SE, Defendants.

Before: Gary S. Katzmann, Judge
Court No. 24–00014

[The court grants Plaintiff's Motion for Alternative Service on Defendants.]

Dated: August 21, 2024

Luke Mathers, Trial Attorney, U.S. Department of Justice, New York, N.Y, argued for Plaintiff United States. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, and *Edward F. Kenny*, Senior

Trial Counsel. Of counsel were *Sasha Khrebtukova*, Attorney, and *Brandon T. Rogers*, Senior Attorney, Offices of the Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, N.Y. and Indianapolis, IN.

John F. Wood, Holland & Knight LLP, of Washington, D.C., argued for Defendants Koehler Oberkirch GmbH and Koehler Paper SE. With him on the briefs were *Andrew McAllister*, *Anna P. Hayes*, and *Stuart G. Nash*.

OPINION AND ORDER

Katzmann, Judge:

Defendants Koehler Oberkirch GmbH ("Koehler GmbH") and Koehler Paper SE ("Koehler SE") (collectively, "Koehler" or "Defendants") are German manufacturers of lightweight thermal paper[1] that allegedly owe about $200 million in unpaid antidumping duties and interest to the United States. *See Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373 (Fed. Cir. 2016). The United States ("the Government") brought this action to recover that sum, filing a summons and a complaint with the U.S. Court of International Trade ("USCIT") on January 24, 2024. *See* Summons, Jan. 24, 2024, ECF No. 1; Compl., Jan. 24, 2024, ECF No. 2; *see also* Am. Compl., Feb 8, 2024, ECF No. 4; USCIT R. 3(a).[2]

Before this litigation can proceed further, the Government must serve copies of the Summons and Amended Complaint on both defendants. *See* USCIT R. 4(b)(1). In the motion now before the court, the Government requests that the court order service through Koehler's U.S. located counsel, arguing that this method of service constitutes "means not prohibited by international agreement" and is in accordance with federal law. USCIT R. 4(e)(3). Koehler opposes this request, insisting that the Government instead effect service through the issuance of diplomatic letters rogatory to the government of Germany.

Because USCIT Rule 4(e) is the relevant provision, and because the Government's proposed service on Koehler through its U.S. counsel would accord with that provision—violating neither international agreement nor federal law—the court grants the Government's motion.

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[1] Lightweight thermal paper is paper of a certain weight that "form[s] an image when heat is applied," and is "typically (but not exclusively) used in point-of-sale applications such as ATM receipts, credit card receipts, gas pump receipts, and retail store receipts." *Antidumping Duty Orders: Lightweight Thermal Paper from Germany and the People's Republic of China*, 73 Fed. Reg. 70959, 70960 (Dep't Com. Nov. 24, 2008) ("*Antidumping Duty Orders*").

[2] "The Rules of the United States Court of International Trade, necessary to implement the Customs Court Acts of 1980, are styled, numbered and arranged to the maximum extent practicable in conformity with the Federal Rules of Civil Procedure[]." Preface, USCIT Rules.

BACKGROUND

To fully unspool the sixteen-year history of the administrative proceedings underlying this case would make this opinion even more of a paper-intensive endeavor than its subject matter demands. The court instead sets forth only the facts necessary to explain how Koehler came to owe about $200 million to the United States.

The U.S. Department of Commerce ("Commerce") imposed an antidumping duty order on lightweight thermal paper from Germany in 2008. *See Antidumping Duty Orders*, 73 Fed. Reg. 70959. Koehler's U.S. imports of lightweight thermal paper were subject to that order from its imposition to its revocation in 2013. *See id.* at 70960; *Lightweight Thermal Paper from the People's Republic of China and Germany: Continuation of the Antidumping and Countervailing Duty Orders on the People's Republic of China, Revocation of the Antidumping Duty Order on Germany*, 80 Fed. Reg. 5083 (Dep't Com. Jan. 30, 2015).

During Commerce's third administrative review of the antidumping duty order, which took place from 2011 to 2013, Commerce discovered that Koehler had engaged in a "deliberate scheme to conceal home market sales and manipulate home market price data . . . ." Mem. from C. Marsh to P. Piquado, re: Issues and Decision Memorandum at 7, Case No. A-428–840, Bar Code: 3129807–01 (Dep't Com. Apr. 11, 2013). Commerce solicited information from Koehler regarding its home-market sales of lightweight thermal paper, but "Koehler intentionally provided incomplete and inaccurate information in response to the Department's detailed and very specific . . . questionnaire" and "continued to misrepresent its home market sales reporting in response to . . . supplemental questionnaires that included specific questions concerning home market sales." *Id.* at 10. On account of this misrepresentation Commerce made an adverse inference that resulted in the assignment of a 75.36% *ad valorem* antidumping duty rate to Koehler's imports of subject merchandise from November 1, 2010 to October 31, 2011. *See id.* at 17–18; *Lightweight Thermal Paper from Germany: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 23220, 23221 (Dep't Com. Apr. 18, 2013).[3] Then, following the Government's voluntary remand request in litigation pertaining to the second administrative review (covering the period between 2009 to 2010), Commerce applied the same 75.36% dumping margin to Koehler's imports during that period as well. *See* Final Remand Redetermination Pursuant to Court

[3] For a lengthier summary of this administrative proceeding, see *Papierfabrik August Koehler SE*, 843 F.3d at 1375–77.

Remand Order at 52–53, *Papierfabrik August Koehler AG v. United States*, No. 12–00091 (CIT filed June 16, 2014), ECF No. 76, Bar Code: 3210702–01.

Koehler challenged both applications of the 75.36% dumping margin in a pair of actions before this court, from which ensued appeals to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"), and petitions for writs of certiorari from the U.S. Supreme Court. *See Papierfabrik August Koehler AG v. United States*, 40 CIT 983, 180 F. Supp. 3d 1211 (2016), *aff'd sub nom. Papierfabrik August Koehler SE v. United States*, 710 F. App'x 889 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 1290 (2019); *Papierfabrik August Koehler SE v. United States*, 38 CIT 1239, 7 F. Supp. 3d 1304 (2014), *aff'd*, 843 F.3d 1373, *cert. denied*, 583 U.S. 1038 (2017). None of these challenges were successful, and the 75.36% margin's applicability to Koehler's imports of lightweight thermal paper from November 2009 through October 2011 is now final. *See* 19 U.S.C. § 1514(a); Notice of Lifting of Suspension, Case No. A-428–840, Bar Code: 380629501 (Dep't Com. Mar. 15, 2019).

The amount of Koehler's antidumping duty liability consequently exceeded the amount of Koehler's cash deposits, which were premised on estimated 3.77% and 6.50% dumping margins, to a considerable degree. The Government alleges that Koehler's unpaid antidumping duties amount to $145,288,597.04, and that the pre-liquidation interest on these unpaid duties amounts to $48,343,045.04. Am. Compl. ¶ 24 (citing 19 U.S.C. § 1677g). The sum of these figures—allegedly a total of $193,631,642.08 at the time of this action's commencement—does not include post-liquidation interest that accrues each month on the unpaid duties. *Id.* ¶ 26 (citing 19 U.S.C. § 1505(d)). The Government seeks Koehler's payment of this post-liquidation interest as well. *Id.*

The Government brought this action to recover the unpaid duties and interest, alleging that Koehler is engaged in a scheme (separate from the home-market price manipulation scheme noted above) to avoid payment and defraud Customs through the transfer of assets between related corporate entities. Am. Compl. ¶¶ 29–53. The Government claims that the entity that incurred the antidumping liability—Koehler GmbH, which in turn changed its name from Papierfabrik August Koehler SE in 2021, *id.* ¶¶ 4–5, transferred assets and liabilities to a new entity, Koehler SE, fewer than nine months after Customs's assessment of Koehler GmbH's antidumping duty liability became final. *Id.* ¶ 29. At the time of the transfer, Koehler GmbH and Koehler SE allegedly had the same corporate address and

the same slate of officers and directors. *Id.* ¶¶ 30–31. According to the Government, "[a]t the end of the FY 2021, Koehler [GmbH]'s assets had been reduced to . . . less than a quarter of what they were at the close of the prior fiscal year before the 'spin-off.' " *Id.* ¶ 36.

After initiating this action, the Government unsuccessfully attempted to serve Koehler with copies of the Summons and Complaint under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638 [hereinafter Hague Convention],[4] to which the United States and Germany are both signatories. The Government sent a request for Hague Convention service with a German district court in Freiburg im Breisgau, Baden-Württemberg (the German state where Koehler's Oberkirch headquarters are located), but that court concluded in a pair of identically-worded letters (dated March 13, 2024) that "[t]his matter concerns claims under public law and is not a civil or commercial matter" and that "[t]he Hague Service Convention is therefore not applicable to the servicing of the documents." Gov't Br. Ex. B at 2, 5, Apr. 22, 2024, ECF No. 7–2. Instead, the German court "request[ed] that a request should be made through *diplomatic channels*, so that the relevant administrative authorities can take action if necessary." *Id.* (emphasis in original).

While the Hague Convention request remained pending, the Government attempted to serve Koehler through Steptoe LLP, a law firm whose Washington, DC-based counsel actively represent both Koehler GmbH and Koehler SE in separate ongoing litigation pertaining to a different antidumping duty order on thermal paper from Germany. *See Matra Ams., LLC v. United States*, No. 21–00063 (CIT filed Dec. 22, 2021). The Government sent an email inquiry on January 24, 2024, to which counsel from Steptoe responded as follows (on March 12, 2024):

> As I previously indicated, Steptoe does not represent the defendants in this action and that remains so. Nonetheless, I would expect that the defendants would be interested in attempting to resolve this matter amicably with the U.S., without litigation. Toward that end, I would expect that the defendants would be willing to appoint counsel (not Steptoe) for this matter for the purpose of attempting to negotiate a settlement, provided that the U.S. agreed that by doing so the defendants are not consent-

[4] The Hague Convention is a multilateral treaty whose "purpose . . . is to simplify, standardize, and generally improve the process of serving documents abroad." *Water Splash, Inc. v. Menon*, 581 U.S. 271, 273 (2017). Its first Article provides that "[t]he present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Hague Convention, *supra*, at art. 1.

> ing to service of process and are not waiving any objections to service, and that the U.S. will not attempt to effectuate service through that counsel. Please let me know whether you will agree to these terms and I will pass it on.

Gov't Br. Ex. C at 2–3, Apr. 22, 2024, ECF No. 7–3. The Government emailed the following reply the following day:

> We are open to considering a reasonable settlement proposal from the defendants. As we are in the process of serving the defendants pursuant to the Hague Convention, we don't currently have any reason to attempt service through alternative means; however, we can agree to those terms (i.e., that the defendants are not consenting to, nor waiving any objections to, service by negotiating, and are not authorizing their U.S. counsel to accept service; and that we will not to attempt to effect service on such counsel unless authorized).

Id. at 2. About thirty minutes later, counsel from Steptoe replied in turn: "Thanks. Message received and passed on. Tapping out here." *Id.*

It appears that after this exchange, and after the Government's receipt of the German court's letters, the Government made no further attempt to serve Koehler with the voluntary cooperation of either the German government or U.S.-based counsel. The Government instead proceeded to seek a judicial order from the U.S. Court of International Trade.

The Government filed the instant motion for alternative service on April 22, 2024, seeking "an order authorizing the Government to effect service on defendants . . . through their U.S. counsel of record" in the *Matra* litigation (Steptoe). Gov't Br. at 1, Apr. 22, 2024, ECF No. 7. Koehler was unrepresented in this case at the time the Government filed this motion, and remained unrepresented for three weeks. But on May 13, 2024, Washington, DC-based counsel from Holland & Knight, LLP entered notices of appearance on behalf of all defendants. *See* Form 11 Notice of Appearance, May 13, 2024, ECF No. 9; Form 11 Notice of Appearance, May 13, 2024, ECF No. 10; Form 11 Notice of Appearance, May 13, 2024, ECF No. 13; Form 11 Notice of Appearance, May 13, 2024, ECF No. 14 (collectively, the "Form 11 Notices"). Koehler concurrently filed a response in opposition to the Government's motion, *see* Defs.' Resp. in Opp'n to Mot. for Alternative Service, May 13, 2024, ECF No. 11 ("Defs.' Br."), and

moved for oral argument. *See* Mot. for Oral Arg., May 13, 2024, ECF No. 12. The court granted this motion for oral argument and ordered the Government to file a reply in further support of its motion for alternative service. *See* Order, May 14, 2024, ECF No. 14. The Government timely complied. *See* Reply in Support of Pl.'s Mot. for Alternative Service, May 28, 2024, ECF No. 17 ("Gov't Reply"). In its reply, the Government broadened its request for service on Koehler through U.S. counsel to include Holland & Knight. *See id.* at 9. Oral argument took place on June 25, 2024, after which the parties filed post-argument submissions at the court's request. *See* Pl.'s Post-Oral Arg. Br., July 1, 2024, ECF No. 24; Defs.' Post-Oral Arg. Br., July 3, 2024, ECF No. 25.

DISCUSSION

This action lies under 28 U.S.C. § 1582(3), which vests the U.S. Court of International Trade with exclusive jurisdiction over "any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover customs duties."

The sole issue before the court is how the Government may serve copies of the Summons and Amended Complaint on Koehler GmbH and Koehler SE. Rule 4(e) of the U.S. Court of International Trade, which pertains to "Serving an Individual in a Foreign Country,"[5] provides as follows:

> Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:
>
> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
>
> (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means by a method that is reasonably calculated to give notice:
>
> (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; or

[5] USCIT Rule 4(g) provides that service on a corporation "at a place not within any judicial district of the United States" must be effected "in any manner prescribed by Rule 4(e) for serving an individual, except personal delivery under (e)(2)(C)(i)." USCIT R. 4(g)(2).

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

USCIT R. 4(e). The Government seeks to invoke subdivision (3), which it asserts "was built for these circumstances," Gov't Br. at 10, and asks the court to order service on Koehler either through Koehler's U.S.-located counsel or through email. Other means of service, according to the Government, would constitute "time-consuming" and "unnecessary" processes.[6] *Id.*

Koehler opposes the Government's request on two grounds. First, Koehler argues that USCIT Rule 4(e) does not permit service on a foreign defendant through its U.S. counsel because "Serving an Individual in a Foreign Country" refers to the place of service—and that service through Koehler's U.S. counsel would take place in the United States. Defs.' Resp. at 3–4. Second, Koehler argues that as a matter of international comity and "due process principles," alternative service under USCIT Rule 4(e)(3) is improper until the Government first exhausts the "diplomatic channels" referenced by the German court in Baden-Württemberg. *Id.* at 4.

For the reasons explained below, the court holds that USCIT Rule 4(e) permits service on a foreign-located defendant through its U.S.-located counsel, and concludes that under the circumstances of this case, international comity and due process considerations do not

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[6] Nothing in USCIT Rule 4(e)'s text requires a plaintiff to exhaust, or establish the futility of exhausting, the procedures enumerated in subdivisions (1) and (2) before it may properly request a court order pursuant to subdivision (3). But USCIT Rule 4(e) does facially require a plaintiff to establish that its proposed court-ordered means of service would not contravene "federal law," and that those means would not be "prohibited by international agreement." *Id.* And because the Hague Convention is an "international agreement" which by its terms "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad," Hague Convention, *supra*, at art. 1, USCIT Rule 4(e)(3)'s "by other means not prohibited by international agreement" language effectively imports an exhaustion requirement with respect to Hague Convention service.

As explained below, however, the German court's conclusion that the Hague Convention does not apply in this matter obviates this quasi-exhaustion requirement. *See infra* Section IV.

preclude service through Koehler's particular U.S.-located counsel. The court also concludes that the Government has carried its burden, under USCIT Rule 4(e), of showing that its proposed means of service on Koehler would contravene neither federal law nor international agreement.

I. USCIT Rule 4(e) Applies to Service on a Foreign Defendant Through U.S. Counsel

Although Koehler (both GmbH and SE) is incorporated and headquartered in Germany, the Government's proposed conduit for service under Rule 4(e)(3) is counsel located in the United States. This raises a matter of first impression in the U.S. Court of International Trade, which is whether the scope of "Serving an Individual in a Foreign Country" includes service on a foreign defendant through U.S.-located counsel. USCIT R. 4(e). This is a matter on which other federal courts, applying the identically-worded Rule 4(f) of the Federal Rules of Civil Procedure ("FRCP"), are not unanimous. Two opinions by the U.S. District Court for the Southern District of New York illustrate the main point of disagreement—and prove, through their patent reasonableness, that FRCP Rule 4(f)'s scope is a matter on which reasonable minds can disagree.

In *Convergen Energy LLC v. Brooks*, the district court reasoned that by their "plain language," FRCP Rules 4(e) and 4(f)[7] "speak not to whether the individual to be served is located or resides outside of the United States but to where the individual 'may be served' or the 'place' where service is to be made." 2020 WL 4038353, at *8 (S.D.N.Y. 2020). This language, the district court held, "does not permit the Court to order alternative service at a place outside any judicial district of the United States when the service would be made in a judicial district of the United States." *Id.* at *9.[8] This, in *Convergen*, precluded service on the defendant through its counsel in New York City. *Id.*

In *United States v. Mrvic*, the district court diverged in part from the *Convergen* approach. 652 F. Supp. 3d 409, 413 (S.D.N.Y. 2023) .

[7] These subdivisions correspond to subdivisions (d) and (e), respectively, of USCIT Rule 4. "USCIT Rule 4 is substantially identical to Federal Rule of Civil Procedure 4; therefore, the court may consider decisions and commentary on Federal Rule of Civil Procedure 4 for guidance." *United States v. Zatkova*, 35 CIT 1059, 1061 n.1 (2011).

[8] The underlying reason for this, as explained by the district court in *Convergen*, is that FRCP Rule 4(f) ("Serving an Individual in a Foreign Country") "operates as a counterpart to [FRCP Rule] 4(e), which is entitled 'Serving an Individual Within a Judicial District of the United States,' and sets forth the rules by which service can be effected in a judicial district of the United States." *Id.* at *3. No federal court appears to dispute that the two provisions, taken together, fill out the universe of possible locations of service.

Although the district court did not reject *Convergen*'s premise that FRCP Rule 4(f)(3) permits service only "at a place not within any jurisdiction of the United States," it held that the provision nevertheless "permits service through U.S. counsel, because 'the relevant circumstance is where the defendant is, and not the location of the intermediary.'" *Id.* (collecting cases) (quoting *Wash. State Inv. Bd. v. Odebrecht, S.A.*, 2018 WL 6253877, at *4 (S.D.N.Y. 2018)).

The court follows *Mrvic*, which appears to represent the majority view among the federal judiciary,[9] in parsing the heading of USCIT Rule 4(e). Even though "Serving an Individual in a Foreign Country" refers to the place of service and not the identity of the defendant, service on a foreign defendant through U.S.-located counsel is generally an act that takes place in a foreign country. This is because service through U.S. counsel is not service *on* U.S. counsel: the recipient of service is the defendant,[10] and the defendant receives the summons and complaint from its U.S. counsel wherever the defendant is located. *See Freedom Watch, Inc. v. Org. of the Petroleum Exp. Countries*, 766 F.3d 74, 84 (D.C. Cir. 2014) ("[W]hen a court orders service on a foreign entity through its counsel in the United States, the attorney functions as a mechanism to transmit the service to its intended recipient abroad.").

Delivering the summons and complaint to a defendant's U.S. counsel may alone suffice to satisfy the due process requirement of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). But whatever the reasonableness of this calculation, service does not actually occur until the defendant receives the required documents. The location of U.S. counsel is no more the place of service than a last-mile distribution center is the destination of a package. *See Spin Master, Ltd. v. Aomore-US*, 2024 WL 3030405, at *7 (S.D.N.Y. June 17, 2024) ("Put another way,

[9] The Government contends that *Convergen* "represents the minority position within the federal judiciary," *see* Pl.'s Post-Oral Arg. Br. at 1, and that *Mrvic* represents the view of "most courts". Gov't Br. at 6. While this appears to be accurate, *see Bazarian Int'l Fin. Assocs., L.L.C. v. Desarrollos Aerohotelco, C.A.*, 168 F. Supp. 3d 1, 15 (D.D.C. 2016) (collecting cases), the court pays no heed to *Mrvic*'s seeming "majority" status in adopting that case's reading of FRCP Rule 4(f). Nor does any Federal Circuit precedent compel the court's holding on this question. *See In re OnePlus Tech. (Shenzhen) Co., Ltd.*, 2021 WL 4130643, at *3 (Fed. Cir. 2021) (declining to disturb the United States District Court for the Western District of Texas's *Mrvic*-like interpretation of Federal Rule 4(f)(3), under a highly deferential "clear and indisputable" standard, in ruling on a mandamus petition in a patent infringement case).

[10] The text of USCIT Rule 4 makes this clear. It refers, for example, to a "domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, [that] must be served." USCIT R. 4(g).

[FRCP] Rule 4(f) permits a method of service that entails transmitting documents through U.S. counsel, but only if service is ultimately *completed* abroad." (emphasis in original)).

Because Koehler is a corporation that is based in Germany, Germany is in all likelihood where Koehler will receive service of process. It is accordingly USCIT Rule 4(e) ("Serving an Individual in a Foreign Country"), and not 4(d) (whose heading is "Serving an Individual Within a Judicial District of the United States"), which governs the court's consideration of the Government's proposed method of service in this case.

II. International Comity Does Not Preclude Service Through Koehler's U.S. Counsel

Koehler argues that service through any means other than the "diplomatic channels"[11] referenced by the German court in Freiburg im Breisgau "would violate principles of international comity, which requires that foreign and public international law be given effect in U.S. courts." Defs.' Resp. at 4.

Even though USCIT Rule 4(e) facially requires compliance only with U.S. federal law and international agreement—and not with foreign law—the comity principles cited by Koehler are not toothless. "American courts should," after all, "take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987). The Advisory Committee Note to (Federal) Rule 4(f)(3) states that "an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law." Fed. R. Civ. P. 4 advisory committee's note to 1993 amendment. And international comity does sometimes favor channeling service on a foreign defendant through the issuance of letters rogatory. In *Tucker v. Interarms*, a case that Koehler highlights, the district court cited "principles of comity" as

[11] The Government argues that Koehler conflates "Diplomatic channels" with "diplomacy," and quotes a statement on the U.S. Department of State's website that defines "diplomatic channels" as "a formal system of communication between governments . . . used to transmit letters rogatory to a foreign government so that they may be directed to the appropriate foreign court." Gov't Reply at 6 n.1. The court is unpersuaded that "diplomatic channels" necessarily refers to a category as narrow as the formal transmission of letters rogatory, and recognizes that this question's resolution would ultimately depend on the proper construal of the German term "*diplomatischem Wege*." Gov't Br. Ex. B at 4. For the reasons explained below, however, even a maximally broad construal of this term would not compel a conclusion that the German government has issued a categorical objection to all forms of non-letters rogatory service in this case.

the basis for its insistence that the plaintiff "follow Brazilian law and obtain letters rogatory to ensure service of process." 186 F.R.D. 450, 452 (N.D. Ohio 1999).

International comity does not compel a similar insistence here. Koehler's representations do not establish a German sovereign interest to which comity might conceivably be owed. Koehler cites no provision of German law that, like the Brazilian law referenced in *Tucker*, would as a general matter require that "service of process by a foreign party upon a party domiciled in [Germany] . . . be made by means of letters rogatory". *Id.* (quoting *Alpha Omega Tech., Inc. v. PGM - Comercio E Participacoes Ltda.*, 1994 WL 37787, at *1 (S.D.N.Y. 1994)). Indeed, another district court has found that Germany, as of 2009, "has not expressly forbidden numerous other potential avenues to insure that a defendant is aware of the allegations against it." *In re S. African Apartheid Litig.*, 643 F. Supp. 2d 423, 437 (S.D.N.Y. 2009).

Nor do the statements by the German district court in Freiburg im Breisgau evince a German sovereign interest in Koehler's avoidance of alternative service. The (translated) documents issued by that court read in their entirety as follows:

> Dear Sirs, dear Madams,
>
> I am returning the above request for service without addressing it.
>
> Completion under the Hague Service Convention is out of the question, as the present proceedings are not a civil or commercial matter.
>
> The plaintiff in the present case is the United States of America.
>
> In the proceedings, the plaintiff is demanding payment of antidumping duties in the amount of over USD 193,000,000.00.
>
> This matter concerns claims under public law and is not a civil or commercial matter.
>
> The Hague Service Convention is therefore not applicable to the servicing of the documents.
>
> The execution of the requested service was therefore to be denied.
>
> I therefore request that a request should be made through *diplomatic channels*, so that the relevant administrative authorities can take action if necessary.
>
> With the highest regards
>
> [Signature]

Gov't Br. Ex. B at 2 (emphasis in original). Even through the mists of translation,[12] the court does not read this as a statement requiring that diplomatic channels form the U.S. Government's exclusive means of serving Koehler. Instead, the German court's request-for-a-request through diplomatic channels is tied to a specific rejection of the U.S. Government's requests for service under the Hague Convention. Most of the text of the German court's letters is devoted to explaining why Hague Convention service is inapplicable—which is apparently because this case is not "a civil or commercial matter" as defined[13] by German law. *Id.*; *see also* Hague Convention, *supra*, at 362. The letters then conclude by framing "diplomatic channels" as an alternative to Hague Convention service: "The execution of the requested service was therefore to be denied. I therefore request that a request should be made through *diplomatic channels*." Gov't Br. Ex. B at 2 (emphasis in original). This series of statements directs the U.S. Government, to the extent it seeks the German government's assistance with serving Koehler, to obtain that assistance through diplomatic means. It does not suggest that without such assistance, Koehler cannot be served.

Invoking the persuasive force of international comity requires a stronger showing of a foreign sovereign interest than what Koehler has made here. If "due respect" for Germany's "sovereign interest" thwarted the operation of USCIT Rule 4(e)(3) in this case, it would be hard to imagine when the court's exercise of discretion to order alternative service under Rule 4(e)(3) might ever be proper. *Aérospatiale*, 482 U.S. at 546. Such vestigiality would distort Rule 4's structure, wherein "[FRCP] Rule 4(f)(3) is not subsumed within or in any way dominated by [FRCP] Rule 4(f)'s other subsections; it stands independently, on equal footing." *OnePlus*, 2021 WL 4130643, at *3 (quoting *Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1239 (Fed. Cir. 2010)); *see also* Wright & Miller, 4B Fed. Prac. & Proc. Civ. § 1134 (4th ed. 2024) ("[FRCP R. 4(f)(3)] may be used for example . . . when the Central Authority of the foreign country has refused to serve a particular complaint (perhaps based on its own public policy or substantive law limitations) . . . ."). The court accordingly concludes

[12] No party disputes the accuracy of this translation.

[13] It appears that at least some German courts, upon concluding that a matter involves a claim for punitive damages, do not consider the matter to be "civil or commercial" in nature. *See United States ex rel. Bunk v. Birkart Globistics GmbH & Co.*, 2010 WL 423247, at *2–3 (E.D. Va. 2010). The German court in this case did not expressly state this proposition in its letters to the Government in this case. But its reliance thereon might be inferred from the statement that "[i]n the proceedings, the plaintiff is demanding payment of anti-dumping duties in the amount of over USD 193,000,000.00." Gov't Br. Ex. B at 2.

that alternative service pursuant to USCIT Rule 4(e)(3) would not offend international comity in this case.[14]

III. Service Through U.S. Counsel Would not Deprive Koehler of Due Process

The court next must ensure compliance with USCIT R. 4(e)'s general requirement that service in a foreign country not contravene "federal law." *Id.* This, for present purposes, means ensuring that the Government's proposed means of service would satisfy the (U.S.) constitutional requirement of providing "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314; *see also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) ("[T]here has been no question in this country of excepting foreign nationals from the protection of our Due Process Clause."). The court concludes that service on Koehler through Holland & Knight would satisfy the *Mullane* standard for constitutionally sufficient notice, and thus would not violate federal law.

Recall that on May 13, 2024, counsel from Holland & Knight electronically filed USCIT Form 11 Notices of Appearance on the court's docket in this case. *See* Form 11 Notices. Each attorney signed and filed a form that states, "the undersigned appears as attorney for defendant, *Koehler Oberkirch GmbH and Koehler Paper SE*, in this action . . . and requests that all papers be served on him/her." *Id.* (underlining in originals).[15] Boilerplate[16] though this language may

[14] Nor would alternative service "deprive the German government of an opportunity to assess whether it might have a beneficial role to play in helping to negotiate an equitable resolution of the dispute." Defs.' Resp. at 4–5. That opportunity still exists. While it may be that "[c]ollectability of judgment in this case is a matter on which the German government might well have views that could help resolve this dispute without further use of judicial resources," Defs.' Post-Oral Arg. Resp. at 2 n.2, the court is unpersuaded that the completion of service of process would forestall a hypothetical attempt by the German government to negotiate a resolution of this case with the United States.

[15] The court does not address the separate question of whether these filings establish Koehler's amenability to service by the method of "delivering a copy of [the summons and complaint] to an agent authorized by appointment or by law to receive service of process." USCIT R. 4(d)(2)(C). This is because, as explained above, the method of service proposed by the Government will not take place "Within a Judicial District of the United States." USCIT R. 4(d).

[16] Koehler notes that USCIT Rule 75(b)(2) requires that notices of appearance "must be substantially in the form as set forth in Form 11 of the Appendix of Forms," and argues that "[a]ltering the form to materially change the substance (striking the language 'request[ing] that all papers be served on' counsel) would not have complied with CIT Rules." Defs.' Post-Oral Arg. Resp. at 3 (quoting USCIT Form 11). Without offering a view as to the legal hypothesis that "substantially in the form" refers to substance, the court notes that Koehler did not test this hypothesis by moving for the court's leave to submit a differently-worded form.

be, it leaves no doubt that Holland & Knight can be relied on to inform its client of the existence of the very action for which the client engaged its services.[17] *See Mullane*, 339 U.S. at 314. Hypothetical[18] unreliability on this score might even constitute a violation of the District of Columbia Rules of Professional Conduct, to which Holland & Knight's lead counsel is apparently subject, and which provide that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." D.C. Rs. Pro. Conduct 1.4(a).

Koehler's invocation of *United States v. Ziegler Bolt & Parts Co.* for the proposition that "[t]he mere relationship between a defendant and his attorney does not, in itself, convey authority to accept service" is misplaced. 111 F.3d 878, 881 (Fed. Cir. 1997). The Federal Circuit in *Ziegler* held on non-constitutional grounds that service on a defendant's attorney did not satisfy the specific agency requirement of USCIT Rule 4(d)(3) (now USCIT Rule 4(g)(1)(B)). *Id.* That stricter requirement is inapplicable to the *Mullane* -focused inquiry here. The Government targets Koehler's U.S. counsel not as an agent for accepting service under USCIT Rule 4(g)(1)(B), but as an instrument for conveying it.

The attorney-client relationship at issue in *Ziegler*, moreover, pertained to an administrative proceeding that was distinct from the litigation in which the Government sought to serve the defendant. The Government's evidence was "insufficient to show that Ziegler had empowered [the attorney] to receive service *in the current action*." *Id.* (emphasis added). *Mrvic*, the S.D.N.Y case, neatly illustrates this distinction. *See* 652 F. Supp. 3d at 414–15. In that case, the district court declined the Government's request for service through an attorney who "indicated he has not had recent communications with Defendant, attempted to reach him without success, and does not have [contact] information for him," but granted the Government's request for service through attorneys who "specifically communicated with the IRS in providing a substantive, detailed, and lengthy protest letter to the IRS regarding the merits of the underlying . . . dispute here," and who were unlikely to "have prepared this significant submission on behalf of Defendant without extensive communications

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[17] It is also virtually certain that Koehler itself knows of pendency of this action. Why, otherwise, would Holland & Knight have been authorized to enter an appearance in this case? But actual notice, in any event, would not obviate adherence to USCIT Rule 4's service provisions. *See* Wright & Miller, *supra*, § 1134 ("The primary function of Rule 4 is to provide the mechanism for bringing notice of the commencement of an action to the defendant's attention *and* to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit.") (emphasis added).

[18] The court outlines this hypothetical scenario only for the purpose of illustration, and casts no doubt whatsoever on the integrity of either party's counsel.

with Defendant." *Id.* at 414. Here, as with the second request at issue in *Mrvic*, it would have been practically impossible for counsel from Holland & Knight to participate in this litigation on Koehler's behalf without establishing a channel of communication through which a Summons and Complaint could be reasonably presumed to travel.

Koehler raises a concern that granting the Government's request for service through Holland & Knight would impair future foreign defendants' ability "to retain counsel without mooting objections to service of process by establishing an avenue of alternative service." Defs.' Post-Oral Arg. Resp. at 3 n.6. Koehler envisions a malign outcome in which a foreign defendant cannot retain U.S. counsel to contest service without paradoxically rendering itself amenable to service through that counsel.

This outcome is not so malign as Koehler makes it out to be. No private defendant, foreign or domestic, enjoys a rebuttable procedural right to avoid service of process.[19] What a defendant instead enjoys is a procedural right to be properly served—which involves both compliance with USCIT Rule 4 as well as "notice reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Mullane*, 339 U.S. at 314. A defendant may retroactively vindicate this latter right by asserting, in a motion, a defense of insufficient service of process. USCIT R. 12(b)(5). The defendant at that time may also raise other defenses or objections without waiving the insufficient-service defense. USCIT R. 12(b). But until service is attempted, a defendant has no cognizable interest in engaging U.S. counsel for prospective advice on how to avoid being served at all.

IV. Service Through Koehler's U.S. Counsel Would not Contravene an Applicable International Agreement

The court's remaining task is to ensure that service on Koehler through Holland & Knight would not constitute means "prohibited by international agreement." USCIT R. 4(e)(3); *see* Gov't Br. at 8. It would not. Koehler does not specify an international agreement other than the Hague Convention that would prohibit the means of service proposed by the Government, and the court is not aware of any. And the Hague Convention, according to the German court in Baden-

[19] The due process considerations pertaining to service of process are in this sense distinguishable from those pertaining to personal jurisdiction. Those latter considerations require that a defendant "have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice". *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

Württemberg, is "not applicable to the servicing of the documents" because this case is not a "civil or commercial matter." Gov't Br. Ex. B at 2; *see also* Hague Convention, *supra*, at art. 1. This court has no occasion to disturb the German court's legal conclusion on this point. Neither party makes such a request, and the court in any event "has no practical ability to require the German Central Authority to effect service under an international convention that it has determined does not apply." *Bunk*, 2010 WL 423247, at *4.

It is accordingly unnecessary to determine at this stage whether the terms of the Hague Convention, if applicable, would prohibit the "other means" of service proposed by the Government in this case. USCIT R. 4(e)(3). The Government has made a sufficient showing that service through Holland & Knight would not contravene any applicable international agreement. *See id.*; *see also* Gov't Br. at 8.[20]

CONCLUSION

Koehler asserts that service through its U.S. counsel—an action that would manifestly result in Koehler's awareness of the Government's action to recover Customs duties, and thus allow the judicial process to resume its course—would implicate "serious issues of international relations at stake in this case . . . ." Defs.' Br. at 4.

Koehler is correct in the broad sense that any service on a foreign defendant necessarily implicates an important issue of international relations. That issue is fairness. Foreign and domestic litigants alike are entitled to their day in court. *See Schlunk*, 486 U.S. at 705. USCIT Rule 4 is a mechanism that helps ensure that a defendant—no matter where it is in the world, and no matter its nationality—has an opportunity to vindicate its rights before the U.S. Court of International Trade.

But that does not mean that defendant may rely on USCIT Rule 4's protections as a defensive moat against a plaintiff's attempts to vindicate its own rights through the judicial process in the United States. *Cf.* USCIT R. 1 ("[The USCIT Rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."). Koehler is entitled to notice, but not to the avoidance of notice.

[20] As the court grants the Government's request to serve Koehler through Holland & Knight, the court does not address the Government's alternative requests to serve Koehler (1) through Steptoe (Koehler's U.S. counsel in the *Matra* litigation) or (2) through email. The court holds those requests in abeyance. The court will consider them on the Government's renewed motion, if necessary, without the need for further briefing.

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's Motion for Alternative Service is **GRANTED**; and it is further

ORDERED that Plaintiff may, in accordance with the relevant provisions of USCIT Rule 4, effect service of the Summons and Amended Complaint on Defendants through the delivery of copies thereof to Defendant's counsel of record in this matter.

SO ORDERED.

Dated: August 21, 2024
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

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